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Shipping

## Salvaging the Salvor: The Decision of the Malaysian Apex Court in *Fordeco Sdn Bhd v PK Fertilizers Sdn Bhd*

### Introduction and Key Issues Discussed

In a unanimous decision delivered by a five-man panel, the Malaysian apex court shed light on important aspects of the law on salvage. The judgment of the Federal Court was delivered by Malaysia's first Admiralty Court Judge, Nallini Pathmanathan FCJ.

The judgment re-stated the principles on general average and further discussed the following two key issues relating to the law of salvage:

- When is a contract termed one for salvage rather than for towage or for carriage of goods; and
- What is the standard of care in assessing whether a salvor was negligent in the course of salvage operations?

### Key Takeaways

- Malaysia is not a signatory to the Salvage Convention 1989. Therefore, the law on salvage in Malaysia is based on the common law. Thus, English and Singaporean judgments – and the bible on the law of salvage, Kennedy and Rose on the Law of Salvage - are highly persuasive.
- A salvage situation (as distinct from a towage situation) exists when (i) firstly, the ship is in danger due to circumstances which could not reasonably have been contemplated by the parties; (ii) secondly, risks are run or duties performed which could not reasonably be regarded as being within the scope of the (initial) towage engagement; and (iii) the salvage situation remains as long as these factors continue to exist (see the judgment of Brandon J in *The Aldora* [1975] 1 Lloyd's Rep 617, affirmed).
- Courts look leniently to salvors who cause damage during salvage operations and will judge their efforts as a whole. Public policy issues applicable to maritime salvage carried out in an emergency will be taken into account (the judgment of the House of Lords in *The Tojo Maru* [1972] AC 242, affirmed).

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### **Brief Facts**

The "Thor Traveller" (the "**Vessel**") was carrying a cargo of 22,000 metric tonnes of rock phosphate (the "**Cargo**") from Egypt to Malaysia. During the voyage, the Vessel grounded on coral rocks at the coast of Sabah, East Malaysia. This caused both the Vessel and the Cargo to be in peril. The Cargo was owned by the Plaintiff.

In order to rescue the Vessel, it had to be refloated. This meant that some of the Cargo had to be offloaded on to other vessels. General average was declared and the Cargo was then offloaded on to two vessels, one of which is the Hathaway, which belonged to the Defendant.

Subsequently, when the Cargo was unloaded at a port in Sabah, a portion of the Cargo was found to be wet and contaminated with debris.

The Plaintiff brought a claim in bailment and/or negligence against the Defendant. The Plaintiff contended that the Defendant was a sub-bailee of the Cargo and thus the Defendant had a duty to deliver the Cargo in the same condition as the Defendant had received the Cargo - rather than wet and contaminated with debris.

The Defendant, on the other hand, contended that the operation was one of salvage and not a contract of carriage of goods - thus, it was not in breach of any obligation to the Plaintiff.

### **At the High Court and Court of Appeal**

The High Court determined that the contract between the Plaintiff and the Defendant was a contract of bailment within the context of a carriage of goods and therefore governed by section 104 of the Contracts Act 1950 ("**CA**").

The Judge rejected the contention that the nature of the contract was one of salvage for two key reasons: (i) that this was not pleaded; and (ii) that there was no evidence that the Vessel was in danger or that it required salvage.

The High Court held that the Defendant had a duty to take reasonable measures to care for the Cargo such as a man of ordinary prudence would take of his own goods. And that by failing to do so, the Defendant had failed to discharge its duty of care under section 104 of the CA and was responsible for the loss and damage suffered by the Plaintiff under both bailment and negligence.

The Court of Appeal affirmed the decision of the High Court.

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### At the Federal Court

#### ***Whether the present situation was one of salvage?***

The reason this issue is important is because the nature of the contract – whether a contract for carriage or salvage – will regulate the nature of the duties imposed on the Defendant. The duties on the Defendant would be lower if the contract was one of salvage.

The Federal Court concluded that, on the facts of the case, the situation was one of salvage.

The Court held that there are four elements for a contract of salvage (as opposed to a contract for the provision of towage, pilotage or the carriage of goods): (i) there should be a recognised subject matter; (ii) the object of salvage should be in danger at sea; (iii) the salvors must be volunteers; and (iv) there must be success by either preserving or contributing to preserving the property in danger.

The point of contention here was point (ii). The Court said that the pertinent question was whether the Thor Traveller was really in "danger". The Federal Court referred to the case of *The Charlotte* [1848] W Rob 68 which states that "*all services rendered at sea to a vessel in danger or distress are salvage services...It is not necessary that the danger should be imminent and absolute...It will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered.*"

The Federal Court also referred to the decision of Brandon J, an English Admiralty Court Judge, in *The Aldora* [1975] 1 Lloyd's Rep 617 in stating the test for a claim in salvage : (a) firstly, the ship is in danger by reason of circumstances which could not reasonably have been contemplated by the parties when the engagement to pilot or tow was made; (b) secondly, risks are run, or duties performed which could not reasonably be regarded as being within the scope of such engagements; and (c) thirdly, the salvage situation remains in being so long as those factors continue to exist to some extent at least.

The Federal Court held that the test in *The Aldora* was satisfied as (a) the ship was in danger and it was not within the contemplation of the parties that the Vessel would run aground and be left stranded on coral rocks; (b) it could not have been contemplated that the Vessel would have to be refloated to save the Vessel and the Cargo; and (c) the carriage of the Cargo by the Hathaway comprised an essential part of the entire salvage operation and could not be distinguished or separated from it.

Based on the above, the Federal Court concluded that the situation was one of salvage.

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### ***Whether the duty of care over the safety of the cargo on the vessel has to be evaluated differently?***

The Court answered this question in the affirmative. In line with the principles in the leading case of *The Tojo Maru*, the Federal Court decided that the courts look leniently to the negligence of salvors which cause damage to the property salvaged and will judge their efforts as a whole.

The same standards of care are applicable in judging the conduct of professional salvors as those applicable to other professionals, save that public policy issues applicable to maritime salvage carried out in an emergency will be taken into account by the Court.

The Federal Court observed that the Defendant was not a professional salvor. Further the Court held that only a small portion of the Cargo was damaged and that this arose as part of the inherent operation of salvage. It was not an independent and distinguishable damage arising outside of the salvage operation. Based on the authorities of the *Tojo Maru* and the *St Blane*, the Federal Court concluded that the Defendant was not negligent.

## **Conclusion**

This is a well-reasoned judgment that is in keeping with the position of the common law. It was a nuanced application of broad principles to the factual circumstances surrounding the case. This judgment augurs well for Malaysian maritime and commercial law.

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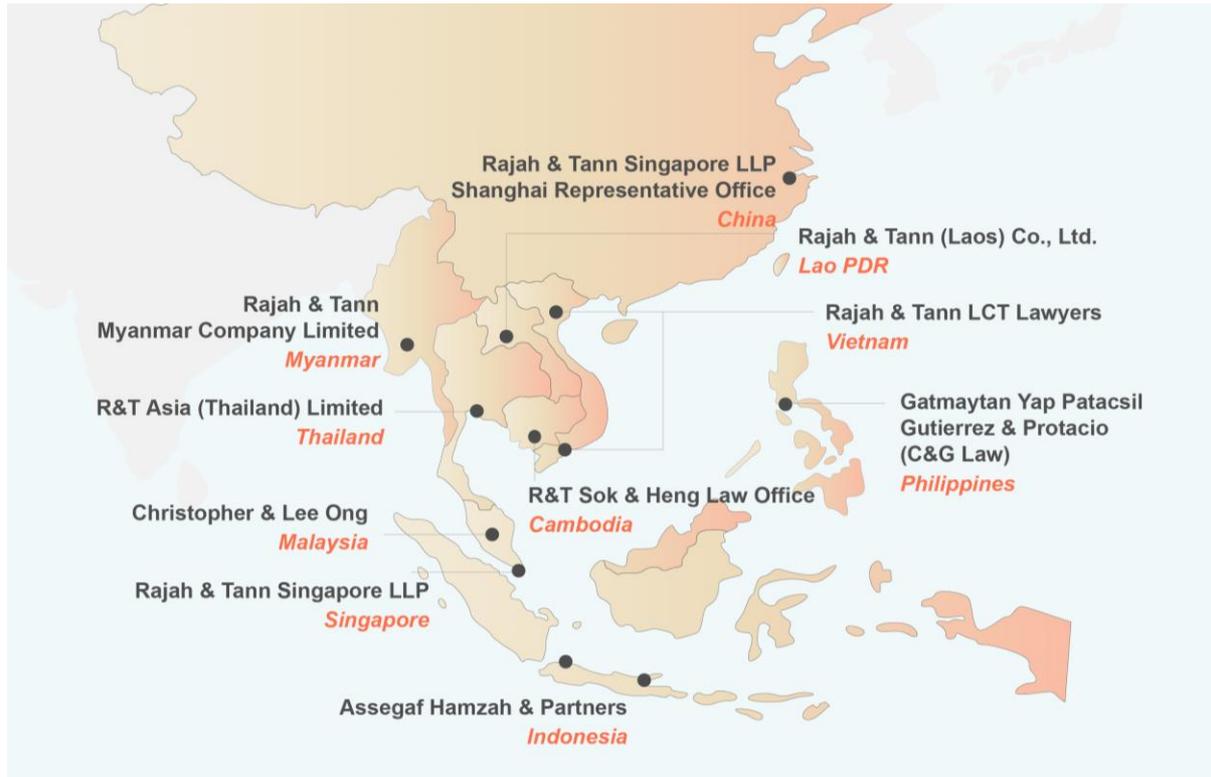
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