Neutral Citation Number: [2023] EWHC 697 (Admlty)

Case No: AD-2022-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL
(but handed down at the Cardiff Civil and Family Justice Centre)

Date: 30/03/2023

Before :

MR JUSTICE ANDREW BAKER

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Between :

(1) SMIT SALVAGE B.V. **(2) BAGGERMAATSCHAPPIJ BOSKALIS B.V.** **(3) OCEAN MARINE EGYPT S.A.E.** **(4) AUGUSTEA SHIP MANAGEMENT SRL**	**Claimants**
- and -	
(1) LUSTER MARITIME S.A. **(2) HIGAKI SANGYO KAISHA LIMITED**	**Defendants**

m.v. ***Ever Given*** **– Salvage Claim**

- -

Elizabeth Blackburn KC and Andrew Carruth (instructed by **Holman Fenwick Willan LLP**) for the **Claimants**
Nigel Jacobs KC and Caroline Pounds (instructed by **Stann Law Limited**) for the **Defendants**

Hearing dates: 28 February, 1, 3 March 2023

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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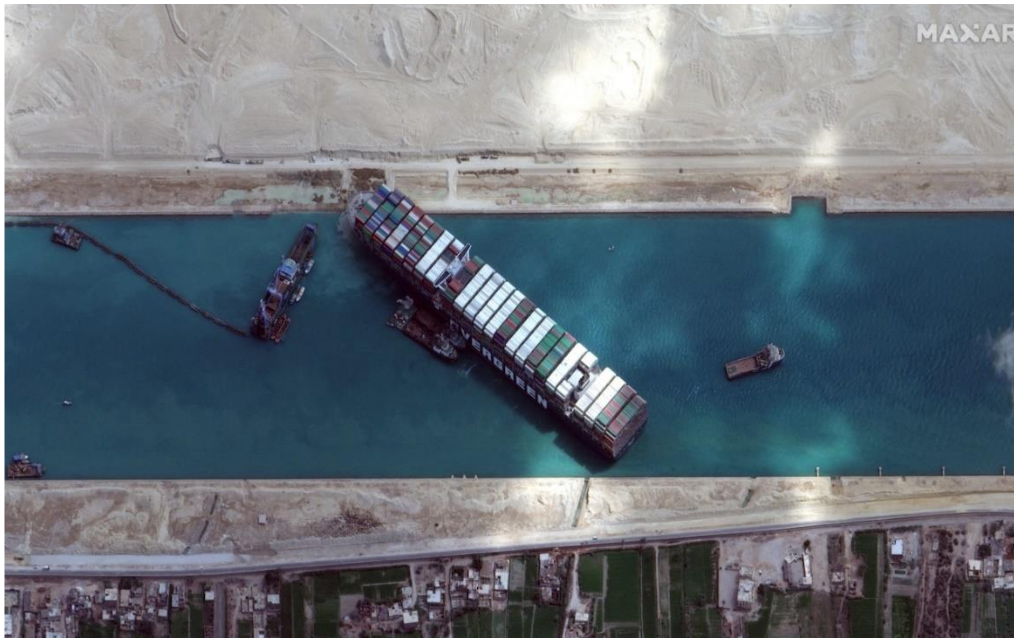
MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. The m.v. *Ever Given* is a leviathan, just shy of 400m long (399.98m, to be exact), close to 60m broad (58.80m), and almost 200,000 DWT (199,489 DWT on a draught of 16m), with a container capacity of 20,388 TEU. She was part of the morning northbound convoy making its way up the southern section of the Suez Canal on Tuesday 23 March 2021. At about 05:40 UTC (07:40 local time), she grounded 200m or so north of the 151 km mark. That is one of the narrowest, if not the narrowest, sections of the Canal.

2. The grounding blocked the Suez Canal and made headlines around the world. From above, as grounded, *Ever Given* looked like this:



(Image credit: MAXAR)

3. As I had recent cause to note, the Suez Canal Authority ('the SCA') reserves to itself exclusive authority to order and direct, through its officials, all operations required to refloat a ship grounded in the Canal (see *NYK Orpheus c/w Panamax Alexander* [2023] EWHC 2828 (Admlty) at [153]). Under such direction, *Ever Given* was refloated at about 13:05 UTC on Monday 29 March 2021. She proceeded to the Great Bitter Lake, safely anchoring there by about 17:00 UTC that day.

4. The first claimant ('SMIT') is a leading maritime salvage company. By the time *Ever Given* refloated, SMIT had a team on board (with onshore support from Holland), and two chartered tugs, *ALP Guard* and *Carlo Magno*, contributing to the salvage effort. It is not necessary for the purpose of this judgment to introduce the other claimants or their roles save to say that any involvement they had derived from SMIT's involvement.

5. The defendants ('Luster' and 'Higaki') are the co-owners of *Ever Given* (10% Luster, 90% Higaki). Luster is a wholly-owned subsidiary of Higaki. An associated company, Shoei Kisen Kaisha Ltd ('SKK'), acts under a contract with Luster as the managing agent for the ship.

6. I do not understand it to be denied that SMIT's involvement contributed to the successful refloatation effort, although it is said by the defendants that the contribution was very limited. They plead that "*[SMIT's] primary role was to provide technical assistance and consult with the SCA as to the refloating plan and to sub-contracted [sic.] two tugs: "ALP GUARD" and "CARLO MAGNO". The latters' contribution (when they eventually arrived) was minimal.*"

7. The claimants claim salvage under the terms of the International Convention on Salvage 1989 and/or at common law. The claim is denied. The first line of defence is an averment, the burden of proof on which lies with the defendants, that the claimants "*provided technical assistance … under a contract concluded on 26 March 2021 … pursuant to which the parties agreed the scope of, and remuneration for, the technical services.*" It is trite law that if that be so, no salvage claim would lie, only a claim under the contract. For example, the first sentence of the opening paragraph of *Brice on Maritime Law of Salvage*, 5th Ed., states that "*In English law a right to salvage arises when a person, acting as a volunteer (<u>that is without any pre-existing contractual or other duty so to act</u>) preserves or contributes to preserving at sea any vessel, cargo, freight or other recognised object of salvage from danger*" (my emphasis). For these purposes, the sea includes tidal river or canal waters such as, in this case, the Suez Canal.

8. By a written Jurisdiction Agreement dated 25 June 2021 between the claimants, acting by their solicitors, and the defendants, their hull and machinery underwriters, Mitsui Sumitomo Insurance Co Ltd ('Mitsui'), and SKK, acting by the defendants' solicitors:

   (i) it was recited *inter alia* that (a) the claimants say they rendered services entitling them to salvage, and (b) that the defendants dispute that salvage services were rendered by the claimants as alleged, and aver that any services rendered were performed pursuant to a pre-existing contract; and

   (ii) it was agreed *inter alia* that:

      (a) "*[the] determination of the dispute as to whether the Claimants' services were in the nature of salvage and the assessment of the amount of the salvage remuneration payable …, together with any other dispute between the parties arising out of the alleged Salvage Services, shall be determined exclusively by the English Courts in accordance with English law and practice*";

      (b) the English court would be asked to determine the salvage remuneration (if any) due to the claimants in respect of all salved property and within 28 days of a final and unappealable judgment in that regard the defendants would pay their *pro rata* proportion of the global salvage sum and SKK would pay cargo's *pro rata* proportion of that sum, in each case with interest and costs, failing which the claimants would be entitled to claim against certain security that was to be (and was in fact) provided.

9. The parties appear to have proceeded (at least implicitly) on the basis that the agreed application of "*English law and practice*" was an agreement to apply English salvage law to the question whether the claimants are entitled to salvage, including whether, *per contra*, they performed services under a contract negativing any salvage claim, but

not an agreement to dispense with English conflict of laws rules entirely. In particular, questions of actual authority on the defendants' side, to conclude the contract they allege, that English conflict of laws rules would say are governed by Japanese law, were treated on both sides as still so governed. Of course, that does not operate in the abstract. Any case as to the content of Japanese law that is or might be applicable needed to be pleaded. In the event, only four specific, narrow, matters of Japanese law were pleaded, and one of those Mr Jacobs KC did not pursue at trial. It will not be necessary to make findings on the three other points that were pleaded.

10. With permission I had granted on agreed terms, there was expert evidence as to Japanese law in reports from Mr Jumpei Osada, a partner of Japanese law firm TMI Associates in Tokyo, served by the claimants, and Mr Mitsuhiro Toda of the Law Offices of Toda & Co, also in Tokyo, served by the defendants. Their reports strayed substantially into areas that are properly for the court rather than for expert witnesses as to foreign law; but that may be because their brief as endorsed by the relevant Consent Order was wider than, with hindsight, I ought to have allowed. There was substantial agreement between the experts on the content of Japanese law, as distinct from its application to the facts, and as I said in the previous paragraph only very limited points were pleaded. As a result, the parties agreed between themselves to dispense with cross-examination on the points of difference between the experts, dealing with those points through argument. As a result, the experts were not called to give oral evidence and the parties took the day that had been reserved for that evidence to prepare their closing arguments.

The Alleged Contract

11. The trial upon which this is my judgment was the trial as a preliminary issue of the question whether "*a binding contract for salvage services [was] concluded by the parties as alleged in paragraphs 1, 13, 35-36B and 47 of the Defence*". I quoted from paragraph 13 of the Defence in paragraph 7 above. The pleaded case that a contract was concluded, on 26 March 2021, is that *consensus ad idem* as to all essential terms was created, and a mutual intention to be bound thereby was intimated, notwithstanding a mutual intention to agree (and sign) more detailed terms, by the following exchange of emails that morning (UTC):

    (i) At 11:35 UTC, from Captain Saumitr Sen on behalf of WK Webster & Co Ltd ('WKW'), a claims manager acting as agent appointed by Mitsui, to Mr Richard Janssen (Managing Director of SMIT) and Mr Jody Sheilds (also of SMIT), copied to various others, stating:

    "*We refer to our telephone conversation subsequent to my previous email and my further conversation with Japan.*

    As agreed over 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."

(ii) At 11:40 UTC, from Mr Janssen to Capt Sen, cc. Mr Sheilds and the others, in reply, stating:

"*Thank you Captain 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.*"

12. SCOPIC 2020, as referred to in Capt Sen's email, is the SCOPIC Clause (2020 version), designed to supplement a main agreement on the terms of the Lloyd's Form Salvage Agreement "No Cure – No Pay" ('Lloyd's Open Form' or simply 'LOF' terms). SCOPIC 2020 rates, therefore, are the rates set out in Appendix A to SCOPIC 2020, which include standardised daily rates for various types of personnel and for tugs (with a wide definition stated of what is treated as a tug). The daily rate for a tug (with fixed uplifts for fire fighting and ice breaking) is calculated on its certificated bhp (US$3.29 per bhp up to 5,000, plus US$2.35 per bhp over 5,000, up to 12,000, US$1.65 per bhp over 12,000, up to 20,000, and US$0.82 per bhp over 20,000).

13. The "*draft as sent last night*", in Mr Janssen's email, referred to an email from Mr Dave Wisse of SMIT to Capt Sen, sent at 21:40 UTC on 25 March 2021. It was copied to various others, including Messrs Janssen and Sheilds of SMIT and Messrs Isawa and Tsuyama of Mitsui. It was also forwarded by Mr Sheilds to Mr Faz Peermohamed of Stann Law Limited ('Stann'), the defendants' solicitors. It attached:

(i) a detailed, three-page "*Commercial proposal*" ('the Proposal');

(ii) an eleven-page "*DRAFT Salvage Plan*"; and

(iii) a draft amended Wreckhire 2010 contract form, with a three-page set of draft Additional Clauses 27 to 36 intended to go with it.

14. The Proposal set out, under a heading of "*Commercial terms and conditions on daily hire basis*", what it described as a summary of the "*main terms and conditions*" of SMIT's proposal, in the form of seven bullet points:

- Contract: Wreckhire 2010, logically filled and amended. For your review, please see enclosed the proposed draft wording of the contract stating all relevant contracting details. (original emphasis)

- Contractor: SMIT Salvage BV

- Nature of Services:

    - Assessment of the Vessel's condition

    - Preparation of the Vessel for refloating (e.g. by shifting or discharging ballast water/fuel);

    - Coordination and liaising with SCA arranged tugs and Contractors' tugs;

    - Cargo lightening and/or dredging (if required);

    - Delivery of the Vessel;

    - Liasing with and cooperating with the relevant authorities, including SCA.

- Contractor's Craft, Equipment and Personnel: at SCOPIC 2020 rates with no uplift, commencing from start mobilisation until completion of demobilisation (including any waiting time/delays due to Covid-19 procedures, quarantine, etc);

- Third party Craft, Equipment and Personnel: at cost + 15% uplift;

- Refloating bonus: 35% of the sums due in the final agreed Running Cost Sheet;

- Payment:

    - First 3 days on signing of this Agreement;

    - Thereafter in advance every 7 days for subsequent invoices based on the Running Cost Sheet.

(I note that the reference to charging at SCOPIC 2020 rates for Covid-related waiting time or delays is the context for the provision sought by Capt Sen and agreed by Mr Janssen that the Refloatation Bonus was not to apply to "*amounts chargeable for quarantine or isolation waiting period*".)

15. The Proposal continued with sections providing SMIT's thoughts on "*Optional transition to Lloyd's Open Form*", "*Support and coordination with SCA*", and "*Operational scenarios*" of (i) refloating by tugs only, (ii) refloating with tugs in combination with dredging, and (iii) refloating with tugs in combination with cargo lightering (with three options for consideration).

16. The Defence was incomplete, to my mind. It made clear enough that the defendants would say that a contract came into existence by the exchange referred to in paragraph 11 above, that it defined the services to be provided by SMIT and the remuneration to be paid by SMIT for providing them (paragraph 13, as quoted in paragraph 7 above), and that it contained "*all essential and necessary terms and did not require any supplementation or elaboration to form a binding contract (alternatively, at least not*

any supplementation or elaboration that could not be resolved by way of implication if necessary)" (as it was put in paragraph 36A). However, it did not set out the contractual term said to have been agreed so as to define the services to be provided, or identify any other 'essential and necessary' term or terms said to have been agreed.

17. An alternative case was pleaded in paragraph 36B (i.e. a further alternative to the case in parentheses in paragraph 36A, quoted in paragraph 16 above), that the alleged contract "*incorporated and / or was subject to the standard Wreckhire terms (as amended by the terms of the email exchanges)*". The reference to "*standard Wreckhire terms*" is to the unamended terms of the Wreckhire 2010 Form. I understand the pleaded alternative of a contract on those terms "*as amended by the terms of the email exchanges*" to mean amended to the extent required (but no further) to give effect to the main terms settled by the exchange of emails. That would be a detailed contract wording different from the draft put forward the previous evening by SMIT (paragraph 13 above), the defendants' response to which was awaited.

18. At my encouragement, having raised my concern about the pleading, Mr Jacobs KC provided, for closing, the following formulation:

"*By a 'Main Terms' Agreement concluded on 26 March 2021 ("**the Agreement**"), the Claimants and the Defendants agreed that the Claimants would be paid at a fixed rate of remuneration in respect of any salvage services rendered by the Claimants to the Vessel. The following were terms of the Agreement:*

(1) The Defendants would pay for the Claimant's personnel and equipment on SCOPIC 2020 rates;

(2) The Defendants would pay for any hire personnel and equipment or out of pocket expenses on SCOPIC rates plus a 20% [sic., should be 15%] uplift; and

*(3) In the event that the Vessel refloated, the Claimants would be paid a 35% bonus ("**the Refloatation Bonus**") of the Claimants' gross invoice value, irrespective of the type of assistance rendered by the Claimants. However:*

a. The Refloatation Bonus would not be calculated on amounts chargeable for any quarantine or isolation waiting period; and

b. The Refloatation Bonus would only be payable in the event that the refloatation attempt by the SCA on 26 March 2021 was unsuccessful."

19. I can see no basis for the claim (whether as originally pleaded or as reformulated for closing) that any of the claimants other than SMIT might be privy to any contract concluded, as alleged, on 26 March 2021.

20. As reformulated for closing, the defendants' primary case is now that there was no agreement on the (scope of) services to be provided by SMIT, and no obligation on SMIT to provide services. Rather, now the alleged "*'Main Terms' Agreement*" is said to be just an agreement as to how remuneration would be calculated for any salvage services in fact provided by SMIT.

21. The defendants' case in that regard is that nothing more needed to be agreed for there to be a contract, if that was the parties' intent. Strictly in the alternative, that is if a bare agreement on a basis for remuneration were not enough to be a contract, it is said that:

    (i) there were express or implied terms that:

        (a) the scope of services to be provided by SMIT was as set out in Mr Wisse's email and accompanying commercial proposal, referred to in paragraph 13 above; and

        (b) SMIT was obliged to exercise due care in respect of its provision of such services, "*in accordance with the provisions of the Salvage Convention and / or the terms of the standard form Wreckhire 2010*";

    alternatively

    (ii) the parties' agreement expressly or impliedly incorporated the standard form Wreckhire 2010.

22. There is one other observation to make on the pleaded case. The claim is that a contract precluding a common law salvage claim was concluded on 26 March 2021, with no alternative claim that any such contract was concluded any earlier (or later).

23. The Defence included allegations that during preliminary discussions on 23 March 2021, "*it was agreed between Captain Sen and Mr Wisse that [SMIT] would charge for personnel at the usual SCOPIC rates if they were going to mobilise a team*"; and that by a conversation and exchange of emails between Capt Sen and Mr Wisse early on 24 March 2021, "*The rates for personnel and out of pocket expenses [were] agreed*" as "*the costs of [SMIT's] personnel will be scopic rates and out of pocket expenses on usual uplift of 15%*". Lest this was intended to be an alternative claim of a contract giving rise to a defence to a common law salvage claim, the defendants were asked pursuant to CPR Part 18 to say whether they were alleging a legally binding contract agreed on 24 March 2021. Their response was that they "*do not rely on any legally binding contract concluded on 24 March 2021. The Defendants' case is as pleaded in the Amended Defence, in particular paragraphs 35 to 36B thereof [i.e. that a contract was concluded on 26 March 2021, not before].*"

24. I agree with a submission advanced by Mrs Blackburn KC that it would not be fair in those circumstances for the defendants to argue that a contract was concluded earlier than on the morning of 26 March 2021, or otherwise than by the exchange of emails by which they pleaded that a contract had been concluded. It was plain to me that the claimants' evidence had been prepared to meet the pleaded case of a contract concluded between Capt Sen and Mr Janssen, and not a different (further or alternative) case of a prior contract concluded between Capt Sen and Mr Wisse. Mr Jacobs KC led Mr Janssen in cross-examination to give answers on which he relied, together with some of Capt Sen's evidence and the initial email exchanges, for an argument in closing that a contract *was* concluded earlier than on that morning. That was not a case open to him on the pleadings. As will be clear, below, I was not persuaded by the argument anyway.

Factual Witnesses

25. I had factual witness evidence from Mr Janssen, called by the claimants, and from Capt Sen, Mr Toshiaki Fujiwara, a Director of SKK, and Mr Tomohiko Tsuyama of Mitsui, called by the defendants. Mr Tsuyama was the Manager of the Shikoku Marine Claims Section of Mitsui with responsibility, therefore, for all cargo and hull claims associated with SKK vessels insured by Mitsui.

26. None of the witness statements was particularly long. Even so, they were all longer than they needed to be, as each of them included to at least some extent an unnecessary recitation of or commentary on written correspondence, and the witnesses' inadmissible opinions on whether, when, or on what terms, any contract had been concluded by that correspondence. That was true especially for Mr Janssen and Capt Sen. Much of their cross-examination was no more than the putting to them of the contrary interpretation of the correspondence and its consequent legal effect contended for by the defendants, respectively by the claimant, that could and would better have been left for argument.

27. Messrs Fujiwara and Tsuyama gave evidence remotely from Japan (via internet video conferencing). I record my particular thanks to our interpreter, Mr Ben Jones, for his assistance, which was of the highest and most seamless quality. It was apparent that Mr Tsuyama has good enough English to conduct business correspondence in English, and he confirmed as much. The same question was not asked of Mr Fujiwara. Both witnesses had given their witness statements, that stood as their evidence in chief, in Japanese, and I have no doubt were much better able to respond fully and clearly to questions by doing so in Japanese.

28. Capt Sen was a somewhat difficult witness, discursive so as to appear evasive in some of his answers, and rather argumentative generally. That said, I did not detect in the cross-examination any real challenge to the honesty (as opposed to the accuracy or reasonableness) of his opinion that he had achieved a relevant contract for his principals, rather than an inconclusive negotiation; and his evidence, to the extent it was admissible factual testimony (for example as to things said over the telephone) was not challenged. Messrs Janssen, Fujiwara, and Tsuyama, I considered to be straightforward, honest witnesses.

Law

29. There was no material dispute about the principles (in truth, the principle) to be applied; and there is no need in this case for a detailed review or analysis of the law. The parties entered into a contract, as alleged by the defendants, if and only if they so communicated with each other as to make it appear, judged 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 agreed any more detailed set of contract terms. As will be seen, below, there was neither uncertainty as to what was agreed and not agreed, nor insufficiency (in principle) in what was agreed, if taken by itself, to be capable of being a contract. The contract formation issue is intention to be bound.

30. The parties did not state in terms whether the intention was to be bound there and then, or only upon agreeing (if they did) a detailed set of contract terms, or only upon signing a written contract having first agreed such terms. The issue of contractual intent is

therefore to be determined by considering what was reasonably conveyed by the parties to each other about that, by the way they expressed themselves and by their conduct visible to the other, considered as a whole, at least up to and including the moment at which it is alleged that a contract was concluded. An intention to be bound cannot be found where it is not the only reasonable connotation of the parties' exchanges and conduct, taken as a whole. Exchanges and conduct not consistent only with an intention to be bound are ambiguous, and a contract can only be found in and constructed from unambiguous communication.

31. An orthodox statement of the law has it that when the question is whether any contract was concluded, 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: see, for example, *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, *per* Hamblen LJ at [28]-[39], and the cases cited. Mr Jacobs KC was reluctant to accept that proposition, but my decision in this case does not turn on it.

32. More generally, I was referred to a number of authorities for a range of largely self-evident developments of the proposition that the legal test is as I have stated it in paragraph 29 above, with the corollary stated in paragraph 30 above. For example, there is 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 is 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.

33. The leading modern authority is *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], and *Global Asset Capital*, *supra*, together with the well-known older cases of *The Blankenstein, Damon Compania Naviera S.A. v Hapag-Lloyd International S.A.* [1985] 1 WLR 435, *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 and *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25.

34. *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at [15] is a useful reminder that the court should not strain to impose on parties a binding contract it is not clear they had reached; and *CRS GT Ltd v McLaren Automotive Ltd et al* [2018] EWHC 3209 (Comm) is a useful reminder that while substantial performance of that which would be contractual services if a contract had been concluded may be a powerful indication of intention to be bound, that too ultimately depends on the whole circumstances of any given case. There is no rule that substantial (or even total) performance means as a matter of law that a contract was concluded.

35. So long as the parties have agreed enough to be capable of constituting a contract, there is no rule of law that if terms of economic or other significance have not been finalised, the parties cannot have intended to be bound (see, for example, *RTS Ltd*, *supra*, at [45]). I agree with Mr Jacobs KC that the following statement of law remains accurate, *per* Parker J in *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284, at 288-289:

> "*It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract, contemplate the execution of a further contract*

> *between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire.*"

(For completeness, I consider that the simpler, underlying, explanation for there being no enforceable contract, in Parker J's 'former case', is that on a proper construction of the relevant communications the parties have conveyed to each other that they do not intend to be bound unless and until the condition is fulfilled.)

36. Almost a century later, in *Goodwood Investments Holdings Inc v Thyssenkrupp* [2018] EWHC 1056 (Comm), Males J (as he was then) made the same point, expressing it thus at [31]:

> "*In brief, it is well established that the whole course of the parties' negotiations must be considered (a point reiterated in* <u>Global Asset Capital</u> *...), that it is possible for parties to conclude a binding contract even though it is understood or agreed that a formal document will follow which may include terms which have not yet been agreed, and that whether this is what the parties intend ... must be determined by an objective appraisal of their words and conduct.*"

37. Mr Jacobs KC relied on *The Athena* [2011] EWHC 589 and *The Kurnia Dewi* [1997] 1 Lloyd's Rep 552, since they are both decisions in this court on facts concerning the engagement of salvage assistance without agreeing a full set of detailed contract terms or signing a written contract.

38. It is unsurprising that David Steel J found a contract in *The Athena*, given the offer and acceptance in that case: see [2011] CLC 425 at 432F-433H ("*Please find our following offer ...*"), 434C-E ("*We have received your offer and accept [it] as it is*"), without reference to anything more detailed to follow. The more challenging issue was whether, since that exchange did not include or incorporate any dispute resolution agreement, the London arbitration clause invoked by the claimant became part of the contract, so as to justify an anti-suit injunction to restrain the pursuit by the defendant of proceedings in Chile. David Steel J concluded that it did.

39. In *The Kurnia Dewi*, Clarke J (as he was then) decided that there was a good arguable case for the existence of a contract with the third defendant P&I Club, so as to justify service on it out of the jurisdiction. There was never a final decision, as the case settled without a trial. The key point was whether there was a good arguable case for saying that the language of a particular fax conveyed that a contract on identifiable terms was awarded, there and then, or only that there had been a decision in principle to award a contract on terms to be agreed, the language in question having been as follows (*ibid* at 556 rhc):

> "*... We are pleased to advise that the [P&I Club] now confirms full involvement in this matter. We are also pleased to confirm that we are now fully authorised on behalf of our principals to award Smit International Singapore Pte Ltd, the wreck removal contract of the MV "KURNIA DEWIA".*
>
> *As discussed, we would greatly appreciate you mobilising immediately. We confirm we shall finalise the wording of the formal wreck removal agreement earliest next week.*"

40. Clarke J stated expressly (at 559 lhc) that he was not "*expressing any view as to the likely outcome of any trial*". Subject always to that general qualification, he could see force in an argument for the claimant on the facts of that case that the mobilisation procured by the fax was to be on the basis of a binding commitment there and then, notwithstanding the evident intent that there should later be a "*formal wreck removal agreement*", the terms of which needed to be finalised. Mr Jacobs KC's argument was that the proper reading of the parties' correspondence and conduct in this case was to that effect. It is either right or wrong on the terms of that correspondence and the purport of that conduct, not upon Clarke J's conclusion that there was a strong enough argument of that kind in *The Kurnia Dewi* to justify service out.

41. It follows that *The Athena* and *The Kurnia Dewi* do not show, as Mr Jacobs KC argued, "*that it is common practice in the salvage industry for main terms (remuneration/type of contract) to be agreed and then for a broader contract on WRECKHIRE or other terms to be agreed. The latter contract supersedes the previous contract, which is entered into at a time of urgency and when there is no time for a full agreement to be reached.*" They are simply decisions on their own facts, applying to those facts the basic principle I stated at the outset (paragraph 29 above). I would add, for completeness, that in any event, this was not a case in which, though it is true there was urgency, there was "*no time for a full agreement to be reached*".

Detailed Facts

42. A comprehensive factual narrative was agreed between the parties for the trial, upon which I have largely based the Appendix to this judgment, which sets out the detailed facts I find established by the evidence. It is fuller than is necessary to decide the case, or than I might have chosen to set out if starting from scratch, but it does justice to the parties' efforts in agreeing so much, for which I am grateful, to descend to the same level of detail as they did.

43. In the discussion that now follows, a reference in the form [A[x]] will be to paragraph A[x] of the Appendix.

Discussion

44. The background against which the parties conducted their correspondence, said to have resulted in a contract, was that:

    (i) Each side was familiar with salvage operations, and with LOF, SCOPIC and Wreckhire terms, and was aware of that familiarity on the other side.

(ii) If SMIT were engaged on LOF terms, or provided salvage services without any contract, they would run the 'no cure – no pay' risk that if *Ever Given* was lost, or if she was salved but SMIT had not contributed, they might not be paid, but they might still have incurred significant costs. On the other hand, there was the prospect of reward on the basis of a LOF or common law salvage claim, which had the capacity at least to be significantly more profitable for SMIT than remuneration on a contractual basis, particularly if the salvage effort was not prolonged.

(iii) The *Ever Given* grounding was a high profile incident, globally, in which on all sides time was perceived to be of the essence in trying to get the ship refloated.

(iv) Any refloating operation would ultimately be under the direction and control of the SCA. The defendants and their underwriters were not the only interested parties in a position to be offered assistance by SMIT and to be willing, potentially, to pay for such assistance.

45. Capt Sen has had experience with SMIT and other professional salvors in which "*we typically seek assistance from them after agreeing to the main terms or conditions of remuneration and, in response, they mobilise their team and get to work. It is usual for final contract wording or clause negotiations to continue as the salvors' team mobilises to the casualty and during salvage/towage operations.*" In his oral evidence, Capt Sen clarified that this incident was the only time he has not seen final contract wording or clause negotiations culminate in an agreed, detailed contract.

46. Mr Janssen's evidence, – in keeping, it might be thought, with the nature of salvage – was that "*SMIT regularly mobilises personnel and equipment on a speculative basis before a contract has been secured. ... As such the situation for the "EVER GIVEN" was not unusual. Indeed, in some cases we have committed significant expenses in chartering craft without a contract in place.*"

47. There was no pleaded case of customary practice as to when, if at all prior to final agreement on detailed terms and/or signature of a written contract, parties in the salvage business consider themselves bound. Nor was it suggested that the extent of SMIT's experience of mobilising on a speculative basis was known to Capt Sen or anyone else on the defendants' side of the negotiation in this case. The point, for my purposes, is simply that in the salvage context, a consent to mobilisation and the provision of assistance, or actual mobilisation and assistance, does not imply the existence of a contract. Other things being equal, it is not consistent only with an intention to be bound there and then, but is reasonably explicable by the hope of concluding a contract and a willingness to leave rights and liabilities to some applicable general law of salvage if in the event no contract is concluded.

48. Against that general background, the immediate context of the key exchange of emails, by which the defendants say a contract was concluded (paragraph 11 above), is created by the parties' exchanges and conduct in the preceding few days, following the grounding. For orthodox reasons, I focus in what follows on communications that 'crossed the fence', and conduct that would have been visible from the other side of the fence.

49. SMIT was aware of the grounding, and in contact with Nippon Salvage Co Ltd ('Nippon Salvage') about it, before being contacted by Capt Sen [A7]. That contact, on the afternoon of 23 March 2021, involved a request to SMIT for technical advice, possibly with salvage assistance to follow depending on how matters developed [A9], and a confirmation that SMIT was willing to work on the basis of SCOPIC rates with a 15% uplift for out of pocket expenses. SMIT got to work straight away towards providing technical advice on the options for refloating the ship, and began to prepare a team to mobilise to the casualty [A10-A18]. To allow for that, SMIT asked WKW for a simple form of authorisation letter to be obtained from *Ever Given*'s owners or managers to facilitate the SMIT team's swift passage to the ship "*to execute a detailed assessment of the current situation*" [A16].

50. Early on 24 March 2021, Capt Sen confirmed that what he was looking for at that stage was for a SMIT team "*to attend on board assess the grounding, assist Master and SCA with on site recommendation for quick refloatation*" [A23]. He also said in that email that, "*Although we had verbally discussed [a reference to the initial telephone call the previous day], the costs of your personnel will be scopic rates and out of pocket expenses on usual uplift of 15%*", and that "*We wait for your confirmation in writing, along with passport details of the attending personnel …*".

51. Mr Wisse's reply pressed the advantages of an LOF contract for this type of situation, but continued: "*Having said [that], we do appreciate the current discussions and instructions and we will continue to mobilize our team towards the casualty based on below daily hire scheme*" [A24].

52. Capt Sen responded, indicating that the SCA were regarded as the main salvors, but "*Owners and Underwriters want to give whatever professional assistance that can be given to refloat the vessel*", and asked SMIT, if possible, to arrange for a dive survey even while the SMIT team was in transit [A24]. Mr Janssen in reply acknowledged the SCA's control of the situation, but emphasised SMIT's ability to work with the SCA and their experience of being engaged by the SCA, including on LOF terms. He therefore proposed that, "*to avoid a chicken and the egg situation [sic.] we would require an appointment letter or contract from the Owners with which we approach the SCA and work out a path forward*" [A27]. Capt Sen replied, confirming that a suitable letter from *Ever Given*'s owners or managers had been requested and would be provided as soon as it was to hand [A28].

53. The references in those exchanges to agreement of, or mobilisation based on, remuneration terms of SCOPIC rates (plus 15% uplift on out of pockets), do not, in my view, convey unambiguously an intention to be bound there and then. Mr Janssen's email distinguished an appointment letter from a contract, the former being sufficient in the absence of the latter to enable SMIT to approach the SCA with authority from *Ever Given*'s owners for getting involved. It was an open question whether that would lead, in due course, to any contract, with the defendants or with the SCA, and, if so, on what basis, in particular whether LOF terms would be used or something else.

54. Just after midday on 24 March 2021, Mr Wisse sent Capt Sen a detailed proposal from SMIT as to commercial terms [A35]. That detailed offer was not said to be 'subject to contract', and as regards the contract form, it said: "*Contract: Wreckhire 2010, logically filled and amended.*" A clean acceptance as in *The Athena* (see paragraph 38 above), I envisage, would have concluded a contract, without more ado, subject to any issue as

to authority on Capt Sen's side of the exchange. There was no such acceptance, however.

55. During the afternoon and evening of 24 March [A42-A45]:

(i) Mr Wisse sent Capt Sen operational updates on the progress of the team mobilising to the casualty and on tug options that SMIT had identified that might assist in refloatation efforts;

(ii) Capt Sen sought and obtained clarification of SMIT's offered terms as to scope of services; and

(iii) Capt Sen notified SMIT that his principals might engage the tug *Red Sea Brigand*, for the following morning's refloatation attempt;

(iv) SMIT's offer of commercial terms therefore remained on the table, awaiting a response.

56. Early on 25 March 2021, with a response to SMIT's offer of terms still awaited, Capt Sen asked Mr Wisse to engage the *Red Sea Brigand*, if the SCA would allow it to assist [A50]. In response [A51], Mr Wisse confirmed that a charter for that tug was being drafted, and stated that "*it is important that we receive your / owner's formal response to our commercial proposal sent yesterday. We need some kind of assurance before we can ramp up our mobilization efforts and make out of pocket expenses, trust you will understand. Also the Wreckhire needs to be discussed/negotiated between the parties, I believe this is being prepared in the background by respective legal experts. …*". Capt Sen replied promising to revert "*[on] your Wreckhire offer asap*" [A52]; and Mr Wisse forwarded SMIT's commercial proposal to the defendants' solicitors [A54].

57. I note two features of Mr Wisse's message chasing a response to SMIT's offer of commercial terms based on Wreckhire. Firstly, it sought a "*formal response*" that provided "*some kind of assurance*" before SMIT would ramp up their efforts further. That neither stated nor implied that the parties needed to have completed their negotiations. Secondly, it now indicated that there would or might be more to completing those negotiations than making logically necessary amendments to the Wreckhire 2010 Form. The Wreckhire wording was now something to be discussed and negotiated, on which (it was suggested) lawyers were to be involved.

58. Mr Jacobs KC submitted that "*Also the Wreckhire needs to be discussed / negotiated …*" (my emphasis) connoted that an agreed, full contract wording based on the Wreckhire 2010 Form was supplementary and inessential. I do not agree. The tenor of Mr Wisse's message, in my view, was that (a) SMIT wanted to see that progress was being made in the commercial negotiations, before 'ramping up', and (b) after that (assuming it occurred), the completion of those negotiations so as to create a contract would require discussion and negotiation of the detailed Wreckhire wording.

59. Thus it was that, with no contract yet in place, but negotiations under way, the SMIT team arrived on board *Ever Given*, and discussions of tug options in the area continued [A56, A57, A60], while in the background, Capt Sen sought instructions from Mitsui on SMIT's offered terms [A55, A58, A59, A61, A62]. SMIT did not charter the *Red Sea Brigand*, as in the event she was engaged to assist by the SCA.

60. That was the state of play when Mr Wisse sent the Proposal, which was in fact, therefore, a revised commercial offer, now with a draft detailed Wreckhire wording, at 21:40 UTC on 25 March 2021 [A63]. Capt Sen replied at 22:28 UTC, promising to "*revert on your proposed commercial offer asap*" [A64]. As I noted in paragraph 13 above, Mr Wisse also sent with the Proposal a draft salvage plan. That included SMIT's assessment of *Ever Given*'s situation and of refloatation options. In context, the reassurance from Capt Sen that a response on SMIT's offered terms would be sent "*asap*" was apt to suggest that SMIT would receive something early the following morning, bearing in mind that Capt Sen's instructions would be coming from principals in Japan who could take the whole of 26 March 2021 to consider the terms, for either acceptance or counter-offer, in plenty of time for the response to be sent at the start of the business day in Europe.

61. With that response awaited, Capt Sen asked Mr Wisse to proceed towards the engagement of tugs, and Mr Wisse confirmed that SMIT would do so [A70-A71].

62. The morning of 26 March 2021 (UTC) therefore arrived with, still, no contract in place, but a detailed set of terms on the table proposed by SMIT to which an imminent response could have been reasonably expected. In that context, those terms were forwarded by SMIT to the defendants' solicitors at 06:06 UTC [A75].

63. Capt Sen temporarily confused matters by purporting to confirm agreement to remuneration terms that differed from SMIT's offer, having misunderstood his instructions from Mitsui [A79-A82]. In doing so, however, he acknowledged and accepted that in any event it remained necessary to agree the detailed contract: "*We look forward to your confirmation / acceptance to the above. We can then start ironing out the wreck hire draft …*".

64. That, then, was the context for an email from Mr Sheilds to Capt Sen at 08:43 UTC, following a telephone call between them, stating that "*we need to have an agreement with Owners by 12:00 Dutch time to day. Otherwise we will have to take a firm position and stand down our operations to protect our interest*" [A85]. Given the terms of the immediately preceding messages, the subject matter for 'agreement' at this point was the remuneration package proposed by SMIT that Capt Sen's error had seemed to suggest that his principals were not agreeing. In my view, Mr Sheilds' message did not convey a change to the basis on which the parties had been proceeding, namely that there would still then need to be an agreed full contract wording before the negotiations would be complete.

65. At 10:32 UTC, Capt Sen again confirmed to SMIT agreement of the different terms he had counter-offered in error a few hours earlier [A90] (although he had received approval from Mitsui to agree something different again, that would have been more favourable to SMIT than his counter-offer (see [A89])). Capt Sen again asked for SMIT's "*confirmation / acceptance to the above. We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest …*".

66. That was rebuffed by Mr Janssen; emails and conversations followed, in which the remuneration terms were agreed that are set out in the final exchange of emails by which the defendants say a contract was concluded. They included two qualifications negotiated by Capt Sen in relation to the 35% Refloatation Bonus, *viz.* that it would not apply to costs for quarantine or isolation periods and it would not be earned at all if the

SCA succeeded in refloating *Ever Given* that day (26 March). (See for all of that, [A91-A95].)

67. Capt Sen's confirmation of the remuneration terms thus agreed, sent at 11:35 UTC, closed with, "*We look forward to confirmation. We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest …*" [A94]; and Mr Janssen's response, at 11:40 UTC, after confirming and thanking Capt Sen for the agreement on remuneration terms, said, "*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 …*" [A95]. Capt Sen responded straight away with a promise to be in touch with Mr Sheilds and Mr Wisse on the contract wording [A96].

68. To my mind, as throughout the parties' exchanges since early the previous day (see paragraphs 56 to 58 above), the tenor of those communications was that the parties had reached agreement on the remuneration terms for a contract 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.

69. It was appreciated on the defendants' side that SMIT had in mind finalising and signing a contract that day (see [A98]); and with that in mind, SKK agreed to SMIT's proposed contract wording, 'as is', but on the basis that it would be signed (by Mr Fujiwara) on the Monday (29 March 2021) [A99-A101]. That was not communicated to SMIT, however; and at 17:56 UTC, Mr Wisse chased Capt Sen for "*when we can expect to have your/Company's detailed response on the draft Wreckhire? We would obviously like to finalize this soonest*" [A105].

70. Capt Sen replied, very promptly, reassuring Mr Wisse that there was "*nothing remarkably major to amend*" [A106]. This was false optimism, as significant changes were proposed in the event, when Capt Sen finally did respond to SMIT's proposed wording, on the Sunday morning. But it means that the parties' continued cooperation and exchanges on the Friday evening and all through Saturday, in particular about the terms upon which the *ALP Guard* was to be fixed, came at a time when the appearance had been created that a contract was close, albeit not yet agreed.

71. The falseness of Capt Sen's optimism emerged at 07:44 UTC on the Sunday, and the resulting significant gap between the parties as to contract terms was not resolved by the late morning of the Monday (see [A132]-[A145]). After that, *Ever Given* was refloated at about 13:05 UTC, leading to exchanges about the SMIT team and tugs standing down, and finally (so far as material) an email from Mr Janssen at 19:39 hrs UTC asserting the absence of any contract and the availability, therefore, of a claim for salvage (see [A149-A156]). The failure to agree contract terms was therefore never resolved. The defendants did not accept that there was no contract and SMIT maintained their stance (see [A157], [A159], [A161]), leading ultimately to the trial in this court upon which this is the judgment.

72. Mr Jacobs KC advanced a number of arguments as to why the parties' exchanges should be read as evincing an intention to be bound. I had them well in mind in explaining, above, how in my view the parties' relevant exchanges read, but let me now indicate for at least the main lines of argument why I was not persuaded by them to the view that a contract was concluded.

73. First, it was said that there were serious implications or ramifications for the salvage industry if SMIT is correct in this case. A salvor, it was said, could "*agree ... commercial "main terms" with a shipowner and commence the provision of services on the basis of those terms, deliberately delay the finalisation of the formal contract until the services had been completed and then, on a relative assessment of the level of remuneration, make a common law salvage claim on the basis that no contract had been agreed.*"

74. I do not see that there is a problem. The law requires clarity of agreement, as to content and as to intention. If on the parties' exchanges and conduct it is unambiguously the case that they intend to be bound by something they have agreed that is sufficient, in principle, to amount to a contract, but that is not a full, detailed contract wording, there is no room for either party to resile from that. If it is not, i.e. the position is equivocal, then the law takes the parties to have appreciated that, and takes it accordingly that the employer was content to take any risk there was of a common law salvage claim imposing a greater liability than there would have been under such terms as had been agreed, had they formed part of a concluded contract, and that the salvor was content to take any risk there was of earning nothing if the ship was not salved or was salved without their having contributed (or, possibly, of a salvage award being smaller than the remuneration that would have been payable under the proposed commercial terms).

75. It is true of course, as Mr Jacobs KC submitted in developing this first point in closing, that a binding agreement as to the basis upon which a salvor is to be remunerated of the kind alleged in this case might be attractive to both sides for its greater measure of certainty than LOF terms or leaving matters to the common law. But that does not answer the question whether in any given case the parties have so communicated as to make clear to each other that they are entering into such an agreement; and willingness to pay or be paid a certain type of remuneration might be tied to other elements of what might be stipulated, for example the scope of services, the payment regime, or the liability regime. In this case, SMIT had tied their expressed willingness to work on the SCOPIC-based remuneration package to a set of detailed contract terms covering such matters, as I explain further in paragraph 79*ff*, below, when dealing with another of Mr Jacobs KC's arguments.

76. Second, SMIT's threat to stand down unless something was agreed was a pointless ultimatum, it was said, unless the agreement demanded was intended to be binding. Therefore, it was said, the final exchanges on 26 March 2021 demonstrated an intention to be bound. However, that argument assumes, without foundation, that a salvor in SMIT's position would regard agreement in principle on important main terms, and thus progress in the contractual negotiations, as worthless, and insufficient to 'buy' a decision not to pause their efforts or stand down more generally. Of course, an ultimatum to quit a project unless some agreement were in place could be expressed in such terms that, in context, *did* convey intent to be bound by the agreement sought. In this case, in my judgment, not so, on the terms of the exchanges on 26 March 2021.

77. Third, it was said that the agreed stipulation that the Refloatation Bonus would not be payable if the SCA achieved refloatation on 26 March 2021 made no sense unless the parties intended to be bound, there and then. I disagree. It was reasonably to be contemplated that the detailed terms of any contract could be finalised promptly after the emails agreeing the remuneration terms. Indeed, SMIT was understood on the defendants' side to be looking to finalise a contract and get it signed within 26 March

2021. That did not occur, in the event, because (a) SMIT was not given any response to its proposed terms until the morning (UTC) of 28 March 2021, and (b) that response revealed as to terms a gulf between the parties that was never bridged.

78. Fourth, it was said to be relevant that SMIT's internal response to the exchange of emails between Capt Sen and Mr Janssen at 11:35/11:40 UTC on 26 March included an email from Mr Wisse, "*Agreement on main terms!*", and that Mr Janssen had commented internally by WhatsApp after his telcon with Capt Sen immediately prior to that exchange, "*Confirmed - pls p&c [i.e. private and confidential] until I see the confirmation on paper*". Those internal reactions did not cross the fence. In any event, they say no more than they say and do not convey that a contract has been concluded. If anything, Mr Wisse's comment conveys that a contract has not yet been concluded.

79. Fifth, it was emphasised that the parties did not use the language of 'subjects' in their exchanges. Stating that some measure of agreement expressed in exchanges by way of contractual negotiation is 'subject to' something has the capacity to make it clear that there is no intention to be bound by that which has been agreed. Familiar examples are 'subject to contract', typically making clear an intention to be bound only if a written contract document is executed between the parties, and 'subject to details' (or 'sub details'), often making it clear that though certain basic or main terms are agreed, the intention is not to be bound unless and until some fuller set of contractual terms is also agreed.

80. I agree with Mr Jacobs KC that in the exchange of emails on 26 March 2021, by which the defendants say a contract was concluded, or more generally in the correspondence I have considered, SMIT could easily have said in terms that any basic agreement on remuneration terms was or would be 'sub details'. That was, however, the effect of what *was* said, in the key exchanges between the parties. The consensus alleged to have been contractual was created by Capt Sen's email sent at 11:35 UTC on 26 March 2021 (offer) and Mr Janssen's reply sent at 11:40 UTC (acceptance). The nature and effect of the offer was made clear by how it articulated the effect of an acceptance: "*We look forward to your confirmation. <u>We can then start ironing out the wreck hire draft agreement</u> so that the same can be signed at the earliest*" (my emphasis). That was said in the context of the Proposal, sent the previous evening by SMIT.

81. Read with the Proposal, Capt Sen's email communicated agreement to one of the seven bullet points set out in the Proposal as a summary of the main terms and conditions offered by SMIT, with counter-proposals on two more, and left without response the other four, one of which was a proposed definition of the contractual services, another of which was a draft Wreckhire Form contract "*stating all relevant contracting details*". Seen thus, the tenor of Capt Sen's offer was, and was only, that if it were accepted, the parties could move to a necessary next stage in their negotiations. It was not that if it were accepted, there would be a contract there and then. Mr Janssen's acceptance was in keeping with that.

82. The counter-proposals were that whereas in the Proposal, third party craft, personnel and equipment were to be at cost + 15%, Capt Sen proposed SCOPIC 2020 rates + 15%, and two qualifications in respect of the Refloatation Bonus. The latter was a counter-proposal Capt Sen understood to be acceptable to SMIT based on the conversation he had just had with Mr Janssen. The former may have been an error (at the time, thought

by SMIT to be an error in their favour, as the SCOPIC 2020 daily rate for the *ALP Guard* (c.€42,000) was higher than the rate her owner was offering (€35,000)).

83. Sixth, the urgency of the situation was emphasised. In a situation of urgency, it is obvious that parties might conclude a contract more rapidly than they would absent urgency and/or be willing to contract upon a less full or detailed set of express terms than in other circumstances they might insist on agreeing before being committed. But that does not replace the need for clarity, i.e. unambiguity; and in the present case, the parties did not make it clear to each other that they intended to be bound upon achieving consensus, as they did by that email exchange between Capt Sen and Mr Janssen, on three (of seven) bullet points for a possible contract. To the contrary, although it is not necessary to go this far for a conclusion that there was no contract, they made it clear to each other that they intended to be bound only by a detailed set of contractual terms based on the Wreckhire 2010 Form that still needed to be negotiated, the next step in that regard being for Capt Sen to provide the defendants' response to that element of the Proposal.

84. Seventh, heavy reliance was placed on the fact that SMIT undertook work, and chartered in two expensive tugs. That is of course true; but all the while the parties were still negotiating the terms for a possible contract. The performance during contractual negotiations of what will become (retrospectively) part (or even all) of the contractual service if the negotiations are completed successfully does not mean they must have been completed. On the facts of this case, the negotiations continued in parallel and were never completed. That is, I consider, the plain tenor of the parties' correspondence, taken as a whole.

85. Eighth, and finally, it was said that there had been a rejection of any 'no cure – no pay' basis of remuneration, rendering it "*antithetical to the parties' clear intentions*" and "*bizarre*" if, as the claimants contend, their right (if any) to remuneration is a common law salvage entitlement on a 'no cure – no pay' basis. However, there was no unequivocal, mutual rejection of 'no cure – no pay' terms (specifically, LOF terms). In any event, an unequivocal rejection of a possible contractual term, as part of negotiations that are not brought to a successful conclusion, is no more binding than anything else that does not find its way into a contract because no contract was ever concluded.

86. Theoretically, I suppose it might be possible to find a binding contract not to claim some type of remuneration even though no contract for any other type has been concluded. But no such contract, if theoretically possible, is alleged by the defendants here. There is nothing antithetical to the parties' expressed intentions or bizarre about holding them to whatever are their rights and liabilities in the absence of a contract where they did not manage to conclude a contract.

Authority

87. The question of authority does not arise for determination in circumstances where I have concluded that, objectively assessed, the parties did not by their exchanges and conduct purport to conclude a contract, because what they said and did failed to convey a mutual intention to be bound in the absence of an agreed full contract wording that they never achieved. I therefore deal with the question relatively briefly.

88. Firstly, SKK had full, standing authority to bind Luster to a contract for salvage services between Luster and SMIT, or to authorise Mitsui (or WKW, via Mitsui) to do so. The relationship between SKK and Luster was governed by the VAA [A1-A3]. The references in the VAA to SKK acting in accordance with directions or orders issued from time to time by Luster do not read, without more, as limitations upon SKK's authority. They provide for limitations to exist, if Luster issued a direction or order creating them. There is no allegation or evidence of any such direction or order.

89. SKK's authority was therefore a general authority as Luster's agent to manage and conduct the business of, in this instance, the *Ever Given*.

90. The matters listed in Clauses 3(A) to 3(F) of the VAA do not confine that authority. They oblige SKK to attend to those matters. In any event, read in the context of an appointment as general agent to manage and conduct the business of the ship, the obligation (and therefore entitlement) specified by Clause 3(F), to "*Perform all necessary services in connection with salvage and general average*", sensibly must extend to concluding contracts, directly or via Mitsui/WKW, for salvage services. Indeed, in my view, that is the primary service contemplated by Clause 3(F), since it cannot have been envisaged that SKK would salvage the ship itself, rather than through contractors.

91. I do not see how that could have authorised SKK to contract (or to authorise others to contract) for Higaki. The defendants raised a number of arguments on a theme of the close corporate relationship between SKK, Higaki and Luster, to say that SKK must have had authority to act for Higaki; but they all fail given the separate corporate identities and separate Boards of Directors (even if some individual directors were on more than one). However, that would not have prevented a contract from coming into existence between SMIT and Luster that would have been sufficient to defeat any common law salvage claim.

92. SKK, in the person of Mr Yukito Higaki and Mr Fujiwara, authorised Mitsui, in the person of Mr Tsuyama and Mr Isawa, to agree the remuneration terms proposed by SMIT at 21:40 UTC on 25 March 2021, at the meeting between SKK and Mitsui concerning the casualty at 00:30 UTC on 26 March 2021 [A68].

93. The terms thus authorised, however, were not the terms that Capt Sen agreed (see paragraph 82 above). Mitsui (Isawa) received approval of the terms that Capt Sen agreed from Mr Fujiwara, by telephone [A87]. Mr Yukito Higaki was one of two Representative Directors of SKK, with authority to commit SKK without the need for full Board approval of the specific commitment. Mr Fujiwara was an ordinary Director of SKK, meaning he did not have that same personal authority to bind SKK to a contract. I do not regard that limitation of authority as relevant, as no question arises of binding SKK to any contract. The question is whether, as the ship's managing agent acting on behalf of Luster, SKK, necessarily acting by some relevant individual since it is a corporation, approved terms for a contract between SMIT and the ship. I see no reason why Mr Fujiwara, as a Director of SKK, could not act for SKK whereby to give such an approval.

94. For completeness, had it mattered, I would not have accepted that there was any wider grant of authority to Mitsui prior to or at the meeting referred to in paragraph 92 above. Mr Fujiwara gave evidence, which I accept, that matters of detailed contract wording

were left to Mitsui to decide. But leaving Mitsui to negotiate and possibly agree detailed wording would not have authorised them to agree different remuneration terms from those for which SKK's approval had been sought and obtained at the meeting. The change to those terms proposed by Capt Sen (in error, but that was not apparent to Mitsui) needed SKK's approval. That approval was not given at the meeting since Capt Sen's change was introduced for the first time three hours or so later (see [A71]). Finally, in relation to the meeting, if approval had been given to Mitsui there (which it was not) for the remuneration terms Capt Sen in due course agreed, I would still have said that bound only Luster, not Higaki. Mr Yukito Higaki was an ordinary Director (only) of Higaki who could not commit the company on his own.

95. I agree with Mr Jacobs KC's reading of Section 2-3 of the CHAA [A4-A5], the contract governing Mitsui's engagement of WKW to assist. That is to say, Section 2-3 obliged WKW to recommend a salvor to Mitsui (in the event, SMIT), and to advise Mitsui on the most appropriate form of contract to enter into; and that 'type recommendation' obligation goes with the authorisation provision under which WKW was authorised to enter into any "*kind of contract relating to a salvage operation*" if written approval had first been received. The authorisation provision therefore reads, and in my judgment is, a 'type approval' requirement complementing the 'type recommendation' obligation.

96. In this case, subject to the point made in the next paragraph, Capt Sen had recommended agreement of the remuneration terms he purported to agree with Mr Janssen, with detailed contract wording to follow. That recommendation was accepted by Mitsui, and approval in writing to agree it was given to Capt Sen, by Mr Isawa's email at 10:24 UTC on 26 March 2021 [A89]. By then, Mr Fujiwara had authorised Mr Isawa to agree those terms (see paragraph 93 above).

97. In the event, Capt Sen negotiated, from Mitsui/owners' perspective, two slight improvements to the terms that Mitsui had purported to authorise him to agree. It was rightly not suggested that that meant the terms he agreed were not within the scope of the authority he had received.

98. It follows that if by agreeing that which he agreed, Capt Sen had (purported to) conclude a contract with SMIT, it would have been a contract approved by Mitsui, with authority granted to them by SKK as managing agent of the ship authorised by Luster.

99. On that basis, it would not have been necessary for the defendants to rely on ratification, so I shall not lengthen this judgment by considering the points that arose in relation to that.

Conclusion

100. By the exchange of emails relied on by the defendants, upon their terms read objectively and in context, Capt Sen and Mr Janssen did not purport to conclude a contract between SMIT (let alone any of the other claimants) and the defendants or either of them. By that exchange, agreement was reached, after a period of uncertainty in part created by some of Capt Sen's earlier messages, on the remuneration terms for a contract that was being negotiated. However, the parties made clear to each other that they were still negotiating, indeed the detailed work of negotiating the contract terms by which they would be bound was only thus able to commence, albeit there was room for the view that it ought not to require much time to complete.

101. The parties did not communicate to each other an intention to be bound in the absence of completing that work of negotiating and agreeing a detailed set of contract terms. The tenor of their exchanges, to the contrary, was that they did *not* intend to be so bound. In the event, that work was not completed, as the counter-proposal on detailed terms later sent by Capt Sen put the parties some considerable distance apart, and that gap was never closed.

102. Therefore, no contract such as is alleged by the defendants was concluded.

SMIT Salvage BV et al. v Luster Maritime SA et al.

Appendix to Judgment – Detailed Facts

Times are stated in UTC. At the time of the casualty, Japanese time was UTC +9 (JST), Egyptian time was UTC +2 (EET), Dutch time was UTC +1 (CET) and UK time was UTC (GMT). From 28 March 2021, Dutch time was UTC +2 (CEST) and UK time was UTS +1 (BST).

Agency Contracts

A1. Luster as 'the Owner' and SKK as 'the Agent' entered into a written Vessel's Agency Agreement dated 1 January 1990 ('the VAA'), terminable on 60 days' written notice, that remained in place in March 2021. It set out agreed terms for management by SKK of ships owned by Luster. By Clause 1, Luster appointed SKK "*its sole agent to manage and conduct the business of the Vessel, owned by the Owner in accordance with such directions and orders as the Owner has issued or from time may issued [sic.] and upon the terms and conditions herein provided.*" By Clause 2, SKK accepted such appointment and undertook "*to manage the vessel under this agreement for the account of the Owner and in accordance with such directions as the Owner has issued or from time to time may issue, and upon the terms and conditions herein provided*" and "*to perform its duties under this Agreement in accordance with the standards of care of first class vessel agency.*"

A2. Clause 3 of the VAA provided as follows:

"For the account of the Owner, in accordance with such directions, order, forms and methods of supervision and inspection as the Owner may from time to time issue, in an economical and efficient manner, and execising [sic.] due diligence to protect and safeguard the interest of the Owner, in connection with the duties prescribed in this Agreement, the Agent shall:

(A) Arrange to engage and dismiss the Master, officers, and crews of the vessel, and all personnel necessary for the operation of the vessel (all of whom shall be employees of the Owner).

(B) Purchase necessary stores, supplies, services, and provisions for the vessel and supervise the distribution thereof to the vessel.

(C) Arrange for and supervise repairs and maintenance of the vessel and arrange for and supervise vessel classification and other vessel surveys, shipyard overhaul, major repairs and drydocking, and appoint classification, Coast Guard and other surveyors.

(D) Process and handle the insurance claims and collect the proceeds thereof.

(E) Arrange for taking inventories of stores, food and equipment, as required.

(F) Perform all necessary services in connection with salvage and general average.

(G) Keep records relating to the activities, maintenance and business of the vessels in such form as may be required by the Owner.

Nothing in this Agreement shall be deemed to obligate the Agent to expend its own funds in the payment of any amounts to be disbursed for the account of the Owner, it being understood that all such funds shall be provided by the Owner as herein set forth."

A3. By an Addendum dated 25 September 2018, Luster and SKK agreed a monthly agency fee under the VAA for *Ever Given*, the effect of which (it was common ground) was to apply the VAA to her.

A4. By a written Claims Handling Agency Agreement concluded on 20 December 2003 ('the CHAA'), between Mitsui as 'the Company' and WKW as 'the Agent', Mitsui appointed WKW, and WKW agreed to act, as Mitsui's agent for Europe, Africa and the Middle East, to "*act on behalf of the Company in accordance with the terms set out below to ensure the protection of both the Company's interest as Hull & Machinery Underwriters and those of their assured.*"

A5. Section 2 ('Services') authorised WKW to take specified steps on Mitsui's behalf when receiving notice of a casualty directly from an assured, with an obligation to report to Mitsui the circumstances of the casualty and any action taken. Section 2-3 ('Salvage Cases'), then, was in the following terms:

"Depending on the circumstances of casualty, the Agents [sic.] is required:

AAA) To make recommendation to the Company about the most suitable salvor, and

BBB) To advise the Company on the most appropriate form of contract to enter into (e.g. towage / salvage / lump sum / no cure – no pay etc.).

The Agent is hereby given authority to enter into any kind of contract relating to a salvage operation provided always that written approval from the Company has first been received."

23 March 2021

A6. At about 05:40 on 23 March 2021, *Ever Given* ran aground whilst transiting the Suez Canal, northbound. At 07:21, Mr Tsuyama by email notified Capt Sen of the grounding and requested his assistance. Mr Tsuyama conveyed the general brief in these terms, namely: "*In order to avoid extremely expensive salvage award, we need your support and assistance on this matter.*" He gave Capt Sen contact details for Bernhard Schulte Shipmanagement (Hong Kong) Ltd Partnership ('BSM'), the ship's technical managers, and for the ship's local agent in Suez, and closed thus: "*We wonder if SMIT can be contractor between the Owners of EVER GIVEN and tug Owner in Ezypt [sic.]*".

A7. At about 12:14, SMIT was notified of the grounding and approached Nippon Salvage to follow up with *Ever Given*'s owners and possibly underwriters. By 13:50, Nippon Salvage had identified Mitsui as her hull underwriters.

A8. At 14:38, Capt Sen sent Mr Dave Wisse of SMIT an email which attached various information about the condition of the ship. This followed an initial telephone call, Capt Sen calling Mr Wisse, in which Mr Wisse told Capt Sen that SMIT had been trying to get

in touch with *Ever Given*'s owners or managers, and Capt Sen said that he had been instructed to seek assistance. Capt Sen told Mr Wisse that he was not contacting any other salvor at that stage and that he had instructions to engage SMIT "*for seeking technical assistance based on standard SCOPIC rates plus 15% uplift for out of pocket expenses*", and Mr Wisse indicated a willingness on SMIT's part to work on that basis.

A9. Capt Sen's email stated:

"Dear Dave,

We refer to our telephone conversation a short while ago.

On behalf of Owners / Mangers [sic.] and Underwriters, we request your assistance to provide us with technical advice regarding the above mentioned matter and depending upon how thing [sic.] unfold with salvage assistance if needed.

Below information received from Master along with attached plans and photos.

[information about the Vessel's condition and a photo]

Vessel manager request urgent advice on if any ballasting deballasting should be carried out to reduce the ground reaction so that it can assist in vessel refloating using the SCA tugs…"

A10. At 14:58, Mr Wisse sent an email to Capt Sen which stated:

"Dear Capt. Sen,

Thanks for below messages and earlier call.

We are looking into it and revert shortly with our preliminary thoughts based on the available information…"

A11. At 16:28, Mr Wisse sent Capt Sen and his colleague Mr Warner Gomes an email which stated:

"Dear Warner, dear Capt. Sen,

Thanks for the additional information and actions.

Following team from SMIT is now 'remotely' working on a professional advice regarding this matter:

(1) - Jules Martina – Salvage Master
(2) - Quinten Schothorst – Naval Architect
(3) - Paul van 't Hof – Operations Manager
(4) - Peter Smits – Salvage Supervisor

Focus is now to calculate the ground reaction and influence of the strong winds on the vessel. It is therefore important to know the latest and accurate ballast and stability conditions of the vessel.

De-bunkering plan is noted and we will advise on which tanks to take it from. Please advise when this de-bunkering is scheduled and by which tanker(s).

Further our local towage joint venture Ocean Marine Egypt (OME) may provide further local towage support if required. Reverting with tug availabilities. Lastly, should the vessel remain heavily grounded it is recommended to have a SMIT Salvage team mobilize to the vessel in order to coordinate matters locally.

Reverting with further operational thoughts or requests for information asap."

A12. At 16:43, Capt Sen sent Mr Wisse an email which stated:

"Dear Dave…

As a first step , please advise us on recommended best ballast arrangement to reduce GR. Secondly if bunkers have to be pumped out , what will be your recommendation.

I need something to revert back to Master asap. So that he can start lining up the ballast per your suggestion and if SCA plans debunkering then suggest as per your recommendation.

Right now two more tugs have been called in (seven tugs in total) by SCA for the refloatation attempt, which is going to be made around 1900 hrs LT.

About 4000 tns ballast has been pumped out from no.4 tanks.

Please see attached stability information after pumping out the bunkers…"

A13. At 16:44, Mr Wisse sent an email to Mr Komoto of Nippon Salvage which stated:

"Dear Komoto san,

…

Meanwhile we are lining up teams for possible mobilization and a remote professional advice for first steps.

Please also note that we have been approached by WKW Webster UK some hours ago who appear to have been appointed by Vessel managers. They have provided some information and requests for advice and hence we are in discussions with them.

Any further information from Japanese owners or H&M is of course appreciated…"

A14. At 17:04, Mr Wisse sent Capt Sen an email which stated:

"Dear Capt. Sen,

Tried to call, but you were on another line.

Are you available for a Teams meeting with the SMIT team in 15 minutes (18.15 CET)?

Meanwhile, please find our Casualty Information Sheet with relevant documents which we require. Our naval architect emphasized the need for the Bay Plan, but all other documents are required as well.

I will send a Teams invite shortly…"

A15. At 18:38, Mr Gomes sent Mr Wisse an email which stated:

"Dear Dave,

We have now received various documents from the Owners / Managers. Copies of the same attached for your kind perusal.

Furthermore as per the latest update received we understand that tugs have been unsuccessful in refloating the vessel. They will continue to keep trying for another two hours (up to 2200 hrs LT) if they are unable to refloat then reattempts will be made tomorrow morning at 1700 hrs…"

A16. At 20:18, Mr Wisse sent an email to Mr Gomes and Capt Sen which stated:

"Dear Warner, Capt. Sen,

Thanks for the provided information, confirm safe receipt of emails 1 to 4 and the below mail with the stowage plan.

Meanwhile I have also spoken to Capt. Sen who confirmed to be in agreement to advise owners/managers that SMIT will proactively mobilize a 3 pax Salvage team to the casualty site for an on-site assessment. Our team is currently lined up for PCR tests tomorrow morning and onwards most efficient travel options to Egypt are being verified. Due to waiting time on test results we expect that our team will only be able to arrive in Egypt 24th late PM or 25th AM. So 25th PM earliest possibility to be on board the casualty.

In order to start a dialogue with SCA to allow our team on board the casualty and/or to carefully discuss a possible cooperation for refloating operations, it is required to obtain a letter from the vessel owners and/or managers clearly stating that the SMIT team is tasked and allowed to go on board. Below a draft wording for your reference:

[draft wording of letter of invitation]

Trust above is in order and hope you can arrange the letter by tomorrow.

Meanwhile please note that our JV OME has four tugs in the range of 69 to 86 tbp available in the Gulf of Suez at about 130 nm distance from the casualty (i.e. less than a day sailing). Please find attached the relevant specification sheets. If required they can be made available for assistance during the refloating. We will also mention this to SCA should the opportunity arise.

Furthermore we are proactively sourcing for more powerful tugs in the region, as well as crane capacity should container lightering be required in due course. We will revert with our findings.

For now we suggest to await the developments on site during the scheduled refloating attempts and be in contact again tomorrow morning. Possibly in the course of tomorrow also our naval architect can already release some initial results from his calculations…"

A17. At 20:24, Capt Sen sent an email to Mr Wisse which stated:

"Dear Dave,

Thank you for your email, which is duly noted noted [sic.].

We will discuss as things unfold by tomorrow morning.

I will also arrange for the requested letter as per your advised format…"

A18. At 21:59, Mr Wisse sent an email to Mr Gomes which stated:

"Dear Warner,

The mentioned team is scheduled to depart from Amsterdam (Schipol airport), The Netherlands.

For sake of contingency and faster flight options we are also looking into teams from Singapore or alternatively a chartered plane from a different airport in The Netherlands or Belgium."

A19. At 22:04, Mr Wisse sent an email to Mr Komoto (Nippon Salvage) which stated:

"Dear Komoto san,

We have been informed that WK Webster is acting on behalf of owners, managers and hull underwriters jointly. Hence they are in the lead of this matter and they have indicated to us that they prefer all communication lines go via them. Meanwhile we have also already obtained all relevant casualty information (drawings, etc) via them.

So for the moment it seems that the matter is progressing (albeit no salvage contract has been signed or discussed) and we thank you for your efforts so far."

A20. At 23:21, Mr Imamura (Nippon Salvage) sent an email to various employees of SMIT (including Mr Wisse) and Nippon Salvage which stated:

"Nippon/SMIT internal only

Dear Dave san,

We refer to your email. PIC of MSI advised that they have appointed WK Webstar [sic.] to approach you directly as the owner put pressure on them, however they intend to appoint Nippon/SMIT as Co-salvor depending on the owners' consent for which MSI will visit owners office this morning. In such situation, we know that you are in liaison with WK Webstar for operational i.e. possible arrangement, necessary information, etc. directly, but for the commercial/contract we will discuss with MSI

as Co-salvor for which please indicate your preferred contract in view of local situation, etc. LOF? .

As for information you have obtained from them and the advice you have made/discussed including your teams' flight schedule, we would appreciate it if you could share with us?

We look forward to hearing from you soon…"

24 March 2021

A21. At 04:46, Mr Imamura sent Mr Wisse an email which stated:

"SMIT/Nippon internal

Dear Dave san,

As advised over phone, MSI/owner decided to appoint Nippon/SMIT as co- salvor for the salvage of this vessel and therefore we will ask MSI to get the owners signature on LOF SCOPIC as co- salvor for which please confirm. In the meantime, we will dispatch our salvage team (below 7 men) headed by Salvage Master T. Sugita by the flight arriving at Cairo at 1025 on 26 March…"

A22. At 05:12, Mr Wisse replied by email, stating:

"Dear Imamura san,

Thanks for your below message and earlier call. I herewith copy some of my colleagues.

Look forward to receiving the draft LOF before you have it signed by MSI. In the meantime I will discuss with my Management."

A23. At 07:09, Capt Sen sent Mr Wisse an email which stated:

"Dear Dave,

We refer to our telephone conversation just now.

Please be advised we have received confirmation that no LOF has been agreed yet.

Please send us the passport of the persons you are planning to dispatch today.

We need to send the same to local agents via vessel managers.

Although we had verbally discussed, the costs of your personnel will be scopic rates and out of pocket expenses on usual uplift of 15%.

The team needs to attend on board assess the grounding, assist Master and SCA with on site recommendation for quick refloatation.

Tugs are and have been arranged by SCA.

We wait for your confirmation in writing, along with passport details of the attending personnel…"

A24. At 07:53, Mr Wisse replied as follows:

"Dear Capt. Sen,

Thank you for your below message and earlier telephone calls.

Duly noted on the confirmation that no LOF has been agreed yet. This status is indeed in line with our discussions with our Japanese partner Nippon Salvage (whom as you know are also speaking with MSI and the vessel owners).

However, as discussed, we do want to emphasize again the obvious advantages of an LOF contract in this matter (many as you know, but foremost the advanced speed of getting the right resources on site timely), which seems to be rather serious and complex. SMIT, together with Nippon Salvage have a lot of experience in working in complex/dynamic circumstances and as you know we also hold good relationships with the SCA. Furthermore we have built up a vast track record in dealing with salvage matters with ultra large container vessels. Based on initial calculations of our naval architects the vessel is very hard aground and its condition is not getting any better under the circumstances. Lightering of bunkers and/or containers and/or dredging around the vessel may be required in this matter, so the earlier preparations are lined up for such operations (i.e. not necessarily already chartering relevant craft, but already initial sourcing and engineering, etc), the sooner a plan can be agreed to refloat the vessel and have the Suez canal reopened. Therefore the LOF contract seems to be the recommended way forward in our view.

Having said the above, we do appreciate the current discussions and instructions and we will continue to mobilize our team towards the casualty based on below daily hire scheme. Passports of our team are attached (please note one addition) – Mr. Jody Sheilds – Manager Commercial EMEA who will be in the lead with liaising with SCA). The team is being PCR tested in the next hour or so and several flight options are lined up for departure later today (subject to getting the negative results) and arrival Egypt late PM 24th or early AM 25th."

A25. At 08:08, Capt Sen replied, stating:

"Dear Dave,

…

As far as we are concerned SCA are the main salvors since they have sovereign control over the canal. Owners and Underwriters want to give whatever professional assistance that can be given to refloat the vessel.

I have spoken with Jody and he has advised that Smit will be able to arrange for dive survey around the vessel through your local divers.

If possible please arrange for dive survey subject to SCA agreement, while your team is still enroute so that more up to date underwater situation/ information is at hand…"

A26. At 08:14, Mr Wisse sent an email to Mr Sato (Nippon Salvage) as follows:

"Dear Sato san,

That's going to be complex, because WK Webster just now confirmed that at this stage (when no LOF has been signed), only a SMIT team is allowed to mobilize to the site on daily hire basis. So WKW will likely not approve the additional Nippon team (I will speak to them nonetheless).

We of course prefer LOF and Nippon's involvement, so therefore suggest you try to have the letter and the LOF signed via your network asap…"

A27. At 08:15, Mr Janssen sent an email to Capt Sen, as follows:

"Dear Capt,

Thank you for your message and please allow me to clarify one important point. You are correct that the SCA controls the channel yet they accept support from us for large salvage cases in the Canal as have provided on a number of occasions. The basis on which this works is that they accept Owner's wishes when they contract with us and we liaise with our local JV company with them about salvage solutions. An example of such a case was the grounding of the New Katharina on which we were awarded an LOF and worked closely with the SCA.

So, to avoid a chicken and the egg [sic.] situation we would require an appointment letter or contract from the Owners with which we approach the SCA and work out a path forward. Obviously, with the channel being blocked it is a high profile matter of national interest which may complicate matters when not dealt with by the appropriate people and salvor. We hope that being part of Boskalis who dredged the second Canal will carry some weight…"

A28. At 08:18, Capt Sen replied thus:

"Dear Richard…

The letter has already been requested yesterday from Owners / managers and we are waiting for the same.

It will be sent as soon as at hand."

A29. At 08:39, Mr Sato sent an email to Mr Wisse which stated:

"Hi Dave san,

Thanks for yours – indeed I'm caught in a dilemma.

My understanding is that H&M, who appointed WK Webster, have already accepted to dispatch Nippon's team to scene. Therefore, I would think WK Webster can approve the Nippon's team and this would not be an issue.

This misunderstanding can be solved if WK Webster gathers evidence from H&M…"

A30. At 10:18, an internal email at SMIT, from Mr Wilco Alberda to Messrs Wisse, Janssen and Sheilds reported as follows:

"Hi all,

Just spoke to Jeff. He had spoken to Capt. Sen. Capt. Sen assured that this wouldn't be a repeat of the MAKASSAR HIGHWAY and that he has a daily hire contract with SMIT and that we are mobilizing and can operationally commence immediately.

I advised Jeff that indeed we are mobilizing a small team from NL to assess the situation (which will be paid for), but no further agreements. I shared my concern that Capt. Sen is a micro case manager who we need to get approval from each and every step we take.

It seemed from the conversation that Capt. Sen is not sending other salvors to site.

Jeff will keep pushing for LOF. He is very concerned about the delays, and I advised him that we are incurring delays by not having an LOF (contract) in place.

They have instructed a local lawyer, no rep/consultant yet…"

A31. At 10:19, Mr Janssen replied to Mr Alberda's email, stating:

"Thanks W.

Problem will be assets that are moving away from the Canal / region and under LOF we would have already contracted them…"

A32. At 11:39, Mr Wisse sent an email to Capt Sen and Mr Gomes saying that SMIT would "*send the commercial summary to you shortly*" and requesting "*in the meantime*" a 'Hecsalv' model from Class and certain other information requested by SMIT's naval architects.

A33. At 11:42, Mr Gomes sent Mr Wisse an invitation letter signed by BSM on behalf of the defendants, based on a draft for such a letter that Nippon Salvage had sent to Capt Sen. The letter, dated 24 March 2023 on BSM headed paper and signed by Capt Paritosh Dube, a Senior Marine Superintendent at BSM, was in these terms:

"We, [BSM] / Technical Managers of the MV "Ever Given" (IMO: 9811000), having our vessel immobilized in the Suez Canal at km 151 in Egypt, have tasked a team of experts of the company, [SMIT] and [Nippon Salvage] to execute a detailed assessment of the current situation.

This team consists of:

[*names and roles listed, 5 x SMIT personnel, 7 x Nippon Salvage personnel*]

and any other persons of [SMIT] and [Nippon Salvage] team arriving on site.

We kindly ask all the relevant parties involved to grant them safe and swift passage to the casualty location to assist us as soon as reasonably possible."

A34. At 11:54, Capt Sen sent an email to Mr Wisse which stated:

"Dear Dave,

Please share your naval arch's calculations based on the submitted information since yesterday.

Vessel managers are also asking if there is any advice on ballasting / deballasting for the vessel on board will also be appreciated…"

A35. At 12:03, Mr Wisse sent Capt Sen an email that, in context and given its content, was evidently the "*commercial summary*" he had said at 11:39 would be following shortly (paragraph A33 above):

"Dear Capt. Sen,

Further to discussions earlier today regarding the commercial way forward in this matter, we herewith summarize the following daily hire arrangement:

• Contract: Wreckhire 2010, logically filled and amended

• Contractors: SMIT Salvage and Nippon Salvage as Co-salvors

• Scope:

  ○ Assessment of Salvage team on board, possibly including a dive survey by a local dive team

  ○ Preparations for refloating by pulling only (by e.g. shifting or discharging ballast water/fuel)

  ○ Refloating by pulling only (coordination by the salvage team with the SCA tugs and Contractor's mobilized additional tugs)

• Daily hire rates for Contractor's personnel and equipment: @ Scopic 2020, commencing from start mobilisation until completion of demobilisation (including any waiting time/delays due to Covid-19 procedures, quarantine, etc)

• All out of pocket expenses (this includes external craft): @ documented costs + 15% handling fee. For all out of pocket expenses over and above USD 5,000, Contractor will reasonably try to seek approval from Company representative before confirming.

• Personnel:

- 7 pax SMIT Salvage (including two persons of our local JV Ocean Marine Egypt (OME) for local shore coordination and liaison with SCA and any other authorities)
  - The 5 pax team coming from NL is scheduled to depart Amsterdam at 18.15 today and arrive at Cairo (via Istanbul) at 02.40 tomorrow 25th March. Onwards travel by land and tender/pilot boat is being arranged and all going well the team should be on board PM 25th March.
- 7 pax Nippon Salvage
  - This team coming from Japan is scheduled to arrive at Cairo AM 26th March and with onwards travel should arrive on board PM 26th or AM 27th March.

• Craft: we will revert with full overview of tug options shortly. Based on further insights on the matter and initial assessment on board a recommendation and mutual decision can be made to charter any external craft.

• Refloating bonus: 25% on gross revenue of the total contract value.

• Payment:

- First 3 days upon signing agreement
- Thereafter regular invoicing every 5 days of hire of expected services in advance
- Final adjustment upon completion of demobilisation

Any other services, such as cargo lightering and/or dredging will not be included in the above proposal. In such case we would like to keep the option open to change the contract form into an LOF.

Lastly by way of update regarding discussions with SCA: a meeting has been arranged by our liaison officer of tomorrow 25th with our arriving team, OME team and the Chief Transport of SCA who is coordinating the response from SCA side.

Trust to have you informed…"

A36. At 12:13, Capt Sen forwarded that proposal to Mr Isawa of Mitsui and asked Mr Isawa to "*review/discuss with all concerned and let us know if any clarifications are needed*".

A37. At 12:19, Mr Janssen emailed Capt Sen as follows:

"Dear Capt,

I would like to make use of this opportunity to discuss strategy with you going forward contractually if our envisaged efforts on the offered commercial basis would not lead to a refloating of the vessel.

You are more than aware of the workings of an LOF yet what is important to consider going forward is the presumed joint effort to work towards owners/underwriters facing one salvage claim and not two or more. It is therefore of paramount importance that we (Owners and us) sing of [sic.] the same sheet towards the SCA and we continue our dialogue with them so that we can tailor the discussions accordingly and that we pre-empt possible developments. By discussing matters with them we can tailor the discussions accordingly and that we pre-empt possible developments. By discussing matters with them we can obviously raise the desire to incorporate their activities and efforts under the same contract one way or another so that there is proper control. Their sovereignty obviously remains and the other point that remains is that the SCA reports back to and acts upon instructions from Cairo…"

A38. At 12:20, Mr Wisse sent Capt Sen preliminary calculations prepared by SMIT's naval architects.

A39. At 12:43, Capt Dube (BSM) sent an email to Capt Sen which stated:

"Good day Capt Sen,

On behalf of owners we would leave the decision of the tug appointment and selection on underwriters…"

A40. At 13:00, Capt Sen sent an email to Mr Isawa which stated:

"Dear Isawa san,

Further to my email below regarding commercial offer from Smit/ Nippon salvage.

I have discussed the matter further with Smits, which I want to share with all concerned.

I asked them why they have proposed a different contract term namely (LOF) in case vessel transhipment / dredging needs to be done.

The Smit's person explained , as transhipment / dredging will involve more personnel and more costs for them.

I explained to them that as a far as we are concerned, we are ready to give Smit all the support and flexibility is concerned to use all available means to refloat the vessel. Owners and Underwriters may also agree on a lumpsum bonus if refloatation is done after lightering or dredging.

The problem with LOF is the aftermath. Obtaining security from thousands of cargo owners is a Herculean task.

Vessel not only gets delayed it also affects commercial relations of Owners / Charterers with cargo interests.

Due to this reason Smit and Nippon should reconsider the offer of LOF if transhipment / dredging is needed and instead propose an additional lumpsum bonus, so that the issues arising due to LOF can be avoided.

Smit will discuss the matter internally and with Nippon salvage and revert.

If you and consider it appropriate , please also discuss on the same lines with Nippon salvage…"

A41. At 16:21, Mr Janssen sent an email to Mr Nishibe (Nippon Salvage) asking for his views on why the owners of the Vessel appeared to be reluctant to sign a salvage contract.

A42. At 16:30, Mr Wisse provided Capt Sen with an operational update regarding the progress of the salvage team, available tug options including the *ALP Guard* and the *Carlo Magno*, and the assessment of the casualty's condition. It is relevant to note that the *ALP Guard* had rated main engine power of 18,000 kW, which is 24,138 bhp, so that her SCOPIC 2020 rate was US$49,493.16 per day (at the time, c.€42,000 per day).

A43. At 18:15, Mr Wisse sent an operational update to Capt Sen. At 21:30, Capt Sen replied as follows:

"Dear Dave,

Reference to your email below.

Please clarify the below statement:

Further assessment on site and discussion with SCA by our team is necessary to decide on which tugs to engage in the refloating (pulling only) operation.

If any tug engaged via Smit , will the tug be involved in "pulling only" ; does that mean if the salvage master or chief pilot wants the tug to carry out scouring around the vessel or pushing, always within safe capabilities of the tug , it will not be possible ?

Looking forward to hearing from you…"

(original emphasis)

A44. Mr Wisse in reply, at 21:37, apologised if that was unclear and explained that:

"…

With refloating by pulling only we actually mean all kind of operations by tugs only and we explicitly mean to exclude refloating by means of cargo lightering, bunker lightering and/or dredging operations. So scouring or pushing by the tugs would be included.

We will certainly make sure that this is clearly stated in the Wreckhire so that all parties are crystal clear in the intentions and expectations of the services."

A45. At 22:42, Capt Sen sent an email to Mr Wisse which stated:

"Dear Dave,

As a heads up, Principals may consider engaging tug Red Brigand to assist in tomorrow mornings scheduled refloatation attempt at 0800 hrs and any future attempts.

We will revert if we get the go ahead, please alert clarkson's accordingly."

25 March 2021

A46. At 01:46, Mr Nishibe (Nippon Salvage) responded to Mr Janssen stating:

"Dear Richard,

This owner who has huge power like King of EHIME is hating Nippon in the past salvage case, Sincerity Ace.

Owner utilize WKW negative idea with LOF against us.

On the other hand, MS trust Nippon very much and want to use Nippon, however MS can't take straight way against powerful owner.

We are seeking chance for LOF, negotiating with Owner harder and carefully in cooperation with MS.

That is real situation."

A47. At 04:46, Capt Sen sent an email to Mr Janssen stating that misinformation was being circulated in the market in the name of SMIT and asking SMIT not to speak directly to the press.

A48. At 06:14, Mr Janssen responded to Mr Nishibe (Nippon Salvage) with comments as to what type of contract would be preferable and the differences between LOF and a commercial contract:

"Dear Nischibe-san [sic.],

Thank you very much for your clear information which explains the situation. I can only wish you/us all the best in the time ahead discussing matters with them. What it also does is raises the question what would be our best way to move forward contractually as one can lead a horse to water but cannot make it drink. The perfect contract for this situation would be an LOF but if Owners remain this adamant that they do not want one then in this particular case it may be that a commercial contract could be almost as interesting from a financial perspective if one weighs up the chance of having to part discharge the cargo and the criteria of an Art. 13 settlement or award; particularly the dangers/services/out of pockets. If the operation is not a relatively short one then there is a chance that the perceived difference between a LOF and commercial contract is perhaps not as big as most insurance people think, as long as we can keep our offered terms -or even improve them as offered by WK Websters in case of cargo discharge- then that may work as well and gives us the opportunity to work towards a cash-neutral basis.

Let's please stay in touch during the day to see if and how things develop…"

A49. At 06:34, Mr Janssen responded to Capt Sen confirming that SMIT would not speak to the media and that they had never claimed to have an LOF in place.

A50. At 06:56, Capt Sen instructed Mr Wisse to engage the tug 'RED SEA BRIGAND' if the SCA would allow it to be engaged in the refloatation attempts.

A51. At 07:29, Mr Wisse responded to Capt Sen stating that a charterparty was being drafted for 'RED SEA BRIGAND' "*so that the tug can be prepared to mobilize to the casualty site soonest*". The message also stated:

> "…
>
> - As discussed, it is important that we receive your/owner's formal response to our commercial proposal sent yesterday. We need some kind of assurance before we can ramp up our mobilization efforts and make out of pocket expenses, trust you will understand. Also the Wreckhire wording needs to be discussed/negotiated between the parties, I believe this is being prepared in the background by respective legal experts;
>
> - Furthermore we understand from our partner Nippon Salvage that the owner has cancelled the mobilization of the entire Nippon Salvage team for reasons unknown. Could you please check and advise? …"

A52. At 07:34, Capt Sen responded to Mr Wisse stating:

> "As mentioned in the instruction please ensure tug is fixed only if it can participate in refloatation operation.
>
> Reverting with your Wreckhire offer asap."

A53. At 07:40, Mr Wisse informed Capt Sen that 'RED SEA BRIGAND' already seemed to be participating in the refloatation effort but had not been engaged by SMIT.

A54. At 07:45, Mr Wisse forwarded SMIT's commercial proposal to Mr Peermohamed of Stann.

A55. At 09:21, Mr Isawa (Mitsui) sent an email to Capt Sen which stated:

> "Dear Capt Sen
>
> We are afraid Smit may misunderstand our intention.
>
> Wreck-hire and/or LOF will be discussed after Smit's report about the followings;
>
> In this case Smit is only in a consultant position and what they can do seems very much limited.
>
> Concept of LOF is give some freedom to salvors to prompt salvage operation.
>
> 1. The meeting with SCA
>
> 2. The plan by SCA for salvage operation.

> 3. Investigation report by Smit about condition of the vessel
>
> 4. Any plan by Smit for salvage operation.
>
> We believe what salvors can do is quite limited in the Suez Canal…"

A56. At about 10:00, SMIT's salvage team arrived on board the Vessel.

A57. At 10:09, Mr Wisse messaged Capt Sen about the availability of the tug 'ALP GUARD' at (*inter alia*) a day rate of €35,000 (minimum four days) and demobilisation rate of €150,000.

A58. At 12:42, Mr Isawa sent an email to Capt Sen which stated:

> "Dear Capt Sen,
>
> We do hope we will be able to receive the reports by the end of your today.
>
> The reports is very important agenda at the meeting tomorrow at 9:00 AM.
>
> Regarding "Any plan by Smit for salvage operation", please advise when we may expect to receive the report if Smit fails to deliver it by tomorrow morning.
>
> (The plan is the most difficult one to produce.)
>
> 1. The meeting with SCA
>
> 2. The plan by SCA for salvage operation.
>
> 3. Investigation report by Smit about condition of the vessel
>
> 4. Any plan by Smit for salvage operation.
>
> Regarding LOF scenario we have discussed with you, please provide your thoughts on the possible scenarios in which Smit and/or SCA will propose LOF. We would like to know details of the actual Suez Canal cases in which Smit or Smit/SCA concluded LOF…"

A59. At 14:28, Mr Isawa informed Capt Sen that Mitsui had reviewed SMIT's proposal and had certain comments on the contract, following which (at 15:22) Capt Sen sent a marked-up version of the proposal to him. Mr Isawa responded at 16:01 stating that Mitsui were not able to agree to the 'full 7 days' (in relation to Covid quarantine on return).

A60. At 16:36, Mr Sheilds sent an email to Capt Sen attaching minutes of a meeting held on board the Vessel between SMIT, the SCA, the Master and the owners' local agent. The minutes contained an update on the refloatation efforts and SMIT's recommendations for further steps to be taken.

A61. At 17:05, Capt Sen sent further comments on SMIT's proposal to Mr Isawa. His message stated (in part):

"… Please note before dispatching Smit's team onsite , I have already negotiated that Smit's own personnel and equipment to be charged on Scopic rates not 15% uplift .

15% uplift is for out of pocket expenses , hired equipment and personnel.

Regarding quarantine regulations , this can be discussed / raised with Smit at a later stage if necessary. We wanted their professional team to go on site on commercial rates and not argue about their return.

As advise in my earlier email. 5 person salvage team daily rate is around USD 10,000 / day.

… My bigger aim is for Smit to agree to carry out any lightering operation etc. if needed to be done on commercial terms not LOF. As per intention of Owners / Charterers. I am pushing them accordingly."

A62. At 21:00, Capt Sen sent an email to Mr Isawa which stated:

"Dear Isawa san,

Further to the report already sent to you earlier.

I am expecting a refloatation plan from Smit in the next 2 hrs and a copy of the draft agreement which will be based on wreckhire.

They have verbally indicated that they will agree not to push for LOF and will do the job under commercial wreck hire.

25 % of success refloatation bonus on the gross invoice and an additional 10% success refloatation bonus on the gross invoice only if containers need to be offloaded .

This in my view is a positive achievement during negotiations. One can only imagine the LOF award and associated costs.

…

Further the managers BSM called me to discuss hiring of tug ALP GUARD. They are of the opinion that we engage this tug asap subject to your and Owners approval…

Please discuss the same with Owners and let us know if we have the go ahead to engage ALP GUARD."

A63. At 21:40, Mr Wisse sent Capt Sen SMIT's revised commercial proposal, a draft Wreckhire 2010 contract and a draft salvage plan (with appendices), as to which see paragraphs 13-15 above. At 22:24, Capt Sen sent SMIT's proposal documents to Mr Isawa. His message stated:

"Dear Isawa san,

Please see attached just received from SMIT.

1. Commercial proposal;

2. Wreckhire draft (two separate documents; main body and additional clauses);

3. Salvage plan draft

4. Operational illustrations, as appendices to the salvage plan.

I have not yet look into it in detail as I have just received it. But there is some room for negotiation instead of 35% bonus on total gross , it can be 25% if no transhipment of containers , 35% if transhipment of containers is required. Further , SMIT invoice should not include SCA salvage charges other wise we will be paying bonus to SMIT on SCA invoice as well.

There will be some additional amendments in the draft agreement which can be discussed or negotiated with SMIT.

At present as a first step , subject to your and Owners agreement , we should engage powerful tug ALP GUARD to assist . The ETA of tug will coincide with completion of the suction dredger…"

A64. At 22:28, Capt Sen responded to Mr Wisse in an email which stated:

"Dear Dave,

We acknowledge receipt of your email and documents.

As a heads up we may engage ALP GUARD once we have the green light from Owners.

We will also revert on your proposed commercial offer asap."

A65. At 22:37, Mr Wisse sent Capt Sen an email asking him to draw the tug 'CARLO MAGNO' to the attention of the Vessel's owners as well as the tug 'ALP GUARD'.

A66. At 22:49, Mr Isawa forwarded SMIT's proposal documents to Mr Ochi of SKK. He stated that he was reviewing the documents and would revert shortly.

A67. At 23:03, Capt Sen recommended to Mr Isawa that they also engage the tug 'CARLO MAGNO' to be billed "*once she is delivered at Suez on or around 28th evening*".

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A68. At about 00:30 (09:30 Japanese time), a meeting took place between Mitsui and SKK, attended by Mr Yukito Higaki (a Representative Director of SKK, and a director of Luster and Higaki), Mr Ikeda and Mr Fujiwara of SKK, and Mr Tsuyama and Mr Isawa of Mitsui.

A69. At 03:10, Mr Isawa informed Capt Sen that the Vessel's owners had approved the engagement of 'ALP GUARD' and 'CARLO MAGNO' and asked Capt Sen to "*urgently arrange for the tug employment and advise as to ETA of both vessels*".

A70. At 03:39, Capt Sen asked Mr Wisse to engage 'ALP GUARD' immediately "*in order for tug to proceed to casualty site*" and to inform 'CARLO MAGNO' that they would be engaged once they arrived at the Suez Canal if the Vessel was still aground.

A71. At 03:51, Mr Wisse informed Capt Sen that they would follow up with the two tugs accordingly, and at 03:58, Capt Sen sent an email to Mr Isawa which stated:

> "Dear Isawa san,
>
> Thank you for your email.
>
> I have instructed SMIT accordingly, as per my below instructions.
>
> …
>
> Regarding Commercial offer:
>
> We need to advise Smit that in principle Owners agree with the following.
>
> a) SMIT personnel and equipment to be paid on Scopic rates
>
> b) Any hired personnel and equipment, out of pocket expenses to be paid on scopic rate + 15% uplift
>
> c) Refloatation Bonus 25% of Gross invoice value to be increased to 35% if containers need to be offloaded to lighten the vessel for refloatation.
>
> (In short we are making a counter offer, to their current offer of 35% success bonus, irrespective of how the vessel refloats)
>
> The remaining contract, clauses, etc. can be mutually discussed before both parties final signature.
>
> Please urgently discuss and revert. SMIT need to be given some assurance that Owners have agreed to the points mentioned in a, b and c above.
>
> Please also note that as SMIT has agreed to offer all services on commercial terms instead of LOF, it is unlikely that hey [sic.] will entertain inquiry / negotiation about covid related quarantine or delays."

A72. In that email, Capt Sen changed the proposed rate for hired personnel and equipment from cost + 15% to SCOPIC 2020 rates + 15%. This was a mistake on Capt Sen's part. He had not intended to pass on for approval something different, in that respect, to SMIT's proposal.

A73. At 04:30, Mr Isawa responded to Capt Sen asking for certain costs estimates. His message stated that:

> "… We need to obtain the above information to obtain the owner's approval and our internal approval."

A74. At 04:56, Capt Sen responded to Mr Isawa providing the requested costs estimates.

A75. At 06:06, Mr Sheilds forwarded SMIT's latest commercial proposal and draft Wreckhire contract to Mr Peermohamed.

A76. At 07:23, Mr Wisse sent a WhatsApp message to other SMIT employees which stated:

> "Cpt Sen replied with instruction to turn around/mob the ALP Guard. ALP was informed and acted accordingly. C/P to be finalized this morning. ETA 29th AM. Sen also confirmed the Carlo Magno which is en route already. ETA 28 PM. C/P almost finalised."

A77. At 07:46, Capt Sen sent an email to Mr Isawa which stated:

> "Dear Isawa san,
>
> Smit has given ultimatum that if we do not agree to the main terms of the offer they will start demobilisation. Please discuss with Owners and given me the go ahead to agree main terms of the Smit's commercial offer..."

A78. At 08:03, Mr Isawa sent an email to Capt Sen which stated:

> "Dear Capt Sen,
>
> Thank you for your email below.
>
> Please confirm the main terms are as below;
>
> We need to advise Smit that in principle Owners agree with the following.
>
> a) SMIT personnel and equipment to be paid on Scopic rates
>
> b) Any hired personnel and equipment, out of pocket expenses to be paid on scopic rate + 15% uplift
>
> c) Refloatation Bonus 25 % of Gross invoice value to be increased to 35% if containers need to be offloaded to lighten the vessel for refloatation.
>
> (In short we are making a counter offer , to their current offer of 35% success bonus , irrespective of how the vessel refloats)
>
> Thanking you for your kind attention in advance and looking forward to hearing from you…"
>
> (font difference in the original – although there, the colours were the other way round – marking the section that Mr Isawa was copying back to Capt Sen from Capt Sen's message at 07:23 (A71 above))

A79. At 08:16, Capt Sen sent an email to Messrs Wisse and Sheilds which stated:

> "Dear Jody / Dave,
>
> We are please to confirm the below on behalf of the 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 25 % of Gross invoice value to be increased to 35% if containers need to be offloaded to lighten the vessel for refloatation.

We look forward to your confirmation / acceptance to the above. We can then start ironing out the wreck hire draft…"

A80. That was an error on Capt Sen's part. Mr Isawa's email was not an approval of those terms, but a request for Capt Sen to reconfirm that they were the terms in respect of which he was seeking approval in principle.

A81. At 08:18, Mr Janssen sent an email to Mr Sheilds asking him to convey to Capt Sen that the proposal of a 25% refloatation bonus was unacceptable and should be 35% regardless of the method of refloatation. Mr Sheilds conveyed that to Capt Sen by telephone.

A82. At 08:20, Capt Sen sent an email to Messrs Wisse and Sheilds which stated:

"Dear Dave / Jody,

Below email stands cancel for now.

Please give me few hours to revert.

There has been some confusion.

I will revert to you straight away…"

A83. At 08:29, Capt Sen sent an email to Mr Isawa which stated:

"Please seek Owners approval of the Smit's commercial wreckhire offer.

The main points are as below:

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 35 % of Gross invoice value…"

A84. At 08:30, Mr Sheilds sent a WhatsApp message to Mr Wisse asking him to "*please make sure both tugs improve their speed and arrive here ASAP*". At 08:32, Mr Wisse responded to Mr Sheilds via WhatsApp confirming that he would do so.

A85. At 08:43, Mr Sheilds sent an email to Capt Sen which stated:

> "Dear Capt. Sen,
>
> Thanks yours duly noted and shall be ignored.
>
> As discussed we need to have an agreement with Owners by 12:00 Dutch time to day.
>
> Otherwise we will have to take a firm position and stand down our operations to protect our interest.
>
> The tugs are on charter to SMIT and are steaming full speed to the EVER GIVEN.
>
> Awaiting yours soonest reply.
>
> We will revert formally by mail at 11:00 with all involved in cc as discussed."

A86. At 09:17, Mr Isawa sent Capt Sen an email, in reply to Capt Sen's email reconfirming the remuneration terms for which he was seeking approval (A83 above). Mr Isawa's reply was in these terms:

> "Dear Capt Sen,
>
> Thank you for your email below.
>
> We are about to call to the owner.
>
> We understand that signature on the contract can be done next week after discussion over the wording.
>
> Thanking you for your kind attention in advance and looking forward to hearing from you…"

A87. Mr Isawa called Mr Fujiwara of SKK immediately after sending that email. Mr Fujiwara approved the remuneration terms for which Capt Sen had sought approval.

A88. At 09:50, Mr Peermohamed confirmed to Mr Sheilds that he had received SMIT's commercial proposal and draft Wreckhire contract from Mitsui.

A89. At 10:24, based on his call with Mr Fujiwara (A87 above), Mr Isawa sent the following to Capt Sen by email:

> "Dear Capt Sen,
>
> Thank you for your email below.
>
> We confirm the owner's agreement to the main terms of a) b) and c) as per below email.

As we would like to bring the final wording to the owner for signature at the next meeting (9am) on Monday next week, we will appreciate your work on the wording.

Thanking you for your kind attention in advance and looking forward to hearing from you…"

A90. At 10:32, Capt Sen sent an email to Mr Sheilds which stated:

"Dear Jody,

We are pleased to confirm the below on behalf of the 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 25 % of Gross invoice value to be increased to 35% if containers need to be offloaded to lighten the vessel for refloatation.

Refloatation bonus to SMIT will be applicable if refloatation attempt by SCA on 26 March 2021 is unsuccessful.

We look forward to your confirmation / acceptance to the above. We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest…"

A91. At 10:37, Mr Janssen sent an email to Capt Sen which stated:

"Dear Capt. Sen,

Please allow me to refer to the telephone conversation that you had with Jody this morning in which it was agreed that you would get back to us with a decision before 1100 hrs [i.e. Dutch time, or 10:00 hrs UTC] after which we would then repeat our position in a formal message. With that time having lapsed I checked with Jody and understand that you just have had a telcon with him which is why I would like to repeat our offer as submitted last night and make it clear that your recap as sent below is incorrect and not on the table as our offer of last night supersedes that. For the avoidance of doubt, specifically relating to the bonus arrangement, the percentage is 35% irrespective of the manner in which the vessel will be refloated. Alternatively, we remain open LOF terms.

With the world watching us and presently having our hands tied behind our backs failing the requested confirmation of either a commercial agreement or LOF we may be left with little choice as relayed by Jody.

Trust to have clarified sufficiently and we look forward to your earliest confirmation…"

A92. Capt Sen then spoke, separately, to both Mr Janssen and to Mr Isawa regarding the refloatation bonus and the circumstances in which it was to be payable.

A93. At 10:48, Mr Janssen sent an email to Capt Sen which stated:

"Dear Capt,

Thank you for your call just now and our messages just crossed indeed which is why the confirmation below is appreciated yet not entirely correct, particularly relating to item C the bonus arrangement. Our revised offer of last night clearly states 35% irrespective of the manner in which the vessel will be refloated. If you/ship's interest could revisit that in reconfirmation please then we shall be much obliged."

A94. There was then a further telephone conversation between Capt Sen and Mr Janssen, following which, at 11:26, Mr Janssen sent a WhatsApp message to other SMIT employees which stated "*Confirmed – pls p&c until I see the confirmation on paper*", and at 11:35, Capt Sen sent an email to Mr Janssen which stated:

"Dear Richard,

We refer to our telephone conversation subsequent to my previous email and my further conversation with Japan.

As agreed over 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…"

A95. At 11:40, Mr Janssen replied, as follows:

> "Thank you Captain 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…"

A96. At 11:42, Capt Sen sent an email to Mr Janssen which stated:

> "Dear Richard,
>
> Thank you for your prompt confirmation.
>
> I will be in touch with Jody and Dave regarding the contract wording."

A97. At 11:44, Mr Wisse sent an internal email to other SMIT employees which stated:

> "Agreement on main terms!"

A98. At 11:43, Mr Isawa sent Mr Fujiwara an email which stated:

> "Dear Senior Managing Director Fujiwara Toshiaki,
>
> Thank you for your ongoing support.
>
> As we discussed by telephone today, with regard to the Commercial Contract (attached *password msi*) with SMIT, which was the topic of discussion at today's meeting,
>
> We were asked by SMIT to sign within today, for the firm order for a tug that had been issued; but I explained that, although we agreed with the contract, signing would take place on Monday of the following week or thereafter.
>
> I am moving ahead so that we can pass along the wording for the signing at the accident response meeting at 9 a.m. on Monday next week…"

A99. Mr Isawa's email attached the draft Wreckhire 2010 contract wording, with additional clauses, then being proposed by SMIT. The email was wrong to suggest that SMIT had been told those terms had been agreed, but signing would not take place until the Monday. Nor for that matter had Capt Sen been told by Mr Isawa, or anyone else at Mitsui, that the draft contract wording put forward by SMIT was agreed. No response to SMIT's draft contract had yet been provided.

A100. At 12:18, Mr Fujiwara replied to Mr Isawa, stating:

> "Dear Mr. ISAWA Tetsuo,
>
> I received the following.
>
> I will sign on Monday."

A101. Thus, at 12:18 on 26 March, the clear message, from SSK (Fujiwara) to Mitsui (Isawa), was that SMIT's proposed contract wording was agreed and would be signed – by Mr Fujiwara – after the weekend. That message, however, was not given to Capt Sen, or to SMIT.

A102. At 14:18, Capt Sen sent an email to Mr Isawa which stated (in part):

> "Dear Isawa san,
>
> We refer to the attached draft agreement wording sent by SMIT.
>
> Please let us know any comments / request for revised wording from your / Owners side…"

A103. At 16:32, Mr Wisse sent an email to Capt Sen in relation to the 'knock for knock' terms for the mobilisation of 'ALP GUARD' which stated:

> "Dear Capt. Sen,
>
> …
>
> During the charter term negotiations ALP is holding on to a section in Box 20 which has an effect on the standard knock for knock liability regime. We have already tried to reject it, but they do not agree. Please see below highlighted section:
>
> "… Any damage to the vessel, incl. but not limited to damage to towing wire, thrusters, underwater parts as a result of this contract shall be compensated by Charterer…'
>
> Albeit a remote risk of this materializing, it cannot be ruled out. Including such section into the charter party would have a potential cost impact on the operation, which we need to have covered under the Wreckhire as well. Therefore and taking into account the 'approval mechanism' of Clause 13 final sentence of the draft Wreckhire (see below), we herewith kindly ask you to confirm by return that including the above section in the charter party with ALP is approved and that any consequential costs (unhoped for) and liabilities are covered as Out of Pocket Expenses under the Wreckhire…"

A104. At 17:00, Capt Sen sent an email to Mr Wisse which stated:

> "Dear Dave,
>
> Thank you for your email.
>
> It does not seem right for ALP to change the "knock for knock" principle but inserting this wording in box 20, which is just charter hire.
>
> If they intended to do so then they should have advised you at the time of offer.
>
> Please negotiate with them accordingly."

A105. At 17:56, Mr Wisse sent an email to Capt Sen which stated:

"Dear Capt. Sen,

Reference is made to below exchanges.

Could you please indicate when we can expect your/Company's detailed response on the draft Wreckhire? We would obviously like to finalize this soonest."

A106. At 18:02, Capt Sen sent an email to Mr Wisse which stated

"Dear Dave,

Thank you for your email.

There is nothing remarkably major to amend.

I have asked for info for Box 3 etc. and any comments from Owners side .

Will revert asap…"

A107. At 18:05, Mr Wisse sent an email to Capt Sen which stated:

"Thanks for the swift response and good to hear no major issues exist.

Look forward to your soonest full feedback."

A108. At 18:20, Mr Wisse sent an email to Capt Sen stating that ALP were maintaining their position in relation to the charterparty negotiations for the 'ALP GUARD' and the proposed amendment to the knock-for-knock liability regime. At 18:26, Capt Sen confirmed receipt of that message and stated that he would discuss it with his principals and revert. At 18:52, Capt Sen sent a further email to Mr Wisse about the terms of the ALP charterparty (*inter alia* in relation to when the refloatation bonus would be payable), and at 19:36 he sent an email to Mr Isawa in relation to the 'knock for knock' issue, requesting instructions. Mr Wisse responded to Capt Sen at 20:12 saying that he would await a response.

A109. At 21:31, Mr Sheilds sent Capt Sen minutes of a meeting between SMIT and the SCA on board the Vessel.

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A110. At 00:53, Mr Isawa forwarded the minutes of the meeting on board the Vessel to Mr Fujiwara.

A111. At 04:02, Mr Isawa sent an email to Capt Sen in relation to the ALP charterparty negotiations which stated:

"Dear Capt Sen,

…

We are afraid that it is quite difficult to accept the wording in view of GA rule and PI cover.

The worst scenario is the owner will have to pay the loss (repair and BI of the tug) from their pocket, which we are not able to obtain the owner's agreement to.

You may negotiate daily-hire upwards instead of accepting the clause…"

A112. At 06:26, Mr Sheilds sent an update to Mr Isawa responding to his email in the following terms:

"Dear Tetsuo san,

Thank you for your last.

As you mentioned you need to report urgently to the Japanese government I will reply briefly first before talking to our team and the SCA…

The high level acceptance on main terms was only achieved yesterday, DPR's will report one day in arrear DPR 001 shall be with you in a few hours. Previous minutes of meeting as well as updates where provided…

We here only with a team of 5 people… We can not to 24/7 monitoring and working on multiple complicated plans with a team of only 5… Since the desire of owners was to enter into a due care contract instead of a best endeavours contract we are bound by the system of the time and material contract on due care. Rest assure that all involved are doing our utmost as we are fully aware that the whole world is watching us.

Furthermore we still are awaiting feedback on our contract which has not been signed…"

A113. At 08:01, Mr Isawa sent Capt Sen an email which stated:

"Dear Capt Sen,

Salvage operation has continued without success.

This incident is attracting worldwide attention more and more.

As you are aware, Smit has recently made comments as below;

QUOTE

We here only with a team of 5 people the SCA is coordinating the operations with more than 20 people on the bridge sometimes.

We are providing support and expertise where we can. But our main focus is on the contingency plans.

We can not to 24/7 monitoring and working on multiple complicated plans with a team of only 5… Since the desire of owners was to enter into a due care contract

instead of a best endeavours contract we are bound by the system of time and material contract on due care.

Rest assure that all involved are doing our utmost as we are fully aware that the whole world is watching us.

UNQUOTE

Delay in salvage operation may damage reputation of the owner and MSI if some news or someone criticize unproper contract.

Also, we need to take into account any possible troubles if continue to stick to commercial contract.

We feel that it may now be the timing to sign LOF even after signing wreck-hire.

We will appreciate your opinion and providing explanations to recommend LOF at the meeting with the owner on Monday next week.

We should be much pleased if you could respond to our above request in a few hours.

Thanking you for your kind attention in advance and looking forward to hearing from you…"

A114. At 08:28, Mr Isawa sent an email to Mr Sheilds which stated:

"Dear Jody san

Thank you very much for your email below.

We have duly noted your report and request.

We are working on the wording and come back to you via Capt Sen.

As this incident has attracted attention of MSI's top management and may result in huge loss and cost, we must pay very careful consideration to the contract to obtain internal approval.

As the next big meeting with the owner , to be joined by the owner's president will take place at 9:00 on Monday next week, we hope we will be able to agree to the final wording by then…"

A115. At 08:55, Mr Wisse chased Capt Sen for confirmation that they could agree to the additional wording in the 'ALP GUARD' charterparty relating to the knock-for-knock liability regime. At 09:03, Capt Sen responded, stating that SMIT should negotiate with ALP to remove the damage compensation clause.

A116. At 09:46, Mr Wisse informed Capt Sen that ALP had been persuaded to remove the damage compensation clause in exchange for an increased daily rate of hire of €100,000 with a refloating bonus of €250,000 "*regardless if tug is connected to Ever Given or not*" provided that the tug was on hire at the time. At 11:17, Capt Sen replied, saying he would respond as soon as possible.

A117. At 11:26, Capt Sen sent an email to Mr Isawa outlining two options and seeking instructions in relation to the rate of hire and refloating bonus clause in the 'ALP GUARD' charterparty. At 11:51, Capt Sen outlined the cost of the lower and higher rates and suggested the lower rate.

A118. At 11:54, Mr Isawa sent an email to Capt Sen requesting his input on various points, including the estimated costs for 'ALP GUARD'. Capt Sen sent an email in response to Mr Isawa at 12:50. Capt Sen drew attention to the 15% uplift and the charges for both tugs.

A119. Capt Sen's answers were subsequently passed (in part) to SKK by an email from Mr Isawa to Mr Fujiwara at 13:06. Mr Fujiwara responded to Mr Isawa by email at 15:52 to provide his comments, by which SKK authorised Mitsui to accept the higher charter rate (with 'knock-for-knock' liability regime).

A120. At 17:42, Mr Isawa informed Capt Sen that Mitsui were going to recommend to the Vessel's owners "*to make salvage contract under LOF*" if the refloatation attempt using two large tugs failed. The message further stated that they would ask Stann to discuss the LOF with HFW.

A121. At 17:11, Mitsui (Isawa) asked Capt Sen to confirm that the 35% bonus was not applicable to the 'ALP GUARD'.

A122. At 17:51, Mr Isawa emailed Capt Sen to confirm Mitsui's agreement to "*the wording suggesed [sic.]…except banking days amended from 2 to 10 days*". Mr Isawa also requested confirmation from Capt Sen that the bonus payment of 35% was not applicable for either the ALP GUARD or the CARLO MAGNO. This was authorisation from Mitsui to Capt Sen to agree SMIT's draft contract wording, subject to that one counter-proposal. However, that almost total agreement was not communicated to SMIT, then or at all.

A123. At 18:05, Capt Sen sent an email to Mr Isawa which stated:

> "Dear Isawa san,
>
> Thank you for your email…
>
> Smit current offer , gives option to Owners any time to change to LOF
>
> We recommend, only let Smit know about LOF , only when you and Owners decide to declare LOF , not beforehand .
>
> Even lawyers should not be advised before hand until decision has been made.
>
> If salvors know before hand that LOF is possible then that will have an impact…"

A124. At 18:30, Capt Sen advised Mr Isawa that "*Smit's 35% bonus is applicable on all costs and final invoice amount. So tugs invoices are included as well*".

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A125. At 02:10, Mr Isawa forwarded SMIT's preliminary report to Mr Fujiwara.

A126. At 02:32, Mr Wisse sent an email to Capt Sen and Mr Isawa seeking urgent approval of the 'ALP GUARD' charterparty. The message stated:

> "… We reiterate our request to urgently respond with approval to the below.
>
> ALP advised that they are frustrated with the delay of signing the CP and if nothing confirmed in the next 6 hours they may stop the mobilisation of the ALP Guard.
>
> The client's chosen Wreckhire contract brings along the necessity to get approval from the client/client's representative for engaging assets and costs like this. Delays in the approval process like in this instance may jeopardise the effectiveness of the salvage operation.
>
> Your urgent attention and approval is appreciated so we can move on…"

A127. Capt Sen passed on the email to Mitsui (Isawa) for urgent instructions on the 'ALP GUARD' and a response on the Wreckhire because he had "*not reverted back to SMIT on wreck hire , please confirm if I may proceed accordingly…*".

A128. At 06:33, Mr Isawa sent a message to Capt Sen which stated:

> "Dear Capt Sen,
>
> Thank you for your email below.
>
> We reconfirm our agreement to the wording except banking days amended from 2 days to 10 days.
>
> However, please allow us to discuss payment terms after the meeting with the owner on Monday next week."

A129. At 06:46, Mr Isawa asked Capt Sen to let him know if SMIT did not agree to "*our amended wording*"; and at 06:52, on the 'ALP GUARD', Mr Isawa sent Capt Sen an email which stated:

> "Dear Capt Sen…
>
> We reluctantly confirm the owner's agreement to USD 100,000 excluding compensation clause.
>
> Please send us the amended wording…"

A130. At 07:01, Capt Sen confirmed to Mr Wisse that 'ALP GUARD' could be engaged at a higher daily hire rate without a damage compensation clause included in the charterparty. At 07:03, Mr Wisse confirmed to Capt Sen that SMIT would engage 'ALP GUARD'.

A131. At 07:23, Capt Sen sent an email to Mr Isawa which stated:

> "Dear Isawa san…

Please check and advise , what needs to be inserted inbox 3 "Company / Place of Business".

i.e. details of the party contracting with SMIT.

Will it be registered owners ?"

A132. At 07:44, Capt Sen sent an email to Mr Wisse which attached an amended version of the draft Wreckhire contract. The covering email stated:

"Dear Dave,

Please see V2 (version 2) , with proposed amendments for your perusal.

One of the things Underwriters advised (reflected in box 14) that as they need to process and collect from co-insurers etc. they will be able to make payment within 14 working days upon receipt of each invoice . So while invoices can be generated every 7 days as proposed by you.

Individual invoices can be paid within 2 weeks time.

Further in additional clauses , Clause 31.1 can be amended as below , in accordance with the agreed terms.

31.1 – Upon completion of the services , the contractor shall be entitled to a bonus calculated as follows: 35% of the sums due in the final agreed cost sheet. Refloatation bonus not to be calculated on amounts chargeable for quarantine or any isolation waiting period…"

A133. The amendments to the draft Wreckhire contract included proposed changes to a number of significant provisions:

- Box 5 of Part I – condition of the Vessel;
- Box 7 of Part I – nature of the services to be provided;
- Box 11 of Part I – payment terms;
- Clause 2 of Part II – the services to be provided, including that the words 'due care' were replaced with 'best endeavours';
- Clause 4(a) of Part II – change of method of work;
- Clause 10(f) of Part II – payment terms;
- Clause 13 of Part II – extra costs;
- Clause 15 of Part II – security;
- Clause 16(d) and (e) of Part II – liabilities;

- Clause 24 of Part II – pollution, the words 'due care' again having been changed to 'best endeavours';

- Clause 27 of Part II – a new clause relating to salvage claims having been added.

A134. In certain cases individually, and on any view collectively, the proposed changes to the terms SMIT had put forward represented a significantly different bargain to the bargain that SMIT had proffered and that, though SMIT had not been told this, SKK had approved on the Friday with a view to signing on the Monday. Mr Tsuyama's evidence was that, from his/Mitsui's perception, the proposed changes came from Capt Sen. Capt Sen's evidence was that they did not, although perhaps he was responsible for communicating them to Mitsui as well as to SMIT. I was left with the impression that they may have come from Stann (Mr Peermohamed), but I am not in a position to make a clear finding.

A135. At 07:46, Capt Sen sent an email to Mr Isawa which stated:

> "Dear Isawa san,
>
> I have proposed 14 days payment for individual invoices as per your request.
>
> I will negotiate with Smit accordingly.
>
> Please let me know box 3 details asap.
>
> I want to send you the final draft before your main meeting tomorrow with Owners."

A136. At 07:50, Mr Wisse confirmed receipt of the amendments to the draft Wreckhire contract and said that SMIT would revert as soon as possible.

A137. At 10:58, Mr Janssen sent an email to Messrs Isawa and Tsuyama, which stated:

> "Whilst Thijs-san will respond to the majority of your, or the Japanese government's, questions I would like to mention that at present we are reviewing your suggested changes to our presented contract of last Thursday. As the version that we received is not the one that we presented to you we are unfortunately forced to review each line in the contract again to ensure that the wording, save for your suggested amendments, is exactly the same as we presented. We trust that you appreciate that this will unfortunately take some time and would have been prevented had we only received your comments to our draft. Our team is working hard on the review and we hope to get back to you with our reaction later today.
>
> Furthermore, and this specifically refers to question 4.1 from Owners about a possible discharge of part of the cargo, your chosen contract form of Wreckhire does not cater for us as the Contractor becoming exposed to possible claims of the owners or interest of the cargo in the boxes that are envisaged to be offloaded and temporarily stored until the casualty is refloated. This then makes it necessary for us to be protected against such possible claims by means of an all-encompassing waiver of liability provided by the Owners before such operations can commence.
>
> Another matter is that due to this contract form, each and every decision to develop scenario's, contingencies, sanction actions for engineering, etc., booking, preparing, fabricating, mobilising, etc. of any required resource or asset is to be approved by the

Owner or their appointed representative which no doubt shall have a further delaying effect to the much needed progress of the operation. We can only hope that you appreciate this and recognise that this will unfortunately only add to the already rapid mounting claims that are likely being brought against Owners. Obviously we remain open to discuss alternatives as I noticed your desire to change from a "due care" to a "best endeavours" obligation for us.

We hope to revert with our response to your proposed changes within today…"

A138. At 19:05, Mr Thijs van der Jagt (SMIT) sent an email to Messrs Isawa and Tsuyama providing an update on the refloatation efforts and attaching a document setting out contingency plans produced by SMIT. The message also stated:

"Whilst our teams have been working hard the last few days and night on the cargo discharge scenario, to go from the conceptual stage to the plan that you will find attached, there are at least two other matters to take into consideration as explained in the message of Richard Janssen of earlier today being:

1) The review cycle and prior approval from Company or the Company representative for all the necessary preparation and execution of the plan and its costs and;

2) The provision of a full "Waiver of liability" to us to warrant us against any claims from cargo interest as a result of us offloading the containers.

In addition, I understand from our commercial and legal teams that a contract is still not in place which is an undesirous situation, particularly when you or the Japanese government wants the cargo discharge operation to start…"

A139. At 19:39, Capt Sen sent an email to Mr van der Jagt which stated:

"Regarding your reference to contract, we are waiting for Dave to revert with comments/ acceptances / amendment etc from your side.

We understand your legal team is working on it.

We wait to receive the same asap."

A140. At 20:07, Mr Wisse sent an email to Capt Sen which stated:

"Dear Capt. Sen,

Many thanks indeed for your proposed amendments which we have now had a chance to review, consider and take into account. We continue to approach the operation and underlying contract with the aim to reopen the Canal as quickly as possible.

Please find attached our comments to the draft WH2010 as proposed by Owners [**Note:** This was a set of comments in table form, responding Box by Box and Clause by Clause to proposals by Owners that SMIT did not agree]. To avoid different drafts circulating, may we suggest that you use a similar format to share Owners' response rather than further amending the WH2010? We will provide a final WH2010 for Owners' review once we have agreement on its terms and conditions.

Whilst we can agree to accommodate Owners in relation to certain amendments, I'm afraid that we cannot accept changes to the draft WH2010 that exposes SMIT and our own liability underwriters unnecessarily. We address these concerns below:

The Owners' amendments to Box 7 imply that the services set out in the remainder of the clause are part of a much bigger operation. This is not what was agreed in our discussions to date. We are willing to provide limited services to the Owners to support the refloating efforts under a WH2010 which was the basis of the commercial proposal that we submitted to the Owners. Under the terms of the WH2010, Cargo will not be bound by the WH2010 and so we may well face claims of our own for damage or delay to the cargo when it is discharged. If the discussions about the WH2010 are to continue that it must be on the understanding that the Owners will provide us with a full indemnity for any and all liability arising from the discharge operation, transportation, storage, etc. of the containers.

Clause 2 and Clause 24 of your proposed amendments turn the obligations under the agreement from a 'due care' contract to a 'best endeavours' contract. We cannot accept this. If Owners want us to accept a 'best endeavours' obligation, then the Lloyds Open Form contract is the way forward. The payment provisions that are set out in the agreement have been proposed on a 'time and materials basis' with an uplift. If Owners would like us to accept a higher degree of contractual risk then this needs to be reflected in the Agreement and the only way that this can realistically be done is under an LOF – 'no cure – no pay' contract.

In the event that the condition of the vessel were to deteriorate further, then no doubt the Owners' P&I Club and the SCA would not be comfortable with SMIT only having to provide an obligation to minimise damage to the environment for the duration of the services. Under an LOF, protecting and minimising damage to the environment as well as preserving the salved property is paramount and so having an obligation that also allows the Owners P&I Club to co-ordinate any response with SMIT and the SCA. This, we suggest, gives the underwriters far greater comfort if pollution and/or wreck removal were to become an issue.

The 'warranty' that has been inserted into Clause 2 is not acceptable. Owners are well aware that much of the equipment that may be required will have to be sub-contracted in as a result of the location and time pressure. Whilst SMIT has a suitable due diligence regime for carrying out and inspecting craft and equipment prior to be taken on hire, we cannot provide a warranty that this equipment will be '.. manned and equipped with adequate spares and in every way fit to perform the services contemplated and shall comply with its description'.

Turning to the amendments to Clause 4(a), we are not prepared to accept the proposed amendments. As you are well aware, the situation is very dynamic and matters are likely to change quickly. The ability to respond promptly may require developing and changing the salvage plan at short notice to adapt to these changes, as is customary with an emergency response operation. It is unreasonable to expect us not be able to get paid for the services if they change. Again, this obligation will require our team to document every single development going forward in order to demonstrate whether or not it is a 'new' development and will significantly hinder the operation. We are pretty sure that this is not what Owners want and we would hope that Owners would trust that we will not raise any unnecessary variation order requests.

With regard to the proposed changes to Clause 16(d) and (e), we refer to our comments to the warranty that you inserted in Clause 2, which as explained we cannot accept. As a consequence we cannot agree to the proposed changes to Clause 16. Kindly note that had we been inclined to entertain your addition, we would have had to run this past our underwriters since accepting this would mean a deviation from the liability regime that has been approved by the International Group P&I Clubs. As such it would most probably not have been acceptable to them without us breaching the terms of our cover.

We note that you have included a 'no claim for salvage' clause. Whilst we appreciate that this might work if no cargo lightering were anticipated, we cannot agree the indemnity as drafted in circumstances where a significant amount of cargo looks likely to be removed. As set out above, under the terms of the WH2010, Cargo will not be bound and so we may well face claims of our own for damage or delay to the cargo when it is discharged. We would like to maintain an option of bringing a claim against the cargo owners or to be able to set off our salvage claim against any claim for damages that may be made against us.

Clause 15, we are happy to accept an LOU or bank guarantee issued by Mitsui Sumitomo Insurance Limited but this is subject to agreeing the wording. Please can you kindly send through the text of the wording that you would propose? Please can you advise if this will be provided by a bank or branch of Mitsui Sumitomo based in the Netherlands?

We trust that you appreciate our position and we remain committed to assist the Owners in relation to this casualty. In view of the above we would like to reiterate, with time being of the essence, that a lot of the highlighted issues may be resolved fairly quickly with an LOF contract in place and we would therefore respectfully request Owners to re(consider) the services to be rendered under an LOF contract to allow matters to be resolved in the most expeditious way, in order to reopen the Canal as quickly as possible…"

A141. At 20:09, Capt Sen acknowledged receipt of Mr Wisse's email.

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A142. At 00:10, Capt Sen sent an email to Mr Isawa in which he referred to the response from SMIT on the draft Wreckhire and stated:

"…Few critical issues come to the surface as below:

a) SMIT is saying that they are no agreeing to no claim for salvage clause and will be claiming against cargo interests a salvage claim.

This is a very important aspect. SMIT should be asked to provide draft wording for letter of indemnity they want to Owners to sign so that thy (sic.) can go ahead with discharging containers if required, however unless Owners wants to declare LOF , SMIT need to confirm that once the letter of indemnity has been provided , they will agree to no claim for salvage clause.

b) SMIT wants to make the agreement payment conditions etc. as difficult as possible so that LOF is signed. Signing an LOF agreement is Owners decision. If Owner decides no to sign the LOF , then it is best to that payment terms are accepted which are most practical for Owners and security provided if needed..."

A143. At 00:30, Capt Sen asked Mr Wisse to send: (a) a draft letter of indemnity which they would require the Vessel's owners to sign before de-bunkering or transhipment of containers; (b) a clean copy of what SMIT were now proposing, having rejected most of the owners' proposals but also having suggested some changes to their own original draft wording; and (c) a draft copy of the LoU wording required from Mitsui. At 08:55, Mr Wisse sent Capt Sen a clean copy of the draft Wreckhire contract as then sought by SMIT, with Additional Clauses, as well as a draft LoU.

A144. In the event, that would turn out to be the last exchange in the negotiations over contract terms. Mr Jacobs KC advanced an optimistic submission that it showed the parties not to be very far apart. It evidences no such thing. SMIT had rejected almost all of the one (and only) counter-proposal as to detailed terms that had been sent. Capt Sen had asked, for the sake of clarity, for a clean version of what SMIT was, therefore, now proposing, together with drafts for an LoI and LoU that would be needed if those terms were agreed. The appearance was that Capt Sen would go away and take instructions, so it may be true to say that SMIT's reiterated and/or amended terms were not rejected a second time. But equally no indication of agreement to any of the terms insisted upon by SMIT was ever communicated.

A145. At 11:41, Mr Wisse sent a WhatsApp message to other SMIT employees which stated:

"Spoken to Capt. Sen: he will discuss the CP with Japan and lawyer and expects a response by the end of the day."

A146. At 11:42 Mr Wisse sent a WhatsApp message to other SMIT employees which stated:

"[Capt Sen] also asked for cost sheet. Tatiana has this available. But do we want to discuss this?"

A147. At about 13:05, the Vessel was successfully refloated.

A148. At 13:37, Capt Sen sent Mr Wisse the contact details of Mr Peermohamed and stated that he had "*been asked to communicate directly with SMIT*".

A149. At 13:39, Mr Isawa sent an email to Mr Fujiwara which noted that the Vessel had refloated and stated that he would send instructions to SMIT that their tugs and staff should be released.

A150. At 13:51, Capt Sen sent an email to SMIT (Wisse) with instructions to de-mobilise as soon as possible and to request SMIT's up-to-date cost sheet:

"…As the vessel has now refloated.

Owners have instructed the two tugs (ALP GUARD and CARLO MAGNO) hired by SMIT to be demobilised as soon as possible.

SMIT's team working on this project to also start demobalizing [sic.] with due dispatch.

We are always grateful for the assistance rendered by the Smit's team.

Lastly as requested earlier today , due to reserve purposes for the month end , Principals want your up to date cost sheet, we will appreciate if same can be generated at your registrar's earliest convenience.

Please acknowledge safe receipt of his email…"

A151. At 13:53, Mr Janssen sent an email to Capt Sen stating that the tugs were still connected to the casualty and that SMIT would not start to de-mobilise them. At 13:58, Capt Sen replied that the tugs should be de-mobilised "*as soon as possible*".

A152. At 14:19, Mr Wisse wondered, in a WhatsApp message to other SMIT employees:

"Any strategy change / addition now that the ship is loose and we don't have a contract?"

A153. At 14:20, Mr Janssen replied via WhatsApp:

"Hm playing with a salvage claim thought – Let me discuss with Boss B [a reference, as Mr Janssen explained in cross-examination, to his boss, by which I envisage he may have meant Dr Peter Berdowski, CEO of Boskalis]."

A154. At 15:08, Mr Isawa sent an email to Mr Fujiwara which noted that de-mobilization instructions had been sent to SMIT and stated:

"In addition, I am sending as an attachment the contract currently offered by SMIT that arrived today…

I am in the process of negotiations and will consult with you shortly.

Although it is not likely that there will be an agreement by tomorrow, there are also some items that are not in dispute because the salvage operation has already been completed…"

A155. At about 17:00, the Vessel anchored in the Great Bitter Lake.

A156. At 19:39, Mr Janssen sent an email to Capt Sen which stated (in part):

"… It is unfortunate that we have been unable to agree contractual terms for the assistance provided by SMIT Salvage B.V. as part of the re-floating effort and therefore, for the avoidance of doubt, I can confirm that the counter offer made by you on 28th March in your email timed at 0946 (Dutch time) is not accepted and furthermore, to the extent that our message of 28th March time at 2207 (Dutch time) constitutes a further offer it is hereby withdrawn. Our personnel and hired in craft will continue to assist and support as required and/or directed by the SCA but we anticipate they will be demobilised and stood down in the coming days.

> Obviously you will recognise that we have performed valuable salvage services and we need to agree either a contractual framework and/or reach agreement on appropriate law and jurisdiction in order to properly assess the salvage remuneration now due to SMIT…"

A157. At 20:26, Capt Sen sent an email to Mr Janssen in which he responded to Mr Janssen's email of 19:39 and attached Mr Janssen's email of 11:40 on 26 March 2021 (see A95 above):

> "…I am not sure if legally you are in a position to claim make a common law salvage claim against vessel owners.
>
> The remuneration on which Smit was engaged was agreed by your MD as per the attached email.
>
> You have been making amendments to your own proposed wording so withdrawing the same does not hold any water , it was not an "offer" that was being proposed by your side but suggested wordings/ clauses however the basis of remuneration was already agreed. In short the procedure of remuneration was already agreed. I am sure you will be best guided by your legal advisor to best course of action.
>
> Order for demobalization [sic.] remains firm…"

A158. At 22:40, Mr Fujiwara sent an email to Mr Isawa asking if the "*contract for the tug*" had been cancelled.

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A159. At 09:46, Dave Wisse sent an email to Capt Sen in which he responded to Capt Sen's email of 20:26:

> "…We note what you say but respectfully disagree. As per our message of last night, having taken legal advice SMIT maintain that they have a valid common law salvage claim.
>
> The message that you referred to was clearly 'Subject to Contract' and will be interpreted as such. There is nothing binding in these exchanges and this was made clear by yourself in your message in which you said "We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest". SMIT's response was we "… 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".
>
> Furthermore, your message to us with the owners comments on the draft WH2010 on 28th March 2021 indicated a fundamental shift in the risk that owners expected SMIT to accept. As per our subsequent message, this was unacceptable to us. As such, we maintain our position set out in our message of last night timed at 2039 (Dutch Time) and all SMIT's rights are reserved.

We remain of course willing to discuss matters further but would suggest that all further communications are conducted via HFW and Stann Marine, as the latter is understood to represent the ship's interest…"

A160. At 11:34, Mr Peermohamed emailed Mr Chamberlain (HFW) to reiterate the owner's instructions to de-mobilise. Mr Chamberlain responded by email at 12:09 to confirm that arrangements were being made for the salvage team to leave as quickly and safely as possible.

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A161. At 17:51, Mr Peermohamed sent an email to Mr Chamberlain (HFW), arguing that a contract had been concluded on 26 March covering any services in fact provided by SMIT, so that SMIT could not qualify as a volunteer entitled to salvage at common law, as follows:

"…We refer to SMIT's email to WKW below, in which SMIT purport to have withdrawn from contractual obligations in an effort to bring a common law salvage claim against Owners.

SMIT's decision to take this stance is both surprising and disappointing, particularly in light of the good commercial relationship between WKW/SMIT/MSI/OWNERS and the clear understanding between them as expressed throughout this matter. As explained below, it is also legally unjustifiable.

As you are aware, following the incident, Owners (via WKW) approached SMIT to secure their assistance in relation to the salvage operation in the Canal. A series of commercial exchanges ensued, culminating in the oral agreement of the key contractual terms during a phone call between WKW and SMIT. The agreed terms, which established the charging regime, were expressly set out by WKW in an email to SMIT on 26 March and confirmed by SMIT later that day. Pursuant to that agreement, SMIT mobilised and attended at the scene of the casualty. The parties resolved to formalise the remaining contractual terms on the basis of the WRECKHIRE 2010 contract.

As you well know, a claimant salvor under common law must be a "volunteer" (i.e. the services must be voluntary in nature and cannot be rendered pursuant to a pre-existing contractual agreement) – otherwise a common law salvage claim cannot be brought. We note that SMIT have purported to withdraw from contractual negotiations and retract their most recent counter-offered draft WRECKHIRE in an effort to argue that contractual terms have not been agreed and that, as a result, the services are voluntary in nature. With respect, that is a legally incoherent position.

Irrespective of whether the full suit (sic.) of terms set out in WRECKHIRE were agreed, the parties had already agreed pertinent contractual terms relating to the reimbursement of SMIT in exchange for their services. Unless superseded or varied by a subsequent agreement between the parties, those terms represent the contract between them. It does not matter that the contract was not set out in a WRECKHIRE or other BIMCO form – there is no requirement for the parties to do so. As such, the services were rendered pursuant to a pre-existing contractual agreement and SMIT

accordingly cannot be held as "volunteers" and will be unable to bring a common law salvage claim against Owners.

Put another way, if SMIT are correct, then the implications for the salvage industry are potentially very severe indeed. It would set a precedent that a salvor could agree preliminary terms with a shipowner and commence the provision of services on the basis of those terms, deliberately delay the finalisation of a commercial contract until the services had been completed and then make a common law salvage claim on the basis that no contract had been agreed. That cannot be correct, either legally or practically.

Please urgently confirm that SMIT will now cease their efforts to bring a common law salvage claim and will proceed on the basis of the contractual terms already agreed between the parties. Owners are prepared to make payment to SMIT on the basis of the agreed charging terms as set out in the exchanges of 26 March upon receipt of SMIT's cost sheet. Please confirm.

Finally, please confirm that SMIT have now fully demobilised. We reiterate that Owners will not have any liability for any equipment deployed by SMIT without prior authorisation and/or following Owners' demobilisation instructions.

All of Owners' rights remain reserved…."