RECENT DEVELOPMENTS IN SALVAGE LAW

Maritime Law Association, Salvage Committee, Spring 2006[1]

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Delaware River Tow, LLC v. Nelson, *et al.*, 2005 A.M.C. 794, 2005 WL 331706 (E.D.Pa. Feb. 10, 2005). Insurer liable to insured's salvor based on oral contract and promissory estoppel.

Vernell Nelson's 29' Sea Ray sank while moored at the Philadelphia Marine Center on the Delaware River in Philadelphia. Nelson signed a standard form yacht salvage contract which required Delaware River Tow, LLC to undertake to salvage the yacht on a "no cure, no pay" basis. The effort was apparently successful and the salvage cost was $4,654.50.

The salvor required authorization of Nelson's insurer, Allstate. An Allstate agent told the salvor to: "[d]o whatever is necessary to save the boat." At 796.

The salvor obtained a default against Nelson and sought payment from Allstate. The Court, applying Pennsylvania law, which it concluded did not conflict with

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[1] Author's notes: A special thank you to Rountree, Losee & Baldwin, L.L.P. and its staff for their assistance with this undertaking; on citations: citations to the case which is the subject of this update are cited as follows: "At [A.M.C. or other reporter page number];" questions or comments should be directed to Jason R. Harris of Rountree, Losee & Baldwin, L.L.P.; 2419 Market Street; Post Office Box 1409; Wilmington, North Carolina 28402-1409; (910) 763-3404; facsimile (910) 763-0320; jharris@rlblawfirm.com. Please note that this update is not exhaustive nor is it limited to the period since the last update authored and presented in the Spring of 2005.

admiralty law principles, allowed the claim against Allstate, who was not a party to the written contract, based on alternate theories of *oral contract* and *promissory estoppel.*

Delaware River Tow, LLC v. Nelson, et al., 382 F.Supp.2d 710 (E.D.Pa. June 3, 2005). No attorney's fees for salvor when no bad faith by insurer in defending claim.

On May 10, 2005, the Court was presented with additional issues relating to the case discussed above. It awarded the salvor pre-judgment interest. It also allowed those "taxable costs" listed in 28 U.S.C. § 1920 which do not include attorney's fees nor witness fees in excess of the standard daily witness fee. The Court "jettisoned"[2] the salvor's request for $7,913.98 in attorney's fees citing, among other cases, Vaughan v. Atkinson,[3] for the proposition that attorney's fees are not available in admiralty cases unless the party against whom the fees are to be taxed has acted in bad faith. No bad faith was found because the insurer Allstate properly defended the case, filed no frivolous motions and its liability to pay salvage was "not so clearly established". At 716.

Allstate sought default judgment against Nelson for its cross-claim which it served via "United States First Class Mail" per a certificate of service *or* "via regular mail" per an attorney's affidavit of service. At 717. The motion was denied because F.R.Civ.P. 5(a) required service on a defaulting party per Rule 4 if the pleading (here, a cross-claim) against a party in default asserts a new or additional claim for relief.

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[2] at 715
[3] 369 U.S. 527 (1912), at 714

Offshore Marine Towing, Inc. v. MR23, et al., 2005 AMC 1800, 412 F.3d 1254 (11th Cir. June 20, 2005). Attorney's fees do not fit within *Blackwall* factors.

Despite the claims of a salvor of a 61' luxury motor yacht which grounded on the shore of Gun Cay in the Bahamas, "[a]ttorneys fees do not fit within any of the *Blackwall* factors." At 1804.

The salvor in this case sued the vessel in District Court which compelled arbitration pursuant to the terms of the Standard Form Marine Salvage Contract executed by the owner. The arbitrator issued an award to the salvor for $15,852.50, plus interest and, over the objection of the owner, $29,314.82 in legal fees and expenses. On review of the award, the District Court ruled that the issue of attorney's fees was not submitted to the arbitrator and the attorney's fees could not be awarded in an *in rem* action.

On appeal, the 11th Circuit agreed. The issue of attorney's fees was not submitted to the arbitrator because attorney's fees are not part of a salvage lien. With some exceptions (for instance, bad faith claims, indemnitee's suit against an indemnitor, breach of the warranty of workmanlike performance), it is the "general rule that attorney's fees are not awarded in admiralty cases". At 1803, citing Ins. Co. of N. Am. v. M/V Ocean Lynx, 1991 AMC 64, 901 F.2d 934, 941 (11th Cir. 1990). Attorney's fees cannot be collected in an *in rem* action, including for contract salvage, to enforce a

maritime lien for necessaries as the attorney's fees are not necessaries and are not part of the value of the salvage lien against the vessel.

The outcome may have been different if the salvage contract had a provision for attorney's fees and there was in personam jurisdiction over the owner.

Ensco Offshore Company v. Titan Marine, L.L.C., 2005 A.M.C. 1861, 370 F.Supp.2d 594 (S.D.Tx. Feb. 24, 2005). Choice of foreign law and foreign arbitration clause voidable if no reasonable relation to foreign state.

In a case of national first impression, the Court held that when American companies knowingly enter into a contract containing an English choice-of-law clause and a London arbitration clause, one company can avoid the agreement by claiming the protections of 9 U.S.C. 202 which states, in part (emphasis added): "An agreement...shall be deemed not to fall under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards] unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other *reasonable relation* with one or more foreign states."

The instant dispute between two American companies involved a contract to salve the Ensco 64 rig located 90 miles south of Louisiana which was severely damaged by Hurricane Ivan in September 2004.

The Court, sitting in diversity, applied Texas law which "applies the law chosen by the parties to the contract *unless* the chosen state has no *substantial relationship* to

the parties or the transaction and there is no other reasonable basis for the parties' choice." At 1864 (emphasis added), citing DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tx. 1990).

The salvor sought to invoke the clauses at issue because (1) the rig was in international waters, (2) there was a substantial relationship with London because it is the international center of the salvage market and London's syndicate of underwriters insured the rig, (3) there were arms-length negotiations, and (4) sub-contracts, including a British flag diving support vessel, involved English entities.

Despite strong policy favoring arbitration, the parties could not contract around §202 because to do so "would thwart the public policy of Congress in enacting §202." Id. At 1869. The Court emphasized the need for, but in this instance, a lack of a *reasonable relation* to the foreign state.

Key Tow, Inc. v. M/V JUST J'S, et al., 2005 A.M.C. 2840, 2005 WL 3132454 (S.D.Fla. Nov. 1, 2005). Orchestrated salvage does not yield salvage award.

M/V JUST J'S, a 2002 95', 141,000 pound Sun Seeker and non-Sea Tow member ran aground on a soft sandbar east of Cape Florida in Biscayne Bay. Captain John Tellam of Key Tow, Inc. d/b/a Sea Tow Biscayne Bay rendered assistance.

According to the owner, upon arrival, Cpt. Tellam asked the value of the vessel and, when told, rubbed his hands together and said "Good." At 2842. Cpt. Tellam spoke with the owner's broker who offered an hourly rate. Cpt. Tellam requested that

the owner sign up for salvage but eventually stated that he would just do the job and they would work it out later. The owner and broker said that they would call someone that would do it for an hourly rate. Cpt. Tellam "grumbled and said I'll just deal with it later". At 2843.

The salvor requested exaggerated amounts for the services based on material misrepresentations of times, manpower, and the value of the equipment used. Despite being told not to do so by the owner, Cpt. Tellam bagged the vessel with unfilled air bags that were improperly positioned. Cpt. Tellam failed to anchor the vessel allowing her to advance up the strand. Cpt. Tellam offered one photograph of a wave reportedly representative of what was taking place at the scene. However, witnesses and a meteorologist reported that the photograph depicted a vessel's wake, not a wave. In short, Cpt. Tellam "orchestrated a salvage operation". At 2855.

Sea Tow had serviced the vessel just a few weeks before the incident which provided some basis to calculate a service rate. Additionally, no marine peril was proven. Therefore, the Court denied a salvage award. While there was an incomplete written form contract which Cpt. Tellam requested the owner to sign, the Court found an oral contract allowing "quantum meruit, or time and materials, based on its standard hourly rates plus a very small premium". At 2855.

Martha's Vineyard Scuba Headquarters, Inc. v. Wrecked and Abandoned Steam Vessel R.M.S. REPUBLIC, 2005 A.M.C. 2915, 2005 WL 3783838 (D.Mass. July 19, 2005).

Constructive *in rem* jurisdiction over wreck 50 miles off coast.

In January 1909, the R.M.S. REPUBLIC sailed from New York City with $3 million in gold. After being struck by the Italian liner FLORIDA, she sank in 250 feet of water and lies 50 miles south of Nantucket.

After years of research, searching during the tricky North Atlantic salvage season along a foggy shipping route, fearing interlopers and fending off interveners, the Court allowed the Plaintiff salvor exclusive salvage rights to the REPUBLIC and a preliminary injunction against interference by others.

The salvor was deemed the salvor-in-possession and had a constructive lien over the wreck and her cargo. The Court, relying on RMS Titanic, Inc. v. Haver, 1999 AMC 1330, 171 F.3d 943 (4th Cir. 1999) and Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 1978 AMC 1404, 569 F.2d 330 (5th Cir. 1978), exercised constructive *in rem* jurisdiction over the wreck.

R.M.S. Titanic, Incorporated v. Wrecked and Abandoned Vessel, 435 F.3d 521 (4th Cir., Jan. 31, 2006). Salvage law, where salvor treated as trustee of historical wreck, preferable to law of finds.

Celine Dion's heart and this litigation "go on and on." We are entertained by the former as we learn the depth of her heart and we are educated by the latter as we learn

the depth of the 4th Circuit's ability to distinguish and apply the law of finds and the law of salvage.

The District Court (a) refused to grand comity and recognize a French administrator's decision that the salvor had title to artifacts raised during a 1987 expedition and (b) rejected the salvor's claim to title (pursuant to the law of finds) over artifacts recovered since 1993. The 4th Circuit (a) concluded that it lacked *in rem* or other jurisdiction over the 1987 artifacts and (b) preferred the application of the law of salvage to the law of finds in the instant context of historical salvage.

The Court distinguished between "constructive possession" and "constructive *in rem* jurisdiction". Constructive possession gives a court *in rem* jurisdiction over an entire shipwreck within the court's territorial jurisdiction when only a part of that wreck is actually presented to the court. Constructive *in rem* jurisdiction gives a court jurisdiction when a shipwreck lies outside the court's territorial jurisdiction. However, neither gives the court sovereignty over the wreck nor *in rem* jurisdiction over personal property located within the sovereign limits of other nations.

Therefore, as to the 1987 artifacts, the court lacked constructive possession because they were in France and lacked constructive *in rem* jurisdiction which could only apply to the portion of the wreck still lying in international waters.[4]

The salvor's claim to title over the artifacts discovered in 1993 (and subsequently) was denied. A salvor "cannot have its cake and eat it too" by having the exclusive right to reduce the as-yet unrecovered artifacts to actual possession pursuant to the law of

[4] One wonders if the outcome would be different if the artifacts were in another nation without any direction or control of the salvor. The Plaintiff salvor's predecessor in this case was a joint American-French expedition. The mechanics such as the ownership and operation of a salvage operation present the opportunity for a pro-active or transactional legal approach to anticipating, though maybe not resolving, the various issues confronting salvors.

salvage and also having title to the artifacts recovered. "The common law of finds and the maritime law of salvage. . .cannot be simultaneously applied to a shipwreck and property recovered from that shipwreck. The doctrines serve different purposes and promote different behaviors." At 530. However, the Court did not abandon its previously proclaimed openness to the abstract legal possibility of the salvor's role changing to that of finder under different circumstances. At 534.

Essentially, the Court preferred the law of salvage because that is how the salvor had so far predominately presented itself and been treated. The Court preferred the salvor's role as trustee of artifacts. By treating the salvor as trustee, the Court could supervise the artifacts, ultimately give an appropriate award to the salvor, and not treat unfairly other would-be finders who had been excluded.

While the customary law of salvage may not apply perfectly to historic wrecks (because, for instance, the object is the recovery for historical, archaeological, and cultural purposes rather than traditional notions of recovery of vessels in peril,) it is preferable to the law of finds.