

BRITISH COLUMBIA ADMIRALTY DISTRICT

Vancouver
1967

Jan. 9-11

BETWEEN:

BURRARD TOWING LTD., J. L. GIS-
BOURNE, V. MONTGOMERY, L. } PLAINTIFFS;
HELLAN and H. GLANVILLE }

AND

T. G. McBRIDE & CO. LTD. (Owner of
the barge *D.M. 60*) and LAFARGE } DEFENDANTS.
CEMENT OF NORTH AMERICA }
LTD. }

*Shipping—Salvage—Tug hauling barge asking for aid of second tug—
Whether towage of barge is salvage—Amount of compensation.*

*Shipping—Costs—Action for salvage—Tender of payment—Procedure—
Costs—Court’s discretion as to—Admiralty Rules 90, 91, 92, 131, 135.*

Whilst hauling a barge laden with cement against the wind in the choppy waters of Comox harbour the tug *Dexter’s* engine over-heated and her master asked the tug *Leslie Ann* for a pull. The *Leslie Ann* came alongside and took over the towage of the barge. The owners and crew of the *Leslie Ann* brought action for salvage. Defendants offered plaintiffs \$1,364 and subsequently \$1,500 for the *Leslie Ann’s* services and pleaded tender in the statement of defence subsequently filed, paying \$1,500 into court.

Held, the award should be \$1,300. The tow by the *Leslie Ann* amounted to salvage because of the danger of the barge grounding and because the *Leslie Ann* came to her aid seasonably. As the salvage service was of short duration and no undue risk or extraordinary skill were involved it would be unreasonable to increase the amount of the award by reason of the substantial value of the barge and its cargo. *Humphreys et al v. The M/V “Florence No. 2”* [1948] Ex. C.R. 426, applied.

Held also, defendants had complied substantially though not exactly with Admiralty Rules 90, 91 and 92 re tender, and in exercise of the court’s discretion as to costs under Admiralty Rules 131 and 135 plaintiffs should have their costs of action up to and including the statement of claim and the defendants all costs thereafter. The *“Creteforest”* [1920] P. 111, applied.

ACTION for salvage.

J. R. Cunningham for plaintiffs.

W. O. Forbes for defendants.

NORRIS D.J.A.:—This is an action for salvage, the vessels involved being the tug *Leslie Ann*, chartered by the plaintiff Burrard Towing Ltd. and at all material times

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manned by the plaintiff Gisbourne as master, the plaintiff Montgomery as mate, the plaintiff Glanville as engineer and the plaintiff Hellan as deckhand, and the tug *Dexter* with the barge *D.M. 60* in tow, the tug being owned by Lloyd Towing Co. Ltd., which in turn was owned by Iorwerth Dalgleish Lloyd, who was the master of the tug, one McKenzie, a deckhand, being the only other member of the crew. The barge was owned by the defendant T. G. McBride & Co. Ltd. and was chartered to the defendant Lafarge Cement of North America Limited, which was the owner of the cargo of some 3,930 barrels of bulk cement in the barge. The barge was of a value of between \$185,000 and \$200,000, the cement being valued at about \$17,000.

The tug *Leslie Ann* is a steel tug of 41 tons gross, 48' in length, 15.8' in breadth and 7.7' in depth in the hold, and is valued at about \$50,000. Her engine is a diesel engine of 475 h.p. The plaintiff Gisbourne has a one-third interest in the plaintiff Burrard Towing Ltd., the charterers of the *Leslie Ann*. The tug *Dexter* is of a registered tonnage of 15 tons gross, is 40' in length, 12.5' breadth and 3.8' in depth in the hold. It is powered by a 170 h.p. diesel engine. There is no claim for salvage in respect of the *Dexter*.

The barge *D.M. 60* is a steel cement barge of about 120' in length, with a main breadth of 40'. The stem and stern are square and raked. Her depth in the hold is about 11'. Her gross tonnage under the tonnage deck is some 471.82 tons. Her superstructure is some 287.09 tons, her total gross tonnage being 758.91 tons. The cargo of cement is carried above deck and pumped out through an air slide system and the evidence is that water in the hull would not get at the cement cargo, and the barge would have to be completely submerged for water to get at the cement, *i.e.*, to a depth of approximately 24 feet.

The events giving rise to this claim are as follows:

In the late afternoon of October 5, 1965, the tug *Leslie Ann* was berthed at a pier in Comox harbour. About this time the deepsea tug *La Bonne* delivered the barge *D.M. 60* with its cargo of cement to the *Dexter* in Comox harbour so that the *Dexter* would tow the barge to the wharf of the defendant Lafarge up the Courtenay River. The draught of the *La Bonne* was such as not to permit that vessel to go up the river and she tied up to a buoy in Comox harbour.

The tug *Dexter* with the barge *D.M. 60* in tow proceeded through Comox harbour, up the Courtenay River to the Lafarge wharf which was about a mile and a half from the mouth of the river where the *Dexter* took over the barge. When the *Dexter* reached the Lafarge wharf, due to the fact that it was not convenient to moor the barge there because of weather conditions and the unsafe condition of the wharf, the master of the *Dexter* decided to return to Comox harbour, to turn the barge back to the deepsea tug *La Bonne* from which it had previously obtained delivery.

On a consideration of all the evidence I find that while the wind had increased from about 35 mph to a 55 mph wind, the water in Comox harbour at relevant times was not overly rough, which fact would appear to be due to the nature and topography of the harbour. The master of the *La Bonne*, whose evidence I accept, stated that it was "a heavy chop not a heavy sea". None of the crew of either the *Leslie Ann* or the *Dexter* found it necessary to wear life jackets even when taking over the tow of the barge.

When the *Dexter* reached the harbour, the master Lloyd endeavoured by radio telephone to communicate with the *La Bonne*, which was moored in deep water, but was unable to get an answer. At about this time the engine of the *Dexter* began heating due to the fact that the barge was being towed against the wind, which was at that time a southeast wind. The master of the *Dexter* then called the *Leslie Ann*. There is some slight dispute as to exactly what was said. I find from the evidence that when the *Leslie Ann* answered, the master of the *Dexter* stated to the master of the *Leslie Ann* that his engine was heating and that he would "like a pull".

The master of the *Leslie Ann* said he would come. He was thanked by the master of the *Dexter*, and the *Leslie Ann* then proceeded to a point alongside the *Dexter* and the plaintiff Hellan boarded the barge, removed one of the lines of the *Dexter* and attached one of the bridles. The *Dexter's* deckhand, McKenzie, was on the barge at the time and he removed the other *Dexter* line and attached the other bridle from the *Leslie Ann*. He then stepped from the barge to the *Leslie Ann* without trouble while the vessel was moving. He had been able to walk along the

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barge without difficulty and without holding on to the guard rail in spite of the fact that he was wearing rubber boots. He said that no water was coming over the barge and that he got wet from the rain and not from the sea. He went to the galley on the *Leslie Ann* and found no water on the floor. The *Dexter* then left and the *Leslie Ann* pulled the barge to a place in the harbour where it was later taken over by the *La Bonne*.

I find on the evidence that the whole operation from the time that the *Leslie Ann* was called until the barge was later turned over to the *La Bonne* took between half an hour and three-quarters of an hour.

The Courtenay River empties into Comox harbour and like those parts of the coast which are estuarian, in Comox harbour there are shallows and mudbanks which at low tide are completely bare but which at high tide have some 10 feet or more in depth of water. There are rocks or boulders in the water at points along the shore bank, particularly to the northwest of the harbour.

Lloyd, the master of the tug *Dexter*, has been engaged in river towing and is not certificated. His experience and knowledge of the area in question in this action is indicated in the following passages from his evidence:

Q. Captain Lloyd, you're the Master of the tug *Dexter*, and you are also the principal owner and operator of the firm known as Lloyd Towing Company?

A. Yes.

Q. And the *Dexter* and Lloyd Towing Company generally are engaged, amongst other things, in river towing in the Courtenay River?

A. Yes.

Q. And where do you live?

A. Comox.

Q. How long have you worked in the Courtenay River towing?

A. I've been going on thirty years.

Q. Thirty years?

A. Yes.

Q. When did you start?

A. '37.

Q. And have you been engaged continuously in towing in the Courtenay River since 1937?

A. Yes, with occasional trips out, but principally there.

Q. You take occasional trips to other places, but basically you work on the Courtenay River?

A. Yes.

Q. And I suppose then you must be familiar with the river and particularly in the area of Comox?

A. Yes.

Q. And do you tow exclusively for the Defendants in this case, Lafarge Cement, Deeks-McBride, and those people, or do you tow for anyone who hires you?

A. I tow for anyone that hires me.

* * *

Q. Incidentally, how many times have you towed barges up that river, Captain?

A. Thousands.

Q. Literally thousands?

A. Yes, literally thousands.

Gisbourne, the master of the *Leslie Ann* has had a tow boat master's certificate since 1951 and has been a tugboat master since 1952, and since 1943, save for about a year and a half during the latter part of World War II, has worked continuously on tugboats. That he was not particularly familiar with the area is indicated in the following passages from his evidence:

(Speaking of Lloyd's call on the radio telephone)

A. I can't remember whether that was the exact words or not, your Honour. It's quite a while back now.

Q. Anyway, he said, "come and help me".

A. Yes. So I looked at the chart, and being unfamiliar with the river there I didn't think I could get in there at all.

* * *

A. Well, the deck hand, Hellan—I had him bring the bridles out of the hold.

Q. That is, the towing bridles.

A. Yes. To get the towing gear ready. Then we let go and went to his aid, and I had Hellan show me the way in there as best he knew it.

Q. Now, where were you—where did you handle the vessel from on the way out?

A. On the flying bridge.

* * *

Q. And what route did you take to get into where the—would you mark with a red pencil, as you recall it, the route taken by you with—was there someone with you for a while on the flying bridge?

A. Yes. Well, the deck hand was showing me the way in.

* * *

Q. Well, I put it to you, Witness, that at first the emergency consisted in whether this steel barge would be blown ashore on a mud bank or not.

A. Well, I'll put it this way; when I went in there, I did not know the construction of that bottom. I hadn't towed in there. I mean, that tug was no tug to be going in there with—

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and from the evidence of Hellan, the deckhand on the *Leslie Ann*:

Q And you were a deck hand.

A. Yes. He told me where the bridles were. I went out to the stern of the boat, and mean time they were starting the motors, or motor, and I pulled the bridles out, and had to untie them. They were rolled up, And by then I'd cast off the stern, I believe, and I'd run up to the bow, and I showed Larry approximately what the best, to my opinion—

MR. CUNNINGHAM:

Q. What did you do with the ship when you went to the boat? What was it doing?

A. We'd broken outside the break water, and I was on the side of the boat at the time, and then I had motioned to Larry when to turn in, and when he turned, I started to sound.

The evidence of Gisbourne supported to some extent by the evidence of Hellan places the barge at the point where the *Leslie Ann* took over close to Robb Bluff and the boulders on the shore, and very considerably to the north-west of the place where the master of the *Dexter* placed it, which was near the shallows and mudbanks and also closer to the piers. McKenzie, the deckhand, was born in Comox and has lived all his life there. To the extent that his recollection goes, he supports the evidence of the master of the *Dexter*. Particularly, I find the evidence of the witness Hellan uncertain, vague and untrustworthy and I accept the evidence of McKenzie who was not, as Gisbourne and Hellan were, directly interested in the result of these proceedings.

The evidence of Captain George Armitage, a marine surveyor, who had visited Comox harbour on several occasions by land, sea and air, was largely of a general nature as to harbour conditions on those occasions and on hypothetical situations. It would have been more valuable if, having been shown by a witness who was to testify as to the facts, the place where the *Leslie Ann* was alleged to have taken the barge in tow, he was able to give more exact evidence as to where boulders and rocks were and in what part of the harbour the bottom consisted of mudflats. He had no experience with cement barges. He gave evidence that the lay of the land would increase the velocity of the wind but as there was no dispute that it was 55 mph at the material times, this was not of importance. He did not, and as he was not there presumably could not, give evidence

as to the sea. He gave evidence that the double daily rate of towage was often paid where there was some risk but not necessarily great risk.

There was evidence that the daily rate for the *Leslie Ann* was about \$680. There was also evidence that Lloyd had charged \$1,280 for pulling to Comox wharf a tug which ran out of fuel at the bell buoy in Comox Bar.

Having heard the witnesses and observed their demeanour I accept the evidence of the master of the *Dexter* as to the position of all the vessels and generally as to the conditions, in preference to that of the master of the *Leslie Ann* and the deckhand Hellan. Further, in the conditions there prevailing, the position of the takeover as indicated by the master of the *Dexter* is the more likely one. In all maritime operations a considerable element of danger exists and I cannot accept the almost terrifying picture of the danger to all concerned and to the vessels, painted by the plaintiffs. In my opinion the possibilities of danger to the *Leslie Ann* and its crew and to the *Dexter* and its crew and the barge *D.M. 60* have been exaggerated out of all reason.

The acceptable evidence does not satisfy me on a balance of probabilities that there were rocks or boulders in such a location in relation to the place where the *Leslie Ann* put lines on her that the *D.M. 60* was in danger of being damaged by them. At best for the plaintiffs on such evidence it might be said that there was a possibility that the barge might have been grounded on the mudflats without damage to the barge hull, mechanism or the cargo of cement.

As to the danger to the barge, Gisbourne testified on cross-examination:

Q. Would you agree with me that to go ashore on a hard mud bank is not a particularly hazardous thing for a flat-bottomed steel barge to do?

A. No; but if there had been water under that cement—

Q. Yes. You do not know the construction of the barge, though, do you?

A. No. I've never towed the barge.

Q. No one from the *Dexter* indicated to you that there was any question of life being in danger, or any thing of that sort did they?

A. It was all done so fast that there wasn't too much conversation.

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Gisbourne testified that none of the personnel involved wore life jackets and I find on the evidence that danger to life, over and above a normal maritime risk, was not involved in the operation which is the subject matter of this action.

I accept the statements of Lloyd, the master of the *Dexter* as to other available help, testified to as follows:

- MR. FORBES: Q. Did you say anything to the *Leslie Ann* indicating that you needed help in the way of salvage or rescue?
- A. No.
- Q. Did you in fact need such help? I'm not asking you if you needed help. I'm asking you if you needed help in the sense of being rescued?
- A. No, no.
- Q. Had the *Leslie Ann* replied "yes, I'll come and pull you but I'll put in a salvage claim" of, let's say, over a thousand dollars, what would your answer have been?
- A. I would have told him to stay at the dock.
- Q. Why? What alternatives did you have?
- A. There was another boat, towboat in Comox Wharf, the *Seaview* which I could have phoned quite easily?
- Q. Who runs the *Seaview*?
- A. Mr. Jack French.
- Q. Yes.
- A. There was also aircraft boats there—
- Q. Yes.
- A. —would come out.
- Q. Yes.
- A. There was also boats over at the Crown Zellerbach Logging Company which would come if I so requested them, but the reason that I took the *Leslie Ann*, he was right there and handy, and so forth.
- Q. Now supposing that the situation had been left for you and *La Bonne* alone; and assuming, of course, that the *La Bonne* would not have become aware of the situation until she actually did see you and started coming out,—
- A. Yes. Well—
- Q. —what would you have done? How would you have handled that situation if the *Leslie Ann* had not been there at all and you hadn't called on other tugs?
- A. Well, I had the alternative of turning and going back up the river again. Mind you, while I was here, (indicating) I wasn't going backwards. I was making headway all of the time. I'd made headway about up to here actually all the way—

Evidence by him as to the locality where he was picked up is as follows:

- Q. I see. Now I want to ask you next about this locality, the general area where you were in fact picked up by the *Leslie Ann*. Have you ever seen anything aground there?
- A. Oh yes, yes.

Q. Well, tell the Court about that, please. What type of vessels have you seen aground there?

A. Well, nearly always there's oyster barges aground there. They put them, ground them and load them on at night when the tide goes out.

THE COURT: What's that?

MR. FORBES: He says there's nearly always oyster barges there. They put them aground and load them when the tide goes out at night.

A. Yes, all this area is an oyster bed, (indicating).

Q. That includes the area where you were?

A. Yes.

Q. And what's an oyster barge made of, steel or wood?

A. Wood.

Q. Have you yourself deliberately grounded anything there?

A. Yes.

Q. What?

A. Some 30-foot by 90-foot scows.

Q. Some 30 by 90 foot wooden scows?

A. Yes, wooden scows, loaded.

Q. Loaded?

A. Loaded, yes.

Q. Why would you ground scows in that location?

A. Well, a couple of years ago we were dredging out the river and towing these scows out to sea. Well, we stayed in the river till it was quitting time, and then proceed out over the flats and the barge would ground, and leave it there till the next tide and tow it out. You couldn't get right out with the full scow.

Q. And this was a normal, routine operation?

A. Yes. I think we did that three times on that job.

Q. Now—

THE COURT: What was the job?

A. Dredging the Courtenay River. The scows had about 500 tons of mud on them.

MR. FORBES: Q. Did any of those scows sustain damage—

A. No.

Q. —by those groundings?

A. No, never heard of it.

Q. Now what do you say as to these big four or five foot sharp boulders that are supposed to be in this location? Do you know of any such boulders?

A. Yes. There are a few just along the shoreline, as indicated here, (indicating).

Q. Where's that?

A. Right here, (indicating).

Q. You are pointing into Robb Bluff?

A. Yes.

Q. Now apart from those boulders that are marked as such on the chart, are you aware, or can you tell the Court whether or not there are any boulders in that locality?

A. Yes. There are a few scattered along on this shoreline, you know.

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Q. At the shoreline?

A. Yes, all along.

Q. Well, could you mark those in with, let's say, X-s.

Yes, You've drawn some boulders there along the shoreline.

Now were there any boulders on the sea bed anywhere near where you were?

A. No.

The general principles to be applied in connection with a claim to salvage are well known and there is no great difficulty in understanding them. It is in the application of those principles to the circumstances of each particular case that difficulty arises.

Kennedy on Civil Salvage (4th Ed.) at p. 5 describes a salvage service as follows:

A salvage service in the view of the Court of Admiralty may be described sufficiently for practical purpose as a service which saves or helps to save a recognised subject of salvage when in danger, if the rendering of such service is voluntary in the sense of being solely attributable neither to pre-existing contractual or official duty owed to the owner of the salvaged property nor to the interest of self-preservation.

As to danger, *Kennedy* at p. 14 states:

... the danger necessary to found a salvage service, whether it arises from the condition of the vessel or of her crew or from her situation, is a real and sensible danger. On the one hand, it must not be one either existing only in fancy or vaguely possible, and, on the other hand, it need not be absolute or immediate. It must, however, it is submitted, be at least so near, so much a just cause of present apprehension, that, in order to escape out of it or to avoid it (as the case may be), no reasonably prudent and skilful seaman in charge of the venture would refuse the salvor's help if it were offered to him upon the condition of his paying for it the salvor's reward.

I adopt as part of this judgment the statement of my predecessor, the late Mr. Justice Sidney Smith, in *Humphreys et al v. The M/V "Florence No. 2"*¹:

The factors which go to the making of a salvage award are well-known and well-established, but may bear repetition here. They are, first, the degree of the danger to the property salvaged, its value, the effect of the services rendered, and whether other services were available; next, the risks run by the salvors, the length and severity of their efforts, the enterprise and skill displayed, the value and efficiency of the vessel they have used, and the risks to which they have been exposed here. The amount of the award depends on the degree in which all, many, or few of these factors are present.

Some effort was made by plaintiffs' counsel to elicit from witnesses, and particularly from Captain Armitage, an

¹ [1948] Ex. C.R. 426 at p. 434.

interpretation of Lloyd's call for assistance as a distress call. This was a matter on which the words as accepted by the trial Judge must speak for themselves and be interpreted by him in the light of all the evidence as to what was said and in view of the circumstances prevailing at that time as found from the evidence. I interpret the call from the *Dexter* as a call for towage because of the not unusual circumstance of the engine over-heating as the *Dexter* forced its way with its tow against the wind.

In my opinion this is a case of "a salvage service performed by means of towage", as my predecessor said in *Humphreys et al v. The M/V "Florence No. 2"*, *supra*, at p. 429, and it is lifted into the higher category of salvage on account of the reasonable possibility of the barge becoming grounded on the mudflats and because the *Leslie Ann* seasonably came to her assistance even although I find that there were services available as testified to by the master of the *Dexter*. I do not think that the salvors ran undue risk, nor was there undue risk to the crew of the *Dexter*; the length of the salvage service was short—although that is only one factor and not a determining one. The master and crew of the *Leslie Ann* did not display any out-of-the-ordinary skill, efficiency or enterprise.

I have taken into consideration the fact that the value of the barge and its cargo was substantial but in the circumstances of this case it would be totally unreasonable to award an amount for salvage based on that value. I have in mind the paraphrase of the judgments in the relevant authorities as stated in *Kennedy, supra*, at p. 181 as follows:

"The value of the property saved is a most material and important consideration," "for in proportion to that value is the benefit to the owners, and that is one of the primary principles in settling the amount of remuneration"; but "the court must not be induced by it to award a sum which is out of proportion to the services of the salvors."

See "*The Amerique*" [1874] L.R. 6 P.C. 468;

"*The Glengyle*" [1898] P. 97, at p. 103;

"*The Port Hunter*" [1910] P. 343.

Leonard C. Clemis, a marine supervisor employed by the defendants, produced a diver's report (Ex. 17) made immediately after the events in question to the effect that there was no damage to the barge except a small dint which was old damage, and a number of scratches on the

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paint on the port side, that the company's steel barges, including the *D.M. 60* were often deliberately grounded, and that in 1965 the *D.M. 60* was on the rocks in Active Pass without damage, that in January, 1966, he inspected the bottom of the *D.M. 60* and there was no damage which could be attributed to the events of October 5, 1965. This evidence was in answer to the evidence of Gisbourne that the barge grounded on the stern end. With reference to a bill from Bel-Aire Shipyard Ltd. dated October 13, 1965, which read as follows:

M. V. Leslie Anne

TO: Dock vessel.	
Build blocks.	
Labour	
File wheel.	
Undock vessel.	\$65.00

Gisbourne testified:

Q. And you put the vessel on the ways in Vancouver.

A. Yes, that's right.

Q. What did you see, yourself?

A. Well, all of her propeller blade tips were bent, and you could see—

THE COURT: What did you say? The propeller blades bent?

A. Yes. And she was marked on her keel, where she had been coming and sitting.

Q. Marked on the keel?

A. Yes.

Q. What do you mean, marked?

A. Well, she was all scraped on her shoe, like. Right at her shoe, where the marks were, right at her rudder shoe.

MR. CUNNINGHAM:

Q. And did you incur an expense with respect to the docking, undocking and the propeller work?

A. Yes.

Q. Yes. And would you explain—there is an entry on this invoice, "file wheel". What does that mean?

A. That's to straighten the tips up.

Q. Of the wheel?

A. Yes.

Q. Which is the propeller.

A. Yes.

* * *

THE COURT: What is this item, "file wheel"?

MR. CUNNINGHAM: My Lord, that is—the expression "wheel" also means "propeller", and "file wheel"—

THE COURT: What would that imply? Filing it?

MR. CUNNINGHAM: Simply that the ends were bent over, and they filed them—well, perhaps the Witness should explain, my Lord. If you could Captain Gisbourne?

A. Your Honour, we wanted the boat in a hurry, back again, so rather than take the wheel off, and send it up to—

THE COURT: It is not a question of straightening anything out, it is just simply to file off the edges.

A. Where they were burred over. Ordinarily, if you had time, you would take the wheel right off, and get it fixed properly.

MR. CUNNINGHAM:

Q. What is your opinion as to what had caused this burring of the—

A. Well, when she was hitting there. It's obvious.

Q. This is when she was hitting during the salvage operation.

A. Yes.

As to the marks, Hellan also testified:

MR. CUNNINGHAM:

Q. Now, you were on the *Leslie Ann* when she was on the ways at Bel-Air. Do you recall that?

A. Yes.

Q. And did you have occasion to look at the bottom when she was on the ways?

A. Yes.

Q. What did you see? Just explain briefly what you saw.

A. I'd seen the shaft. Each blade had a nick or two.

THE COURT: What had a nick or two?

A. Each blade of the wheel.

Q. The blade of what?

A. Of the propeller.

Q. A nick or two?

A. Yes.

MR. CUNNINGHAM:

Q. What about the bottom? Did you see any thing else?

A. I never noticed the shoe, or any thing, but all I noticed was the end of the blade on each propeller was shining from something.

THE COURT: Was what? Shiny?

A. Yes.

The internal indication of a tendency to exaggerate is obvious in this testimony.

Having in mind the principles set out in *Kennedy on Civil Salvage, supra*, at p. 12, as follows:

Sir Christopher Robinson, in the course of his judgment in "*The Calypso*" ((1828) 2 Hagg. 209, 217), said of both military and civil salvage: "It will be found, I think, that both these forms of salvage resolve themselves into the equity of rewarding spontaneous services, rendered in the protection of the lives and property of others. This is a general principle of natural equity . . . Considering all salvage . . . to

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be founded on the equity of remunerating private and individual services, a court of justice should be cautious not to treat it on any other principle." In *"The Juliana"* ((1822) 2 Dods. 504, 521) Lord Stowell said that although the Court of Admiralty did not claim the character of a court of general equity, it was bound to determine the cases submitted to its cognisance upon equitable principles and according to the rules of natural justice. Lord Wright said, in *"The Beaverford" v. "The Kafirstan"* ([1938] A.C. 136, 147): "The maritime law of salvage is based on principles of equity."

* * *

Salvage, however, stands upon a broader basis than this. It is a mixed question of private right and public policy. The reward is assessed by the court neither as a compensation merely *pro opere et labore*, nor according to the measure of direct benefit conferred by the particular salvage service upon the shipowner and the cargo-owner, who are chargeable with the payment of the reward.

I would award as "liberal" but not "extravagant" in respect of salvage the amount of \$1,300. I adopt the apportionment suggested by counsel for the plaintiffs, that is to say, three-quarters to the owners, one-third of the balance to the master of the *Leslie Ann*, and the balance then remaining to the mate, the engineer and the deckhand in equal shares.

Counsel may if they wish submit memoranda as to the award of costs, there being in the amended Statement of Claim an allegation of the tender of an amount of compensation by way of salvage.

I am indebted to both counsel for able and painstaking presentations of their respective cases.

* * *

May 23

In this salvage action judgment was given for the plaintiffs, being the owners and crew of the salvor vessel, in the sum of \$1,300, and the parties were requested to make written submissions as to costs, tender having been alleged.

The action was commenced on November 22, 1965.

On December 13, 1965, the defendants' solicitors wrote to the plaintiffs' solicitors offering to pay the plaintiffs the sum of \$1,364 in full discharge of all claims for the services rendered by the plaintiffs. This letter contained the following statement:

This is double the daily rate for your clients' tug, and is offered not in the belief that the services were worth this amount but in the hope of avoiding unnecessary litigation costs.

On June 27, 1966, the defendants' solicitors again wrote the plaintiffs' solicitors increasing the offer to \$1,500 and stating that the amount would be paid into Court if the offer was refused. This letter contained the following statement:

This offer is not to be construed as an admission that the services rendered were in the nature of salvage or were worth as much as \$1,500. It, and the payment into Court, are made in an effort to be as generous as possible to the Plaintiffs, and to avoid needless and uneconomical litigation.

On June 28th the statement of defence was filed and amended the 6th day of January, 1967. This latter admitted the basic facts and the plaintiffs' entitlement to compensation for the services rendered. The statement of defence contained the following statement:

The Defendants have tendered to the Plaintiffs a sum which is more than ample to compensate them for their services even on a salvage basis.

On July 13, 1966, the defendants paid the sum of \$1,500 into Court. This amount stands to the credit of this action.

The plaintiffs submit that as the plaintiffs were successful in establishing a salvage service in view of the defendants' admission in the statement of defence, the plaintiffs should be entitled to their costs.

The defendants concede that in view of the tender after the writ was issued and the statement of claim filed, the plaintiffs are entitled to costs up to and including the filing of the statement of claim but that the costs of this action thereafter should be awarded to the defendants. The contest in this action was substantially as to the quantum of the salvage award. In awarding the sum of \$1,300 I stated:

In all maritime operations a considerable element of danger exists and I cannot accept the almost terrifying picture of the danger to all concerned and to the vessels, painted by the plaintiffs. In my opinion the possibilities of danger to the *Leslie Ann* and its crew and to the *Dexter* and its crew and the barge *D.M. 60* have been exaggerated out of all reason.

The Rules of this Court as to tender are Rules 90, 91 and 92. While the provisions of these Rules were not followed

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exactly, I accept the course followed as a substantial compliance with the Rules. In future, possible difficulty may be avoided if there is strict adherence to the rules.

In support of his submission counsel for the plaintiffs quotes part of a judgment of Hill J. in *The "Creteforest"*². But the part of the judgment of Hill J. quoted is to be read with the part of the judgment immediately preceding it and not quoted. This part is as follows:

Here again the peculiar features of a salvage action and of consolidated actions in Admiralty must be considered.

The Lee ((1889) 6 Asp. M.L.C. 395) shows that where the defendant has paid in one sum to answer several consolidated claims, he runs the risk that the judge may say that it was reasonable for the plaintiffs to go on to trial, even though the tender is upheld.

In my opinion the judgment in *The "Creteforest"*, *supra*, is not applicable in this case because of the fact that the circumstances in this case are widely different from the circumstances in that case. I have the discretion as to costs contained in Rule 131 and Rule 135 reading as follows:

131. In general costs shall follow the event; but the Court may in any case make such order as to the costs as to it shall seem fit.

135. If a tender is rejected, but is afterwards accepted, or is held by the Court to be sufficient, the party rejecting the tender shall, unless the Court shall otherwise order, be condemned in the costs incurred after tender made.

This discretion is, of course, to be exercised judicially and I find that in view of my decision in the action and the fact of the tender, the plaintiffs should have their costs of this action up to and including the statement of claim, and the defendants all costs thereafter, and I so order.

² [1920] P. 111 at p. 115.