

***United Salvage Pty Limited v Louis Dreyfus Armateurs S.N.C. (2006) 263 FCR 151***

"42. The submission raises an important question as to the basis and extent to which the court can have regard to questions of the vessel's exposure to liability claims by third parties for losses arising from the incident giving rise to the salvage operation, as well as the operation itself. In other words, in determining the salvage amount, should the court treat as a relevant consideration whether any potential liability of the vessel or its owners may have been avoided by the actions of the salvors.

43. In these proceedings, the determination of this question had an effect in relation to the admissibility of evidence as well as to the determination of the quantum of an appropriate salvage reward. The issue of "liability salvage" was first raised by way of an objection by the defendants to certain evidence. After hearing detailed argument on the evidentiary point, I decided to allow evidence in relation to this question and to give my conclusions and reasons for my views in this judgment. I considered that it was inappropriate to finally resolve as a question of evidence this important question as to whether liability to which the salvaged vessel might be exposed is a matter that the court is required to take into account.

44. The defendants submit that under the 1989 Convention, the court cannot pay any regard to the consideration that the salvage operations may have had the effect of prevention or reducing the exposure of the vessel to liability to third parties for damage or economic loss. The defendants refer to the language used in Article 13, the *Travaux Préparatoires of 1989 Convention on Salvage* ("The *Travaux*"), the previous *Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea* (1910) ("The 1910 Brussels Convention"), and the fact that the decided cases relied on by the plaintiffs are distinguishable and preceded the 1989 Convention. They conclude that in light of these considerations, liability salvage cannot be considered either in the exercise of discretion or under any specific factor in Article 13(1) in the fixing of a salvage reward.

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50. Experienced text writers differ in their approach as to whether any regard to liability salvage is totally excluded from consideration when fixing salvage reward under the 1989 Convention. In their *Shipping and the Environment* (1998), La Rue and Anderson categorically assert at 583 that liability salvage, in the context of operations which prevent the escape of pollutants, is **not** a factor recognised by Article 13. Brice in his *Maritime Law of Salvage* (1999, 3rd edn) considers at [6-79] - [6-85] that the concept of liability salvage should be considered as a distinct new form of salvage which is not yet part of the law of salvage. He notes that there are enormous practical difficulties in the path of its introduction as a separate consideration. Kennedy and Rose in *The Law of Salvage* (2002, 6th edn) conclude at 150-170 that under the 1989 Convention, liability salvage lies

outside of the range of independent subjects of salvage reward. They observe that while averting or minimizing the risk of a vessel's liability to third parties has not in itself been recognised as a subject for consideration in fixing salvage reward, it is noted that the concept had been treated by some decided authorities as a valid factor in assessing the reward. They refer to five cases including "*The Whippingham*" (1934) 48 Ll.L.Rep 49. These cases were decided prior to the Convention and are of little assistance.

51. The Plaintiffs placed emphasis on the decision of Lynch J, a District Judge of the US Ninth Circuit, in *Westar Marine Services v Heerema Marine Contractors, S.A.* (1985) 621 F Supp. 1135. That case was decided before the 1989 Convention but having regard to the extrinsic material surrounding its drafting. After considering the relevant decisions in the United Kingdom, his Honour concluded that the Court could not consider the prevention of liability to third parties, the public interest, or benefits to the shipowner as distinct and independent factors in arriving at a salvage reward. It is important to note that his Honour's decision was limited to a finding that such matters could not be considered independently. In the final paragraph of the reasons, his Honour noted that the Court was still left with considerable discretion as to how the specified factors should be weighed so that a fair salvage amount that best serves the interest of the parties and the public can be awarded. Ultimately, the proposition that the Court, in exercising its discretion to take account of the need for encouragement of salvage operations is not entitled to look at the question of possible liability to third parties, even in a general way, does **not** find support in this case.

#### *A General Approach*

52. Taking into account the language of the Convention, the *Travaux* and the Nielsen Report as well as the decided authorities, I consider that the preferable view and approach to be taken in the present case in relation to the question of whether liability salvage can be considered is that expressed by Brice at [6-21] to [6-24]:

*Even if the prospect of damage to the property of third parties is **not expressly** included in the Convention, **national laws may, it seems, be permitted to include without there being breach of an international obligation ... the removal by the salvor of the threat of claims against the owner of the salvaged property can properly be regarded albeit very generally as one of the elements showing the merit of the salvor's services and to that extent an enhancing feature.***

*it is inappropriate in a salvage action to investigate in detail who would have been liable in damages to third parties and for how much.....*

*evidence and findings directed to answering these question are beyond the scope of a salvage action. **Save in the most straightforward case** where the existence of liability on the owner of salvaged property is self evident, all the Tribunal can say*

*is that but for the success of the salvage services claims against the owner by third party owners of damaged property would have been made and would have had to have been investigated and defended." (Emphasis added)*

53. In consideration of this issue, there are no bright lines, controlling considerations or set formulas in fixing an appropriate award for salvage services. As outlined above, a global figure must be determined having regard to the factors in Article 13. The weight to be assigned to each factor is dependent on the circumstances. In one sense, the higher the monetary reward given, the greater is the incentive to undertake salvage operations. The fact that the Court should apply a liberal and generous assessment to fixing the reward with this aim in mind does not entitle the Court to award an unreasonable or extravagant amount.

54. In considering the interpretation of Article 13, I set out below my reasons for concluding that on a fair reading, none of the individual paragraphs calls for an investigation of the nature and extent of any possible third party liability which the property salvaged or the owners of the vessel might attract as a consequence of the circumstances leading to the salvage operation. In my view, a correct construction of each of the paragraphs does not import any obligation on the Court to investigate the extent to which third party liability has been avoided by the vessel as a consequence of the incident. Nevertheless, the question arises as to whether any consideration of potential liability is **excluded** by the Convention.

55. In an analysis of this issue, the starting point is that the Convention does not specifically in its terms exclude the consideration of such liability. Moreover, I do not consider that the extrinsic aids to construction prevent the Court, if it sees fit, from having regard to this consideration. In an appropriate case, this consideration may support, in a very general way, an enhancement of the reward without the Court investigating in any degree of detail the fact that the salvors' efforts may have resulted in limiting or eliminating prospective exposure on behalf of the vessel. This is not a consideration that should be scrutinized or examined with a view to reaching any specific conclusion. Rather, it should be recognized as one circumstance in the context of the salvage operation. In the light of the fact that the specific enumerated factors listed in Article 13 have been the subject of numerous international debates and agendas, and are discussed in negotiations, proposals, counter-proposals and published opinions over many years, I consider that the paragraphs cannot be read to recognise the concept of third party liability as a specific factor.

56. In my view, the Court should approach the question in the following way. The Court should consider that the factor of potential exposure to third party liability operates generally to inform the fixation of the global figure, which results from the evaluation of the criteria listed in Article 13 that may be relevant in the particular case. It would not be

appropriate to investigate, admit and consider detailed evidence as to the nature and extent of such liability.

57. Having considered the authorities, the *Travaux*, the 1989 Convention history and the detailed submissions made by the parties, I conclude that consideration of the vessel's exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration that some liability on the part of the vessel may have been avoided by the intervention of the salvors and, in appropriate circumstances, this may inform a fixing of the reward as an enhancement without any determination, detailed investigation, consideration of detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability. The possible existence of such liability can be relevant but it does not warrant consideration as an independent factor. In some circumstances, it may not be of any significant weight.

58. It may be said that such an approach introduces an additional element of unpredictability in fixing a reward, but it must be kept in mind that the whole exercise is not one of arithmetic precision. It is an exercise of evaluation, judgment, and the balancing of broad considerations. In this particular case, having regard to the circumstances to which I refer below, the prospective exposure to liability of the vessel is a matter to which I have given little weight as a general enhancing factor in fixing the reward. I now turn to consider the specific considerations."

Tamberlin J then considered each of the criteria set out in Article 13 and it is also instructive to reproduce some of the comments which he made. In relation to Article 13(1)(b) he said as follows:

"74. Article 13(1)(b) is premised on the finding that there was a real risk of substantial physical damage which has been avoided **by the skill and efforts** of the salvors. This risk must be a risk arising from the circumstances in which the vessel was placed as a consequence of the grounding and the consequent movements of the vessel. In the present case, the possible risks that may have arisen had the tugs not provided assistance include the release of oil, damage to or blockage of the channel, damage to adjoining structures or resources or livestock, or even, in the worst-case scenario, the break-up of the vessel. The possible pollutants or sources of contamination include the oil and dirty ballast water that may have escaped from the damaged ship and, in the event of the break-up of the vessel, pieces of wreckage that would be scattered in the area surrounding the vessel.

75. This provision is not concerned with remote, possible or hypothetical damage to those specified aspects of the environment, but with the prevention of **substantial physical** damage. The paragraph uses the expression "**in minimising or preventing**" which points to the implementation of some process and the existence of an actual risk or danger. This stands in contrast with the term "**threatened**" damage as used in the context

of Article 14(1). In Article 13(1)(b), the language does not refer to skill and efforts which "aim" to minimise or prevent damage, but to those used in **the process** of preventing or minimising damage to the environment.

76. Importantly, the provision is not concerned with economic loss which the vessel may incur by way of liability for environmental damage. Rather, it is directed to the skill and efforts of the salvors in preventing or minimising any potential damage caused by major incidents. The collocation of adjectives listed in this paragraph to describe the type of incident clearly contemplates a significant event. In my view, it is not open on any reasonable reading of this provision to open up, or give weight to, considerations relating to the extent to which the efforts of the salvors avoided any potential liability of the vessel to third parties. The provision is directed to substantial **physical** damage, and is focused on the level of skill in combination with the amount of work, and difficulty of that work, which is required to prevent physical damage to the vessel and the surrounding environment.

77. In considering this paragraph, the Court must assess whether there was some realistic prospect of significant or substantial physical damage to the environment caused by the incident that is the subject of the proceedings. In considering the events of 27 March 2002, I find that there was no major incident which seriously affected or posed a direct threat to the environment. Nor was there any notable escape of pollutants or contamination into the surrounding areas which required containment or prevention measures to be implemented. The grounding of the "La Pampa" and the consequential salvage operations could be described as incidents, but I do not consider they could be characterised as major incidents which affected or threatened the environment in the manner required by this paragraph.

78. At the time of the incident, the "La Pampa" was carrying 2993 tonnes of heavy fuel oil and 163 tonnes of diesel oil, as well as lubricating oil and engine wastes containing oil and ballast water. Having regard to the position in which the oil was stored, I find that there was merely a remote possibility of a failure such as would lead to the release of any of that oil. Furthermore, the arrangement plans and the tank plans for the "La Pampa" indicate that the fuel tanks were at the rear of the vessel, well away from areas where there was any real prospect of rupture or failure which could lead to the escape of contaminants that might pollute the environment.

79. I have come to the conclusion that there existed only a remote possibility of the escape of any contaminants or pollutants. Although I consider that the salvors have exercised considerable skill and effort in salvaging the endangered property as specified under this paragraph, I do not consider that there was any imminent, present or substantial threat to the environment prevented by their skill and efforts.

80. In my view, there was virtually no real - as opposed to remote - possibility that oil or ballast water in any significant quantity could escape as a result of the grounding, and therefore I have not assigned any significant weight to this consideration. Nor do I consider that there was any real risk of breakage of the vessel so that the environment would be adversely affected.

81. In light of the evidence, I am not persuaded that there was any danger of substantial physical damage or injury to human health, marine life or resources due to the escape of oil or other pollutants, or the blockage of the channel. Nor was there any danger of substantial damage to marine resources caused by any major incident similar to fire, pollution or contamination. The plaintiffs have not established that there was any proximate prospect of such a consequence as opposed to pointing to the existence of a remote possibility. I also note that the time frame during which the salvage efforts were made was of relatively short duration. Therefore I have given some, but not great, weight to this consideration in forming my conclusion as to the proper quantum of the reward."

In considering Article 13(1)(c) Tamberlin J said as follows:

"82. Article 13(1)(c) requires that the reward is fixed taking into account the "measure of success obtained by the salvor". In this phrase, the term "success" refers to the salvaging of the property and ship in danger. The expression "success obtained by the salvor" should not be construed to mean success in avoiding the danger of the vessel or its owners or crew being sued for economic loss by third parties. The salvage operation, as Article 1 indicates, is the operation of salvaging "a vessel or property" in danger. It is directed to physical loss or damage. It is not directed to protecting the vessel from potential third party litigation claims for loss suffered by third parties by way of damage or economic loss or the expense and expenditure of time in defending any proceeding.

83. In the present case, the salvage operation was a one hundred percent success and I have given significant weight to this factor accordingly."

In relation to Article 13(1)(d) his Honour said as follows:

"85. In my view, this paragraph does not contemplate danger to the environment but rather the focus is on the degree of danger to the salvaged vessel itself and the persons and property in it. This factor is directed to assessing the danger to human life and the risk of loss, injury or damage in relation to the salvaged property."