

N. 38 28
IN THE HIGH COURT OF AUSTRALIA

Huddart Parker Limited
V.
The Ship "Mill Hill" and her cargo

The Master and Crew of the
Steam Tug "Foremost".

V.

The Ship "Mill Hill" and her
cargo.

(CONSOLIDATED ACTION)

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE
on FRIDAY 6th JULY, 1951.

HUDDART PARKER LTD.

v.

THE SHIP "MILL HILL" & HER CARGO.

THE MASTER & CREW OF THE STEAM TUG "FOREMOST"

v.

THE SHIP " MILL HILL" & HER CARGO.

DECREE.

Award the plaintiffs in the consolidated actions £10,000 for the salvage services rendered by them to the ship "Mill Hill" and her cargo together with costs and condemn the defendants in the said sum and costs. Decree that of the said sum of £10,000 the sum of £7000 be awarded to the plaintiffs the owners of the tug "Foremost" and the sum of £3000 be awarded to the plaintiffs the master and crew of the said tug "Foremost".

Decree that the said sum of £3000 be apportioned among the master and crew of the said tug "Foremost" as follows:-

To the master (Captain Angelin)	£450
To the mate (S.G. Bonney)	£375
To the chief engineer (D. McColl)	£325
To the leading hand - G.L. McCulloch A.B.	£300
To Roberts A.B.	£250
To Pritchard A.B.	£225
To the second engineer	£200
To the wireless operator	£200
To the greaser and the three firemen each	£135
To the cook	£135

Reserve liberty to apply for further relief or otherwise consistently with this decree.

HUDDART PARKER LTD.

v.

THE SHIP "MILL HILL" & HER CARGO.

THE MASTER & CREW OF THE STEAM TUG "FOREMOST"

v.

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JUDGMENT.

DIXON J.

70 to
35/-

HUDDART PARKER LTD.

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JUDGMENT.

DIXON J.

These are consolidated salvage suits brought in rem which went to a hearing without pleadings. One suit was instituted by the owners and the other by the Master and Crew of the Steam Tug "Foremost" in respect of salvage services rendered by the tug to the Ship "Mill Hill" in August 1950.

The "Foremost" is a steam tug built in 1926 with a length of 105 feet, a beam of 27 feet and a draft of 13 feet. Her gross tonnage is 244 tons and her indicated horsepower 850. She has a towing pull of 12.9 tons and her cruising speed is about 9 knots. Her value last year was estimated at £70,000. While performing the services in question she carried a master, a mate, three deck hands a first and second engineer, a greaser, three firemen, a wireless operator and a cook, thirteen in all. Adelaide is her port. The "Mill Hill" is a Liberty Ship built in the Bethlehem Fairfield Shipyard at Baltimore in 1944. Her length is 441 feet, her beam 56 feet, her draft 27 feet 9 inches. Her gross registered tonnage is 7020. She has five holds with tween decks. Her value is agreed at £150,000 after the deduction of £10,000 for repairs and the replacement of an anchor and chain about the loss of which it will be necessary to speak. She is a British ship owned by the County Ship

Management Co.. She was manned by 16 Europeans and 40 Indians.

On the morning of Friday, 18th August 1950, the "Mill Hill" sailed from Whyalla for Thevenard having taken on board 3100 tons of pig iron valued at £25,000 approximately. Half the pig iron was stowed in the tweendecks and half in the lower holds. When the ship left Spencer Gulf and set a westerly and north westerly course, she encountered a wind of a moderate gale force. Later it increased to a gale, with a rough sea and a heavy swell. She reached the Four Hummocks Island about half past three in the morning of 19th August and after that she made successive alterations of course more to the north. With a strong westerly gale and a heavy sea and swell the ship rolled heavily. At length while she was on a course of 341° and in a position variously estimated as $33^{\circ}31'S$ $133^{\circ}56'E$ and as $33^{\circ}28'S$ $133^{\circ}50'E$ her entire cargo of pig iron shifted to starboard with a great roar. The ship listed very heavily to starboard. In the heavy sea the list was estimated at 60° or even 70° but afterwards in calm water it was found to be 48° . The shifting of the cargo which seems to have been fairly uniform in every lower hold and tween deck took place about a quarter to five in the afternoon of 19th August. The helm was put hard to port and full ahead was given but the engines stopped because as the chief engineer reported the injections were out of the water, and the ship was left without steam. The rudder remained fixed hard aport. S.O.S. signals were at once wirelessly. Orders were given to cut away the starboard boats so that they would float clear. The hands were mustered on the boat deck. The first officer was washed overboard and lost while at work with the boats on the starboard side where the ship's gunwale was awash. The ship "Culross" was west bound to Adelaide and proved to be the nearest vessel. She proceeded to the assistance of the "Mill Hill". In the meantime that ship drifted inshore in a north easterly direction until she reached a position about four miles off Cape Radstock on the west coast of southern South Australia. In that position the "Mill Hill"

dropped her starboard anchor in thirty fathoms of water. The time was approximately midnight. Apparently the brakes upon the gypsy did not hold. One hundred fathoms of cable ran out. The anchor held and as the ship swung to wind and sea she steadied up. While she was drifting she was beam on, her starboard bulwark was awash amidships, as she rolled the water reached or almost reached the coamings of the hatch and it was said the boat deck sometimes dipped into the water. Any further movement of cargo might well mean that she went over. The chief officer had opened the corner of No. 2 hatch not long before the cargo shifted to see if there had been any movement of cargo and the work of battening the hatch was not complete when the pig iron fell into its new position. The wedges were never put in and little doubt can be felt that this formed a vulnerable point had seas washed over the hatch.

It is hardly necessary to say that the ship's company had much to endure. The decks were at an impossible inclination, the ship's lighting had of course gone, they had no food or water except what they could obtain from the life boats and it was very cold. After the anchor was dropped flares were sent up every half hour as signals to the "Culross" which reached the scene about a quarter to two in the morning and stood by till daylight. The master of the "Mill Hill" decided to leave the ship and a message was signalled to the "Culross" that he was abandoning the vessel and asking that boats be sent. The "Culross" sent her life boats and picked up the ship's company, including the master's wife, who all entered the water from Jacob's ladders put over the ship's stern and swam towards the boats. This was done, it was said, because of the danger which the boats would otherwise face of being struck by the ship's counter owing to the swell. When the crew were aboard the "Culross" she resumed her voyage to Adelaide. The master of the "Mill Hill" sent a message to the ship's agents in Adelaide stating among other things that the "Mill Hill" was listing seventy degrees when abandoned but there was a possibility of salvage if there was no

deterioration in the weather. In leaving his ship I think that the master took the view that there was no purpose to be served by remaining with her, that any worsening of the weather might result in her overturning and that in any case conditions made life on her impossible. He probably did not consider the question at that stage whether he would return to take part in any attempt to save her but he knew that to save her tugs were required which must come from Adelaide and he expected them to be sent. He left the ship's log aboard but I doubt very much whether that forms an indication of an animus revertendi. In Adelaide the Deputy Director of Navigation had informed the ship's agents on the night of Saturday, 19th August, of the radio signals received from the "Mill Hill" appealing for assistance. The ship's agents communicated with the Adelaide manager of the owners of the tug "Foremost" who consented to despatch her to the assistance of the "Mill Hill" provided an undertaking was given to sign the tug owner's usual form of agreement. The undertaking was given and later the agreement was signed. The effect (so far as now material) of the agreement, which was discussed in the interlocutory proceedings reported in 1950 Argus L.R. 918, may be briefly stated. By the agreement the "Foremost" was engaged to proceed from Port Adelaide and to endeavour to save or assist the "Mill Hill" which was described as in a position four miles off Cape Radstock. It was stipulated that if the ship should be brought to port or her safety otherwise secured by or with the assistance of the tug, the services of the tug should be remunerated on a salvage basis and in ascertaining the amount of such remuneration no regard should be paid to certain clauses which followed. Those clauses provided that if the ship should not be so brought to port or her safety so secured the tug should be remunerated at the rate of £13:2:6 per hour from the commencement of her preparations for departure until her return to her berth and that a charge of £8 a day for the use of her hawser should be paid. The master of the tug, Captain Angelin, received

instructions on the evening of 19th August to prepare to go to the assistance of the "Mill Hill". At midnight the crew turned to to prepare the tug for sea and at 4am. on Sunday, 20th August, she cast off. About half past twelve midnight of the morning of 21st August she sighted the "Culross" north east of Four Hummocks Island.

In the meantime the agent of the "Mill Hill" on Sunday afternoon, 20th August, had asked the owners of the tug "Foremost" if the tug would take the master of the "Mill Hill" and another officer off the "Culross" to accompany the "Foremost" to the "Mill Hill". The owners of the tug assented and sent a radio message to the master of the "Foremost" saying they were agreeable to the transfer of the master and an officer of the "Mill Hill" from the "Culross" to the tug if it was possible. The "Mill Hill's" agent sent a message to the "Culross" for the master of the "Mill Hill" telling him that a question of ownership of the vessel arose if she was abandoned and to strengthen the owners' case they suggested for his consideration that he joined the tug and returned to control the salvage operations. In consequence of these messages the tug signalled the "Culross" asking if they would lower a boat and send it across. There was lumpy swell and the "Culross" refused to do so, asking the tug to send a boat. The tug refused but offered to go to the lee of Neptune Island for the purpose of the transfer. The "Culross", however, said she was proceeding to Adelaide. The tug informed her owners by radio that she was unable to effect the transfer owing to the heavy swell and asked if she was to proceed to the wreck. She received an affirmative reply. The tug arrived at the place where the "Mill Hill" rode at anchor at 5.15pm on Monday, 21st August. In the meantime the tug owners had sent from Adelaide a message informing Captain Angelin, the tug master, that the tug "Tancred" had left for the "Mill Hill" at half past two that

morning with anchor gear. The "Tancred" is a steam tug which carried some salvage equipment and was then in Adelaide after lying idle in Sydney for a period. She was not in a very good state of repair and though possessing two engines usually ran on one. But she was fitted with a derrick reputedly capable of lifting 30 cwt. and carried a quantity of tackle and accessories. She was placed for the purpose of the operation under the command of the senior harbour master of the South Australian Harbour Board and port superintendent, Captain Baddams, and the radio message so informed Captain Angelin.

By the time that the "Foremost" reached the "Mill Hill" there had been a considerable moderation in the weather. The wind was from the south west but it had faded away to a gentle breeze. There was, however, a lumpy swell running in from the same direction, the height of the peaks being variously estimated from about eight or ten feet to four feet. I think the latter estimate is much too low even if the former is too high. The ship lay head to wind but later in the evening, about 9 o'clock the wind veered to the south east and then the ship swung broadside to the swell and rolled well into the water. Captain Angelin called his crew together and asked for their co-operation. The mate Bonney had volunteered to board the ship if some of the crew would go with him. The port life boat was manned by the leading hand, McCulloch, two A.B.'s, Pritchard and Roberts, and the chief engineer, McColl, who all volunteered for the task. The life boat was lowered and sent away about 6.15pm. with the mate in charge. They carried a mall hack saw and blades and a torch or two and each man wore his life belt. The mate took the helm and the other four rowed. They pulled to the stern where they found the rudder hard aport and one blade of the propeller rising from the water. They rowed to the Jacob's ladders hanging over the stern. The mate Bonney went to the bow and as the ship's counter rose he jumped for the ladder and got a hold of it and climbed to

the deck. McCulloch and Roberts followed him. Pritchard and McColl were at the oars and remained in the boat, the painter of which was made fast to the ladder. The whole operation of boarding the "Mill Hill" called for a good deal of seamanship and involved unusual exertion and not inconsiderable risk. The launching of the boat was not altogether easy and to overcome the danger from the ship's counter and the difficulty of making the Jacob's ladder skill as well as a readiness to take risks was required. The three men who boarded the ship found a scene of confusion which it is unnecessary to describe. They made their way forward with difficulty by means of the high bulwark rail on the port side. They hoisted the Australian ensign aft and they also hoisted the tug-owner's house flag. The journey to the bow took some time. They found the port anchor fully housed and the starboard anchor down. The brakes were screwed up. They unscrewed the starboard brake and by striking the chain with the mallet attempted to get it to run, but in vain. They could not find a shackle in the anchor chain. The "Foremost" came within hailing distance and in answer to Captain Angelin's question they said that they were unable to find a shackle within reach. It was decided to cut the anchor chain with the hacksaw. The three men after screwing up the brake then set to work on the long and arduous task of cutting through two sides of a link. They took turns at the hacksaw, occupying a very cramped and awkward position to use it. The night was very cold. They also obtained the assistance of Pritchard who boarded the ship, leaving only McColl in the boat. Before the work was finished they found it necessary to obtain more blades from the "Foremost". They obtained them by means of a line lowered to the tug which stood in. At length about a quarter or half past eleven the chain was cut through. The fact was signalled to the "Foremost" with a torch and she came up close to starboard of the drifting ship. Bonney cut his lifebelt in two and made one half fast to a line consisting of one of the guy falls and passed it through the hawse pipe. The line paid out clear of the ship and they managed to get it

aboard over the ship's rail. They then used the line to haul aboard through the pipe the "Foremost's" towing line which they then secured to some bellards. Captain Angelin had decided that it would be easier to make his connexion with the "Mill Hill" after she was adrift rather than before she was freed of her anchor. During the operations on board the "Mill Hill" the weather had gone round to the south east and the work was hampered by the increased rolling of the ship. All attempts to move the wheel proved fruitless and the rudder remained fixed hard aport. The four men re-embarked in the life boat by means of the Jacob's ladder, an operation made less difficult than boarding the ship by the fact that the ship was being slowly towed by the "Foremost".

When they returned to the tug shortly after midnight it remained to hoist the life boat aboard and make it fast, a not altogether easy piece of work. Captain Angelin decided to tow the "Mill Hill" to Streaky Bay in order to get it to a safe anchorage. The "Foremost" began to tow the ship to that destination but it was found that, owing to her rudder being fixed hard aport, the "Mill Hill" ran off to port and Captain Angelin was not sure whether his gear was chafing in the hawse pipe, though it had been packed by Bonney and his men as well as they could do it. After consulting with Bonney he decided to make Scele's Bay^{which is south of Streaky Bay} and there anchor the ship and attempt to free her steering gear or rudder. He radioed his owners in Adelaide in the early hours of Tuesday, 22nd August, that he had commenced towing "Mill Hill" to Scele Bay and that there was a possibility of his requiring other assistance. About 8.30am. on that day the "Tancred", which had been in radio communication with the "Foremost", overhauled the tug and tow. She had met the "Culross" and taken aboard the master of the ship "Mill Hill" and the chief engineer. When the two tugs were in hailing distance the master of the "Mill Hill" demanded that Captain Angelin should give the tow line to the "Tancred", a request Captain Angelin instantly refused. Captain Baddams, who thought

this demand unfair, at once intervened and said "We are not here to pinch your tow Captain but to render assistance to the 'Mill Hill'", or something to that effect. Captain Baddams said they wished to take the ship to Port Lincoln. Captain Angelin agreed to this course and told Captain Baddams to put a tow line aboard the "Mill Hill". This was eventually done but at the cost of much time and manoeuvring. The "Tancred's" tow line was made fast to the port side of the "Mill Hill", the "Foremost's" tow line being on the starboard side. A long tow back to Spencer Gulf was then commenced. During the tow the "Tancred's" engines stopped more than once. At about half past eleven on Wednesday, 23rd August, when they had traversed about a third of the distance between Flinders Island and the Four Hummocks Island the engines broke down and the "Tancred" began to drift down to port on the lee side of the "Mill Hill". The "Foremost" stopped and, at some risk of fouling her propellers with her own tow line, managed to pass a line to the "Tancred". The first line broke but the second held her and perhaps saved her from getting mixed up with the tow. The constant running of the "Mill Hill" to port made towing difficult. From the time the ship's cargo shifted until she was safely moored in Port Lincoln the great risk to the "Mill Hill" lay in the chance of an increase in the severity of the weather. As they came round Thistle Island into Spencer Gulf the wind freshened and was dead ahead and its force increased into a northerly gale before they reached Port Lincoln. They entered Port Lincoln Harbour about half past nine on Friday, 25th August, and after about an hour and a half's manoeuvring put the "Mill Hill" at her anchorage. It was found, however, that her port anchor was held in the pipe. Captain Angelin suggested that he should make a line fast to the anchor and pull it out while the "Tancred" held the ship astern. This was done but the chain would not run. Eventually it was run out by towing the ship astern. The "Foremost" herself berthed at about two o'clock. Next morning she left Port Lincoln for Adelaide where she arrived shortly after 11pm., that is on 26th August 1950. The adventure had thus

occupied the tug seven days.

The "Tancred" had been employed at towage rates or at all events her remuneration was on the basis of towage services. The owners of the "Mill Hill" paid the South Australian Harbour Board for her services the sum of £2082 and distributed among the master and crew the sum of £1000 as a bonus. The services performed by the "Foremost" were clearly salvage services. This was not denied and could not be denied. The "Mill Hill" was left by her master and crew in a position of considerable danger and from this the "Foremost", assisted by the "Tancred", rescued her and restored her to safety.

The question is what salvage reward should be fixed.

The value of the property salvaged is, as has been already stated, £175,000. The degree of risk in which it stood depended upon chances. When the ship was taken in tow she was rolling somewhat heavily and her margin of stability must have been small. Had she been left to ride at anchor her fate must have depended on the weather including the relation of wind and swell. The coast upon which she was anchored is inhospitable and is exposed to some very heavy weather. Moreover it was not a good time of the year. The fact that a ship was derelict was considered at one time to entitle the salvors to one half of the value of the salvaged property, but now it is a circumstance to be considered, a circumstance operating in favour of a larger reward. In the present case the plaintiffs maintained that the "Mill Hill" was clearly derelict. For the ship and cargo owners however it was urged that the ship was not abandoned *sine spe recuperandi et sine animo revertendi*. I do not think that much turns on a nice assessment of the master's intentions or of his motives. He probably would have some difficulty in defining them for himself. But pretty plainly he did not leave the ship for lost but regarded her as in a position where he and his ship's company could do nothing, but from which with any luck she could be rescued by properly equipped tugs or by a salvage

operation. It was dangerous to remain, the ship was untenable for himself and his crew and the "Culross" was there to save them.

In the Janet Court, 1897 P. 59, at p. 62, Sir Francis Jeune, said:-

"The fact that the subject of a salvage is a derelict does not now, and I doubt if it ever really did, carry with it a right to remuneration consisting of a half, a third, or any specific proportion of the value of the property salvaged. There is no magic in the word 'derelict'; but the term imports a certain state of things containing elements which tend, on the general principles of salvage, to raise the amount of salvage award, for there are three conditions which a derelict generally fulfils.

The first, and perhaps the most important element to be considered in an award of salvage, is the risk to which the salvaged ship and her cargo were exposed. This in the case of a derelict is generally high; The second consideration involved in the case of a derelict is that she has no men on her and has to be approached without such aid as they can afford; and although in calm weather there is no great difference in approaching a derelict as compared with any other vessel, if there is any sea the difficulty is increased, because there is nobody to let down a ladder or throw a rope, or otherwise assist in the attempt to board her from a boat."

His Lordship also referred to the increased labour falling on the remainder of a crew some of whose members are aboard the derelict ship.

In the present case all these considerations are to be found in a greater or lesser degree. On the other hand the actual danger to the "Foremost" was not of a definite character but consisted rather in the chances of things going wrong in a long operation comprising difficult manoeuvres and other hazards in a heavy swell or in bad weather. Nor was the risk to life or of bodily injury in the case of the master and crew any more definite, except that there was a particular hazard to the men who rowed over to the "Mill Hill" and who boarded her. It is said that after the tow line was connected the operation took in more the character of a towage service. But not only was the tow long and arduous; it was attended with unusual difficulty, difficulty which was increased by the stoppages of the "Tancred's" engines. There was always danger of the weather becoming sufficiently adverse to cause the ship to go over and her sinking might involve considerable danger to the tugs. Usually salvage rewards are enhanced by the consideration that failure to bring the salvaged vessel to safety would mean that the intending salvors would get no remuneration. As the "Foremost"

in the case of non success would have been paid towage rates, it is difficult to see how this element can be taken into account as a reason for increasing the salvage reward, notwithstanding that the agreement provides that in the event of success no regard shall be paid to the clauses providing for towage rates. But on the other hand the "Foremost" is a tug adapted for salvage work and such craft are always encouraged by placing on their services a somewhat greater value. The skill and experience of Captain Angelin are acknowledged to be exceptional. Indeed at every emergency these qualities, as well as his resource, were exhibited. The narrative shows what these emergencies were and doubtless in less capable hands the difficulties might not have been surmounted and the dangers avoided. But it would be a mistake to regard them as very extraordinary incidents for a salvage operation at sea.

One matter was laid hold of as a ground for diminishing the reward. It is the loss of the anchor and cable. The contention is that Captain Angelin should have awaited the arrival of the "Tancred" and should with her aid have saved the anchor and cable. It is said that he was actuated by a desire to take possession of the ship for salvage as soon as he could. I do not think that the anchor and cable could have been saved even if the "Tancred" had been there. Possibly they might have been buoyed, though there is some evidence that the "Tancred's" buoys were unserviceable. I think that the probabilities of the anchor and cable being lost in any case are very high. But be that as it may there was every reason for taking the "Mill Hill" in tow at the earliest moment in order to save her. Doubtless Captain Angelin considered it was his job to save the ship, but so it was, and any deterioration in the weather might have meant her loss.

On the side of the salvors no property was lost except the chafed end of a hawser.

In all the circumstances I fix the salvage reward at £10,000. Of this sum I award £7000 to the owners of the tug "Foremost" and £3000 to her master and crew. At the hearing I

was invited to leave the apportionment of the sum awarded to agreement amongst those who manned the tug but afterwards I was informed that this would not be a satisfactory course. The result was some delay in the decision of this case. But the parties have since requested me to apportion the amount awarded to the master and crew among them. I have not found this an easy task. A considerable responsibility fell on the master, Captain Angelin. The mate Bonney besides being in the counsels of the master led the boarding party and that party underwent some hazard as well as hardship and exerted themselves to some purpose. The chief engineer not only formed one of the party who pulled over to the "Mill Hill" and kept the boat while the others went aboard but he had an increased responsibility throughout the adventure. Having considered the respective positions of all concerned I apportion the sum of £3000 as follows:-

The master, Captain Angelin	£450
The mate, S.G. Bonney	£375
The chief engineer, D. McColl	£325
A.B. G.L. McCulloch (Leading Hand)	£300
A.B. Roberts	£250
A.B. Pritchard	£225
The second engineer	£200
The wireless operator	£200
The greaser and the three firemen each	£135
The cook	£135

There will be a decree with costs for a salvage reward of £10,000 apportioned as I have stated.