

1948

BRITISH COLUMBIA ADMIRALTY DISTRICT

May 13, 14
and 15

BETWEEN:

June 3

HUMPHREYS ET AL. PLAINTIFFS;

AND

THE M/V FLORENCE NO. 2 DEFENDANT.

Shipping—Salvage—Misconduct of owner of vessel rendering salvage services—Demand for excessive salvage award—Owner deprived of costs—Factors which make salvage—Misconduct of owner does not deprive master and crew of salvage award.

The action is one claiming a salvage award. The plaintiffs are the owner, master, engineer and fishermen—crew of the ship *Emma K.* The Court found that the service rendered the defendant ship by the *Emma K.* was one of salvage performed by means of towage to Alert Bay because of the disabled and submerged condition of defendant ship and the seasonably coming to her rescue by the *Emma K.* Under instructions of the owner of the *Emma K.* defendant ship was towed by her from Alert Bay to Vancouver against express orders of officials of the Board of Marine Underwriters representing the owners of the *Florence No. 2.*

Held: That the plaintiffs are entitled to an award for salvage, such award not to include the towage from Alert Bay to Vancouver.

2. That the misconduct of the owner of the *Emma K.* does not deprive the master and crew of a salvage award.
3. That the factors which go to the making of a salvage award are the degree of the danger to the property salvaged, its value, the effect of the services rendered and whether other services were available; the risks run by the salvors, the length and severity of their efforts, the enterprise and skill displayed, the value and the efficiency of the vessel they used and the risks to which they have been exposed.
4. That because of the misconduct of the owner of the *Emma K.*, he is deprived of costs. The master and crew are entitled to recover their costs from defendant.

ACTION for salvage.

The action was tried before the Honourable Mr. Justice Sidney Smith, Deputy Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

Walter S. Owen, K.C. and *Evans Wasson* for plaintiffs.

A. Hugo Ray and *J. W. Wallace* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

SIDNEY SMITH D.J.A. now (June 3, 1948) delivered the following judgment:

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The plaintiffs claim a salvage award for services rendered to the *Florence No. 2* in the following circumstances:

The *Emma K.* is a purse seine fishing vessel 54 feet long, of 41 tons gross, and propelled by a diesel engine of 65 horse power. At all relevant times the first plaintiff was the owner of this vessel, the second plaintiff her master, the third plaintiff the engineer, and the other four plaintiffs composed her fishermen-crew. Her agreed value is \$30,000.

About 2 or 2.30 p.m. on 8th October, 1947, while crossing Johnstone Strait, from Robson Bight to Blackney Passage, in moderate weather: S.E. wind with choppy sea and white caps: this vessel came upon the fishing-vessel *Florence No. 2*, which had fallen over on her beam ends and lay submerged in the water with the stern somewhat higher than the bow. The *Florence No. 2* is of similar type, but somewhat smaller than, the *Emma K.*—length 52·5 feet, of 38 tons gross, equipped with a 77 horse power diesel engine, and normally carrying a complement of 7 men, including the master.

Johnstone Strait is a long, busy thoroughfare lying between Vancouver Island, and the mainland; it runs first in a general northwesterly direction for about 25 miles, thence westerly for 50 miles, with a fairly constant width of from 1½ to 2 miles; the tidal streams attain a rate of from 1 to 5 knots, with short periods of slack water, although these do not synchronize with the times of high and low water by the shore, but occur from 1 to 2 hours later. The *Florence No. 2* had shortly before been crossing the Strait from Robson Bight to Growler Cove, and when about the middle of the Strait had capsized with the loss of two men. There was no evidence pointing to the cause of this casualty, but I am satisfied that it was not due to the weather then prevailing. The master and remaining 4 members of her crew had saved themselves by scrambling into the skiff and were soon thereafter picked up by the much smaller fishing-vessel *London* and by her taken to Growler Cove. There they boarded the fishing-vessel *Glendale V* of comparable size to the *Emma K.*, and at once returned to the scene of their misfortune.

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There they found the *Emma K.* in process of putting a line on board. Captain Beswick of the *Glendale V* spoke to the master of the *Emma K.*, and gave some advice as to securing the towline to the submerged ship. Being assured by the *Emma K.*'s master that he could handle the situation, Beswick said he would proceed with the rescued crew to Alert Bay (10 miles away) as they were suffering some distress in their wet condition from cold and exhaustion. He did so.

Meanwhile, or very shortly thereafter, other fishing-vessels gathered at the scene; some six in all, of which the *Invercan 2*, in the same ownership as the *Florence No. 2*, was to perform a prominent role. At about 3 p.m. or later, the *Emma K.* began towing, accompanied by the *Invercan 2*, whose master, Myers, gave advice and assistance (to be mentioned later) as the towage proceeded.

The tide at the time was ebbing to the westward and the wind, as I have said, being from the S.E., both combined to carry the towing and towed vessels to the westward, and thus towards Blackney Passage. Myers advised the *Emma K.* to make for Blackney Passage, and this course was adopted; and later it was agreed to head for Parson Bay.

Blackney Passage runs roughly North and South, and its Southerly entrance lies between Cracroft Point to the East and the Easterly end of Hanson Island. From the position of commencement of the towage to Cracroft Point is a distance of 2 to 3 miles, and thence to Parson Bay another 3 miles. Once past Cracroft Point the vessels were sheltered from wind and sea. The chart shows the tide ebbs through the Passage at from 3 to 5 knots, towards Parson Bay. The towing of the *Florence No. 2* however was hampered by that vessel's nets which had become foul of some of her gear. Tug and tow would seem to have got too far west at the entrance to Blackney Passage which required the *Emma K.* to pull hard in a general easterly direction to keep clear to the end of Hanson Island. In order to assist her progress Myers with another man put out in the skiff of the *Invercan 2* and cut the nets adrift. When in this vicinity the *Florence No. 2* sank deeper, righted herself, and again rose to the surface. Much was made of this as an incident causing unusual danger to the

Emma K. and requiring heroic work on her part to cope with it. While giving full value to the circumstance, I do not quite regard it in that light. The evidence is clear that the cutting of the tow-line would at once have put an end to all danger, and it is elementary practice to have an axe on hand for such a contingency. When clear of wind and tide the two vessels accomplished the rest of the voyage without difficulty, and arrived in the Bay about 7 p.m., where the *Florence No. 2* was securely made fast for the night between a V frame and the *Emma K.* There is, perhaps understandingly so, some uncertainty about the times. No log-books or written memoranda were produced. The *Invercan 2* escorted tug and tow until this Bay was reached, and left when everything was under control.

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So far there is no serious conflict on the evidence; but I formed the impression that those on board the *Emma K.* were inclined to magnify the severity of the weather and the difficulties of the towage. My own view in this regard was confirmed by the plaintiffs' concluding witness, one, Beswick, master of the *Glendale V*, whose testimony had been taken *de bene esse*. I think his evidence must be accepted as giving the fairer version of the events that came under his notice. He said, *inter alia*, that they had fished in weather just as bad as it was that day. The evidence does not persuade me of the likelihood of either the sinking or the stranding of the *Florence No. 2*, had no assistance been rendered during the course of the next 24 hours or so after her collapse; though, no doubt, as darkness fell, she would have been faced with the added potential danger of being run down by passing ships.

The first phase of this matter ends here; and the second opens with the *Florence No. 2* full of water, but upright, safe and undamaged (save as to a broken mast) in Parson Bay. The termination of the danger marks the termination of the salvage service. I have no doubt that the service performed by the *Emma K.* to this point was one of salvage, and not one of towage only. It was a salvage service performed by means of towage. It was lifted into the higher category of salvage on account of the disabled and submerged condition of the *Florence No. 2* and of the *Emma K's* seasonably coming to her rescue. A towage

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service contemplates the towage of an uninjured vessel. It was pressed upon me that the *Florence No. 2* was then either a derelict or a wreck; but I cannot accept this contention. It is plain that in the circumstances mentioned she was neither the one nor the other. 30 Hals. 870 and 872. In my opinion the *Emma K.* was never at any point in any appreciable danger. The service she rendered did not contain any important element of risk or skill. Moreover there were other efficient means of assistance to the *Florence No. 2*—other vessels on the spot ready, able and willing to perform the same service, had the *Emma K.* not been a little ahead of them. I gathered that the others, quite properly, stood aside to permit of the first-comer's winning her salvage award. I speak chiefly of the *Invercan 2* and the *Glendale V*, since the other vessels only dimly appear in the evidence. I had, but did not need, the assurance of the masters of these two that they would and could have done the job in the absence of the *Emma K.* Nor do I need a like assurance from the masters of the other craft, although they were smaller and so might have had to team up to complete the task. For "it is the duty of all ships to give succour to others in distress; none but a free-booter would withhold it", as Lord Stowell said in *The Waterloo* (1). And that not the less so because this duty, as regards the saving of life, is now statutory; Canada Shipping Act, 1934, Ch. 44, Sec. 519. Unless deprived by subsequent misconduct the plaintiffs are entitled to a salvage award commensurate with their services, and erring, if at all, on the side of generosity.

The master and crew of the *Emma K.* turned in, and did no work that night. In the morning they found the *Florence No. 2* some two feet lower in the water, and supported her by two cedar logs, one on either side. About 9 a.m. the master of the *Florence No. 2* with one of his crew, arrived in the *Glendale V*. He requested that he be told when she was pumped out so that he could obtain the crew's effects. After an hour or so he left again on the *Glendale V* but never received this information. Something was made of the master's having given no instructions about the preservation or movements of his ship, but the matter had by then passed out of his hands into those of Mr. Olney of

(1) (1820) 2 Dods. 433.

Alert Bay, and his colleagues. The most the plaintiffs can make out of this is that the master took no steps to prevent what was done. This Mr. Olney represented the Vancouver office of the Board of Marine Underwriters of San Francisco, who in turn represented the owners of the *Florence No. 2*; about noon of the same day he appeared on the scene, prepared and duly authorized to take charge of operations on behalf of the owners. He was there about two hours. While there he heard a call on the radio-telephone to the master of the *Emma K.*, telling him "not to pay any attention to them fellows at Alert Bay". The call came from Mr. Gilbert Humphreys, the son and representative of the owner of the *Emma K.* in the vicinity. "So that's that" said Olney. "Yes, I guess it is" replied the master. Mr. Olney therefore, recognizing that his assumption of control would be resented, contented himself with engaging the services of Mr. Harry Mann, a logging operator at Parson Bay, to pump out and raise the *Florence No. 2*. Mann provided his own equipment for this purpose, and was duly paid for his services by the said Board of Underwriters. He was assisted in this work by the master and crew of the *Emma K.* By 11 p.m. the vessel was practically clear of water.

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Next day, the 10th October, at noon, began the third phase; for then the *Emma K.* left Parson Bay, with the *Florence No. 2* in tow, bound for Vancouver where she arrived about midnight on the 13th. I find she undertook this towage, on the orders of her own owner (acting through his son), and against the express instructions of the officials of the said Board of Underwriters; and I have no doubt her object was to augment her salvage claim. Instead of merely doing what was needed, and either leaving the *Florence No. 2* at Parson Bay, or towing her (as the Board of Underwriters desired) to Alert Bay, 10 miles distant to the westward in sheltered waters, the owner of the *Emma K.* insisted upon taking the salvaged vessel to Vancouver, a distance of 170 miles to the eastward, most of the way through exposed waters. It is to be noted that the plaintiffs' claim is for \$18,000 and that the agreed salvaged value of the *Florence No. 2* is \$24,982; that plaintiff Sydney Humphreys swore on affidavit that the salvage service continued till the vessel's arrival at Vancouver.

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This clearly was untrue. Moreover, at Vancouver (so Counsel informed me, without contradiction) the salvors retained possession of the *Florence No. 2* and the crew's effects till they had obtained an appropriate undertaking for payment of their claim. All this indicates grasping misconduct, happily of rare occurrence, of which the Court must mark its disapproval. Improper conduct of the salvors may cause a diminution or total disallowance of the award. *The Marie* (1); *The Capella* (2); *The Clan Sutherland* (3); *The Gypsy Queen* (4). Here the owner of the *Florence No. 2* was wrongfully deprived of the control of his vessel for at least four days.

Three officials of the Board of Marine Underwriters gave evidence, namely, the aforesaid Mr. Olney of Alert Bay, Mr. Williams of Alert Bay (who, in addition to being a barrister and solicitor, is a Stipendiary Magistrate there) and Mr. Hichon of Vancouver. As such officials they all three occupy a responsible and semi-public position in maritime affairs; and part of their duties consists of the very matter they had here in hand, viz., the giving of skilled assistance to owners whose vessels have met with misfortune. It was suggested in argument that these men may have connived at falsehood to shield their own, or the Board's, misdoings or negligence. There is no ground whatever for any such suggestion. They each gave their evidence with frankness and with care; I accept it, and the whole of it, without reservation. Their testimony convinces me that from first to last the instructions received by the owner of the *Emma K.* from the Board was to tow the vessel to Alert Bay. As to this there could be no room for misunderstanding. I did not form so favourable an impression of the plaintiff Humphreys. I thought he did not deal quite frankly with the Court. It remains to be noted that his son, Gilbert Humphreys, who had much to do with the whole series of transactions, did not give evidence before me.

I do not associate the master and crew of the *Emma K.* with this high-handed behaviour. They merely obeyed their owner's instructions, and I do not think they were aware of the essential facts that showed they were acting wrongly. If left to themselves they would no doubt have

(1) (1882) 7 P.D. 203.

(2) (1892) P. 70.

(3) (1918) P. 332.

(4) (1922) 284 Fed. Rep. 607.

acted very differently. Nor does the misconduct of their owner deprive them of a salvage award, although they all join with him as co-plaintiffs. *The Neptune* (1); *The Kenora* (2). The Court watches carefully the interests of seamen and will resolve doubts in their favour. But clearly I can give no reward, either to the owner or to the master and crew, for the towage to Vancouver. That was a wrongful and deliberate act for which there can be no excuse. Liabilities are not to be forced on shipowners in this way against their wishes. Any compensation to which the master and crew may be entitled for this towage must be sought from the owner of the *Emma K.*

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But there was the salvage service on the 8th October and the further service on the 9th. Strictly these latter services should have ended at noon upon the arrival of Mr. Olney, the representative of the owner of the *Florence No. 2*. The control of the operations should then have been handed over to him. This has been settled long ago, and I would refer to the following passage from the judgment of Sir James Hannen in *The Pinnas* (3):

Mr. Crown (the managing partner of the salvors) thought he had a right to exclude the owner from his own vessel, and insisted on doing what he thought necessary to be done up to the time of getting the vessel into dock. I have no hesitation in saying that I am of opinion that he had no such right. I can conceive the possibility of such circumstances that would morally excuse a man for saying, "You must not interfere; it is a critical moment and if you interfere in the way you propose we shall lose the ship". Circumstances of that kind might arise, but in this case it was simply an assertion by Mr. Crown of his assumed right to complete the job, and on salvage terms and not on ordinary tradesman terms.

Nor did such circumstances arise in the present case.

It should be noted, too, that no question was raised here, nor could be raised here, of the plaintiffs' losing their right to immediate security by so acting. That could have been arranged at any time it was mooted. If there was the slightest doubt about the matter all they had to do was to bring an action *in rem* to enforce their maritime lien. But Mr. Olney did not take a very firm stand and there is no doubt of the valuable assistance given by the master and crew of the *Emma K.* on the 9th both before and after his arrival. This must be carefully taken into account in arriving at the salvage award.

(1) (1841) 1 Wm. Rob. 297.
 (2) (1921) P. 90.

(3) (1888) 6 Asp. M.C.
 313 at 314.

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I think too, but with some doubt, (for he who seeks a salvage award must come "with clean hands") that I should not withhold a full reward to the owner for the use of his vessel, as the salvaging instrument during the afternoon of the 8th, and all day on the 9th, bearing in mind however the very slight risk to which she was at any time exposed. I have in mind also the evidence as to loss of fishing profits, though this was unsatisfactory and lacking in precision. Such profits form an element, but only element, of the award. In this respect I would adopt the language of Mr. Justice Pilcher in the *St. Melante* (1) as follows:

It is well established now that, while the pecuniary sum which represents, or which is alleged to represent, the loss of catch due to the performance of the salvage service is an element which has to be taken into consideration in making the salvage award it is also well recognized that any sum which the tribunal thinks would be an appropriate sum in respect of that is not given, in any sense of the word, as moneys numbered, but merely forms an element of the award.

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.

Giving every consideration to these various matters and to the others I have mentioned, my view is that the owner should receive \$750 for the use of his vessel, and the master and crew \$1,500 for their total services on the 8th, 9th and whatever work was accomplished on the 10th pumping out the last of the water.

The question of apportionment amongst the master and crew was not before me. But I think it right to say that the master, the engineer, and Vilandor (who with the engineer went out in the skiff and made fast the tow-line) should receive the lion's share. The remaining members of the crew should be compensated on a much lower level,

(1) (1947) 80 Lloyds L.R. 588 at 591.

as there is no evidence of any particular part played by any of them in these events, and it is doubtful if they were even seriously inconvenienced.

As to costs—on account of the misconduct of plaintiff Humphreys, I deprive him of costs. The other plaintiffs will have their costs. In my discretion I apportion these as being one-quarter incurred by the former and three-quarters by the latter. In the result the defendant must pay three-quarters of the costs of the whole action to the plaintiffs, excluding plaintiff Humphreys. There will be judgment accordingly.

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Judgment accordingly.