IN THE HIGH COURT OF NEW ZEALAND
IN ADMIRALTY
WELLINGTON REGISTRY

CIV-2012-485-452
[2013] NZHC 2584

IN THE MATTER	of an admiralty action in personam	
BETWEEN	SVITZER SALVAGE BV Plaintiff	
AND	Z ENERGY LIMITED First Defendant	
	SEAFUELS LIMITED Second Defendant	

Hearing: 27-28 February 2013

Counsel: L J Taylor QC and J B Orpin for the Plaintiff
R Gordon for the First Defendant
C R Carruthers QC and P Barratt for the Second Defendant

Judgment: 4 October 2013

Reissued: 20 December 2013

JUDGMENT OF GODDARD J

This judgment was delivered by me on 20 December 2013
at 11.30 am, pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Izard Weston, Wellington for Plaintiff
Minter Ellison Rudd Watts, Wellington for First Defendant
Jones Fee, Auckland for Second Defendant

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Introduction

[1] This proceeding concerns applications by the defendants for summary judgment in the three causes of action pleaded. Alternatively, the second defendant applies for strike-out of all three causes of action; and as a further alternative, for a partial review of an earlier interlocutory decision by Associate Judge Gendall.

[2] The plaintiff's claims arise out of a third party hire agreement between the salvor of *MV Rena* (*Rena*) and the second defendant, for the urgent deployment of a purpose built bunker tanker owned by the second defendant.

Background

[3] At approximately 2.20 am on 5 October 2011, *Rena* ran aground on the Astrolabe Reef off the Port of Tauranga in the Bay of Plenty.

[4] The grounding created a significant risk of pollution from discharge of heavy fuel oil and other oils and lubricants onboard and Maritime New Zealand's Marine Pollution Response Service declared the grounding a Tier 3 Emergency.

[5] Representatives of the plaintiff, Svitzer Salvage BV (Svitzer), a company incorporated in the Netherlands, arrived in New Zealand on 5 October 2011 and began investigations. On 6 October 2011 Svitzer was appointed salvor of *Rena* under a Lloyds open form contract (with the SCOPIC clause invoked).[1] The same day the Director of Maritime New Zealand declared *Rena* to be a hazardous vessel pursuant to s 248 of the Maritime Transport Act 1994.

[6] It quickly became apparent *Rena* was unlikely to be refloated unless her bunkers and containers were first discharged. Removal of the 1,700 tonnes of heavy fuel oil and 200 tonnes of marine diesel oil onboard the stricken ship therefore became the immediate and critical priority, given the significant environmental and

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[1] The Lloyds open form provides a regime for determining the amount of remuneration to be awarded to salvors for their services in salving property at sea and minimising or preventing damage to the environment. Under the SCOPIC clause, Svitzer is entitled to be reimbursed for all of its costs and expenses, reasonably incurred.

pollution risk from discharge into the sea of her cargo of fuel oil and other lubricants. While the weather at the time of the grounding was favourable, the long-term forecast was adverse.

[7] In an effort to minimise the risk of leakage into the sea, Svitzer sought urgently to hire a bunker tanker into which to pump the fuel oil and other substances *Rena* was carrying.

[8] *Awanuia*, a purpose built bunker tanker owned by the second defendant, Seafuels Limited (Seafuels), was identified by Maritime New Zealand and independent salvage experts as the only tanker barge on the New Zealand coast capable of safely undertaking the off-loading operation. However, at the time, *Awanuia* was on a long term exclusive charter to the first defendant, Z Energy Limited (Z Energy or Z).[2]

[9] Svitzer's charter agent, Mr Jorgensen of Monjasa A/S,[3] approached Seafuels, as owner of *Awanuia*, on 6 October seeking a charter of the barge but was told *Awanuia* was on long-term charter to Z Energy and was thus "fully occupied".

[10] Svitzer was, however, under intense pressure by Maritime New Zealand and its independent salvage experts to secure *Awanuia*, as Mr Shannon, the Regional Manager of Svitzer Australasia and initial salvage master of *Rena*, explained:

> Maritime New Zealand indicated that if Svitzer did not manage to conclude a deal with the owners of *Awanuia*, then it would intervene to exercise the requisition powers contained in the Maritime Transport Act.[4]

[11] Direct approaches were then made to Z Energy by both Maersk Shipping-AP Moller and Monjasa A/S on behalf of Svitzer, seeking the release of *Awanuia* and a number of urgent discussions followed.

[12] After referring Svitzer's agents back to Seafuels as owner of the barge, Mr Mulvena, the Contract and Trading Manager of Z Energy, asked for preliminary

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2 Under this charter, Z Energy was using the *Awanuia* primarily for the transportation of oil from the Marsden Point refinery for the bunkering of ships docked in Auckland Harbour.

3 Bunker traders.

4 Maritime Transport Act 1994, s 100(1) and (6).

information about "the quantity of fuel oil to be off-loaded, the specification of the fuel oil, where it was loaded and quality certificates for the product" to assist him in establishing if release of *Awanuia* for the off-loading operation were going to be feasible for Z Energy. These factors would have "a significant impact on the time Awanuia [would] be out of normal operation". An estimate of the costs to Z of releasing *Awanuia* would also be dependent on such information. In an email response to Maersk Shipping (and copied to key Svitzer personnel[5] and its agents), sent at 9.13 pm on 6 October, Mr Mulvena concluded by saying, "[w]e can talk about commercial terms once we have established if the operation is feasible".

The release agreement

[13] Later that same day (6 October), Z Energy reached agreement with Seafuels for a temporary release of *Awanuia* from her charter, albeit apparently at substantial inconvenience and potential financial cost. Z's evidence on the matter was that, notwithstanding this inconvenience and the potential cost, Z was prepared to temporarily release *Awanuia* from her long-term charter to Seafuels because of the larger environmental issues and out of a sense of responsibility arising from its own involvement in the petroleum industry. Z Energy says it was, and remains, very proud of the contribution it made to the *Rena* salvage effort by agreeing to urgently release *Awanuia* to Seafuels, so that she could be redeployed to assist in the salvage operation.

[14] Z's agreement to release *Awanuia* was predicated on the condition that Seafuels would meet the costs and expected losses that would inevitably arise from Z's loss of use of the barge. This involved estimating the likely costs that Z would incur in supplying its customers by means other than *Awanuia*, as well as direct losses caused by customers changing their plans as a consequence of her unavailability and bunkering their ships elsewhere. There were also other conditions Z insisted be specified in the release agreement. One was a restriction on Svitzer's use of *Awanuia* to fuel recovery and for no other purpose without Z's approval:

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[5] Including Mr Polderman, who was appointed senior salvage master of *Rena* and on board the ship from about 5 October.

another was an undertaking that Seafuels would not permit Svitzer to deploy *Awanuia* in the vicinity of *Rena*:

> ... unless and until Seafuels has delivered to Z Energy a written assessment by the Salvor that:
>
> (a) describes the actions that the Salvor will take in deploying the Awanuia in the Fuel Recovery; and
>
> (b) includes an assessment, made in accordance with good industry practice by a suitably qualified expert, that such deployment is considered to be safe.

[15] The release agreement, as negotiated between Z Energy and Seafuels, was able to be reduced to the following terms by late the next day, 7 October 2011, and was incorporated into a draft written agreement on 8 October. Those terms provided that:

(a) Seafuels would pay Z Energy $150,000 per week for a minimum of one week and pro-rata daily thereafter;

(b) Seafuels would reimburse Z Energy with the direct costs actually incurred by it in accommodating customers who had existing short-term supply commitments (at the time estimated to be around $100,000 per week and capped at that amount); and

(c) Z Energy would take title to the fuel oil and other oils salvaged from *Rena* and would be responsible for dealing with their off-loading from *Awanuia* and disposal.

[16] A compensation clause was also included, which provided as follows:

> 3.2 **Compensation**
>
> (a) Seafuels shall:
>
> (i) use reasonable endeavours to procure that Svitzer pays all compensation due by Svitzer under clause 42 of the Additional Terms incorporated in the Salvage Charter (**Clause 42 Compensation**) when due;
>
> (b) Seafuels shall not be liable:

(i) to Z Energy for any failure by Svitzer, for any reason, to pay Clause 42 Compensation when due;

(ii) to pay any other compensation to Z Energy in respect of this Agreement or the use of Awanuia hereunder.

3.3 **Invoicing**

Seafuels will invoice the Salvor for all amounts due under Clause 42 of the Additional Terms. Z Energy will invoice Seafuels for the amounts due under this Agreement.

3.4 **Pay when paid**

For the avoidance of doubt, Seafuels' obligation to pay any Z Energy invoice will be subject to, and deferred in time until, Seafuels receives payment of the equivalent amount from the Salvor under the Salvage Charter, provided that Seafuels will, if requested by Z Energy, assign to Z Energy the right to enforce such payment obligation directly against the Salvor.

[17] According to Mr Mulvena, the point in (c) in [15] above had its genesis in an early telephone conversation he had with Mr Ben Terry of Svitzer, Australasia, who had agreed Z Energy should take the oil away at no extra cost because Svitzer did not know how it would dispose of the oil otherwise. Mr Mulvena said "[i]ndeed, at this early point in time, the people I was dealing with at Svitzer were delighted to learn that it was possible Z could take the oil away at no extra cost". He said Z Energy wanted a sensible solution in place that provided for the fuel oil from *Rena* to be quickly unloaded at Marsden Point and *Awanuia*'s tanks washed, so the vessel could be returned to "normal service" in Auckland as soon as possible. For its part Z Energy presumed that Svitzer, as salvor, was capable of directing the disposal of the fuel oil.

[18] At the time the agreement by Z to release *Awanuia* back to Seafuels was reached, all concerned envisaged that the charter to Svitzer would be for a very short time. This understanding had been conveyed in an initial email from Monjasa A/S on Wednesday 5 October 2011, in which it was said Svitzer wanted to spot charter *Awanuia* for "Time period 3-4 days".

[19] In the outcome, a final version of the release agreement between Seafuels and Z Energy was never formally executed because, Mr Mulvena said, developments in dealing with the oil on *Rena* "overtook events" (referring to (c) in [15] above).

Otherwise, he said, Z Energy and Seafuels have "largely performed the contract and its terms are the terms of agreement between the two parties".

[20] I will return to the subject of the fuel oil ownership and the issues around disposal of the oil off-loaded from *Rena* at a later point.

[21] As a result of the negotiations between Seafuels and Z Energy to temporarily release *Awanuia* from her long-term charter with Z, and the consequential negotiations between Seafuels and Svitzer for the short-term hire of *Awanuia*, two separate contracts were entered into:

(a) the first was the release agreement between Seafuels and Z Energy outlined above and reached late on 7 October (Svitzer was not a party to this agreement); and

(b) the second was a charterparty agreement between Svitzer and Seafuels for short-term hire of *Awanuia* to remove the fuel oil from *Rena* (Z Energy was not a party to this agreement).

The charterparty

[22] The agreement between Seafuels and Svitzer was a BIMCO[6] charterparty agreement (to be referred to as "the charterparty"), reached in principle on 7 October 2011. This agreement confirmed that *Awanuia* would be chartered to Svitzer for removal of oil and other contaminants from *Rena* on the short term basis requested, estimated by that stage to be for a period of seven days from delivery at Auckland to redelivery at Marsden Point, with the tanks emptied and washed out. Details of the charter rate and the costs of breaking the charter with Z Energy were to be finalised at a later time.

[23] A series of emails exchanged over a very short timeframe and adduced in evidence by Mr Mills, the Chairman of Seafuels, attests to the number of communications between Svitzer's principals, its agents and brokers and Seafuels,

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[6] The Baltic and International Maritime Council (BIMCO): Time Charter Party for Offshore Service Vehicle Agreement: codename SUPPLYTIME 2005.

about the contractual details and the urgent despatch of *Awanuia* to undertake the lightering operation. The primary matters of importance to Svitzer were clearly to get the main contractual terms settled, to be advised of the form of contract to be used, and other matters such as the inclusion of a "No Claim for Salvage Clause". The costs of the charter were not the pressing issue at that point, as is evident from various references to that aspect in emails from Svitzer's end.

[24] Some representative examples from the email trail follow.

[25] On 6 October at 9.27 pm (NZ), Mr de Jong, the Commercial Manager of Svitzer in the Netherlands, gave confirmation for Seafuels "to go ahead with the fixture of the bunker tanker *Awanuia* ex Auckland" and further advised that the commercial arrangements and all communications would be handled through Thalund Shipping, Svitzer's "in-house lightering tonnage broker in Denmark".

[26] At 10.12 pm (NZ) on 7 October, Mr Coombridge, the Managing Director of PB Sea-Tow (NZ) Limited,[7] emailed Mr Terry of Svitzer, Australasia, with the following advice:

> Ben
>
> We are mobilizing Awanuia and I believe our Master – Rick Hunter has been in touch with Svitzer. Progress is as follows:
>
> > Awanuia will depart Auckland tonight & steam to Whangarei to arrive Marsden Point in order to discharge fuel oil aboard in order to make room for fuel off the MV Rena.
> >
> > Awanuia will be on charter to Svitzer from Dep Auckland until the oil is off Awanuia at Marsden Point Refinery and tanks washed.
> >
> > Bimco Supplytime, Charter Rate and Costs for breaking charter with Z Energy will be finalized over the weekend once all estimated costs are received.
> >
> > Hire period estimated @ 7 days from Del Auckland / Redel Marsden Point Whangarei, with max 3 days allowed in Tauranga / MV Rena unless mutually agreed in order to return to Marsden Point Whangarei to discharge oil and clean tanks, as other customer commitments ma [sic] dictate.

[7] P B Sea-Tow (NZ) Limited is the management contractor to Seafuels, the owner of the *Awanuia*.

> Ben – we are concerned that a recent full Hydro graphic survey has not been done. Before the Awanuia goes alongside this needs to be done. Understand Titan's got one done earlier this week – checking if we can access. Please confirm above is in order and acceptable.

[27] Mr de Jong responded to Mr Coombridge shortly afterwards, at 10.55 pm (NZ), confirming that Thalund Shipping would "arrange the commercial side of the *Awanuia* with regards to contract and rates", as they were "already in direct contact with owners" and that a new survey was planned for the following day, the detail of which would be forwarded to Mr Coombridge as soon as it was available.

[28] At 11.06 pm (NZ), Mr Jorgensen emailed Mr Coombridge, requesting the main terms and the contract form, signing off his request with:

> Pleased to hear from you urgently, as the barge must go to Tauranga ASAP.

[29] At 11.35 pm (NZ) Mr Jorgensen emailed again seeking confirmation of the addition of a clause of "No Claim for Salvage" in the contract "ASAP, before you move the bunker tanker".

[30] Mr Coombridge responded to this two hours later at 1.40 am (NZ) on 8 October, advising in relation to one aspect of this additional clause that:

> 1 Z Energy as part of the agreement to release the Awanuia, will take ownership of the fuel pumped into Awanuia and deal with its offloading and disposal.

[31] Mr Jorgensen replied at 1.44 am (NZ), advising he would "revert on this ASAP" and asking for the main terms to be provided and the form of contract to be used. He noted the hour was late, but said "both authorities, insurance company and client is pushing to get this arranged today". He ended his email as follows:

> I know that the bunker tanker will leave this night, but we have to arrange the main terms before this leaves. It is acceptable to forward these, without any prices in.

[32] The BIMCO Supplytime form was proposed by Mr Coombridge as the appropriate form of contract at 1.47 am (NZ). Mr Jorgensen confirmed the contract at 1.57 am (NZ), and requested that the form be filled out "expect [sic] for

charges/prices since you will first have these tomorrow" apologising and saying "Sorry but will need this one today".

[33] At 2.47 am (NZ), Mr de Jong emailed Mr Coombridge, Mr Terry, and Thalund Shipping (with copies to others), confirming that Svitzer would like to have the contract for the hire of *Awanuia* arranged by Thalund Shipping, assisted by Monjasa A/S, and if agreed, all communications should be aligned through those agents. He recorded the details advised in Mr Coombridge's updating email to Mr Terry (at [26] above) and said, "…we really need a contract in place soonest, please make sure that owners of the AWANUIA assist Thalund in this matter".

[34] At 3.00 am (NZ) on 8 October, Mr Coombridge responded to Mr Jorgensen, with copies to Mr Terry, Mr Mulvena and others, advising that the BIMCO Supplytime form would be filled out in New Zealand later that morning by Seafuel's "contracts man" and that:

> Progress is as follows:
>
> 1. Awanuia has departed Auckland ETA 0630 Marsden Point Whangarei to discharge fuel oil aboard in order to make room for fuel off the MV Rena. ETD Marsden Point 1300 8th. ETA Tauranga daybreak Sunday 9th.
>
> 2. Awanuia will be on charter to Svitzer from Dep Auckland until the oil is off Awanuia at Marsden Point Refinery and tanks washed.
>
> 3. Bimco Supplytime as provided will apply
>
> 4. Awanuia Daily Charter Rate will be finalised later today. NZD ?????
>
> 5. Costs for breaking charter with Z Energy will be finalized later today after estimated costs are received. These costs include fuel supplied to Z Energy customers elsewhere at a premium.
>
> 6. Fuel loaded from Rena to Awanuia approx 1500T becomes the property of Z Energy as per previous email.
>
> 7. Hire period estimated @ 7 days from De Auck/Redel Marsden Point Whangarei, with max 3 days allowed in Tauranga/MV Rena unless mutually agreed in order to return to Marsden Point Whangarei to discharge oil and clean tanks, as other customer commitments may dictate.
>
> ... rates and conditions will be agreed by Seafuels Chairman later today as well.

...

[35] As per these terms, *Awanuia* was to be on charter to Svitzer from the time she left Auckland on 8 October to sail to Marsden Point. There, two of her tanks were off-loaded to create sufficient capacity to allow *Rena*'s bunkers to be on-loaded. Not all of her tanks were emptied because of the need for swift action. However, *Awanuia* was still carrying more fuel oil in her tanks than was onboard *Rena*.

[36] *Awanuia* then steamed to Tauranga from Marsden Point, arriving on station at *Rena* at 6.30 am on 9 October 2011.

[37] The completed charterparty with the cost amounts inserted was sent by Mr Coombridge to Svitzer at what appears to be 0.59 am on 9 October (NZ) and received at 1.59 pm (Danish time) on 8 October. In his covering email, Mr Coombridge referred to the final figures having been "negotiated with Seafuels shareholder and Z Energy". He also referred to the effort that had been involved in releasing *Awanuia* from service, she being Ports of Auckland's only supply of fuel for ships entering that Port. He said many alternatives had had to be arranged to cover the situation in *Awanuia*'s absence.

[38] The charter hire rates for *Awanuia* required by Seafuels and additional terms relevant to this proceeding were specified at box 20 of the contract as follows:

> 20. Charter hire (state rate and currency) (Cl 12(a), (d) and (e))
>
> 1. Daily Rate: NZD145,000 per day + GST (inclusive of crew, fuel)
>
> FOR BREAKING Seafuels & Z Energy Charter following applies:
>
> 2. Lump sum – Charter break per 7 days and until back on Hire to Z Energy – Seafuels – NZD135,000 prorata after 7 days + GST.
>
> 3. Lump sum – Charter break per 7 days – Z Energy NZD150,000 prorata after 7 days + GST.
>
> 4. Lump sum – reimbursements (with evidence) of Z Energy increased cost of working capped at NZD100,000 per 7 days + GST.
>
> 5. Title passes for all fuel oil transferred to Awanuia ex MV Rena to Z Energy on loading Awanuia.

[39] A substituted "No Claim for Salvage" clause (clause 39(a)) was proposed providing, as an exception, that fuel loaded onto *Awanuia* from *Rena*, to which the "Owners Group will have a claim for salvage", would be passed to Z Energy.

[40] Additional clauses to the charterparty relating to title to the fuel oil, risk assessment and compensation to Z Energy, specified the following:

> 40. Notwithstanding any other provision of this agreement (including but without limitation clause 39) as provided in Part 1 clause 20 any fuel oil (whether or not including contaminants) that is loaded from the MV Rena onto the Vessel will, on passing the flange on the Vessel, become the property of the Owners and immediately thereafter the property of Z Energy Limited (and every other person will be required to waive any right of salvage or other form of interest in the same, with the Owners and the Charterers to hold Z Energy Limited harmless from any claim that is contrary to this position).
>
> ...
>
> 41. The Charterers undertake they will not deploy the Awanuia in the vicinity of the MV Rena unless and until the Charterers have delivered to Seafuels and Z Energy a written assessment by the Charterers that:
>
> (a) describes the actions that the Charterers will take in deploying the Awanuia in the fuel recovery; and
>
> (b) includes an assessment, made in accordance with good industry practice by a suitably qualified expert, that such deployment is considered to be safe and that the risk of serious damage to, or loss of, the Awanuia is not probable.
>
> 42. Compensation to Z Energy
>
> (a) As compensation for the unavailability of the Awanuia, the Owners are required to pay Z Energy Limited:
>
> (i) NZ$150,000 (plus GST); plus
>
> (ii) for every week or part thereof that the Off-Hire Period is greater than 7 days, NZ$150,000 (plus GST) per week, calculated proportionately in whole period of hours and with any part hour being treated as a whole hour.
>
> The Charterers shall reimburse the Owners for all amounts payable by the Owners to Z Energy as described in this clause 42(a).
>
> (b) As further compensation for the unavailability of the Awanuia, the Owners are required to pay Z Energy Limited

> the amount that Z Energy reasonably determines is the additional cost to it or its customers of being required to supply or take fuel oil during that period by means which are alternative to their usual use of the Awanuia provided that such amounts will be capped at NZ$100,000 per week (plus GST).
>
> The Charterers shall reimburse the Owners for all amounts payable by the Owners to Z Energy as described in this clause 42(b).
>
> The provisions of this clause 42 shall continue to apply notwithstanding any other provision of this agreement. The Owners and the Charterers acknowledge that the Owners' obligations to pay compensation to Z Energy as described in this clause shall cease at the time the Owners redeliver the vessel to Z Energy Limited.

[41] The date in the charterparty was 7 October and the deployment of the vessel was stated to be "restricted to … [r]eceive offloaded oil onboard Awanuia – from casualty MV Rena".

[42] A copy of the charterparty was provided to Z Energy. It had clauses 1 and 2 of box 20 redacted, so that only clauses 3-5, recording the agreement by Svitzer that Seafuels could invoice it for the amounts it was liable to pay to Z Energy, were visible. Mr Mulvena said that Z Energy only learned of the actual amount that Svitzer was contractually liable to pay to Seafuels for the charter of *Awanuia* later, on 13 October, during discussions between representatives of Svitzer and Z Energy about disposition of the fuel oil.

[43] On receipt of the above terms from Seafuels, a series of urgent emails was exchanged between Svitzer and various interested parties, including the liability insurers of *Rena*'s owners and the owners of the oil, maritime lawyers and officials of Maritime New Zealand. It seems clear from these emails that immediate liability issues arose as a result of clauses 39 and 40 of the charterparty,[8] as well as in relation to the charter rate. Advice was given that the written approval of the owners of the oil would be required before the charterparty could be signed in that form. Seafuels was not privy to these email discussions and apparently only became aware of them through the issue of these proceedings. Some relevant extracts from the emails follow:

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[8] Providing for title for all fuel oil transferred onto *Awanuia* to pass to Z Energy.

From: Dirk de Jong (Svitzer)
Date: 9 October 2011 3:34:41 AM NZDT
To: Orjan.Karlsson@swedishclub.com [and numerous other recipients]
CC: Svitzer Salvage, Operations, Svitzer, Ben Terry
Subject: RENA / Problems bunker tanker AWANUIA

Dear Sirs

As stated in earlier updates the bunker tanker AWANUIA is due to arrive on site at 9:00 hrs LT on Sunday the 9th of October. We are still in the process of completing the contractual side of their involvement and despite our repeated requests for a contract/ agreement, we have only just one hour ago unfortunately received terms & conditions from the owners of the tanker which cannot not (sic) be accepted.

Besides the tremendous rates and charters fees demanded to free the vessel from her current obligations they are also demanding to take ownership of all bunkers that are transferred to the AWANUIA as stated in [clauses 39 and 40 of the charterparty].

...

It goes without saying that we can simply not agree to such a condition as we as Salvors of the RENA are not the owners of the bunkers and can thereby not make any decision on a change of ownership.

We are now establishing contact with the rightful owners of the RENA to brief them on the above situation. In the meantime we will continue negotiations with the owners of the bunker tanker, explaining to them once more that we cannot agree to the terms suggested without written approval from our principals.

Finally we would like to point out that it is of the utmost importance that this issue is solved soonest as the discharge of the bunkers cannot be hindered whatsoever and therefore we request owners, underwriters and the New Zealand Maritime authorities to assist in solving this issue.

[44] The Senior Claims Manager of the Swedish Club responded with advice that the *Rena* owners and their insurers would not get involved in any argument about the reasonableness of costs, although their appointed Special Casualty Representative would monitor and challenge the reasonableness of costs according to the SCOPIC protocols. However, he expressed reservations of the "strongest nature" to the hire of *Awanuia* in the terms as proposed, describing the various oils onboard as "of an assortment of provenance", some of which belonged to the owners, but the fuel and diesel oil did not. Title could therefore not simply be relinquished. The Senior Claims Manager referred to the role of Maritime New Zealand and the possibility of *Awanuia* being requisitioned in the circumstances, observing:

> The writer is not so familiar with the authorities of MNZ and other government departments to order use of assets in the unfortunate circumstances of this casualty. But with the impending prospect of a change in the weather during Monday afternoon – evening, it is clearly imperative that the bunkers and other oils are discharged without ANY delay.
>
> SVITZER should, as may be necessary, work with MNZ in order to requisition the AWANUIA or consider whatever additional steps that might be necessary to mitigate the possible consequences of steps not being taken within SUNDAY or latest Monday to take receipt of the oils from the vessel.

[45] As earlier recorded, *Awanuia* arrived at the site of the *Rena* grounding at about 6.30 am on 9 October. I will refer to this and to events that followed that day at the site of the grounding at a later part of the judgment.

[46] It seems clear from an email sent by Mr de Jong to Mr Coombridge and received at 12.02 pm (NZ) on 9 October, that there had been some initial response from Thalund Shipping to Seafuels about the level of remuneration and ownership of the bunkers earlier in the day. Mr de Jong's email at 12.02 pm was otherwise relatively brief and confined to querying what Mr Mills described as "some of the generally uncontroversial aspects of the agreement". These Seafuels immediately agreed to rectify. Mr de Jong ended his email by saying:

> [Ple]ase issue an amended version of the contract soonest. We trust you understand that the operation in the meantime will have to continue under pressure of the authorities.

[47] Mr Coombridge responded to Mr de Jong at 2.18 pm (NZ) as follows:

> ... Dirk – all noted – will work through. Understand you have been talking with underwriters. On the basis of the (illegible) being tidied up please confirm rates and prices have been agreed.

[48] At 4.03 pm (NZ) on 9 October 2011, Svitzer agreed to the proposed terms of the charterparty by email in the following terms, stating that it was doing so under protest:

> Based on the numerous discussions that have been taking place between SVITZER, PB Sea Tow, the owners of the RENA and the authorities we have no other option than to agree with the rates and conditions indicated by PB Sea Tow. Therefore please consider this message as our confirmation.

> Please take note however that we believe that the terms and conditions proposed are outrageous but based on the situation at hand and the pressure from all parties involved we see no other option than to accept.
>
> As agreed in our telecon we will read through and finalize the revised version of the contract and your amendments here in Europe during the course of today.
>
> In the meantime please give instructions to the AWANUIA to continue operations as soon as possible.

[49] Mr Mulvena pointed out that while the above acceptance was copied to other interested persons it was not copied to Z Energy; and the "numerous discussions" referred to in the opening to the email did not identify Z Energy as having been involved in those discussions.

[50] On 11 October 2011, the Director of Maritime New Zealand issued a notice to inter alia the master and owner of *Rena* and to Svitzer directing that the SCOPIC clause of the salvage agreement between the owner of *Rena* and Svitzer not be terminated without his prior written consent.

[51] Following Svitzer's acceptance of the charterparty terms on 9 October (under protest), discussions and negotiations between representatives of Seafuels and Svitzer seem to have continued, with some changes to the terms being agreed.

[52] Mr Mills said Seafuels was prepared to consider a reduction in the charter rate and this appeared to be the only real issue, as is reflected in the following email exchange between Mr Coombridge and Mr Shannon during 12 and 13 October. Mr Mills said he assumed Svitzer had, in the interim, satisfied itself as to any issue over its ability to transfer title to the oil:

> From: Ian Coombridge
> Sent: Wednesday, 12 October 2011 11:19 p.m.
> To: Svitzer- Drew
> Subject: FW: Awanuia
>
> Hi Drew – good to catch up today.
>
> 1. We are unaware that there is any issue operationally, and that the commercials /financials are the only issue of concern to Svitzer.
>
> 2. Below is explanation of the various charges.

3. As discussed today please let me know of the areas of concern and we can sit down and address these together, hopefully tomorrow Thursday and resolve. Please call me and advise when suits.

4. Following our conversation we will stay in Port until a further report of ships condition is made by those going on board tomorrow and when the Awanuia will be required next.

Seafuels Business & Break Charter costs

There are many factors that have been considered, with 3 parties incurring

1. significant cost,

2. business interruption

3. for business risk.

[etcetera]

On 13/10/2011, at 2.09 PM, "Ian Coombridge" icoombridge@pbsea-tow.com wrote:

Dear Drew

1. Further to our good discussion this morning I confirm that SeaFuels are prepared to consider reduction in the daily charter rate and discuss at a mutually convenient time shortly.

2. You have advised that you will have the contract signed this afternoon by 4pm. Please confirm this is the latest version as attached.

3. Please confirm Svitzer will withdraw the notice of protest.

Thanks for your time this morning and all the best

Kind Regards
Ian

From: Drew Shannon
Sent: Thursday, 13 October 2011 4:30 p.m.
To: Ian Coombridge
Subject: Re: Awanuia Bimco

Ian

Thanks for yours.

As to your points,

- Confirm this is the charter Party

- Thank you for the consideration to discuss rates during or after the services

- Our corporate affairs department advise that I am authorized to sign the charter party with you however the letter of protest remains in place and will be provided to you.

If you can advise your current location I will meet with you to sign the charter party.

Best regards
Drew Shannon

[53] The charterparty was accordingly executed on 13 October 2011, in the terms specified at box 20, and as set out in [38] above.

[54] An internal file note by Mr Burton, Svitzer's legal representative in New Zealand, made at about 11.30 am (NZ) that day, recorded that "it had been decided by Svitzer to sign the charterparty and lodge a letter of protest. There simply wasn't time to continue the negotiations." I will refer to this file note again and its background in more detail in a later part of the judgment.

[55] The letter of protest that accompanied the executed contract of hire was in the following terms:

"RENA" Salvage
Letter of Protest
On the charter of MV "AWANUIA"

From: Svitzer Salvage BV

To: Sea Fuels Ltd c/o PB Sea-Tow (NZ) Ltd
Colmar Brunton House
6-10 The Strand
Takapuna
Auckland
New Zealand

Attention: Ian Coombridge

Cc: Meredith Ussher (Z Energy Corporate Counsel)

Re: "RENA" Salvage – Charter of mv "AWANUIA"

Dear Sirs,

We write to protest at the terms of the Contract between Svitzer Salvage BV and the Owners of mv "AWANUIA" (Seafuels Ltd). It has been necessary

for Svitzer salvage BV to sign the Contract today in order to ensure redeployment the "AWANUIA" back on station at RENA.

The Contract is illegal in that Sea Fuels requires Charterers to convey fuel oil to which it has no title and thus requires Charterers to commit an illegal act (Box 20.5 and clause 40).

The Contract requires Charterers to include the Owners of mv "RENA" in the Contract which the Charterers have no authority to do (Box 3).

Charterers are by clause 40 required to waive other parties' rights which it has no authority to do.

And

To agree to that third parties should hold Z Energy harmless from claims which it has no authority to do. Clause 40 therefore exposes Charterers to claims of breach of warranty of authority.

Further, the charter rate that is demanded is an excessive degree too large for the services and the Contract has been entered into under the influence of danger and its terms are inequitable.

The Charterers have no option but to charter the "AWANUIA" at this time as there are no reasonable alternatives and the Director of Maritime New Zealand has issued a directive preventing the Contractors from terminating the SCOPIC clause.

Charterers therefore protest and reserve all their rights under statute, common law and equity.

Yours faithfully,

Drew Shannon
Onshore Salvage Master

Time: 1845 hours
13 October 2011

[56] The terms and duration of the charterparty are said to have resulted in an overall charter rate for *Awanuia* of between NZ$187,000.00 and NZ$200,000.00 plus GST per day. The original seven day charter term expired on 15 October and was renewed on that date at Svitzer's request and with Z Energy's consent (Z having been entitled to the rehire of *Awanuia* at that time).

[57] The charterparty was then extended a further eleven times from 19 October, each time at Switzer's request and on the same terms and conditions, with Svitzer issuing the same letter of protest on each occasion.

[58] It is clear from the evidence of Mr Mills and from the email trail that Seafuels expressed reluctance on the occasion of each renewal, reiterating that *Awanuia* was urgently needed back for her normal business and asking Svitzer to look for alternatives and suggesting some alternatives. Svitzer, whilst expressing thanks, stressed that Seafuels should "be under no misunderstanding. AWANUIA is NOT released from oil transfer operations."[9]

[59] An email from Mr Mills to Mr Shannon on 15 October also made it clear that, even after Svitzer decided to formally execute the charterparty on 13 October, Seafuels remained willing to try and resolve "any outstanding issues" between their companies.

[60] In the event, *Awanuia* did not come off-hire to Svitzer until around 18 November 2011.

[61] Over the total 43 day period of hireage, the amount charged and invoiced to Svitzer by Seafuels under the charterparty was $8,882,435.72 (including GST) plus $6,209.57 for miscellaneous items and damage repair and $55,589.38 for Z Energy's additional costs. Of these amounts, some $2,966,145.50 remains unpaid by Svitzer, which seeks to have the charterparty set aside and its terms effectively recast. Seafuels counterclaims for the outstanding sum under the charterparty, plus the cost of repairs to *Awanuia*, plus interest. Seafuels says none of the invoices it has submitted to Svitzer for the work done under the charterparty have been the subject of dispute.

History of the litigation

[62] In response to Svitzer's application to have the charterparty set aside, Seafuels brought applications for strike out and for summary judgment, and Z Energy applied to be removed as a party under r 4.56 of the High Court Rules. These applications were heard by Associate Judge Gendall who, on 20 July 2012,

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9 Email from Mr Shannon to Seafuels, sent 23 October 2011.

declined the applications, entering judgment in favour of Svitzer, together with costs.[10]

[63] The defendants then applied for a review of the Associate Judge's decisions and filed an appeal against his refusal to grant summary judgment.

[64] On 19 September 2012, Svitzer filed an amended statement of claim in which the original two causes of action were recast as three causes of action: the first seeking to void the charterparty between Svitzer and Seafuels for duress; the second seeking to have the charterparty set aside by the Court acting in its admiralty jurisdiction; and the third seeking to have the charterparty set aside or modified in reliance upon Article 7 of the International Convention on Salvage 1989 (the Convention).[11] The Convention was incorporated into New Zealand law as part of the Maritime Transport Act 1994.[12]

[65] Following this, Seafuels was granted leave to file an application seeking summary judgment; in the alternative, striking out all causes of action in the amended statement of claim; and, if necessary, reviewing the judgment of Associate Judge Gendall of 20 July 2012, to the extent that the decision related to the cause of action based on the Convention.

[66] Z Energy was granted leave to file an application for summary judgment on its defences to the claims as pleaded against it in Svitzer's amended statement of claim of 19 September 2012.

The Associate Judge's interlocutory decision

[67] Although the Associate Judge's decision is not under review here, except partially in relation to the third alternative cause of action, the arguments successfully advanced before him are relied on by Svitzer in opposing the present applications for summary judgment and the alternative orders.

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10 *Svitzer Salvage BV v Z Energy Ltd* [2012] NZHC 1650.

11 International Convention on Salvage 1953 UNTS 165 (open for signing 28 April 1989, entered into force 16 October 2003).

12 Maritime Transport Act 1994, s 216.

[68] In declining to remove Z Energy as a party to the proceeding, the Associate Judge found that Z Energy was not "improperly or mistakenly joined" and its presence was necessary to justly determine all of the issues in the proceedings.[13] The Associate Judge took the view that, notwithstanding the direction in r 4.1(a) that parties to a proceeding must be limited as far as practicable to "persons who ought to be bound by any judgment given", and although Z Energy was not a party to the charterparty between Svitzer and Seafuels, it was directly involved and its role was relevant in two respects.

[69] First, because part of the remuneration amounts payable by Svitzer were charter break fees to Z Energy with a lump sum reimbursement to Z Energy for increased costs due to the disruption. Second, because the charterparty contained the clause requiring title to all fuel oil transferred to *Awanuia* to pass to Z Energy.

[70] The Associate Judge found these remuneration clauses in the charterparty clearly conferred a benefit on Z Energy, which would likely have conferred standing on it under s 4 of the Contracts (Privity) Act 1982 to enforce the cl 42 compensation obligations.[14] Thus, if ultimately, the charterparty were declared voidable, Z Energy's entitlement to enforce those benefits might be altered. Additionally, the level of remuneration Z Energy would be entitled to receive under the release agreement with Seafuels might also be reduced, as the obligation on Seafuels to pass on the compensation to Z Energy agreed to in box 20 of the charterparty was dependent on the terms of the charterparty continuing in force; and the validity or otherwise of the charterparty could still have some bearing on Z Energy's third party right to receive a benefit, if ultimately the charterparty were declared voidable and new terms substituted by the Court.

[71] The Associate Judge found this to be the case, notwithstanding Z Energy's right to receive its payment had crystallised at the time Svitzer paid Seafuels $1.1 million in remuneration and even though the release agreement had been substantially performed. His finding was based on the hypothesis that "if the payment had not been made by Svitzer, Z Energy might still have rights to recover

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13 High Court Rules, r 4.56(1)(a).

14 *Svitzer Salvage BV v Z Energy Ltd*, above n 10, at [23].

payment due to it as stated in the Charterparty while cl 3.2(b)(i) of the Release Agreement would prevent Z Energy recovering unpaid amounts from Seafuels".[15]

[72] The Associate Judge further found that any successful claim against Seafuels and determination of a quantum merit in lieu would directly affect Z Energy's rights and this possibility also required it to "remain properly joined as a defendant to this proceeding".[16]

[73] For all of these reasons, the Associate Judge found Z Energy's presence was necessary:[17]

> ... to justly determine all the issues in these proceedings. If the Court does decide ultimately that it is appropriate to adjust the amount of remuneration payable under the Charterparty, it will have to consider the portions of that remuneration designed to compensate Z Energy. In deciding on what is a reasonable figure, the Court might well be required to determine the costs and expected losses that Z Energy faced in allowing the Awanuia to go off hire. In that sense also, in my view, Z Energy should remain a party to adduce evidence that the compensation payable to it under the Charterparty is reasonable or otherwise. The application before the Court by Z Energy to strike it out as a party here is therefore dismissed.

[74] As a further matter, the Associate Judge touched on the issue of legal title to fuel transferred onto *Awanuia* and the possibility that, if cl 5 in box 20 of the charterparty were proved to be no longer operative, Svitzer alleged this clause would have amounted to a conversion of the oil in the period between the charterparty being signed and Z Energy purchasing the fuel from *Rena*'s owners under a supervening agreement (a matter I will come to).

[75] In relation to the (now) third cause of action, calling in aid art 7 of the Convention, the Associate Judge, in dismissing Seafuels' application to strike out that cause of action, noted the paucity of New Zealand jurisprudence on the Convention to date. In light of the contested nature of the charterparty and on the basis that its purpose was to assist in removing potentially hazardous material from

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15 At [24].
16 At [26].
17 At [28].

Rena, in particular to prevent further environmental damage from the grounding, the Associate Judge observed that the charterparty:[18]

> ... may very well be seen ultimately as a salvage contract being part of the overall salvage operation and thus subject to the Convention. The question that would then follow, whether the Court should exercise its discretion under Article 7 to modify the terms of the Charterparty contract, involves intense and complex factual matters requiring a full hearing and testing of the evidence. It is certainly not appropriate therefore to strike out this second cause of action here.

The amended statement of claim

[76] In the original statement of claim dated 29 February 2012, no relief was sought against Z Energy and no actionable allegations were pleaded against Z Energy.

[77] Following the issue of the Associate Judge's decision, Svitzer amended its statement of claim in certain respects: to include a new second cause of action in admiralty; an allegation of illegitimate pressure by Seafuels through its employee, the master of *Awanuia*, on 9 October; an allegation of illegitimate pressure by Z Energy through its solicitor on 13 October 2011; and an additional prayer for relief as against Z Energy in respect of all three causes of action.

[78] The amended first cause of action seeks a declaration that the charterparty is void for duress and unenforceable. The grounds are that the terms were excessive and unreasonable and agreed to in circumstances where the plaintiff had no practical choice other than to accept, because of the imminent danger of pollution and the immediate availability of *Awanuia*. The two allegations of illegitimate pressure outlined in [77] above have been inserted into this cause of action. The first allegation concerns only Seafuels and the second concerns only Z Energy. There is no linking allegation pleaded that Seafuels and Z Energy were co-conspirators in the two separate instances of alleged illegitimate pressure. Nor is there any distinction made between the separate contractual situation of Seafuels and Z Energy. There is a further allegation that the requirement to transfer title to off-loaded oil to Z Energy would have amounted to conversion and resulted in a further benefit to Z Energy.

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[18] At [56].

[79] The second alternative cause of action, which is new, seeks to have the charterparty set aside by the Court in the exercise of its admiralty jurisdiction, on the grounds that the rates under the charterparty were manifestly unjust, inequitable and exorbitant for some of the reasons pleaded in support of the first cause of action. These reasons are directed to the rates for chartering *Awanuia*, plus the allegation relating to possible conversion of the fuel oil. Again, no distinction is made between the separate contractual situations of Seafuels and Z Energy in this claim.

[80] In the third alternative cause of action, Svitzer claims that the terms of the charterparty should be annulled or modified under art 7 of the Convention because the charterparty was entered into under the influence of danger, such that its terms are inequitable or that payment made under the contract was to an excessive degree too large for the services actually rendered. The allegation relating to possible conversion of the fuel oil is repeated. Svitzer seeks, among other things, modification of the terms of the charterparty to reflect a more reasonable rate of remuneration for the vessel. As with the second cause of action, the pleading is again sparse and essentially confined to the terms of the charterparty. Again, it does not distinguish the separate contractual situation of Z Energy.

The amended case against Z Energy

[81] As now pleaded, the case against Z Energy appears to be as follows:

[82] In relation to the fuel oil and other contaminants onboard *Rena*, it is pleaded that:

> Under the salvage agreement, the property to be salved included the fuel oil and other property on the vessel. The other property on the vessel to be salved included the various oils, lubes and other contaminants on the vessel which were the property of the *Rena's* owners.

[83] In relation to cls 3, 4 and 5 in box 20 of the charterparty, it is pleaded:

> The amounts referred to in sub-paragraphs (iii), (iv) and (v) above [clauses 3, 4 and 5 in box 20 of the charterparty] were inserted into the charterparty for the benefit of and at the insistence of Z Energy. Although under the terms of the proposed charterparty, the amounts referred to in sub-paragraphs (iii) and (iv) were to be paid by the plaintiff to the second defendant, the first

> and second defendants agreed that those amounts received by the second defendant from the plaintiff would be passed on to the first defendant.

[84] In relation to discussions between representatives of Svitzer and Z Energy, it is pleaded:

> On 13 October 2011, the first defendant through its solicitor informed the plaintiff that the charterparty would need to be signed before the *Awanuia* was re-deployed at the *Rena* on that day.
>
> Following that advice and other discussions on 12 October 2011, between representatives of the plaintiff and representatives of Z Energy, on 13 October the plaintiff signed the proposed charter agreement ("the charterparty") and delivered it to the first (sic) [second] defendant together with a letter of protest [copies to Z Energy] dated 13 October 2011 protesting the terms of the charterparty.
>
> ...
>
> Pursuant to the [charterparty] …., of the NZ$5,980,000 paid by the plaintiff to the second defendant the second defendant has paid an unknown sum of money to the first defendant representing the amounts paid by the plaintiff under the terms of the charterparty referred to in 12(ii) and 12(iv) above.

[85] As a particular of duress it is pleaded that:

> The first defendant communicated on 13 October through its solicitor, that there was only a limited window in which to attempt to pump oil on to the *Awanuia* (the proposed charter agreement contemplated a period of three days for presence of the *Awanuia* at the Port of Tauranga) and that the charterparty would need to be signed before the *Awanuia* was re-deployed at the *Rena* on that day.

[86] A prayer for relief against Z Energy in relation to all three causes of action is now included, in the following terms:

> (c) An order that all sums paid by the plaintiff to the second defendant pursuant to the charterparty and subsequently passed on by the second defendant to the first defendant be returned to the plaintiff by the first defendant less such sum as the Court finds is a reasonable sum for the first defendant allowing the *Awanuia* to go off hire for the period of its use by the plaintiff.

The amended case against Seafuels

[87] There are two new paragraphs in the amended statement of claim concerning Seafuels and an alleged threat by the master of *Awanuia* to withhold that vessel from providing assistance to *Rena* until he was instructed that the charterparty was in place. Specifically**:**

> On or about 9 October 2011, the master of the *Awanuia,* upon being requested by the salvage master Jan Polderman to assist by bringing the *Awanuia* alongside the *Rena* to enable removal of fuel oil and other contaminants, refused to do so until such time as a contract for hire was in place.
>
> …
>
> The Master of the *Awanuia* threatened to withhold the vessel from providing assistance until a contract for hire was in place.
>
> …

The issues in a nutshell

Z Energy

[88] It is indisputable that two distinct contractual arrangements were entered into for redeployment of *Awanuia* to assist with the *Rena* salvage operation: the first was the release agreement between Seafuels and Z Energy for *Awanuia* to come off-hire with Z Energy; the second was the charterparty between Svitzer and Seafuels for the hire of *Awanuia*.

[89] It is also indisputable that neither contractual arrangement was between Svitzer and Z Energy. To succeed in its claim therefore, Svitzer must establish that it can prove one of its pleaded causes of action against Z Energy as a non-party and thus obtain relief directly from Z Energy.

[90] Svitzer argues that if the charterparty is set aside or annulled and Z Energy had actual or constructive knowledge of the circumstances giving rise to its being set aside or annulled, Z will be obliged to return all sums paid by Svitzer to Seafuels pursuant to clauses 3, 4 and 5 in box 20 of the charterparty and subsequently passed on to Z by Seafuels. It says what the relevant circumstances were and whether Z had actual or constructive knowledge of them are issues of fact not capable of determination on a summary judgment application.

[91] Whilst acknowledging that Z was entitled to a reasonable sum for allowing *Awanuia* to go off-hire, Svitzer challenges the amount received by Z as reasonable. It says the global daily charter rate of $200,000 plus GST for *Awanuia* was exorbitant and Z has refused to disclose the rate it was paying to Seafuels for its

long-term charter. Svitzer contends that the rate was unlikely to have been more than $30,000 per day.

[92] Z Energy's response to the three causes of action is that there is no genuine cause of action against it. Z does not own *Awanuia* and is not a party to the charterparty. The matters put forward by Svitzer do not make it a necessary party to the proceeding. Its "presence before the court is not necessary to justly determine the issues arising"; it cannot "be bound by any judgment given" and no relief can be sought directly from it. The charterparty alone is the subject of this litigation; Seafuels' separate contractual arrangement with Z Energy under the release agreement is not. The negotiations over the cost to Svitzer of chartering *Awanuia* did not include Z Energy and were conducted directly between Svitzer and Seafuels. It was not until 12 October (at the earliest) that Z Energy was (inadvertently) told by Svitzer's legal counsel what the finally agreed terms between Svitzer and Seafuels for the charter of *Awanuia* were.

[93] Z Energy emphasises that, as it has not been paid any sums of money by Svitzer under the charterparty, it cannot "return" any such sums as Svitzer is seeking in the statement of claim. The submission by Z here made is that:

> There is no dispute that a part of the total sum payable by Svitzer to Seafuels is calculated by reference to the separate cost recovery amounts that Seafuels was obliged to pay to Z under the Release Agreement. But that is irrelevant for present purposes. Svitzer had agreed to and was obliged to pay Seafuels a total sum for the hire of *Awanuia* however that sum was made up. What Seafuels did with the money once it received it was ultimately its business, not Svitzer's. For example, if Seafuels had not paid a cent of the amounts that it was separately invoiced by Z (for its costs recovery), that could not somehow create a scenario whereby Z would then be involved in an action or have rights as against Svitzer. Rather, that could only lead to an analysis of (and, in the unlikely event that it was necessary, debate over) the separate contractual arrangements as between Seafuels and Z to which Svitzer was not a party.

[94] I note that part of Svitzer's claim pleads that "[p]ursuant to the [charterparty] … , of the NZ$5,980,000 paid by the plaintiff to the second defendant the second defendant has paid an unknown sum of money to the first defendant representing the amounts paid by the plaintiff under the terms of the charterparty…". However, that is not correct. There is evidence of the sum that has been paid by Seafuels to

Z Energy before the Court. Mr Mulvena, in his first affidavit sworn 27 March 2012, stated that while under the charterparty Seafuels has invoiced Svitzer a total of around $8,800,000.00 for the hire of *Awanuia*, under the terms of the separate release agreement with Z Energy, Z has invoiced Seafuels for a total of around $1,000,000.00, of which approximately $690,000.00 has been paid by Seafuels. He put these figures forward with the suggestion that even a cursory comparison of them is illustrative of the very different nature of the two contracts.

[95] Z Energy further submits that there is no realistic scenario whereby Svitzer can claim that it would have been reasonable to charter *Awanuia* for 6 weeks for any lesser sum than the $1,000,000.00 it has already invoiced to Seafuels under their separate release agreement. Z says it is logical to assume therefore that the sum of $6,000,000.00 Svitzer has already paid to Seafuels, before "turning off the tap", is fairly to be taken as Svitzer's assessment of the total amount it believes it should have paid for the hire of *Awanuia* - a sum well inclusive of the $1,000,000.00 invoiced by Z to Seafuels.

[96] In relation to the Associate Judge's finding that its rights to receive payment under the release agreement might be directly affected by the relief sought, Z Energy says there is no dispute as between it and Seafuels. They have a long-term contractual relationship and neither will be embarking on any counter-claim against the other.

[97] As to the oil ownership issue, Z Energy says that it simply provided a solution for the disposal of oil when Svitzer had no arrangement in place. It is not liable, as suggested, for conversion of the oil taken. In November 2011, the owners of *Rena* agreed to sell the oil to Z Energy for $230,000.00 and that arrangement superseded the relevant terms of the charterparty and thus the terms no longer exist. Furthermore, Svitzer was a party to that agreement. As such, it is fully aware of the situation.

Seafuels

[98] In relation to Seafuels, Svitzer says the matters in issue between it and Seafuels – including whether the charterparty was entered into under duress (first

cause of action); whether it is manifestly unjust, inequitable and exorbitant (second cause of action); and whether it was entered into under the influence of danger, such that its terms are inequitable or the payment made is excessive for the services rendered (third cause of action) – are all issues of fact which are not capable of being determined on a summary judgment application but are matters for trial.

[99] Seafuels' response to the three causes of action is that there was no duress and indeed none has been pleaded; that the Admiralty Court has never had jurisdiction to set aside an agreement between a salvor and a third party for the hire of a vessel and, if that is not correct, the jurisdiction has been lost since the Convention was incorporated into New Zealand law; and that the Convention does not apply to the charterparty. In respect of the latter, it is submitted that the point as to whether or not the Convention applies to third party hire agreements is a matter of law on which the Associate Judge ought to have made a decision on the authorities available, and the Associate Judge had erred in treating this question as a matter requiring factual inquiry.

The alleged threats

The first alleged threat

[100] To reiterate, this alleged threat concerns only Seafuels and not Z Energy and is pleaded as follows:

> On or about 9 October 2011, the master of the *Awanuia,* upon being requested by the salvage master Jan Polderman to assist by bringing the *Awanuia* alongside the *Rena* to enable removal of fuel oil and other contaminants, refused to do so until such time as a contract for hire was in place.
>
> Particular
>
> The Master of the *Awanuia* threatened to withhold the vessel from providing assistance until a contract for hire was in place.

[101] The evidence advanced by Svitzer in support of this first occasion on which the exertion of illegitimate pressure on Svitzer to accept an unconscionable contract is said to have manifested, comes from Mr Polderman. He says that when he saw

Awanuia come within sight of *Rena* at about 8.30 am (NZ) on 9 October 2011,[19] he requested the master, Captain Hunter,[20] to come close to *Rena* to familiarise himself with the situation and start practising the manoeuvres that would be necessary to transfer the oil. In his view, the conditions were ideal to practise positioning *Awanuia* and determine the effect of currents around the reef. He wanted to see if it was feasible to position *Awanuia'*s port bow close to the starboard stern section of *Rena*. He had recent dive surveys which established that the stern section was clear of the reef and *Awanuia* could have safely positioned herself without grounding. He said Captain Hunter's response to him was:

> ... that he had been instructed that he would not do so because he had been instructed that he was not allowed to start operations on RENA until the contract was signed.

[102] Mr Polderman says this was the "only reason [Captain Hunter] gave for not coming close" and he "responded in very strong language, rejecting the master's stance" but Captain Hunter "maintained his refusal". Mr Polderman says he then contacted Mr de Jong in the Netherlands and explained that the master of *Awanuia* had refused to approach *Rena* until the contract was signed.[21] He then:

> ... made further attempts to persuade the master to approach but he refused to do so. On each occasion he stated that his instructions were that without a signed contract AWANUIA would not be assisting.

[103] Captain Hunter's evidence is that his orders on arrival at daybreak were two-fold: "to stand off and wait until salvors were ready" (that is, until a job safety analysis and hazard plan[22] were in place for such a dangerous job) and "until the commercial details had been resolved". He said he did not refuse a request by Mr Polderman to bring *Awanuia* "alongside the *Rena* to enable removal of fuel oil and other contaminants" as is pleaded, when they spoke by radio early that morning. He agrees that Mr Polderman asked him to bring *Awanuia* alongside while they

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19 Mr Coleman's evidence is that that *Awanuia* appeared as a target on *Rena*'s radar at 0500 and he radioed Captain Hunter at about this time to discuss his estimated time of arrival. Captain Hunter's evidence is that he arrived onsite at 0630. Mr Coombridge's evidence is that *Awanuia* arrived at 0640.

20 Captain Hunter was the employee of Seafuels as the owner of *Awanuia* at the time, not of Z; Energy. He did not come under the instructions and direction of Svitzer pursuant to clause 7(a)(1) of the charterparty until its terms were accepted (in principle at least) at 4.03 pm that day.

21 Mr de Jong does not appear to have sworn an affidavit about this call from Mr Polderman.

22 This is referred to in various ways in the documents. For clarity I will use the description "job safety and hazard plan".

made plans for the transfer operation but says he declined this request for several reasons. These included the need to formulate and agree the safety plans which he said are routine and this was a particularly dangerous job involving an unstable shipwreck and a reef with seas constantly breaking over it. *Awanuia* is a vessel of relatively light construction and not equipped to fender effectively against the extreme pressures generated by vessels engaged alongside each other in a seaway.[23] He had extra crew on board for the job, all of whom had been given the option of not participating in the operation, because of the risk. There was also the fact that, although two of *Awanuia*'s tanks had been emptied to create sufficient capacity to allow *Rena*'s bunkers to be loaded, *Awanuia* was still carrying more fuel than was onboard *Rena*. This carried its own environmental risk. At the time Mr Polderman requested him to come alongside he had not seen "recent, detailed, independent, hydographic surveys of the Astrolabe Reef in the vicinity of *Rena,* and didn't know what underwater hazards to *Awanuia* might exist".

[104] Captain Hunter said the "commercial details" to which he referred were the job safety and hazard plans which were required to be resolved before the oil transfer could begin. Of these he said:

> My understanding was that these documents formed part of the commercial arrangements that had to be finalised. I certainly knew that the oil transfer operation could not go ahead until Seafuels' technical staff, Awanuia's insurers and Maritime New Zealand had approved the plans as being satisfactory.

[105] In terms of authorisation and instructions, Captain Hunter said:

> It is always very important for a master to know exactly who is, and who is not, authorised to give him instructions as to the employment of a vessel. At the time ... I had not been told by owners that I should be operating to charterer's instructions … as master my overriding responsibility is always to ensure the safety of the vessel … I considered it unsafe for *Awanuia* to come alongside *Rena,* and I would have refused Mr Polderman's request even if I had believed him to be authorised to make it.

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[23] The issue of the *Awanuia's* vulnerability is verified by Mr Mills, in his evidence. Mr Mills says this was a risky operation for *Awanuia*, as she was not designed for such work, and had never been engaged in it before. The fact the work was risky for *Awanuia* was demonstrated by the fact that, only a few hours after beginning work, she was damaged in a collision with *Rena* while working in heavy swell conditions.

[106] Captain Hunter's evidence about his operational decisions and the necessity to resolve the "commercial details" that he understood were required from him, is supported by Mr Coombridge and also by the documentary evidence.

[107] In his evidence, Mr Coombridge described the different roles undertaken by himself and Captain Hunter. Captain Hunter, as master of the ship and responsible for its safety and for that of the crew and the environment, had the final say in all operational matters. While *Awanuia* was on her way to the *Rena* grounding site, and after she arrived, numerous conversations took place between Seafuels' management and Captain Hunter, all of which were on operational matters. At no time were the commercial arrangements for the charter discussed with Captain Hunter, whether as to the details or as to the progress with negotiations. Nor did Mr Coombridge order Captain Hunter to refuse to take *Awanuia* alongside *Rena* because the charterparty terms had not been agreed.

[108] Mr Coombridge says he most certainly told Captain Hunter it would not be possible to connect *Awanuia* to *Rena* until such time as up to date hydrographic information had been received and the job safety and hazard plan had been prepared. The hydrographic survey was required because *Awanuia* was still carrying a significant quantity of fuel oil and eight crew and was venturing in close proximity to a reef, and it was essential to know how much water was going to be underneath her. This is consistent with the concern Mr Coombridge earlier expressed in his email of 7 October to Mr Terry (at [26] above), that a "recent full Hydro graphic survey has not been done. Before the Awanuia goes alongside this needs to be done". It is also consistent with and supported by the *Risk Assessment essential* clause (referred to in [14] above), which Z Energy had insisted be included in the release agreement as part of its agreement to release *Awanuia*; and also consistent with the mirror clause (additional cl 41) in the charterparty itself (see [40] above).

[109] The job safety and hazard plan was apparently also required by Seafuels' insurers before they would approve cover for *Awanuia* to undertake a completely different type of operation to that covered by the current insurance policy.

[110] The evidence establishes that, during the morning, personnel from Svitzer came on board *Awanuia* and worked with Captain Hunter to put together the required job safety and hazard plan. It can be inferred that the dive surveys Mr Polderman had in his possession formed part of this. In the event, the job safety and hazard plans were ready by about 11.30 am (NZ) in handwritten form and Captain Hunter said he emailed them to Seafuels.

[111] Mr Coombridge's email records show he received the job safety and hazard plan at 3.08 pm (NZ) that day. He then had it approved by Z Energy, in accordance with Z's requirements under the release agreement and authorised Captain Hunter to proceed with the work on *Rena* at 4.51 pm (NZ). He said this was some six hours ahead of Seafuels' insurers' approval of the charterparty and a day before the job safety and hazard plan was approved by the insurers, "so in allowing the fuel removal operation to begin without waiting for this [Seafuels] took a considerable risk".

[112] Captain Hunter said that at about 4.00 pm (NZ) he received the advice from Seafuels "that all necessary arrangements had been completed and that [he] was free to operate on charterer's instructions". He said although weather conditions were by then outside *Awanuia'*s normal operating parameters, in view of the urgency he brought the vessel closer to *Rena*, bow-on to *Rena'*s stern but not alongside. Lines between the two were connected. However, he said, as it turned out, Svitzer was still not ready to proceed with the transfer of oil because they had not received an oil transfer line. One was delivered by helicopter at 1810 and took about an hour to connect. They began pumping oil but the line proved inadequate.

[113] Captain Hunter said the job safety and hazard plan as finally agreed stipulated that *Awanuia* would operate at a distance of 50 metres from *Rena*, although in practice this was more like 30 metres. Even after the charterparty was in place, he never operated *Awanuia* alongside *Rena*, as that would have been too dangerous.

[114] There is some dispute over wind and sea conditions that first evening and the time at which Captain Hunter decided to return to port and his reasons for doing so.

In this respect the evidence of Mr Mills referred to in footnote 23 above may have direct relevance.

[115] As had been forecast, the weather deteriorated the next day (10 October 2011) and *Awanuia* remained in port. However, it seems that off-loading was resumed at some stage because, by 12 October 2011, around 10 tonnes is said to have been pumped across from *Rena* to *Awanuia*. The next alleged threat is very much concerned with the disposal of that oil once onboard *Awanuia*.

[116] Mr Coombridge says it was purely coincidental that the proposed charterparty terms were accepted at about the same time as the job safety and hazard plan was approved by Seafuels and Z Energy (and prior to their insurer signifying approval).

[117] The only other evidence relevant to this first alleged threat is from a Maritime New Zealand safety inspector, Mr Coleman, who was on board *Rena* that day and says Mr Polderman's communications with Captain Hunter over the physical engagement of their vessels early in the morning became very "heated". He recalls Mr Polderman using expletives and Captain Hunter saying "words to the effect that he was not going to come close because of contractual issues". Mr Coleman was concerned that this exchange was being conducted over VHF radio and thus it might become public knowledge that there was a dispute and that the oil would not be transferred off immediately. Mr Coleman said his concern about this arose from "much adverse and ill-informed publicity alleging that Maritime New Zealand was not doing anything to progress the oil transfer", which was "quite incorrect but was apparently a widely held view". Mr Coleman made an entry in his log recording "AWANUIA on scene. Drama re contract".

The second alleged threat

[118] The second occasion on which illegitimate pressure is said to have been exerted was during further discussions and negotiations that took place between Svitzer's representatives and Z Energy's representatives on 12 and 13 October. An implied threat allegedly made by Z Energy's solicitor, Mr Foley, in a phone call to Svitzer's solicitor, Mr Burton, on 13 October is said to have culminated in Svitzer

signing the charterparty under duress. The executed charterparty, together with a letter of protest, was then delivered to Seafuels (with copies of both documents to Z Energy).

[119] To reiterate, this second alleged threat involves only Z Energy and not Seafuels, and is pleaded as follows:

> On 13 October 2011, the first defendant through its solicitor informed the plaintiff that the charterparty would need to be signed before the *Awanuia* was re-deployed at the *Rena* on that day.
>
> Following that advice and other discussions on 12 October 2011, between representatives of the plaintiff and representatives of Z Energy, on 13 October the plaintiff signed the proposed charter agreement ("the charterparty") and delivered it to the first (sic) [second] defendant together with a letter of protest dated 13 October 2011 protesting the terms of the charterparty.
>
> Particular
>
> The first defendant communicated on 13 October through its solicitor, that there was only a limited window in which to attempt to pump oil on to the *Awanuia* (the proposed charter agreement contemplated a period of three days for presence of the *Awanuia* at the Port of Tauranga) and that the charterparty would need to be signed before the *Awanuia* was re-deployed at the *Rena* on that day.

[120] Given a pivotal part of these discussions and negotiations concerned the question of the disposal of the *Rena* fuel oil, it is appropriate to briefly revisit the background to that.

[121] The evidence of an issue over disposal of the fuel oil first appears in the flurry of emails between Mr de Jong and various addressees (owners and underwriters and also Maritime New Zealand), prompted by receipt of the final BIMCO Supplytime from Mr Coombridge at 1.59 pm (Netherlands time) on 8 October (see [37] and [38] above). It is clear from these emails that a major issue presented about ownership of the oil and Svitzer's ability to pass title to any off-loaded oil without the written approval of *Rena'*s owners and the owners of the oil. Neither Seafuels nor Z Energy were privy to these emails. In one of his emails, Mr de Jong explained to the recipients that Svitzer was "now establishing contact with the rightful owners of the RENA to brief them on the situation" and "in the meantime, we will continue negotiations with [Seafuels] as owners of the bunker

tanker, explaining to them once more that we cannot agree to the terms suggested without written approval from our principals." While Mr de Jong expressed reservations in the email about the "... tremendous rates and charter fees demanded to free the vessel from her current obligations ...", it seems clear the focus of these remarks and his overriding and immediate concern was the issue of the oil ownership.

[122] Following this and at the suggestion of Svitzer's legal advisors, a meeting was convened on 12 October with Mr Mulvena and Mr Foley to discuss Z's requirements for permitting *Awanuia* to come off-charter with it. As earlier recorded, by that date, *Awanuia* had taken onboard a small quantity (about 10 tonnes) of fuel oil from *Rena*. Mr Foley said Z was concerned that still more fuel oil would be loaded onto *Awanuia* without there being any plan in place for its disposal. The focus of the meeting on 12 October from Z Energy's point of view, was to discuss a sensible way forward in dealing with this problem, as Svitzer had been unable to come up with any sensible plan for disposing of the oil and:

> this was frustrating especially because, at the same time, Svitzer was objecting to the workable solution that Z was proposing (which was that Z would take ownership of the *Rena* fuel oil and re-process same via the Marsden Point Refinery).

[123] The workable solution Z was proposing was based on the assumption that, as the entity responsible for off-loading the oil from *Rena* onto *Awanuia*, Svitzer was also capable of directing its disposal, "as in a normal salvage situation". Mr Mulvena said Z simply wanted a sensible solution that would provide for the fuel oil to be quickly unloaded, so that *Awanuia* could return to her normal service in Auckland Harbour as soon as possible. The solution Z had proposed, whereby it took ownership of the oil, was workable because:

> As a user of the Marsden Point Refinery, Z had the ability to re-process the heavy fuel oil from *Rena* for other uses. Alternatively, as a worst case scenario (for example if the oil was contaminated), it could be used as base fuel to power the refinery. This access to the Marsden Point Refinery is limited to only BP, Caltex, Mobil and Z. The salvors, Svitzer, could not do so. These were the reasons why there was initially a consensus to the solution whereby Z would dispose of the *Rena* oil once it was onboard *Awanuia*. It was really the only option open (beyond Svitzer's later unpalatable option of simply dumping it).

[124] Mr Mulvena's reference in the above quote, to an initial consensus, is obviously a reference to the early discussion he had with Mr Terry (at [17]) about disposal of the fuel oil. He said he did not become aware until 8 October that Svitzer now considered it could not make any decision about change of ownership of the oil without the written consent of the owners or remuneration for the same.

[125] Mr Foley's evidence is that during the meeting he left the room with Z's representatives to discuss the position and to draft a hand-written note of a revised proposal for dealing with the oil. This revised proposal was then put to Svitzer's representatives. It included an option for Svitzer to take sole rights to the fuel oil for itself, provided that:

> (a) Svitzer provided a plan for off-loading the fuel oil before *Awanuia* came off-hire with it;
>
> (b) the plan was actually practically workable; and
>
> (c) *Awanuia* was cleaned before it came off-hire with it (and thus back on-hire with Z).

[126] Mr Foley says the meeting concluded on the basis that Mr Burton would obtain instructions on Z's revised proposal for solving the oil problem and Mr Foley would formalise his handwritten note into a written proposal.

[127] Of events the next day, 13 October, Mr Foley said:

> The morning after our meeting, I … telephoned Mr Burton to see if he had received instructions from Svitzer on Z's revised proposal for solving the oil problem … . I do not recall the exact detail of the telephone conversation, but I remember the substance of what we discussed. The weather in the Bay of Plenty looked to be improving, and Z had been told that there was one more window of time to pump fuel oil off *Rena* and on to *Awanuia*. Z was therefore keen to hear Svitzer's views on the revised fuel oil proposal with some haste because, from Z's perspective, the problem that already existed (with a smaller amount of oil having already been pumped on-board *Awanuia*) was about to be exacerbated by still more oil being added. Mr Burton said he did not yet have instructions from Svitzer, and also said that he understood we would be sending our revised proposal re the fuel oil in writing. … Given timing considerations, Mr Burton said that he would get back to me as soon as possible.
>
> During the course of the morning, … Z reported to me that its contacts at Svitzer had advised them that Svitzer now intended to sign the Charterparty Agreement with Seafuels. From this, it seemed to us that Svitzer must have decided to revert to Z's original proposal for disposal of the fuel oil (i.e. that

> it take ownership of same) – because this was the proposal referred to in the then draft of the Charterparty Agreement.
>
> Shortly after that, I received a telephone call back from Mr Burton. He confirmed to me … that Svitzer did now intend to sign the Charterparty agreement with Seafuels, but would at the same time be delivering a letter of protest to its terms. He explained to me that Svitzer wanted something signed, and only had time to accept the earlier version of the Charterparty Agreement. I was surprised that Svitzer now intended to sign the contract under protest, and I said to Mr Burton that this was not what had been reported to Z by Svitzer's people on the ground. … Mr Burton said to me that signing the Charterparty Agreement did not preclude further negotiations regarding the fuel oil. I agreed with that.

[128] Following the telephone call back from Mr Burton, Mr Foley said he reported by email to Z as follows:

> John Burton's advice was that Svitzer wanted something signed and only had time to accept the 7 October version. He said he thinks they might be amenable to further discussions. If the vessel is deployed past the first 7 days, we should raise what we have produced.

[129] In his evidence Mr Burton has disagreed that the purpose of the 12 October meeting was to simply discuss Z's requirements for permitting *Awanuia* to come off-charter with it, primarily with regard to disposal of the fuel oil once off-loaded. He says the purpose of the meeting was:

> … to discuss objectionable terms proposed by Seafuels and Z Energy in the proposed charterparty. These related both to ownership of the oil and the rates of hire payable under the charter which were regarded by Svitzer as grossly excessive.

[130] Mr Burton's file note of Mr Foley's telephone call to him the next morning records:

> He [ie Mr Foley] wanted to know what was the position in relation to the proposals discussed at our meeting yesterday.
>
> He said they wished to redeploy the vessel back on *Rena* this morning. He said there is only one last limited window in which to attempt to pump oil onto the *Awanuia*.

[131] Mr Burton says he took from Mr Foley's statement that:

> … unless terms were agreed and the charterparty was signed, then the AWANUIA would not be redeployed. There was no other reason for Mr Foley to raise this issue other than as an implied threat that, unless terms

> were agreed, the AWANUIA could not be redeployed. That is certainly what I took from the conversation.

[132] Mr Foley accepts the general content of this file note as "consistent with [his] own recollection" but says the note does not necessarily record the exact words he used. Of the critical allegation that he informed Svitzer the charterparty would need to be signed before *Awanuia* was re-deployed at *Rena* on that day, Mr Foley says:

> That is simply not correct. Not only do I not recall saying anything to that effect, there is nothing in my notes, emails or file to suggest that I did. There is also nothing in Mr Burton's file notes to suggest that I did either. Further, because Awanuia was by now off-hire with Z, it had no such control and no such ability to dictate whether or when the vessel would be deployed – that direction rested solely with Seafuels. Finally, this new allegation is completely undermined by Mr Burton's own advice (recorded in his file note and my reporting email as above) that it was Svitzer's decision to sign the Charterparty Agreement.

[133] Mr Burton's file note of his telephone call back to Mr Foley to advise him the charterparty would be now signed under protest, records:

> Telephoning Paul Foley, Minter Ellison, 13 October at 11.30am. Call duration 2 minutes 54.
>
> I explained that it had been decided by Svitzer to sign the charterparty and lodge a letter of protest. There simply wasn't time to continue the negotiations.
>
> He said that wasn't what was reported to him via Svitzer people on the ground. I asked how long ago he had been told that – he said about half an hour ago.
>
> He sounded pretty surprised.
>
> I said it didn't necessarily preclude further negotiation. He said yes that was right and it was best that there be some form of contract in place anyway.
>
> I said I would send a copy of the letter of protest as soon as that was available.

[134] When the pleading is analysed in light of the above evidence, there is nothing to support the allegation that:

> ... the first defendant through its solicitor informed the plaintiff that the charterparty would need to be signed before the *Awanuia* was re-deployed at the *Rena* on that day.

[135] Neither Mr Burton's evidence or his file note record Mr Foley as saying the charterparty would need to be signed before *Awanuia* was redeployed on *Rena* that day. Mr Foley's evidence is that "Z had been told" there was one more window of time to pump fuel off *Rena* and on to *Awanuia*, which Mr Burton has recorded as Mr Foley " ... said they wished to deploy the vessel back on *Rena* this morning".

[136] In relation to the critical issue of causation, the pleading does not allege that it was as a result of Mr Foley's telephone call on the morning of 13 October that Svitzer felt compelled to sign the charterparty in its current terms. Nor, as earlier adverted to, does it assert a conspiracy between Seafuels and Z Energy that links the two separately pleaded threats of 9 and 13 October together. The pleading simply claims:

> Following that advice and other discussions on 12 October 2011, ... on 13 October the plaintiff signed the proposed charter agreement ...

Conversion of the oil?

[137] For the sake of completeness I will briefly traverse the outcome of the oil ownership issue.

[138] At paragraph 14(iv) of the Statement of Claim, Svitzer alleges a possible conversion of the oil by Z Energy, as follows:

> 14. The rates and terms proposed for charter of the *Awanuia* were excessive and unreasonable. In particular:
>
> …
>
> (iv) the requirement that the fuel oil, which was owned by the charterers of the *Rena*, be transferred to Z Energy was unlawful and would, if implemented, have resulted in conversion of the fuel oil and a further benefit to the first defendant from processing and subsequent sale of the fuel oil (at the time estimated to be NZ$1 million).

[139] Mr Mulvena's evidence is that even beyond the period of negotiations on 12 and 13 October, Svitzer continued to create "a void in dealing with the oil that was being pumped off the Rena and onto the Awanuia". He described the whole process as "frustrating" and said in the end it took until early November 2011 to get

what he described as "a coherent position on what was ultimately to occur" with the off-loaded fuel oil. A number of meetings and discussions took place, during which he said "we at Z repeatedly asked Svitzer's representatives for their proposed solution for dealing with the off-loaded oil. Simply put, they had none".

[140] In the event, a solution was reached on the matter with the owners of *Rena* on 17 November. This was described by Mr Mulvena as follows:

> In any event (and after many fruitless meetings and teleconference discussions with Svitzer and its New Zealand lawyers), by November 2011, Z had been approached by and reasonably quickly reached agreement with the owners of Rena for the sale of the fuel oil that had been pumped on to *Awanuia*. That agreement is recorded in a letter contract prepared by the *Rena* owners' solicitors dated 17 November 2011, and which agreement was executed by all of Z, Seafuels and Svitzer. In short, Z agreed to pay the Rena owner a lump sum of $235,000 (plus GST) for the salvaged oil (with some potential adjustment for the unforeseen circumstance that the oil was contaminated and thus largely unusable).

[141] The letter contract prepared by the *Rena* owners' solicitors and sent to Mr Foley provided in its essential terms, as below:

> **RENA – SALE OF HEAVY FUEL OIL TO Z ENERGY LIMITED (*Z ENERGY*)**
>
> 1. We write to your firm as the lawyers representing Z Energy in this matter.
>
> 2. We act for Daina Shipping Co of Liberia *(Daina)*. Daina is the owner of *Rena*. Daina is also the owner of the heavy fuel oil previously on *Rena* and now on *Awanuia (Bunkers)*. ...
>
> 3. Daina has agreed to sell the Bunkers and Z Energy has agreed to purchase the Bunkers.
>
> **Terms of sale of Bunkers from Daina to Z Energy**
>
> 4. Daina agrees to sell the Bunkers and Z Energy agrees to purchase the Bunkers on the terms set out in this letter.
>
> 5. Z Energy will purchase the Bunkers at a fixed price of NZ$230,000.00 plus GST; subject to any adjustment in accordance with paragraphs 10 and 11 *(Purchase Price*). ...
>
> 6. The Purchase Price will be paid by Z Energy to SeaFuels Limited in full without discount within 30 days after the date of commencement of the discharge of the Bunkers from *Awanuia* at the Marsden Point Oil Refinery.

...

15. Each of the parties agrees that on signing this letter:

    (a) Z Energy will pay the Purchase Price to SeaFuels in accordance with paragraph 6 of this letter;

    (b) The amount due (if any) from Svitzer Salvage B.V. *(Svitzer)* to SeaFuels under the charterparty dated 7 October 2011 and signed 13 October 2011 *(Charterparty)* is reduced by the amount of the Purchase Price;

    (c) Daina's obligation to pay Svitzer under the Lloyds Open Form is reduced by the amount of the Purchase; and

    (d) SeaFuels acknowledges and confirms that its only remedy for non-payment of the Purchase Price is to seek recourse against Z Energy.

Charterparty

16. SeaFuels and Svitzer agrees as follows:

    (a) Box 20, item 5, and additional clause 40 of the Charterparty are deleted to reflect the terms of the sale of the Bunkers from Daina to Z Energy set out in this letter;

    (b) The *Awanuia* will be redelivered from Svitzer to SeaFuels under the Charterparty at Marsden Point after the Bunkers have been discharged from *Awanuia* at Marsden Point and tank cleaning has finished (at the cost of Z Energy) and the Charterparty will terminate at that time. *Awanuia* will remain on hire during this period save as it may be off hire pursuant to the terms of the Charterparty; and

    (c) Except as expressly agreed in this letter, nothing contained in this letter affects the rights of SeaFuels and Svitzer under the Charterparty and any claim by Svitzer that the Charterparty (or any of its terms) was illegal or is otherwise unenforceable and can be modified or annulled.

General

17. The terms set out in this letter are final and binding on all parties on the signing of this letter by all parties.

[142] Thus, from 17 November 2011, box 20, item 5, and additional cl 40, providing for title to the oil to pass to Z Energy, were deleted and the new terms were substituted.

[143] Two brief observations arise. The first concerns the question of colour of right. There was no privity of contract between Z Energy and Svitzer under the

charterparty. Title to the oil was to pass from Svitzer to Seafuels pursuant to cl 40 of the charterparty and then from Seafuels to Z Energy under their separate contractual arrangement. It is Svitzer that would have been in jeopardy of converting the oil, as it realised, because it did not have good title to pass and thus was clearly at risk in signing the charterparty containing box 20, item 5, and additional cl 40. Z was not in that position and could prima facie have concluded that if Svitzer signed the charterparty with those terms in it, then Svitzer had good title to pass.

[144] The second observation is that given Svitzer was a party to the letter contract by which the oil was sold to Z Energy on 17 November and thus is fully cognisant of the legal situation, its pleading in relation to the potential illegality of those terms is redundant.

[145] The only matter of consequence arising from this aspect of the oil disposition issue and its eventual outcome, is that it demonstrates negotiations and discussions about the charterparty remained ongoing after the charterparty was signed.

Structure of discussion

[146] Having traversed the facts in detail, based on the evidence before the Court, I now turn to outline the principles applicable to summary judgment and the law of duress before dealing with the claim as against Seafuels. I will then deal with the claim against Z Energy separately.

Summary judgment

[147] The principles applicable to summary judgment are well settled.

[148] Under r 12.2: a defendant must satisfy the Court that none of the causes of action in the plaintiff's statement of claim can succeed.[24] In line with the following principles, endorsed by the Court of Appeal in *IAG New Zealand Ltd v Jackson*, summary judgment for a defendant will be appropriate only:[25]

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[24] High Court Rules, r 12.2.

[25] *IAG New Zealand Ltd v Jackson* [2013] NZCA 302 at [15].

- where the defendant has a clear answer to the plaintiff which cannot be contradicted: in other words, where the defendant's evidence is a complete defence to the plaintiff's claim;

- where the defendant's evidence is such as to show that the claim cannot succeed;

- where the substantive merits are clear and capable of summary disposal;

- and where abbreviated procedure and affidavit evidence is sufficient to expose the facts and legal issues.

[149] Summary judgment will not be appropriate where there are disputed issues of material facts or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits.

[150] Other principles relevant to situations of disputed fact in the summary judgment context require the Court to take care if the main facts are in the possession of one party, that an injustice is not caused by failing to allow a full examination through full interlocutory investigation and a trial with cross-examination.[26] Likewise, the Court must be careful not to form a preliminary view of the evidence. The fact that the plaintiff's case may show some weakness is not sufficient and jurisdiction is reserved for clear cases: it is not appropriate for cases which must be determined or decisions arrived at on any fine balancing of the available evidence.[27]

[151] The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. However, it is not required to accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable. The Court's assessment of the evidence will be a matter of judgment and the Court may take a robust and realistic approach

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[26] *Watercare Services Ltd v AFFCO New Zealand Ltd* HC Auckland CIV-2003-404-4207, 8 April 2004 at [13].

[27] At [13].

where the facts warrant it.[28] The principle that spurious defences or plainly contrived factual conflicts should not be permitted to prevent judgment being obtained must equally apply to a defendant's application for summary judgment.[29]

[152] If questions of law arise, the Court may decide these where appropriate, with the caveat that the summary judgment procedure should not be allowed to stultify the proper development of the law. Therefore, promoting development can be a valid reason for sending a claim in a developing area of law to trial.[30]

Duress

[153] The relevant legal principles relating to Svitzer's primary duress allegation are not in issue. It is accepted that a contract that has been obtained by improper pressure is voidable at common law on the ground of duress. That ground will be made out if two elements are established: first, the exertion of illegitimate pressure on a victim; second, if the imposition of that pressure compelled the victim to enter the contract. The parties are agreed that the decision of the Court of Appeal in *McIntyre v Nemesis DBK Ltd*, which recently confirmed that test, is the relevant authority.[31]

[154] In relation to the first limb of the test, the question is whether there has been a threat of illegal action: or whether the context in which the alleged pressure was exerted offends public policy. This proceeding is concerned with the latter category. In relation to the second limb of the test, the question is whether Svitzer intentionally submitted to the alleged pressure upon realising that was the only practical choice open to it. Whether there is a practical choice will depend on all of the relevant circumstances, including the characteristics of the victim, the relationship of the parties and the availability of professional advice to the victim.[32]

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28 *Krukzeiner v Hanover Finance Ltd* [2008] NZCA 187 at [26].

29 *McGechan on Procedure* (looseleaf ed, Brookers) at [HR12.2.08].

30 *BNZ v Maas-Geesteranus* (1991) 4 PRNZ 689, 3 NZBLC 102,180 (CA). Similar reasoning was adopted in *Westpac Banking Corp v M M Kembla NZ Ltd* [2001] 2 NZLR 298, (2000) 14 PRNZ 631 (CA).

31 *McIntyre v Nemesis DBK Ltd* [2010] 1 NZLR 463 (CA).

32 *Pharmacy Care Systems Ltd v Attorney-General* 2 NZCCLR 187 (CA) at [96]. This test was adopted by the Court of Appeal in *McIntyre v Nemesis DBK Ltd* at [67].

[155] In the summary judgment context, the starting point is clearly the evidence that has been put forward and whether that sufficiently exposes the facts and legal issues relevant to duress, so as to enable the Court to confidently conclude that summary judgment should be entered; or whether there are disputed issues of material fact, or material facts that need to be ascertained and which cannot be safely concluded from the affidavits and the available documentary evidence, so as to preclude summary judgment.

[156] Discovery in this proceeding has clearly been limited to date. Most of the evidence before the Court has been adduced by the defendants. If, on the basis of the available evidence, the defendants can clearly demonstrate that neither of the threats alleged by the plaintiff are capable of substantiation on either limb of the test, and that no fuller investigation or examination of witnesses could alter that situation, their applications will succeed in relation to the first cause of action.

[157] A further question arises as to whether Svitzer subsequently affirmed the duress, if indeed there were duress, either by signing the charterparty on 13 October rather than continuing to negotiate; or by extending the term of the charterparty by renewing the agreement a total of 12 times. On this issue, the Court must be able to conclude that Svitzer cannot establish that it is at least arguable those actions did not affirm the duress**.**

Seafuels' situation

[158] I now deal with each separate cause of action as it concerns Seafuels.

First cause of action as against Seafuels: duress

[159] Mr Carruthers' opening submission was that no threats by Seafuels have been pleaded and no evidence of the making of threats by Seafuels has been given. The illegitimate pressure alleged is based on an implied threat not to charter *Awanuia* to Svitzer unless Svitzer agreed to the remuneration demanded, and this was also the basis on which Svitzer's case was argued before the Associate Judge.

[160] Mr Carruthers said the relevant paragraph now inserted in the amended statement of claim contains no more than a simple assertion that the master of *Awanuia* refused to bring her alongside *Rena* until a contract for hire was in place. He said, even if that allegation were accepted as being capable of proof, it does not satisfy the legal tests for establishing illegitimate pressure. A requirement that contract terms be agreed prior to performance is nothing more than commercial common sense, and the pleading does not assert an insistence by Seafuels on the acceptance of any particular contractual terms as a condition of *Awanuia* starting work. Neither of these factors could constitute a threat of illegal action: nor are they in the nature of pressure that offends public policy.

[161] On the issue of causation, Mr Carruthers emphasised that where both parties to a contract are substantial, experienced businesses with equality of bargaining power and access to proper legal and managerial advice and expertise, the courts are less likely to find the existence of duress (as opposed to the legitimate operation of market forces).[33] Duress, he said, is solely concerned with the process by which a contract came into existence, not with the terms of the contract. Arguably, therefore, the existence of unfavourable terms does not of itself support an allegation of duress.

[162] On the issue of coercion, Mr Carruthers pointed out that it was the plaintiff who requested *Awanuia* be made available and pursued the matter by approaching the first defendant "apparently wishing to secure Awanuia's services on any basis".

[163] On the question of affirmation, Mr Carruthers said Svitzer's conduct in signing the charterparty at a time when Seafuels was still negotiating and willing to continue to negotiate, and then insisting on twelve renewals of the charterparty on the same terms, amounts to affirmation and the repeated issue of protest notices is disingenuous.

[164] Mr Taylor in response drew on an observation of the Court of Appeal in *Magsons Hardware*, that it has not been recognised as an absolute rule that a threat not to contract can never amount to duress.[34] He referred also to certain salvage

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33 *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 (CA).
34 *Magsons Hardware Ltd v Concepts 124 Ltd* [2011] NZCA 559 at [29].

cases as providing examples of situations in which the courts have regarded threats not to contract, except on exorbitant terms, as illegitimate.[35]

[165] Applying this observation and these examples to a hire contract in the context of the subject salvage operation, with the focus of an imminent environmental disaster, Mr Taylor said the relevant circumstances on 9 October were, that:

> (a) A maritime disaster would likely have occurred if the services of the Awanuia were not secured with 1,700 tonnes of heavy fuel oil and 200 tonnes of marine diesel oil being discharged into the ocean.
>
> (b) Svitzer, Seafuels, and Z Energy agreed in principle that the *Awanuia* would be used to discharge oil from the Rena and dispatched it to Tauranga for use by Svitzer on this basis. ... the amount of remuneration was only disclosed after the *Awanuia* was already en route. By this time, Svitzer had already made preparations for the use of the *Awanuia*.
>
> (c) There were no other reasonable or practicable options to remove the oil from the *Rena*.
>
> (d) The remuneration demanded by Seafuels (for itself and Z Energy) was excessive. ...

[166] Mr Taylor submitted that the manifestly excessive charter rate has direct relevance to the assessment of duress, because "even a threat to commit what would otherwise be a perfectly lawful act may be improper if the threat is coupled with a demand which goes substantially beyond what is normal or legitimate in commercial arrangements".[36]

[167] As to affirmation of the duress by Svitzer in signing the charterparty and renewing it on twelve occasions, Mr Taylor submitted this is an intensely factual issue only capable of proper resolution at trial. Because of the weather conditions and operational problems, the services of *Awanuia* were required for more time than initially expected and it therefore became necessary to extend the term of the charter. Svitzer's doing so did not amount to an affirmation of the terms and conditions of the

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[35] *The Rialto* [1891] P 175 (where one ship refused to tow another in distress in the Atlantic Ocean unless paid £6,000); *Post v Jones* 60 US 150 (1856) (where salvors would only agree to rescue stranded whalers if the whalers agreed to sell their cargo for a nominal amount); and *The Port Caledonia and the Anna* [1903] P 184 (where the salvor's terms were "£1,000 or no rope").

[36] See HG Beale (ed) *Chitty on Contracts* (31st ed, Sweet and Maxwell, London, 2012) vol 1 at [7-045].

charter, nor an acceptance of the rate, as evidenced by the fact that all extensions were agreed subject to Svitzer's original protest. Whether any of this amounts to affirmation requires a careful evaluation of all relevant circumstances at a trial of the issues.

Discussion

[168] Dealing with the pleadings first, there is substance in Mr Carruthers' submission that the pleading of the first cause of action is deficient. For instance, there is no express pleading of a causal nexus between the alleged threat by Seafuels on 9 October and Svitzer's acceptance of the terms of the charterparty under protest later that same day.

[169] Dealing with the evidence next, the threat by Seafuels, as alleged, is centred on the actions and statements of Captain Hunter. Implicitly the allegation must also involve Mr Coombridge, as he was the person responsible for the commercial negotiations, and until Captain Hunter received authorisation to operate on charterer's instructions, he was under Seafuels' direction.

[170] Captain Hunter's reasons for refusing to bring *Awanuia* close to *Rena* to practice manoeuvres for the oil transfer, until he had a job safety and hazard plan in place and approved, do not disclose any illegitimate conduct or pressure by him on Seafuels' behalf. The uncontested evidence, including the contemporary documentary evidence, is that a job safety and hazard plan had to be in place and approved before the transfer of fuel onto *Awanuia* could begin. Therefore, Captain Hunter's refusal to come alongside when first requested to do so, was legitimate.

[171] Captain Hunter's further explanation, that he understood these safety documents to be part of the "commercial details" that had to be resolved before the oil transfer operation could go ahead, has not been contradicted.

[172] Mr Coombridge's evidence that the timing of Svitzer's email advice at 4.03 pm, that it was accepting the charterparty terms under protest, and his subsequent authorisation of Captain Hunter to proceed with the work on *Rena* at 4.51 pm, was purely coincidental is not contradicted either. He said:

> It is correct that the acceptance of the proposed charterparty arrived at about the same time as the Job Safety Analysis/Safety Plan was able to be accepted by the defendants. That was purely coincidental, but the timing worked out well because Svitzer's chartering agent, Monjasa, had for the previous two days been pushing for the charterparty to be finalised and insisting that it needed to be in place before work could commence.

[173] The pressure from Monjasa Mr Coombridge refers to, is corroborated in the series of emails from Mr Jorgensen (at [24] and following).

[174] Mr Coombridge also pointed out that when he gave Captain Hunter authority to operate on charterer's instructions at 4.51 pm, this was in fact some six hours ahead of insurers' approval of the charterparty and a day before the job safety and hazard plan was approved by the insurers. Thus there is no basis on which to conclude that Seafuels was deliberately withholding *Awanuia*'s services in order to pressure Svitzer into accepting unconscionable charter terms. On the contrary, the relentless efforts and the speed with which everyone concerned was acting in order to make the urgent charter of *Awanuia* possible, indicates the opposite was so. The evidence is that *Awanuia* had been mobilised at the earliest possible time and had steamed with all due haste to the *Rena* grounding site. She had been on-hire to Svitzer since 6.30 am on 8 October, although not operationally under Svitzer's instructions until the safety clearances were in place.

[175] What is abundantly clear is that there were a great many competing pressures on Svitzer during the critical time period between its appointment as salvor on 5 October, and 4.03 pm on 9 October, when it accepted the terms of the charterparty under protest. Those pressures are evident in a number of respects and it emanated from a variety of sources.

[176] The time factor was critical and the weather was a major, pressing and uncontrollable factor. There was the pending risk of a major environmental disaster. The removal of heavy fuel oil and marine diesel oil from *Rena* was a critical preliminary step of the salvage operation. It is beyond doubt that *Awanuia* was the only vessel fit for that purpose and thus Svitzer had no choice over its retention. There was the close monitoring of the situation by Maritime New Zealand and the possibility of requisition under the Maritime Transport Act 1994. The direction of

the Director of Maritime New Zealand, two days later, on 11 October 2011, that the SCOPIC clause of the salvage agreement with the owner of *Rena* was not to be terminated without his prior written consent must have been a material likelihood. Another competing pressure was the advice of the Senior Claims Manager of *Rena's* owners' liability insurers (in his email of 9 October: see [44] above), that their Special Casualty Representative would be monitoring and challenging the reasonableness of costs incurred in the salvage according to the SCOPIC protocols, and warning Svitzer that:

> As the ultimate payee for the costs and consequences arising from this incident, The Swedish Club reserves any and all rights to refer such conduct of the parties to the Salvage Arbitration Committee at Lloyds.

[177] The overwhelming nature of all of these pressures provides a clear answer as to why Svitzer was compelled to accept the terms of the charterparty under protest on 9 October and then to execute the agreement on the same basis on 13 October. The hire rate proposed by Seafuels was open to negotiation, as Mr Coombridge's emails to Mr Shannon make clear (at [52]), but the pressure to have a contract in place before the salvage operation using *Awanuia* commenced and the concerns about the effect of the SCOPIC clause[37] and Svitzer's Salvage Convention obligations[38] obviously precluded any negotiations being concluded.

[178] In conclusion therefore, I accept Mr Carruthers' submission that Svitzer was motivated in signing the charterparty by factors unrelated to the second defendant.

Conclusion

[179] As will become clear from my conclusions in relation to the second and third causes of action, the first cause of action will be dealt with by way of strike-out, rather than summary judgment.

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[37] As the SCOPIC clause was invoked, Svitzer was only entitled to remuneration for all monies "reasonably paid to any third party".

[38] In addition, as salvor, Svitzer had an obligation under art 8(1)(b) of the Convention to prevent or minimise damage to the environment.

[180] In conclusion, for the above reasons, Seafuels' application for strike-out in relation to the first cause of action is granted and the cause of action is struck out accordingly.

The second cause of action as against Seafuels: admiralty jurisdiction

[181] The second cause of action seeks to have the charterparty set aside by the Court in its admiralty jurisdiction. This is a newly pleaded cause of action, although the principles underpinning it were canvassed to some extent before the Associate Judge, having been raised by Seafuels.

[182] 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 and exorbitant.[39]

[183] Svitzer's submission is that in exercise of its admiralty jurisdiction the Court has power to open up the charterparty between it and Seafuels if its terms are manifestly unjust and unfair. This is for two reasons. First, the Court's jurisdiction in admiralty to open up contracts is not limited to salvage agreements but extends to agreements entered into at a time of maritime casualty or where salvage services may be necessary. Second, even if the jurisdiction is so confined, off-loading oil from a stricken ship in order to prevent a major environmental disaster can be regarded as a service of salvage. As a makeweight, Svitzer points also to the fact that, in addition to averting that environmental disaster, the services of *Awanuia* also resulted in property belonging to the owners of *Rena* being salved (other oils, lubes and contaminants).

[184] To obtain summary judgment in this cause of action, Seafuels must establish two matters if it is to satisfy the Court that Svitzer cannot succeed: first, that the Court's power to reopen maritime contracts is limited to salvage agreements and cannot be extended to the charterparty; second, that the charterparty itself is not in the nature of a salvage agreement.

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[39] *The Emulous* (1832) 1 Summ 207 at 210–211 as cited in Francis D Rose *Kennedy and Rose Law of Salvage* (7th ed, Thomson Reuters, London, 2010) at [10.153].

Is the Court's power to reopen maritime contracts limited to salvage contracts?

[185] Seafuels argues that the Court's jurisdiction in admiralty to set aside agreements is limited to salvage agreements entered into between salvors and ship owners and does not extend to a hire agreement between a salvor and a third party service provider. Passages cited by Svitzer, as appearing to support a contrary contention, are from cases involving agreements between salvors and ship owners and thus, Seafuels says, do not apply. To the extent they can be read as referring to other than salvage agreements, they are obiter.

[186] In the first place, Seafuels says, Svitzer is not a desperate ship owner and it is illogical to extend the Court's admiralty jurisdiction to apply to their contractual relationship. Svitzer's SCOPIC rights mean it will never suffer a loss and the higher the charter rate, the greater the financial return to the salvor. In such circumstances, the contract cannot meet the threshold of being manifestly unfair or unjust.[40]

[187] In response, Svitzer points to this case as illustrating one of the "endless varieties of circumstances" involving a maritime casualty in which the extreme nature of pressure resulting from the casualty (here a potential environmental disaster) has resulted in a contract that is unjust and exorbitant. It argues that the policy of the law is not changed because the contract is between a salvor and a third party, as opposed to between a salvor and a salvee. In support, Mr Taylor drew upon passages from the leading case relating to the jurisdiction in admiralty to set aside agreements, *Akerblom v Price*, arguing that while *Akerblom* is a salvage case, the Court in that decision did not limit the Court's power to salvage situations.[41] He referred also to *Kennedy and Rose Law of Salvage*, in which the view is advanced that this principle applies "even if the agreement was not to salve but to provide a specified service in circumstances where salvage services were necessary".[42]

[188] In response to Seafuels' submission that it would be illogical for the Court's admiralty jurisdiction to apply in the present case, Svitzer pointed out that it is only entitled to compensation for expenses reasonably incurred and at a fair rate. It will

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40 In fact, the SCOPIC clause only entitles Svitzer to remuneration for all monies "reasonably paid" to any third party.

41 *Akerblom v Price* (1881) 7 QBD 129 (CA).

42 Rose, above n 39, at [10.159].

not be able to pass exorbitant fees on to the owners of the *Rena*, so it can suffer loss. Further, as salvor of the *Rena*, Svitzer had an obligation under art 8(1)(b) of the Convention to "prevent or minimize damage to the environment". In the context of the risk of environmental disaster, Svitzer was under just as much pressure as a desperate ship owner.

Discussion: is the Court's power to reopen maritime contracts limited to salvage contracts?

[189] The history of the admiralty jurisdiction suggests that salvage contracts are merely a good example of the type of circumstance that will invoke the Court's equitable intervention.

[190] In this regard, Justice Cooper of the Australian Federal Court, in his address to the Maritime Law Association of Australia and New Zealand Conference in 1996, described admiralty decisions as "reflecting the ... approach of the Court to commercial agreements made under the pressure of necessitative circumstances".[43]

[191] Referring to two of the categories of cases that traditionally attracted the attention of the Admiralty Court, Justice Cooper identified the first as involving circumstances where the benefit obtained for the services rendered was so extortionate that it was inconsistent with any just or fair dealing. In such a case, he said, the Court will focus on the demand made for the service in light of the circumstances at hand. That approach reflects the underlying principles that the Court will not enforce or allow unjust enrichment, and the Court will not allow the retention of a benefit unconscientiously obtained.

[192] The second category of cases identified by Justice Cooper establishes that the Court will not enforce an agreement that has been procured by compulsion. Compulsion can be pressure exerted by one party, either by actual duress or by the use of the surrounding circumstances. Justice Cooper noted that, in a situation requiring the provision of salvage services, it may be possible to exert considerable pressure to obtain a certain outcome.[44]

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[43] Richard Cooper "The FS Dethridge Memorial Address 1996" (1997) 12 ANZMLJ 1 at 4.

[44] At 6.

[193] These categories identified by Justice Cooper suggest that the admiralty jurisdiction to set aside inequitable agreements should not be limited to salvage agreements. It is therefore at least arguable that a salvage agreement is just a good example of the kind of situation that has traditionally invoked the Court's admiralty jurisdiction.

[194] As Mr Taylor pointed out, the test as formulated in *Akerblom v Price*, is deliberately expressed broadly. The test, as enunciated by Lord Justice Brett in that decision, is set out in full below:[45]

> ... whenever court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to make any agreement they make with regard to them, the court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties... the rule cannot be laid down in less large terms because of the endless variety of circumstances which constitute maritime casualties. They do not, as it were, arrange themselves into classes... if the parties have made an agreement the court will enforce it unless it is manifestly unfair and unjust: but if it be manifestly unfair and unjust the court will disregard it and decree what is fair and just. This is the fundamental rule. In order to apply it to particular instances, the court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances.

[195] Mr Carruthers argued that it is, however, possible this test was intended to apply only to salvage agreements. Read in that way, His Lordship's comment is authority for the proposition that clear rules for agreements between a salvor and a salvee have not been outlined, because such cases inevitably encompass an "endless variety of circumstances".

[196] That may be so. However, the passage can also be read as expressing the underlying policy of the Court to disregard a manifestly unfair and unjust agreement. Under that policy, the Court will intervene when one of the parties has been practically compelled to accept whatever terms the other party might dictate and the other party has exploited that opportunity to obtain an inequitable advantage. The two requirements are: necessitative circumstances; and an inequitable agreement. It is at least arguable that the admiralty jurisdiction will intervene where those

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[45] *Akerblom v Price*, above n 41, at 132–133.

requirements exist, notwithstanding the agreement was between a salvor and a third party.

Discussion: is the charterparty a salvage agreement?

[197] Svitzer's argument here is in essence a different route for dealing with the same issue. The argument is that, if the admiralty jurisdiction to set aside an agreement is limited to salvage agreements, the charterparty qualifies as such for the purpose of a claim in admiralty. Svitzer says that the *Awanuia* was providing a service of salvage by avoiding or limiting oil pollution and consequential liability to the owners of *Rena*. There is authority to suggest that any event that avoids a potential liability of the salvee to third parties can constitute a service of salvage. In *The "Whippingham"*, a passenger steamship damaged a number of yachts and risked fouling more.[46] The plaintiff's tug boat rescued her and claimed a reward for salvage. Justice Bateson held that if the plaintiff had not intervened, the vessel would have inflicted damage on other yachts and that may have exposed the vessel to further claims against her. His Honour held that the plaintiff had therefore performed a service of salvage.[47]

[198] The authors of *Kennedy and Rose Law of Salvage* said of this issue:[48]

> ... 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 salved from danger.

[199] It appears from the above that Seafuels would have been able to bring a salvage claim against the owners of *Rena* for the services it rendered to *Rena* and therefore this was a service of salvage. The question then returns as to whether it is of consequence that the service provided under the charterparty was to Svitzer and not the owners of *Rena*. As I have concluded, that issue is at least arguable.

[200] For completeness, I deal briefly with Seafuels' submission that the Court's jurisdiction to set aside an agreement has been removed by the Salvage Convention. No authority was cited for this proposition and the issue was not argued during the

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46 *The "Whippingham"* (1934) 48 Lloyd's Rep 49 (Adm).
47 At 52.
48 Rose, above n 39, at [5.021].

hearing and Svitzer has not addressed the matter in its submissions. Accordingly, it is not appropriate or necessary for me to form an opinion on the matter.

Conclusion

[201] As I have concluded that it is at least arguable that the Court's power to reopen maritime contracts is not limited to salvage agreements and might be extended to the charterparty; and that the charterparty itself could be in the nature of a salvage agreement, it is not appropriate to enter summary judgment or to strike out this cause of action.

[202] Seafuels' application for summary judgment in respect of the second cause of action is therefore declined. Its alternative application for strike-out is declined for the same reasons.

Third cause of action as against Seafuels: the Salvage Convention

[203] As Seafuels has failed to satisfy the Court that none of the plaintiff's causes of action can succeed, summary judgment is not available. Seafuels' application for strike-out of the third cause of action remains, as does its alternative application for review of the Associate Judge's decision declining strike out.

[204] As the decision was made following a defended hearing and is supported by written reasons, r 2.3(4) applies:

> If the order or decision being reviewed was made following a defended hearing and is supported by documented reasons –
>
> (a) the review proceeds as a rehearing; and
>
> (b) the Judge may, if he or she thinks it is in the interests of justice, rehear the whole or part of the evidence or receive further evidence.

[205] The burden is on the applicant to satisfy the Court that the Associate Judge's decision was wrong and the Court must make its own assessment of whether the decision is wrong.[49]

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[49] *Austin, Nichols & Co Inc v Stitching Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4] and [16].

[206] The Salvage Convention was incorporated into New Zealand law as part of the Maritime Transport Act 1994.[50] Article 7 of the Convention allows a contract or terms of a contract to be annulled or modified if:

> (a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or
>
> (b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered.

[207] The scope of the Convention is restricted by art 6. Article 6 provides that:

> 1. This Convention shall apply to any salvage operation save to the extent that a contract otherwise provides expressly or by implication.
>
> 2. The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel.
>
> 3. Nothing in this article shall affect the application of article 7 nor duties to prevent or minimize damage to the environment.

[208] A "salvage operation" is defined in art 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.

[209] To have this cause of action struck out, Seafuels must establish that the Convention does not apply to the charterparty because it is not a "salvage operation" or, that if it does, the Court's jurisdiction under art 7 is limited to salvage contracts as opposed to any contract that relates to a salvage operation.

[210] As the Associate Judge correctly concluded, whether the Court should exercise its discretion under art 7 to annul or modify the charter party involves intense and complex factual matters that require a full hearing and testing of the evidence. Seafuels did not seek review of this aspect of the Associate Judge's decision.

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[50] Maritime Transport Act 1994, s 216 and Schedule 6.

Does the Convention apply to the charterparty?

[211] The Associate Judge did not determine this point, observing that the charterparty may ultimately be seen as subject to the Convention. Having considered the arguments, I am also of the view that it is not appropriate to determine this question at this stage.

[212] Whether the Convention applies, or ought to apply to an agreement of this nature, involves complex policy considerations. This was reflected in an address by Justice Ryan of the Federal Court of Australia to the Maritime Law Association of Australia and New Zealand Conference in 2008, in which His Honour urged the courts to be mindful of the underlying policy of the Convention, and gave the advice that:[51]

> It would be salutary for courts ... to bear in mind the new focus which the Convention has brought to bear on the protection of the environment. In particular, effect should be given as far as possible to the new policy discernible as underlying the provisions of the Convention ... That policy is directed to encouraging salvage companies and State authorities to establish and maintain the resources needed to avert or minimise the ecological damage which a significant maritime misadventure can present. It is also concerned to provide an incentive for the speedy deployment of those resources without first conducting a detailed cost-benefit analysis by reference solely to the prospects of recovering a traditional salvage reward.

[213] Bearing that advice in mind, it is at least arguable that to enter judgment summarily in cases such as this could have a chilling effect on the future incentive for professional salvors to assist in similar situations. In this regard, it is important not to risk undermining one of the primary aims of the Convention; namely, to ensure sufficient incentives for salvors in order to ensure the protection of the marine environment. That aim is clear from the Preamble, which provides:

> STATE PARTIES TO THE PRESENT CONVENTION,
>
> ...
>
> NOTING that substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910,

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[51] Justice D M Ryan "The FS Dethridge Memorial Address 1996" (2009) 23 ANZMLJ 1 at 11.

...

> CONSCIOUS of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment.

[214] The background to the creation of the Convention was traversed by Lord Mustill in *Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd*.[52] His Lordship noted that improvements in technology had led to the advent of professional salvors, who maintained tugs and equipment at the ready to provide assistance and earn large rewards. However, as time progressed, it became less worthwhile to sustain the capital and running costs of this against the "chance of finding a vessel in need of assistance, accomplishing a salvage and finding that there was sufficient value left in the salved property at the end of the service to justify a substantial reward".[53] Coincidentally, the prodigious increase in the capacity of crude oil carriers was, at the same time, heralding the possibility of environmental disasters.

[215] That prodigious increase in crude oil tanker capacity led to a natural and growing public concern about "assaults on the integrity of the natural environment".[54] These concerns were exacerbated when the *Amoco Cadiz*, carrying 220,000 tonnes of crude oil, was stranded on the coast of France in circumstances believed to involve a possibly fatal delay during negotiations with intended salvors.[55]

[216] Against this evolutionary change and growing concerns, traditional salvage law was proving inadequate. Traditionally, "the only success that [had] mattered was success in preserving the ship, cargo and associated interests".[56] As a result, "a salvor who might perform a valuable service to the community in the course of an attempted salvage ... would recover nothing or only very little, if in the end the ship was lost or greatly damaged".[57] It was therefore decided that "something more was

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52 *Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd* [1997] AC 455 (HL) at 459. Lord Mustill provided the lead judgment in this decision. The remainder of the Court endorsed Lord Mustill's speech. Elsewhere in the judgment, Lord Mackay described Lord Mustill as an "eminent authority" on salvage law.

53 At 459.

54 At 459.

55 At 459.

56 At 459.

57 At 459.

required to induce professional salvors, upon whom the community must rely for protection, to keep in existence and on call the fleets necessary for the protection of natural resources in peril".[58]

[217] The need for reform to salvage law to promote protection of the environment led to the creation of arts 13 and 14 of the Convention. Article 13 preserves the traditional salvage principle of 'no cure – no pay', and the reward is fixed with a view to encouraging salvage operations by taking into account a number of criteria, including the skill and efforts of the salvors in preventing or minimizing damage to the environment. However, under art 13(3), the maximum award (excluding interest and costs) can never exceed the value of the salved property.

[218] Article 14 provides something of a safety net for salvors, if the reward assessed under art 13 does not adequately recognise the salvor's efforts to prevent or minimise damage to the environment. Article 14 makes recovery of "special compensation" possible where a salvor does not earn a reward under art 13 that is at least equivalent to the "special compensation" assessable in accordance with art 14. A salvor that prevents or minimises damage to the environment during the course of a salvage operation will be entitled to special compensation from the vessel's owner for any out-of-pocket expenses "reasonably incurred" and a "fair rate for equipment and personnel actually and reasonably used in the salvage operation". A negligent salvor who fails to prevent or minimise damage to the environment may be deprived of the whole or part of any special compensation due under art 14.[59]

[219] In this case the SCOPIC clause was invoked, wholly replacing art 14. The intention of the SCOPIC clause is the same; to encourage salvors to provide aid in circumstances where there is a risk of damage to the environment. Under the SCOPIC clause, Svitzer is, as earlier noted, entitled to remuneration for all monies "reasonably paid" to any third party.

[220] Against all of that background, and in the context of the present case and its particular exigencies, it would, in my view, be inappropriate for the Court to enter

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58 At 459.

59 International Convention on Salvage, above n 11, art 14(5).

judgment summarily in favour of the second defendant, without a careful and detailed examination of the facts and the complex underlying policy considerations at issue.

[221] There was only one vessel capable of pumping oil off the *Rena* to enable the salvage of the bunkers to proceed. Svitzer was obliged to exercise due care to prevent or minimize damage to the environment.[60] It had been notified by the owners' insurer[61] that the owners' appointed Special Casualty Representative "will monitor and challenge the reasonableness of costs according to SCOPIC protocols" and that, as "ultimate payee for the costs and consequences arising from this incident", the insurer "reserves any and all rights to refer such conduct of the parties to the Salvage Arbitration Committee at Lloyds". In such circumstances, it is at least arguable that a third party in possession of a vital and specialist vessel should not be able to demand an exorbitant price[62] which the salvor may not be able to pass on to the owners of the vessel to be salved.

[222] Such a precedent may have potential to cause hesitancy, delay or prolonged negotiations of the type that occurred in the case of the *Amoco Cadiz*, referred to by Lord Mustill. That outcome would tend to undermine the spirit of the Convention, which was founded on the importance of efficient and salvage operations for the protection of the environment.

[223] In reaching this decision, I have not overlooked Seafuels' submission that there is sufficient guidance on whether or not the Convention applies to third party hire agreements in order to make a decision on this issue. I do not, however, confidently share that view. None of the authorities cited by Seafuels deal explicitly with the question of whether an agreement between a third party and a salvor is capable of being regarded as relating to a "salvage operation".

[224] In the result, I am persuaded that the law in this area is far from settled and it is not for this Court in the strike-out jurisdiction to attempt to provide a

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60 Article 8(1)(b).
61 The Swedish Club.
62 If indeed the price demanded was exorbitant. That is a matter for determination at trial.

determination. For the same reason, I find that Associate Judge Gendall's decision not to determine this matter as a question of law correct on the authorities available.

Is the Court's jurisdiction limited to salvage contracts as opposed to any contract relating to a salvage operation?

[225] In the alternative, Seafuels submitted that even if the Convention does apply to the charterparty, art 7 of the Convention is limited to salvage contracts. The charterparty expressly states that it is not a salvage contract and therefore, Seafuels argued, art 7 cannot apply.

[226] Seafuels' argument is that, if the Convention applies to any contract, the effect of art 6(3) would be that all issues of duress and undue influence must be determined according to art 7 and not according to common law or admiralty principles. Seafuels criticises the statement in *Kennedy and Rose* that art 7 may apply to sub-contracts made between salvors and third parties, as an anomaly that stands alone amongst all other commentary. The passage is as follows:

> Article 7 may apply to sub-contracts made between salvors and third parties...

[227] My inclination is that it is at least arguable that art 7 applies to all contracts that are subject to the Convention: that is, all contracts that are within the scope of art 6. Parties to an agreement relating to a "salvage operation" under art 6 are not permitted to contract out of art 7. That suggests that art 7 applies, provided the agreement is for a "salvage operation". If that is correct, it would not matter that the charterparty explicitly stated that it was not a charter contract.

[228] As a further matter, none of the commentary referred to by Seafuels expressly considered the question of whether art 7 applies only to salvage contracts. The authors of *Kennedy and Rose* pose the question and leave it open precisely because the answer has not yet been judicially considered and thus remains arguable.

Conclusion

[229] As I have concluded that the law in this area is far from settled, it is not appropriate to strike out Svitzer's argument as to whether the Convention applies to agreements of this nature and whether art 7 applies solely to salvage contracts.

[230] Seafuels' applications for summary judgment or strike-out in respect of the third cause of action is therefore declined. Seafuels' application for review of the Associate Judge's decision of 20 July 2012 is also declined.

Why Z Energy should not be a party to this proceeding

[231] Turning last to the situation of Z Energy, I can see no valid reason for Z Energy to remain a party to this proceeding and it should not. Accordingly, summary judgment will be entered for Z in respect of all these causes of action in the amended statement of claim.

[232] I deal with the reasons for this under a number of sub-headings. The principal reason, however, is that Svitzer cannot succeed in any of its causes of action as against Z Energy, because Z cannot be bound by any judgment given.

Z Energy cannot be bound by any judgment given

[233] This proceeding is concerned solely with the charterparty between Svitzer and Seafuels. Z Energy is not a party to that contract. The prayer seeking relief against Z Energy in the amended statement of claim is therefore unenforceable. The Court cannot order Z Energy to repay money to Svitzer that has been paid out to it under its separate contract with Seafuels, a contract to which Svitzer is not a party.

[234] In any event, Svitzer does not need to join Z Energy as a party to this litigation in order to obtain the full relief it seeks.

[235] Thus Z has a clear answer to the plaintiff which cannot be contradicted.

[236] While there is a complete answer in this respect, there are additional factors that in my view also support this outcome and ought to be traversed.

It is not in Z Energy's interests to remain as a party

[237] The rather paternalistic view that Z Energy should remain as a party to this proceeding, in case its third party right to a benefit under the charterparty is affected if the charterparty is ultimately declared voidable, is completely at odds with Z's own view of its rights. Put shortly, Z does not wish to be a party to this proceeding. It has no intention of making any claim against Seafuels. The release agreement it entered into with Seafuels has been substantially performed. The hypothesis that "if the payment had not been made by Svitzer, Z Energy might still have rights to recover payment due to it as stated in the charterparty" is not valid, as Z Energy's right to receive payment has crystallised and any enforcement of the cl 42 compensation obligations by means of the Contracts (Privity) Act 1982, is now of no consequence to it.

[238] To summarise, Z does not seek to enforce any rights or third party benefits that others contend it may still have under the charterparty, on a theoretical basis or otherwise.

Z Energy's presence is not necessary to justly determine the issues

[239] Nor is Z Energy's presence in this proceeding necessary to justly determine all of the issues between Svitzer and Seafuels. If the purpose of joining Z Energy is in reality to obtain discovery of the charter rate Z was paying to Seafuels for its long-term hire of *Awanuia*, that information is likely obtainable through third party discovery or probably from Seafuels itself. Z Energy does not need to be joined as a party to this proceeding in order for Svitzer to obtain that information.

No basis for a finding of implied threat

[240] An implied threat by Mr Foley on 13 October that was causative of Svitzer's decision to sign the charterparty with Seafuels was not originally pleaded, and is still not frankly pleaded. Nor is the allegation sustainable on a robust and realistic approach to the available evidence.

[241] First and fundamentally, no operating cause is pleaded. As analysed under the sub-heading *The second alleged threat*, all that is pleaded is that "the first defendant through its solicitor informed the plaintiff that the charterparty would need to be signed before the *Awanuia* was re-deployed at the *Rena* on that day. ... Following that advice and other discussions on 12 October ... the plaintiff signed the proposed charterparty ... and delivered it to the [second] defendant ...". The pleading is, however, silent on a critical element: namely, whether the plaintiff was compelled to sign the charterparty in consequence, or as a result of, this alleged advice from Mr Foley. A causative nexus is therefore absent.

[242] Secondly and equally fundamentally, Z had no legal standing in relation to the charterparty and therefore no power to withhold *Awanuia*'s services pursuant to it, or to threaten to do so. Z Energy is not the owner of *Awanuia*. Nor was it the charterer of *Awanuia* on 12 or 13 October 2011. *Awanuia* had gone off-hire from her charter with Z on 8 October at 6.30 am when she departed Auckland for Marsden Point and was on charter to Svitzer. By 13 October she had been onsite in the Tauranga area for five days.

[243] Third, there is no evidence to support the allegation that Mr Foley gave such advice in the terms alleged, and gave it for the purpose of compelling Svitzer to sign the charterparty. There is no real dispute as to what Mr Foley said in his phone call to Mr Burton on the morning of 13 October, on the basis of either Mr Foley's evidence or Mr Burton's file note. The most critical aspect is that the file note simply does not record what is now pleaded as having been stated by Mr Foley: namely, "the charterparty would need to be signed before the *Awanuia* was re-deployed at the *Rena* on that day". Nor does Mr Burton claim in his affidavit that those words were uttered. In light of that, the interpretation that the plaintiff seeks to place on that telephone call does not give rise to any evenly balanced conflict of evidence, or competing and equally open inferences. Nor does it give rise to a credibility issue that requires determination through cross-examination.

[244] Further support for the absence of any implied threat by Mr Foley is contained in Mr Burton's contemporaneous file note of his call back to Mr Foley at

11.30 am, to advise that Svitzer had now decided to execute the charterparty, in which he recorded Mr Foley's clear surprise at this.

[245] A further matter is that while the purpose of the meeting of 12 October, so far as Svitzer's representatives who convened it were concerned, was to discuss "objectionable terms" in the proposed charterparty relating both to ownership of the oil and the rates of hire, Mr Foley's and Mr Mulvena's evidence is that the charter rate was not the primary issue or the focus of the meeting for Z Energy: it was the disposition of the off-loaded oil that concerned them. That is supported by the evidence that Z Energy did not know what the charterparty rate was at the time that 12 October meeting was convened, until it was inadvertently disclosed to them at the meeting. The hire rate had been redacted in the version of the charterparty Z Energy had received (see [42] above). There is no evidence to refute that. Nor is there any evidence that Z Energy played any role in setting the overall hire rate sought by Seafuels in the charterparty (see the reference to "numerous discussions … between SVITZER, PB Sea Tow, the owners of the RENA and the authorities ..." in the acceptance email of 9 October at [48] and Mr Mulvena's remark about this at [49]). The distinct contrast between the charterparty hire rate and the rate required for releasing *Awanuia* in the separate release agreement between Seafuels and Z Energy is also of some significance.

[246] It is also of relevance that there were parallel but separate discussions and negotiations going on between Mr Coombridge and Mr Shannon during this same period about the charter rate. That is evident in their emails exchanged on 12 and 13 October (referred to in [52] above). There is no evidence that these discussions involved Z Energy or Mr Foley.

[247] Finally, it is not conceivable that any further evidence of cogency can be adduced by Svitzer to support this allegation of an implied threat by Z Energy on 13 October, compelling Svitzer to sign the charterparty.

The 'without prejudice' issue

[248] Mr Burton made an initial objection to evidence about matters discussed at the meeting on 12 October being disclosed to the Court, as he said the meeting was

convened on a 'without prejudice' basis. However, the "discussions" at that meeting are pleaded as part of the first cause of action and Mr Burton has himself given direct evidence about aspects of the meeting. This must be taken as an implied waiver of privilege by Svitzer. Z Energy has clearly waived its right to privilege, by virtue of the evidence proffered by both Mr Foley and Mr Mulvena about the meeting. In any event, little sense can be made of the critical telephone calls the following morning without evidence about what took place at the meeting the day before.

Other assertions

[249] For the sake of completeness, I now deal with some specific assertions by Svitzer in support of its claim of duress by Z Energy.

[250] Svitzer pointed to the fact that its agents had to approach Z Energy directly on 6 October about the possibility of using *Awanuia*, as somehow being relevant to Z's ability to apply illegitimate pressure. It has no relevance to the issues.

[251] Svitzer also pointed to the fact that Mr Coombridge's email advising the final terms of the proposed charterparty referred to its terms as having been "negotiated with Seafuels shareholder and Z Energy". That assertion neither assists or advances any contention that Z Energy had control over *Awanuia* on 13 October and thus had the ability on that date to apply illegitimate pressure. The statement is no more than a record of the fact that a release agreement with Z Energy had been negotiated on terms, as would have had to be the case.

[252] Svitzer said it does not accept it knew *Awanuia* was off-hire from charter to Z Energy. However, it is clear Svitzer did know that, from the emails Mr Coombridge exchanged with Mr Terry, Mr de Jong and Mr Jorgensen on 7 and 8 October (see [26], [27] and [34] above.

[253] Svitzer said Mr Foley's statement that the parties met on 12 October to discuss "Z's requirements for permitting *Awanuia* to come off-charter with it" is indicative that Z continued to have a high degree of control over the barge in terms of any charter rate. However, the evidence is that this was indicative of Z's anxiety

not to have *Awanuia* further loaded with fuel oil without the assurance of a "workable" plan for off-loading the oil expeditiously, to enable the barge to return to Z's employment in a clean state as soon as practicable.

Conclusion

[254] For the reasons outlined above, Z Energy's application for summary judgment in relation to all three causes of action is granted and judgment will be entered accordingly.

Result

Seafuels

[255] Seafuels' application for strike-out in relation to the first cause of action is granted and the cause of action is struck-out accordingly.

[256] Seafuels' applications for summary judgment and strike-out in relation to the second and third causes of action are dismissed.

[257] Seafuels' application for partial review of Associate Judge Gendall's decision relating to the third cause of action is dismissed.

[258] Costs are reserved.

Z Energy

[259] Judgment is entered in favour of Z Energy in respect of all three causes of action.

[260] Z Energy is entitled to costs and counsel may submit memoranda.

Goddard J