GULF AND LAKE NAVIGATION COMPANY LIMITED (*Plaintiff*) ... APPELLANT;

1955
*Jun. 7, 8
*Oct. 4

AND

MOTOR VESSEL *WOODFORD* (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Salvage—Beneficial services rendered at request—Services contributed to eventual salving—Amount of reward.

In an action for salvage services following a maritime collision, the trial judge found that the respondent vessel was in a position of considerable danger up to the time that, at her request, she was taken in tow by the appellant's steamship *Birchton* and that she was brought by the *Birchton* to a position where she remained without damage until finally taken in tow by tugs and brought to port. He concluded that the appellant's services had been of a beneficial nature and had contributed to the eventual salving of the property and should be rewarded as such. Notwithstanding this he assessed the services on a lower basis, because of the fact that the services had been requested and had not been the sole instrument in the ultimate salving.

Held: The fact that, in response to a call for aid, either immediately or through an intermediary, assistance is asked and without more rendered, does not deprive the assisting ship of salvage. The appellant ship fell within the second proposition set forth in the judgment of Phillimore J. in *The Dart* (1899) 8 Asp. M.L.C. 481 at 483, "If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award." If the trial judge had not considered himself bound by what he wrongly conceived to be the applicable principle he would have allowed more than the $12,000 fixed by him. The appeal was therefore allowed and the amount increased to $20,000.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Smith J., District Judge in Admiralty, in an action for salvage.

B. F. Clarke for the appellant.

R. C. Holden, Q.C. for the respondent.

The judgment of the Court was delivered by:—

THE CHIEF JUSTICE:—This appeal is concerned with the amount to be awarded the appellants for salvage services rendered the Motor Vessel *Woodford,* her cargo, freight,

*PRESENT: Kerwin C.J. and Taschereau, Rand, Fauteux and Abbott JJ.

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passengers and crew in July 1952. On the 27th of that month, the *Woodford* had come into collision with the S.S. *John A. France,* in dense fog in the St. Lawrence River, as a result of which the former was badly holed in the port-side of her engine room, the engine room became flooded and the vessel was almost immediately deprived of all power. It is unnecessary to set forth in detail all that happened thereafter, because on all substantial issues of fact the trial judge found in favour of the appellants and the respondents have not cross-appealed.

The trial judge found that the *Woodford* was in a position of considerable danger following the collision and up to the time she was taken in tow by the *Birchton,* owned by the appellant Gulf and Lake Navigation Company, Limited. He considered the argument on behalf of the respondents that the position in which the *Woodford* found herself after the towing was more dangerous than her situation had been before the towing commenced and decided that she had been removed from a position of some actual danger and from perils which could have been reasonably apprehended and was brought to a position where she remained without damage until she was finally taken in tow by certain tugs which eventually brought her to port in Quebec. On this point he concludes: "These services were of a beneficial nature and Court finds that they contributed to the eventual salving of the property". With this I agree.

However, he also held that even if it could not be concluded that the services rendered by the *Birchton* contributed to the ultimate salving of the *Woodford* that would not be sufficient to disentitle the appellants to salvage remuneration. He referred to the fact that a request had been made for the appellant's services, but stated that, as already mentioned, he had no doubt that the services rendered by the *Birchton* were in the nature of salvage services and should be rewarded as such. He pointed out that the case was to be distinguished from that of a ship who, without any request, undertakes to perform salvage services, as in the latter event, the right to salvage remuneration is dependent upon the success of her efforts, and that if her services do not bring about, or contribute, to the salving of

the property, it is entitled to nothing, but if successful her reward is greater than it would have been had her services been engaged by the owner of the property.

Mr. Clarke objected that the trial judge having found that the services were of a beneficial nature and had contributed to the eventual salving he should have awarded salvage on the usual basis and not on the lower one which he had adopted. The learned judge stated at p. 255 of the record:

> While therefore the plaintiffs whose services were rendered at the request of the *Woodford* and did not in themselves result in the *Woodford* being brought finally to a place of safety are not entitled to be rewarded to the same extent that they would have been had their services not been requested and had they been the sole instruments in the salving of the vessel, they are nevertheless entitled to a fair reward for hard work and services well, if not effectively, carried out. (*The Benlarig* (1888) 14 P.D. 3, Butt J. at page 6).

There, however, Butt J. decided that there had been a contract with the captain of the *Vesta* to do his best to tow the *Benlarig* to Gibraltar and that he had performed that contract. It is pointed out at p. 41 of the 3rd edition of Kennedy's "The Law of Civil Salvage" that in that case and in *The Cheerful* (1), the general principle of "no success no salvage" was applied somewhat strictly against the claimant.

In any event there was no contract in the present case and it must happen very often that if a ship in distress does not radio for aid there is no opportunity for any other to go to her assistance. The fact that in response to such a call, either immediately or through an intermediary, assistance is asked and without more rendered, does not deprive the assisting ship of salvage. In *The Dart* (2), Phillimore J. says at 483:

> If a salvor is employed to do anything and does it, and the property is ultimately saved, he may claim a salvage award, though the thing which he does, in the events which happen, produces no good effect. If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award. If a salvor is employed to do a thing and does not do it, and no doubt uses strenuous exertions and makes sacrifices, but does no good at all, then it seems to me he is not entitled to salvage.

(1) (1885) 11 P.D. 3. (2) (1899) 8 Asp. M.L.C. 481.

In The *Stiklestad* (1), Bateson J. sets for the above extract and concluded that the services rendered by the *Dampfem* to the *Stiklestad* fell within the first of these propositions and not the last. In the present case I think the *Birchton* falls within the second proposition.

In my view the trial judge therefore erred by allowing less than he otherwise would have done if he had not considered himself bound by what he conceived to be the applicable principle. While he noted that, apart from the fact that there was a dense fog, the weather was favourable and the sea calm and that those on board either vessel were not exposed to any great danger, having regard both to the proximity of land and of other vessels, he also pointed out that the towing of the *Woodford,* who was entirely without power and did not have the use of her rudder, was a difficult operation requiring considerable skill and care and that, having regard to the fog and strong currents, the operation involved the risk of damage to the *Birchton,* not only by way of collision but as the result of the extraordinary stress and strain put upon her hull and machinery.

On her arrival at Quebec on July 29, 1952, the combined value of the *Woodford* and her cargo was $2,094,850. It was decided by the Privy Council in *The Amerique* (2), referred to in Kennedy at 159, that the value of the property salved should not "raise the quantum to an amount altogether out of proportion to the services actually rendered". The tugs that took the *Woodford* to Quebec from the position in which she was finally left by the *Birchton* will have claims either for towing or for salvage and this is a circumstance that must be borne in mind. At the same time the first salvors should not be treated niggardly. In Kennedy at p. 209 it is stated:—

Where the services of the different sets of salvors have not begun together, but a second set of salvors has either, with the consent of the first, joined at a later stage in the prosecution of the salvage adventure, or has taken up a salvage service which the first set of salvors, after rendering some assistance, has been obliged by the force of circumstances, and without fault on its part, to discontinue, the relative share of each set in the total award will be more or less affected by the consideration that the first salvors, if they have acted meritoriously, are on grounds of public policy, always to be treated with especial liberality in the apportionment. For such liberality is in two different ways of general benefit.

(1) [1926] P.D. 205. (2) (1874) 6 P.C. 468.

It serves, in the first place, to encourage that adventurous promptitude in rendering assistance to life or property in distress at sea which is always praiseworthy, and is often necessary for the accomplishment of the rescue. It serves, in the second place, to prevent a jealousy of second salvors which might otherwise exist, and tempt first salvors, injuriously to the interests to be salved, to shun co-operation when co-operation would ensure, or, at least, materially expedite, the success of the salvage undertaking.

To the same effect is the 2nd edition of Halsbury, Vol. 30, p. 910, para. 1234.

The trial judge allowed $2,199.82 as the cost of repairing the damage which the *Birchton* sustained during the towing operations and for out-of-pocket expenses. In view of what I conceive to be his error of principle, the sum of $12,000 awarded by him for salvage should be increased. It is always a difficult matter to fix a proper amount, but, after considering the cases to which we were referred and the circumstances in the present instance, I think that an allowance of $20,000 should be made. The appeal should be allowed with costs and, in lieu of the judgment below, judgment should go for the appellants in the sum of $22,199.82 and costs. The provision that the cost involved in furnishing bail in excess of $50,000 should be paid by the appellants may stand.

Appeal allowed with costs.

Solicitors for the appellant: *McMichael, Common, Howard, Ker & Cate.*

Solicitors for the respondent: *Heward, Holden, Hutchison, Cliff, McMaster & Meighen.*