‘EVER GIVEN’ in the Suez Canal: when is a binding contract concluded?

Andrew Carruth

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Smit Salvage BV & Ors v Luster Maritime SA & Anr (The ‘Ever Given’) [2023] EWHC 697 (Admlty)

At about 05:40 UTC on 23 March 2021, the Ultra Large Container Vessel ‘EVER GIVEN’ (the ‘Vessel’) grounded in the Suez Canal. She remained aground for about six days and the Canal was blocked in both directions for that entire period. The incident caused significant disruption to global trade and made headlines around the world.

Almost two years to the day since the Vessel was re-floated, the Admiralty Court has handed down judgment on a preliminary issue in a claim brought against the Vessel’s registered owners by SMIT Salvage BV (‘SMIT’), a leading maritime salvage company based in the Netherlands, and certain other parties who had participated in the salvage effort (the ‘Claimants’).

The Court held that, contrary to what was argued by the defendant owners, no contract was concluded between the parties. The corollary is that the Claimants can claim salvage under the International Convention on Salvage 1989 (the ‘Convention’) and/or at common law.

On the day of the grounding, the Vessel’s owners sought assistance from SMIT, initially in the form of technical advice. By the time the Vessel re-floated on 29 March 2021, SMIT was contributing to the salvage effort by way of a salvage team on board the Vessel; remote assistance from a team onshore including naval architects; and two tugs, ‘ALP GUARD’ and ‘CARLO MAGNO’.

No sooner had the Vessel re-floated than a dispute arose as to whether a binding contract had been concluded between the Claimants and the Vessel’s registered owners, Luster Maritime SA (‘Luster’) and Higaki Sangyo Kaisha Limited (‘Higaki’).

SMIT contended that no binding contract had been concluded and that they were entitled to claim salvage under the terms of the Convention and/or at common law. Luster and Higaki contended that a binding contract had been concluded on 26 March 2021, such that SMIT could not claim salvage because it had not acted as a volunteer.

A claim for salvage was commenced in the Admiralty Court by SMIT. The defendants to the action were Luster and Higaki (the ‘Defendants’). The Court directed the trial of a preliminary issue as to whether or not a binding contract had been concluded on 26 March 2021 as alleged by the Defendants.

The contract was said to have been concluded by an exchange of e-mails on the morning of 26 March 2021 between Mr Richard Janssen, SMIT’s Managing Director, and a claims handler acting on behalf of the Defendants. The exchange followed a written proposal sent by SMIT the previous evening setting out the basis upon which they were prepared to offer assistance.

In broad terms, the e-mails exchanged on the morning of 26 March 2021 reached consensus as to the basis of remuneration for the Claimants' services. The parties then continued to negotiate the terms of a draft written contract on an amended Wreckhire 2010 form. On 28 March 2021, the Defendants sent substantial amendments to the draft contract which were rejected by the Claimants. No resolution had been reached by the time the Vessel re-floated the following day and no written contract was ever signed.

The e-mail sent on behalf of the Defendants at 11:35 UTC on 26 March 2021 stated:

> *'As agreed over the phone, I am please to confirm as below on behalf of Owners of Ever Given.*
>
> *Owners agree to the following :*
>
> *The tugs, dredgers, equipment engaged by SCA and their subsequent salvage claim are separate to the Smit's offer of assistance.*
>
> *a) SMIT personnel and equipment to be paid on Scopic 2020 rates*
>
> *b) Any hired personnel and equipment, out of pocket expenses of SMIT to be paid on scopic 2020 rate + 15% uplift*
>
> *c) Refloatation Bonus of 35% of Gross invoice value irrespective of the type of assistance rendered.*
>
> *ci) Refloatation bonus not to be calculated on amounts chargeable for quarantine or isolation waiting period.*
>
> *cii) Refloatation bonus to SMIT will be applicable if refloatation attempt by SCA on 26 March 2021 is unsuccessful.*
>
> *We look forward to your confirmation. We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest.'*

The response from Mr Janssen at 11:40 UTC on the same day stated:

> *'Thank you... and confirmed which is very much appreciated. I shall inform our teams accordingly and we shall follow up with the drafting of the contract upon receipt of your/your client's feedback to our draft as sent last night.'*

The Defendants' case was that by these e-mails the parties had reached consensus as to all of the essential terms of a contract and intimated a mutual intention to be bound immediately thereby, notwithstanding their mutual intention to agree and sign a more detailed written contract in the future.

By contrast, the Claimants' case was that no binding agreement had been concluded because the parties had not intended immediately to be bound. Rather, on an objective reading of the correspondence, the parties had intended only to be bound upon the conclusion and signature of the Wreckhire contract.

Andrew Baker J started by observing that the parties entered into a contract only if they communicated with each other so as to make it appear, objectively, that they had reached agreement upon terms sufficient in law to constitute a contract and that they intended to be bound by those terms whether or not they subsequently agreed a more detailed set of terms.

Given that the parties had not stated in terms whether their intention was to be bound immediately, or only upon agreeing a detailed set of contract terms, or only upon signing a written contract, their intention was to be determined by considering what the words and conduct of each party had reasonably conveyed to the other.

The leading authority in this area was the decision of the Supreme Court in ***RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)*** [2010] UKSC 14, read with ***Benourad v Compass Group plc*** [2010] EWHC 1882 (QB) at [106]. Those authorities demonstrated that the legal test was as the Judge had already stated and that each case was fact specific with no hard or fast rules.

There was no rule of law that contemplation of agreement of a fuller set of detailed contract terms, or of signature of a written contract document, must mean that there was no intention to be bound prior thereto. On the other hand, there was no rule of law that the failure to use a particular form of linguistic qualifier, such as 'subject to contract', must mean that there was an intention to be bound. Moreover, the fact that terms of economic significance had not been finalised did not mean the parties could not have intended to be bound.

Whittle Movers Ltd v Hollywood Express Ltd [2009] EWCA Civ 1189 at [15] was a useful reminder that the court should not strain to impose on parties a binding contract that it was not clear they had reached. ***CRS GT Ltd v McLaren Automotive Ltd et***

al [2018] EWHC 3209 (Comm) was a useful reminder that while substantial performance of what would be contractual services if a contract had been concluded may be a powerful indication of intention to be bound, that too ultimately depended on the whole circumstances of any given case.

An orthodox statement of the law was that the court does not 'stop the clock' at the moment when the party claiming that there was a contract says that negotiations came to an end, but has regard to the whole course of the parties' communications. The Defendants had been reluctant to accept that proposition, but it was supported by Hamblen LJ's judgment in ***Global Asset Capital Inc v Aabar Block SARL*** [2017] EWCA Civ 37 at [28]-[39].

The Defendants had relied upon two cases in the salvage context, ***The Athena*** [2011] EWHC 589 and ***The Kurnia Dewi*** [1997] 1 Lloyd's Rep. 552. However, neither of those cases assisted the Defendants. It was unsurprising that David Steel J had found a contract in The Athena given the unequivocal terms of the offer and acceptance in that case. ***The Kurnia Dewi*** had been a jurisdictional case in which Clarke J had held that there was a good arguable case for the existence of a contract on the facts of that case. Both cases were decisions on their own facts. They did not establish any general principle that it was common practice in the salvage industry for main terms to be agreed, followed by a more detailed contract.

On the facts of the present case, the tenor of the communications between the parties was that they had reached agreement on the remuneration terms for a contract which they were still negotiating, enabling them to move on to discuss and negotiate the detailed contract terms by which they were willing to be bound. It was appreciated by the Defendants that, as at 26 March 2021, SMIT had in mind finalising and signing a contract the same day.

Expressions such as 'subject to contract' and 'subject to details' could be used to make it clear that although certain terms were agreed, the intention was not to be bound unless and until some fuller set of contractual terms was also agreed. Although the parties had not used those expressions, the effect of what was said was that the consensus they had reached was 'sub details'. The parties had made it clear to each other that they intended to be bound only by a detailed set of contractual terms that still needed to be negotiated.

The case demonstrates that in the course of contractual negotiations it can be difficult to identify when, if at all, the negotiations have reached the point that a binding contract exists. Although phrases such as 'subject to contract' and 'subject to details' put the matter beyond doubt, their absence does not mean that the parties intend immediately to be bound by whatever has been agreed thus far.

It can also be seen from this case that there are no special principles applicable to salvage cases. The courts will not find a contract more readily in the salvage context; the legal principles of the general law of contract apply. Shipowners seeking commercial terms rather than a Lloyd's Open Form contract would be well advised to conclude negotiations quickly, or face a claim under the Convention.

Andrew Carruth acted for the Claimants, together with Elizabeth Blackburn KC of 36 Stone. They were instructed by Andrew Chamberlain, Jonathan Goulding and Simon Maxwell of HFW.

Nigel Jacobs KC and Caroline Pounds acted for the Defendants, instructed by Faz Peermohamed and Ben Lester of Stann Law Ltd.

Andrew Carruth

"An outstanding junior, very bright and hard-working, with great instincts." (Legal 500, 2023)

Andrew undertakes a broad range of commercial work with an emphasis on shipping, offshore construction, international arbitration, energy and commodities.

Andrew regularly appears in the High Court (primarily in the Commercial Court) as well as in arbitrations. He has experience of all of the main arbitral rules (including LCIA, ICC, LMAA, UNCITRAL, SIAC, HKIAC and GAFTA).

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andrew.carruth@quadrantchambers.com