

***Svitzer Salvage v Z Energy Limited and Another* [2013] NZHC 2585**

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With ongoing environmental protection developments in the maritime industry and the associated changes to the way in which salvage services are conducted, questions arise as to how the peculiar and ancient principles of salvage law should interact and develop with other areas of the law. These issues and developments were discussed in relation to a question of duress in conclusion of a salvage contract in the recent New Zealand High Court decision of *Svitzer Salvage v Z Energy Ltd*.¹ The issues arising in light of this decision demonstrate the complex interaction between the common law, Admiralty law and the *Salvage Convention 1989*,² in these circumstances and indicate the possible ways in which the law may evolve. The relationship between these three areas of law is nuanced and without the Court being able to discuss these matters in great detail due to the fact the decision was on an application for summary judgment, a discussion as to the various approaches that a court might ultimately take, given consideration of the rationale of salvage law and its place in the maritime world today, is warranted. Although the Court was unable to fully explore these approaches the case demonstrates the importance of salvage law today and how it may apply where duress is claimed in circumstances such as those encountered in the case.

Facts

The *Svitzer Salvage* case arose from the grounding of the container ship the MV *Rena*. The *Rena* grounded on the Astrolabe Reef, off the Port of Tauranga in the Bay of Plenty, New Zealand on October 5 2011 at approximately 2.20am.³ The *Rena*, a 256 metre fully laden ship with a gross tonnage of 37 209, was travelling at approximately 17 knots at the time of the grounding.⁴ The response to the risk of significant environmental damage was initiated quickly, with the vessel declared ‘hazardous’ in accordance with the New Zealand *Maritime Transport Act*⁵ the day after it grounded.⁶ On that same day Svitzer was appointed as salvor of the *Rena*, by way of an LOF contract.⁷ Pending risk of a major environmental disaster, Svitzer then sought to acquire the services of the bunker tanker *Awanuia*, to remove fuels and oil from the *Rena* urgently. The *Awanuia*, which was on a long-term exclusive charter to Z Energy, was being used to transport oil from the Marsden Point refinery for the bunkering of ships in Auckland Harbour.⁸ The second defendant Seafuels was the owner of *Awanuia*. Svitzer and associated parties entered into negotiations with Z Energy and Seafuels for the temporary release of the *Awanuia* from its existing contractual obligations. At the time there were no other appropriate vessels that would have been able to safely conduct the required salvage services.⁹ Svitzer entered into a short-term charterparty with Seafuels under protest, on the grounds that the terms were exorbitant and unfair.¹⁰

Following the salvage operation, Svitzer brought an action against both Seafuels and Z Energy on three grounds. First, it was alleged that the charterparty between Svitzer and Seafuels was entered into under duress in accordance with the law of contract; secondly, it was submitted that the charterparty was unjust, inequitable and exorbitant and therefore warranted equitable intervention in the Admiralty jurisdiction, and thirdly, it was contended that the charterparty was entered into under duress and was therefore able to be modified or annulled in accordance with the *Salvage Convention 1989*.¹¹

Duress and the Law of Contract

The claim of duress in accordance with the common law of contract was dismissed.¹² The Court found that the actions of Seafuels were not illegitimate in the circumstances and that the negotiation of terms was unable to be

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¹ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) (*‘Svitzer Salvage’*).

² *International Convention on Salvage 1989*, 1989, 1953 UNTS 165.

³ *Svitzer Salvage* [2013] NZHC 2585 (4 October 2013) [3]; *Svitzer Salvage v Z Energy Limited* [2012] NZHC 1650 (20 July 2012) [1].

⁴ *Svitzer Salvage v Z Energy Limited* [2012] NZHC 1650 (20 July 2012) [1].

⁵ *Maritime Transport Act 1994* (NZ).

⁶ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [5].

⁷ Lloyd’s Open Form contract (with SCOPIC clause invoked).

⁸ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [8].

⁹ *Ibid.*

¹⁰ *Ibid* [48].

¹¹ The *Maritime Safety Act 1994* (NZ) incorporates the *International Convention on Salvage 1989* into New Zealand law.

¹² *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [178].

completed in light of factors unrelated to Seafuels.¹³ These factors included: the likelihood of a maritime disaster if the services of the *Awanuia* were unable to be procured given an encroaching storm, the close monitoring of the situation by Maritime New Zealand, the possibility of the requisition of the *Awanuia* by Maritime New Zealand and the close monitoring of the situation by the Senior Claims Manager of the *Rena*'s liability insurers who were inquiring as to the reasonableness of costs to be incurred in accordance with SCOPIC protocols.¹⁴

Seafuels contended that, in accordance with the common law of contract, there was no illegitimate pressure exerted on Svitzer during the negotiations and that if pressure was applied, it was of a commercial nature and was therefore permitted in the circumstances. The Court agreed with Seafuels,¹⁵ considering that pressure to enter into the contract came from a variety of sources, and that Seafuels remained open to further negotiation of the hire rate.

The refusal of the Captain of the *Awanuia* to come alongside the *Rena* for practice maneuvers until the 'commercial details', including the job safety and hazard plan, had been concluded was deemed not to constitute illegitimate pressure.¹⁶

Admiralty Jurisdiction

With regard to the Court's Admiralty Jurisdiction Goddard J stated:

It is settled law that the Court can set aside a manifestly unfair or unjust agreement in the exercise of its admiralty jurisdiction, if the agreement was entered into in circumstances that allowed a party to avail itself of the calamities of others to achieve a contractual outcome that is in effect unjust, oppressive or exorbitant...¹⁷

It was argued by Svitzer that this jurisdiction does not only extend to agreements for salvage, but applies 'even if the agreement was not to salvage but to provide specified services in circumstances where salvage services were necessary'.¹⁸ Seafuels contended that it would be illogical to extend the Court's Admiralty jurisdiction to the parties' contractual relationship and that in any event the rights afforded to Svitzer in accordance with the SCOPIC clause would warrant a greater financial return. Therefore, the contract could not be considered manifestly unfair or unjust.¹⁹ The Court made note that in accordance with SCOPIC, Svitzer would only be entitled to remuneration for monies 'reasonably paid', thus doubting Seafuels' contention in this regard, although, ultimately, the issue was not able to be decided.²⁰

Given the wide jurisdiction cast by the Admiralty jurisdiction and the contention that parties can only avoid the jurisdiction where it is expressly excluded in the contract,²¹ it was opined that salvage contracts are a 'good example of the type of circumstance that will invoke the Court's equitable intervention'.²²

It was argued by Seafuels that the Admiralty jurisdiction of the Court was not intended to be invoked in circumstances where a salvage agreement had been entered into.²³ If this interpretation were to be accepted by a court, it would therefore be necessary to determine whether a charterparty – as this was the contractual relationship between the parties – could be defined as a 'salvage agreement'.

According to *The Whippingham*,²⁴ it was determined that a third party will have performed salvage services where, if not for the third parties intervention, further damage would have been incurred.²⁵ It is also noted that:

¹³ Ibid.

¹⁴ Ibid [176].

¹⁵ Ibid [178].

¹⁶ Ibid [170].

¹⁷ Ibid [181], citing *The Emulous* (1832) 1 Summ 207, 210-211 as cited in Rose, Shaw and Steel, *Kennedy and Rose The Law of Salvage* (Sweet and Maxwell, 8th ed, 2013) [10.153].

¹⁸ Rose, Shaw and Steel, above n 17, [10.159]; *Svitzer Salvage v Energy Limited* [2013] NZHC 2585 (4 October 2013) [186].

¹⁹ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [187].

²⁰ Ibid.

²¹ *The William Lushington* (1850) 7 N.o.C 261, 363.

²² *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [188]; *Akerblom v Price* (1881) QBD 129, 132-133.

²³ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [194].

²⁴ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [196] – [197]; *The Whippingham* (1934) 48 Lloyd's Rep 49 (Adm).

²⁵ *The Whippingham* (1934) 48 Lloyd's Rep 49 (Adm), 52.

the avoidance or diminution of the extent of potential liability to third parties is in principle capable of proving a distinct service whereby property is salvaged from danger.²⁶

In light of this, the Court found that Seafuels would likely be able to bring a claim for salvage against the owners of the *Rena*, but that it remained arguable as to whether the services provided to Svitzer under the charterparty were able to be defined as ‘salvage services’,²⁷ and therefore attract the Court’s Admiralty jurisdiction in light of a narrow reading of the test outlined in *Akerblom v Price*.²⁸

Salvage Convention

The *Maritime Transport Act 1994* (NZ) incorporates the *Salvage Convention 1989* into New Zealand law.²⁹ A contract may be modified or annulled in accordance with Article 7 of the Convention if the contract has been entered into under undue influence or the influence of danger and the terms are inequitable, or if the payment under the contract is to an excessive degree too large.³⁰ Article 7 is restricted by Article 6, which provides:

1. This Convention shall apply to any *salvage operation* save to the extent that a contract otherwise provides expressly or by implication...
3. *Nothing in this article shall affect the application of article 7 nor duties to prevent or minimize damage to the environment.*³¹

A ‘salvage operation’ in this context is defined by Article 1 as “any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever”.³²

In refusing to determine whether the charterparty was able to be set aside or modified in accordance with the *Salvage Convention* the Court took into account the potential harm that a premature finding in the form of summary judgment could have on the salvage industry, ‘without careful and detailed examination of the facts and the complex underlying policy considerations at issue.’³³

Seafuels contended that if the *Salvage Convention* were applicable to the charterparty, then Article 7 would not be applicable, given the charterparty expressly stated that it is not a contract for salvage. The Court outlined that the Convention shall apply to any ‘salvage operation’, and that in accordance with Article 6(3) the application of Article 6(1) shall not affect the application of Article 7 nor duties to prevent or minimize damage to the environment: ‘[t]hat suggests that Art 7 applies, provided the agreement is for a “salvage operation”’.³⁴ If that were correct, it would render the express statement in the charterparty, that it is not a salvage contract, irrelevant.³⁵ Seafuels argued that the application of the *Salvage Convention* to all contracts would preclude the operation of the common law and Admiralty principles in favour of the Convention. The Court stated that it is at least arguable, in light of the statement in *Kennedy and Rose*³⁶ that sub-contracts may be subject to Article 7.³⁷ In order to determine whether the Court should exercise its discretion in accordance with Article 7 of the Convention, Goddard J stated that the Court would require a full hearing and further testing of evidence.³⁸ The possible ‘chilling effect on the future incentive for professional salvors to assist in similar situations’³⁹ and the background of the development of modern salvage law were cited as justification by Goddard J for not deciding this point in the Court’s summary jurisdiction.⁴⁰

Comment

It is unfortunate but in the author’s opinion wise that the Court did not make a full determination on these issues. The case raises interesting issues as to how the Court would have resolved questions relating to duress

²⁶ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [197], citing *Rose, Shaw and Steel*, above n 17, [5.021].

²⁷ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [198].

²⁸ *Ibid* [189], citing *Akerblom v Price* (1881) 7 QBD 129,132–133.

²⁹ *Maritime Transport Act 1994* (NZ) s 216; sch 6.

³⁰ *International Convention on Salvage 1989*, 1989, 1953 UNTS 165, art 7.

³¹ *Ibid* art 6 (emphasis added).

³² *Ibid* art 1.

³³ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2012) [218].

³⁴ *Ibid* [225].

³⁵ *Ibid*.

³⁶ *Ibid* [226], citing *Rose, Shaw and Steel*, above n 17, [10.169].

³⁷ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2012) [226]-[227].

³⁸ *Ibid* [208].

³⁹ *Ibid* [211].

⁴⁰ *Ibid* [222].

and salvage, and in particular how the common law, Admiralty law and the *Salvage Convention* would interact today in a dispute between a salvor and a third party.

Provided Article 7 is applicable, it offers a broad interpretation of the requirements that will allow for a contract for salvage to be annulled or modified under the Convention given that there is no requirement for an illegitimate compulsion as under the common law.⁴¹ *Svitzer* would therefore only have needed to show that the terms of the agreement were substantially unfair, so much so that the sum was grossly disproportionate, in order to have the charterparty set aside or modified by the Court.⁴² It is submitted that the daily charter rate of \$200 000 per day plus GST under the charterparty would most likely have been found to be exorbitant, given it was unlikely that the *Awaniua* would have been chartered at a rate higher than \$30 000 per day in accordance with the long-term charter.⁴³

In the event that a court were able to make a finding that there was duress in relation to a salvage agreement, the question remains to be answered as to how the causes of action interact. Seafuels' contention that the applicability of the *Salvage Convention* to a charterparty would preclude the operation of the common law and Admiralty principles therefore warrants discussion.

In the *Tojo Maru* case,⁴⁴ Lord Diplock considered that Admiralty, the common law and equity have developed and have fused, so that they are no longer distinct bodies of law.⁴⁵ In regards to an LOF agreement, Lord Diplock likened it to a contract for labour.⁴⁶ He stated that an LOF contract must first be viewed in light of the common law of contract, with salvage law authority to be taken into account at a later stage if required.⁴⁷ His reasoning was based on the fact that most salvage authorities would stem from dated cases where salvage was conducted without a contract, and that it would therefore be of greater benefit to refer to the law of contract for guidance in the circumstances. Lord Diplock also considered whether there were any fundamental differences between an LOF contract and other types of contracts. The requirement for success and that reasonable value be provided for the services rendered were deemed to not to be confined to LOF contracts, and that therefore the law of contract precluded the operation of maritime law in such a case.⁴⁸ This approach was followed in the case of *The Unique Mariner (No. 2)*,⁴⁹ where it was stated that where salvors are engaged by a contract, the law of contract will govern the matter with maritime law only being applicable if it is expressed or implied by the contract.⁵⁰

Lord Diplock's approach does not highlight the role of policy in relation to the law of salvage, which has developed due to the unique nature of maritime law. The nature of Lord Diplock's comments combined with the judgment in *The Unique Mariner (No. 2)*, limit the general application of the Admiralty jurisdiction where salvage services have been performed under a contract. However, as both cases were decided before the *Salvage Convention* came into force there is uncertainty as to how the proposition now rests.⁵¹

In light of Lord Diplock's reasoning, the contractual laws that relate to the quality of consent under duress will overrule the Admiralty jurisdiction's discretion to apply substantive fairness on the basis of public policy grounds. This may be beneficial given the lack of authority in salvage cases regarding duress,⁵² but neglects the important policy considerations that ground salvage law. Such an approach would deny *Svitzer* the right to invoke the Admiralty jurisdiction of the Court in the present case.

The submitted view is that the nature of the *Salvage Convention*, being an international instrument that was drafted with the goal of uniformity and certainty in mind, should be considered paramount to the common law of contract. The concerns of protecting the environment and the need to encourage salvors should be seen to override common law and Admiralty principles.⁵³ It is therefore submitted that the Admiralty jurisdiction should

⁴¹ Rose, Shaw and Steel, above n 17, [10.168]; Olivia Lennox-King, 'Laying the Mark to Port and Starboard: Salvage Under Duress and Economic Duress at Contract Law' (2007) 21 *Australian and New Zealand Maritime Law Journal* 32, 50.

⁴² *International Convention on Salvage 1989*, 1989, 1953 UNTS 165, art 7 (a)-(b); Lennox-King, above n 41, 50.

⁴³ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2584 (20 December 2013) [91].

⁴⁴ *Bureau Wijsmuller NV v Owners of the Tojo Maru (No. 2)* [1972] AC 242 ('*The Tojo Maru*').

⁴⁵ *Ibid* 291.

⁴⁶ *Ibid* 292.

⁴⁷ *Ibid*.

⁴⁸ *The Tojo Maru (No. 2)* [1972] AC 24, 294; Lennox-King, above n 41, 54.

⁴⁹ *The Unique Mariner (No. 2)* [1979] 1 Lloyd's Rep 37.

⁵⁰ Lennox-King, above n 41, 51.

⁵¹ *Ibid* 55.

⁵² Rose, Shaw and Steel, above n 17, [10.099]; Lennox-King, above n 41, 55.

⁵³ Lennox-King, above n 41, 58.

retain its discretion to modify or annul agreements that it considers unfair.⁵⁴ With regard to the *Salvage Convention*, it is submitted that the common law and Admiralty should continue to apply apart from the circumstances in which the Convention is applicable.

Conclusion

It is unfortunate that the New Zealand High Court was not required to make a finding on the relationship between the law of contract, the Court's Admiralty jurisdiction and the *Salvage Convention* in the case of *Svitzer Salvage*. Clarification as to what constitutes a 'salvage operation', and the scope of the Admiralty jurisdiction would have been welcome in light of the limited opportunities presented to courts to make such determinations since the advent of the LOF contract. Nonetheless, it is submitted that the narrower view as to what constitutes duress in contract law should not overrule the intervention of Admiralty or the *Salvage Convention* in circumstances where a contract is entered into that is vital for the salvage of a vessel.

⁵⁴ *The Unique Mariner (No 1)* [1978] 1 Lloyd's Rep 438, 454-455.