

No. 24

In Admiralty

IN THE HIGH COURT OF AUSTRALIA.

UNITED SALVAGE PTY.LTD. & ANOR

V.

THE SHIP " PORTMAR"

V.

THE SALVAGE BOARD

V.

CALMAR STEAMSHIP CORPORATION

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at SYDNEY

on FRIDAY, 19TH NOVEMBER 1943

UNITED SALVAGE PTY. LTD. & WILLIAMS

V.

THE SHIP "PORTMAR";

THE SALVAGE BOARD

V.

CALMAR STEAMSHIP CORPORATION.

JUDGMENT

STARKE J.

These are salvage actions in the Admiralty jurisdiction of this Court which were by order heard together. That brought by United Salvage Pty. Ltd. & Captain Williams against the ship "Portmar" is an action in rem, whilst that brought by the Salvage Board against the Calmar Steamship Corporation, a company incorporated in the United States of America, is an action in personam, which is a rare form of action in salvage proceedings.

The actions relate to the salvage of the ship "Portmar" which had been beached near Channel Island in the Port of Darwin in the month of February 1942. There is no claim for salvage of the cargo, which consisted of field guns, army vehicles, equipment, ammunition, food and stores. The "Portmar" was a steel ship registered in the Port of New York, United States of America, of the burthen of 3,418 tons or thereabouts, 409 feet in length, 54 feet in beam and fitted with triple-expansion oil-burning engines of 2,850 i.h.p. She was owned at all material times by the Calmar Steamship Corporation and was under charter to the United States Maritime Commission. The salved value of the ship is admitted at the sum of £158,000.

In November 1941 the ship left San Francisco bound

for Manila but owing to the outbreak of war with Japan was ordered to Australia. In February 1942 the ship was at Port Darwin and left there in convoy with a regiment of United States Field Artillery, guns, equipment, ammunition, food and stores for an ordered destination. On the 16th February 1942 the convoy was attacked en route by Japanese aircraft, and, though the "Portmar" did not receive a direct hit, she was badly shaken by the bombs that fell around her. Ultimately the ship was ordered back to Port Darwin and proceeded there under her own power, where she anchored on the 18th February. The next day Japanese aircraft attacked the ships in Darwin harbour, including the "Portmar". Again she did not receive a direct hit, but the exploding bombs and gun-fire holed the hull in many places and a good deal of damage was done to compasses, boats and other parts of the ship. The ship was making water, so the anchor was weighed and the ship taken down the harbour under her own power. Troops, guns and equipment etc. were still on board. The troops were taken off the ship in a launch and small vessels that came alongside. The ship began to take a list, and she was beached as already stated off Channel Island in about 12 feet of water six or more miles from her anchorage. Attempts were made to plug the holes in the hull, but the list increased towards forty degrees; but on the high water that decreased to nine or ten degrees. The crew was allowed to go ashore, but the master and three of his men stood by the ship for some days, obtaining provisions out of the ship for the crew and doing other work about her. The ship was not "in a legal sense abandoned" (The Glengyle, (1898) P. 97, at p. 112), but there is no doubt that the master desired to get in touch with his owners and advise them to give notice of abandonment to the insurers because he thought the ship was a constructive total loss. The master and his men left Darwin on the 10th March 1942, but before that date he was for some few days subject to the direction of the American

army authorities, and was not free to move at will in and about Port Darwin.

Williams the plaintiff is a sea captain highly experienced and skilled in stevedoring and salvage services. He was also the managing director of the plaintiff United Salvage Pty. Ltd., incorporated in the State of Victoria, for the purpose of rendering salvage services. In this company the plaintiff Williams holds about 20% of the capital. There are only six shareholders, ^{and} some 3,000 shares have been issued. At the time of the raising of the "Portmar" the issued capital of this company was £4, of which William^s owned one share of £1 and three other persons each owned one share. It was in fact a subsidiary of United Stevedoring Pty. Ltd. and was formed apparently to take over the salvage services of that company, and Williams was paid a salary which covered his services to both companies.

Williams with other employees of the plaintiff company had arrived in Darwin on 13th February 1942 under arrangement with the Department of the Navy to raise, if possible, a submarine. And he was in Darwin on the 19th February when the Japanese raided Darwin and damaged the "Portmar" and other ships. On the morning of the 22nd February 1942 Colonel Paterson of the American Army told Williams that one of their ships - the "Portmar" - was sunk some miles out of Darwin and asked him to see if he could get the guns and equipment out of her. Williams said he would. Accordingly he went out with Paterson to the "Portmar" and was joined by the master and mate of the ship. She was lying with her stem out of the water and her stern aground, some fourteen feet in the mud, and the water was rising towards her after deck at the time. She was listing about ten degrees to port. The fuel tanks were leaking, and the surface both in the ship and round about the hull was a mass of fuel oil. A considerable number of holes were visible along her port side from the engine room to the after hatch, and some of the derricks were down and

the port wing of the bridge was smashed. Williams examined the cargo to some extent and told Paterson that he thought he would be able to recover the guns. Paterson said to get on with the job as soon as possible. Williams also had some conversation with the master concerning the ship. He asked about the condition of the ship, and I have no doubt that the master said that he intended to go ashore and report to his owners that the ship was a constructive total loss. And I feel satisfied that Williams said he did not think she was and that he thought he could raise her. But the master persisted that his ship was finished and that Williams could not raise her. Williams returned to Darwin and saw Captain Thomas, the Naval Officer Commanding at the port, who promised him every assistance. On the following day Williams returned to the ship with Captain Low, who was in the employ of the plaintiff company, and also ^{some} ~~also~~ naval ratings provided by Captain Thomas. Soundings were taken right along the ship to ascertain how she was lying, and it was noticed that the ship listed much more at low water than at high water. The most urgent matter was to get the guns and army vehicles from the "Portmar" for the use of the American Army and the defence of Darwin, but I have no doubt that Williams had also resolved to raise the ship. The problem presented no technical difficulties to so skilled a salvor as Williams, but there were some local conditions that created some practical difficulties.

(1) The tide ^{at} ~~in~~ Darwin runs at about five knots and rises and falls about twenty-five feet. There was a danger that the tide might force the ship over. There was also a danger that storms, which come on very suddenly around Darwin, might force the ship across the bed she had made for herself and result in the breaking of her back.

(2) There was a grave risk of further aircraft attacks by the Japanese, and indeed the naval and military authorities feared that invasion was imminent. Consequently it was pru-

dent and necessary that Williams' operations should be done at night time so that the Japanese might not see them.

(3) The fuel tanks were leaking: the ship was covered with fuel oil, every rope was slimy and round about the hull was a mass of fuel oil.

(4) The ship had listed some nine or ten degrees. The most urgent problem according to Williams was to take out the cargo "forward", for that would ease the ship.

So in the last week of February 1942 gear was rigged; some of it belonged to the company, of a value of about £600, and some was ship's gear. The American authorities provided Williams with some soldiers and the Naval authorities provided him with some naval officers and ratings. The Naval authorities also provided him with a naval vessel, the "Gunbar", which supplied power and also the use of her winch. A lighter also was supplied for landing the guns. The soldiers and naval ratings were not experienced stevedores, and Williams and Low, who were experienced in stevedoring, worked with and directed them. By this means a number of army vehicles were recovered. Steps were also taken to plug the holes in the ship, and hooked plates were made for that purpose by arrangement with naval authorities. A stern mooring was put down to hold the stern of the ship off a nearby reef. Soundings were taken and markings put down ashore. Early in March arrangements were made with the naval authorities to bring a steam tug called the "Wato" alongside with a 10 inch salvage pump to lower the water in the ship. She was made fast on the starboard quarter and started to lower the water, but the tide was falling rapidly and the pipe line had to be broken because the flexible portion of the pump was not long enough. There was no other pump in Darwin, so on 8th March 1942 Williams proceeded to Melbourne by air to obtain a suitable pump, which he succeeded in doing, and he also engaged a diver. He arrived back in Darwin on the 20th March and went straightway to the "Portmar". The diver made

a thorough under-water examination of the steel plating. All the heavy cargo was taken out. A platform was erected for the pump. On the 4th April the pump was started, the the "Gunbar" being on the port quarter and the "Wato" on the starboard. The ship just lifted as the tide was almost at the top of the flood, so the "Wato" pushed her stern around onto a spit that was found when sounding and the ship was settled on the spit on an even keel. More patches were put on the hull. On the 5th April pumping was again started about two hours before low water. The ship floated, and she was hauled out by a ship provided by the naval authorities into the place marked off for her. The diver examined the ship's bottom, her engines were examined and also her plates. The salvage service claimed in these actions ended at this point, and the ship was handed over to the shipping control at Darwin, from whence she was towed to Brisbane and after some further repairs left for Sydney, and presumably came ultimately under the control again of the United States Maritime Commission.

"A salvage service...may be described...as a service which saves or helps to save maritime property - a vessel... when in danger, either at sea or on the shore of the sea, or in tidal waters, or on the shore of tidal waters, if and so far as the rendering of such service is voluntary, and attributable neither to legal obligation, nor to the interest of self-preservation, nor to the stress of official duty" (Kennedy, The Law of Civil Salvage, 3rd ed., p. 2). The services rendered to the "Portmar" were of this nature.

It was argued for the owners of the ship that no salvage services were rendered to the ship because they were directed solely to the recovery of the guns etc. for the American Army and that the raising of the ship was incidental to that operation. Reference was made to the fact that a claim has been made against the American Army authorities for £2,500 for services rendered in salvaging United States

Army property comprising guns, vehicles, petrol and equipment which includes several of the items of claim alleged to have been expended in the salvage services rendered in respect of the ship "Portmar". But the contention cannot be sustained. So soon as the master of the ship stated that he proposed to advise his owners to abandon her as a constructive total loss I have no doubt that Williams resolved to raise her. He did raise her without any legal obligation to do so. It was a skilful and very valuable service to a ship that, in my opinion, would otherwise have become a wreck and gone to pieces owing to the action of the rising and falling tide at Darwin and the sudden storms that arise in that neighbourhood. Apart from the naval authorities, who had much else to do, there was no one competent or available in Darwin to raise the ship, for all the inhabitants, including men brought by Williams from the south for raising a submarine, fled after the Japanese attack. It was a fortunate accident that so experienced, energetic and skilful a salvor as Williams was present in Darwin when the "Portmar" was beached.

Next it was suggested that the services rendered by Williams were rendered in the performance of his public duties as the Chief Salvage Officer of the Salvage Board. It is enough at this point to say that Williams personally worked and laboured in and about the raising of the "Portmar" beyond the scope of the duties of that office or appointment. But I shall have to return to the work he actually performed and in what capacity that work was performed in connection with other aspects of this case, and say no more about it at present.

It was also contended that the United Salvage Pty. Ltd. and the Salvage Board were incapable of claiming salvage awards because awards of this character were only decreed in favour of "those personally engaged in the service" (The Charlotte, 3 W.Rob. 68, at p. 72). But in these days it is recognised, if it were ever doubted, that salvage services

may be rendered by corporations formed for that purpose (The Glengyle, (1898) P. 97; (1898) A.C. 519). And perhaps I had better here also mention "The Chieftain", 4 Notes of Cases 459. It is settled that in all salvage cases, whether the action be in rem or in personam, there must be some res saved (The Cargo ex Port Victor, (1901) P. 243, at p. 255). In The Chieftain, (supra), which were proceedings in personam a monition (by which proceedings in personam were then commenced) was moved for against the owners of the salvaged ship calling upon them to show cause why an agreed salvage award should not be paid and the facts were that at some time after the salvage services had been rendered the ship was lost. Dr. Lushington said:- "There seems to me the greatest possible difficulty in acceding to this motion, as the property is actually lost and gone, and a ^{monition} ~~motion~~ to show cause is decreed only in cases where the property had been allowed to go into the hands of the owners instead of the parties attaching the property itself...It would be to convert the jurisdiction of the Court from a proceeding in rem to a proceeding in personam, which can only be where the property is in possession of the proprietors themselves". This reason seems inconsistent with the reasoning in "The Port Victor" (supra). But even if the "Portmar" were lost by enemy action as was stated at the Bar, subsequently to her being raised at Darwin, still I should think consistently with Dr. Lushington's observations that she had got into the owners' or charterers' hands after she was raised at Darwin and was lost whilst in their hands.

Another question arises between United Salvage Pty. Ltd and the Salvage Board in respect of the services rendered by Williams. The United Salvage Pty. Ltd. claims that Williams in raising the "Portmar" was acting within the scope of his duties as its managing director and as its officer, whilst the Salvage Board claims that from the 20th March 1942 he was acting within the scope of his duties as

its Chief Salvage Officer. National Security (Salvage Board) Regulations made on 4th March 1942 and notified in the Gazette on the 14th March 1942 provided that there should be a Board to be called the Salvage Board which should be a body corporate with perpetual succession and a common seal. The Board, it was also provided, should consist of three members, namely:-

- (a) The Chairman of the Shipping Control Board (See National Security (Shipping Control) Regulations) who should be chairman and who was in fact, until the end of May 1942, Sir Owen Dixon, a Justice of this Court.
- (b) The Chief Salvage Officer.
- (c) A person appointed by the Minister on the recommendation of the Naval Board.

The Minister was also authorised to appoint a Chief Salvage Officer of the Board for the purposes of the regulations with such remuneration and on such terms and conditions as the Minister thought fit. The Chairman and one other member formed a quorum. The Board might authorise the Chief Salvage Officer to direct, control, supervise or carry out all or any salvage operations.

On the 27th March 1942 the Minister approved of a proposal of the Secretary of the Department of Commerce that he should ascertain what remuneration Williams obtained from certain commercial organisations of which the United Stevedoring Company was the principal and that Williams should be taken over by the Salvage Board as Chief Salvage Officer and paid a salary at least equal to that which he then received on the understanding that whilst employed on Salvage Board work he would not draw his fees or salary as managing director of the companies. On the 13th April 1942 the secretary suggested to the Minister that Williams should be paid a salary as Chief Salvage Officer and member

of the Salvage Board £2,080 per annum and that he ^{has} paid his own insurance premium. And the secretary on the same date also advised that the Minister for the Navy had nominated Lt. Commander Geoffrey Fleming Dixon R.N. as representative of the Navy on the Salvage Board and recommended to the Minister of Commerce that he appoint him accordingly. On the 14th April 1942 the Minister approved of the foregoing suggestion and recommendation.

The first formal meeting of the Salvage Board was on 18th April 1942. Sir Owen Dixon severed his connection with the Board about 26th May to take up another public appointment as Minister Plenipotentiary at Washington. And on 4th June 1942 the Minister announced for general information that the following persons had been appointed to be members of the Salvage Board constituted under the National Security (Salvage Board) Regulations:-

Chairman of Shipping Control Board,
His Honour Judge Thomas Stuart Clyne.
Chief Salvage Officer,
John Prothero Williams.
Nominee of Naval Board,
Lt. Commander Geoffrey Fleming Dixon R.N.

The Salvage Board has not, I think, established that Williams in raising the "Portmar" was acting as its Chief Salvage Officer or that he was acting within the scope of his duties as such officer. Williams and Lt. Commander Dixon were not appointed as members of the Salvage Board before 14th April 1942 or ~~before 18th April~~ before 18th April when the Board held its first formal meeting. The salvage services in respect of the ship "Portmar" were completed, it should be remembered, on the 5th April 1942 or at latest on the 6th April when Williams left for Melbourne where he arrived by air on the 9th April 1942. And it is to be noticed that on the 30th March when it was feared that the pumps which Williams had procured in Melbourne had not arrived

in Darwin, it was to his company, the United Stevedoring Company, that Williams notified the fact and stated they were urgently required. And it is also to be noticed that it was not until the 11th May 1942 that the United Salvage Pty.Ltd. granted Williams leave of absence from his employment in that company whilst engaged on duties with the Salvage Board. All the negotiations initiated by Sir Owen Dixon for Williams' services were tentative and in anticipation of the Minister appointing Williams and Lt.Commander Dixon to the Salvage Board. But the Salvage Board incurred no legal responsibility until Williams and Lt.Commander Dixon were formally appointed. And I think the Chairman was careful to avoid any such responsibility for the Board until it was fully constituted. Thus there is a minute of what is called a preliminary meeting of the Salvage Board which sets forth that Sir Owen Dixon advised that until the members of the Board had been gazetted it was not possible to set up the organisation of the Salvage Board but that meanwhile many matters dealing with the physical requirements of the Salvage Board could be put in hand. And indeed Sir Owen did not think the Salvage Board was in a position to give Williams a letter as from the Salvage Board when he returned to Darwin to raise the "Portmar" requesting that all assistance be given to him.

But it was said for the Salvage Board that it was in existence from the 14th March 1942 (Acts Interpretation Act 1901-1937, S. 48) although unable to function as a corporate body until its Chief Salvage Officer and Naval representative were appointed about the 14th April 1942. And further that on their appointment the acts and doings of Williams in connection with the raising of the "Portmar" from the 20th March 1942 when he first met Sir Owen Dixon were approved and ratified as acts and doings of the Board or as done on its behalf. It is true that Williams, after he was appointed, was paid salary as from the 27th March 1942 but there are liabilities amounting to about £1,000 connected with the raising

of the "Portmar" that the United Salvage Pty. Ltd. paid, for instance, hire of pumps to 6th April £281 - the day after the "Portmar" was raised - rail and air fares and insurance for Williams and others in connection with the visit to Melbourne to procure pumps and return to Darwin, and wages. I have not overlooked the fact that United Salvage Pty. Ltd. has charged some, if not all, of these items against American Army authorities. But the point is that the Salvage Board never concerned itself with these obligations even though a proportion of the sum might properly be chargeable to the raising of the "Portmar". And there are various records relied upon by the Salvage Board the purport of which is that the Board and Williams recognised that he was the Board's officer from about the 20th March 1942 when he first met Sir Owen Dixon, as already mentioned. According to Kelner v. Baxter, L.R. 2 C.P. 174, ratification can only be by a person or a body ascertained at the time the act was done - by a person or body in existence either actually or in contemplation of law. The case of Sutton's Hospital, 10 Coke Rep. 1(a), 23(a), 77 E.R. 937, 960, it is said, suggests that the Salvage Board was a corporation in abstracto if not in concreto from the 14th March 1942 when the Salvage Board Regulations were gazetted. The fact in that case, however, was that named persons and their successors were incorporated (Sutton's Hospital, (supra) at pp. 9, 10(a), 26(a)). But apart from this technical answer to the contention of the Salvage Board, Williams, it appears to me, was more concerned with raising the "Portmar" than with the body for whom he was conducting the operations or acting or purporting to act. Thus in April 1942 he was discussing with Lt. Commander Dixon and the secretary of United Salvage Pty. Ltd. the financial aspects of the salvage operations at Darwin and how to divide and treat financially those operations, and in June 1942 he was engaged in much the same sort of discussions with various interested parties. And Williams, I think, always had in

mind that "it was permissible for the person who actually performed the work" to claim salvage reward (See Salvage Board's Minute, 10th August 1942). Further, Williams did not, I feel sure, intend to oust the claims of United Salvage Pty. Ltd. as salvors of the "Portmar". And I am not prepared to find that Williams by his actions dispossessed or intended to dispossess or could dispossess the United Salvage Pty. Ltd. without its knowledge and assent from whatever right it had as salvors in possession of the "Portmar" by reason of the operations of its managing director and officer (See Kennedy, Law of Civil Salvage, 3rd ed., p. 213). I would add that even if the operations of Williams on the "Portmar" from 14th March 1942 onward were to be regarded as operations conducted on behalf of the Board, I should not be prepared to make any salvage award in favour of the Board. Williams was appointed by the Minister as Chief Salvage Officer, but the Board did nothing and risked nothing in the raising of the "Portmar, apart from the salary the Board paid to Williams from the 27th March 1942 and the obligations it incurred under an agreement made with the Marine Underwriters & Salvage Association of Victoria Ltd. dated 17th March 1942, but signed, I think, about 15th May 1942. And it is to be noticed that the United Salvage Pty. Ltd. paid for the hire of the pumps £281.17.2 until 6th April 1942 and that the pumps were used and ultimately acquired by the Salvage Board after that date in connection with the "Portmar" and her towage to Brisbane and other purposes. Williams, I must add, even if he were the chief executive officer of the Board at any relevant time, nevertheless, worked and laboured far beyond the scope of any duty as Chief Salvage Officer: he worked in danger of bombing and invasion: he helped to rig and work gear: he worked amidst the fuel oil and directed and helped the workmen in repairing the ship: he made soundings and laid down markings and slept anywhere he could. The operations were peculiarly a personal effort on the part of

Williams.

The claim of United Salvage Pty. Ltd and Williams for a salvage reward remains for consideration. The services rendered were, as I have said, salvage services. And United Salvage Pty. Ltd. and Williams do not seek for the distribution of the salvage award between them but desire that their claim shall be dealt with without any separation of interests.

There is no absolute rule or fixed scale of remuneration.

"It is not a mere question of work and labour, not a mere calculation of hours, though time is undoubtedly an ingredient; but there are various facts for consideration - the state of the weather, the degree of damage and danger^{as} to the ship and cargo, the risk and peril of the salvors, the time employed, the value of the property; and when all these are considered, there is still another principle - to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interest of commerce, and the general benefit of owners and underwriters, even though the reward may fall upon an individual owner with some severity" (The Industry, 3 Hagg. 203, at p. 204). The nature of the service has already been described, and the value of the ship, and the danger to which it was exposed, and the time employed have been stated. The value of the property risked by the salvors in the service was not large, gear worth £600 or so and pumps hired from the Underwriters Association valued at about £1,700 which were taken over ultimately by the Salvage Board. The Naval authorities, it will be remembered, gave great assistance and provided plant and material and ratings in order to effect the salvage services. But I have been informed that the Naval authorities make no claim, and that the officers and ratings who rendered personal services in connection with the raising of the "Portmar" have dispersed, and records of their services are not available. The expenses incurred in the performance of the salvage services (which are also a matter to be considered) are set forth in the particulars under paragraph 11

of the statement of claim at £1,045, but some of these items have also been claimed against the American Army authorities and will probably be paid by them. But I have not overlooked the possibility of non-payment nor the expenses that have not been claimed against the Army. And I think I may legitimately refer to the fact that a claim for £2,500^{is was} made against the American Army authorities for recovery of the guns etc. estimated to be of a value of not less than £100,000 in Australian currency (See Exhibit 4). The recovery of the guns etc. was not, it must be observed, a salvage service but services rendered upon request for which I should think reasonable remuneration would be payable in any event. The services rendered to the ship were true salvage services, independent of contract and dependent in respect of remuneration upon their success. They were skilful and energetic, rendered in somewhat difficult and uncomfortable conditions and in circumstances of considerable danger.

I have looked at the amounts of awards made in many cases in England, but, as might have been expected, they range from many thousands to a few hundreds ^{of pounds} according to the circumstances of each particular case. And in this case, having regard to all its circumstances, I award the sum of £5,000 to the plaintiffs, the United Salvage Pty. Ltd. and Captain Williams, in respect of the services rendered by them in the salvage of the ship "Portmar". And these plaintiffs must also have their costs of action ^{including the costs of the shorthand notes}. The claim of the Salvage Board is dismissed and the Board must pay the costs of its action against Calmar Steamship Corporation which are exclusively attributable to that action.