

IN THE HIGH COURT OF AUSTRALIA

THE MASTER OFFICERS AND CREW OF THE
STEAMSHIP OR VESSEL 'ADELONG'

v.

THE OWNERS OF THE MOTOR VESSEL
'TUDOR' AND HER CARGO AND FREIGHT

ASSOCIATED STEAMSHIPS PROPRIETARY
LIMITED AS OWNER OF THE 'ADELONG'
STEAMSHIP

v

THE MOTOR VESSEL 'TUDOR' HER OWNERS
AND HER CARGO AND FREIGHT

REASONS FOR JUDGMENT

Judgment delivered at Sydney
on Thursday, 11th April 1968

THE MASTER OFFICERS AND CREW
OF THE STEAMSHIP OR VESSEL "ADELONG"

v.

THE OWNERS OF THE MOTOR VESSEL
"TUDOR" AND HER CARGO AND FREIGHT

ASSOCIATED STEAMSHIPS PROPRIETARY LIMITED
AS OWNER OF THE "ADELONG" STEAMSHIP

v.

THE MOTOR VESSEL "TUDOR"
HER OWNERS AND HER CARGO AND FREIGHT

ORDER

Judgment for the plaintiffs in the consolidated action to be entered in the sum of \$52,000. Such sum to be apportioned as follows:

To the owner of the "Adelong" \$40,000.

To the master of the "Adelong" \$2,000.

To the officers of the "Adelong" proportionately to their basic rates of pay (the chief officer, second officer and third officer to be treated as if their rates of pay were equivalent to those of the chief engineer, second engineer and the third engineer respectively, and the radio officer to be treated as a ship's officer with a basic rate of pay equal to that of the third engineer) \$4,000.

To the members of the crew proportionately to their basic rates of pay \$6,000.

Defendant to pay the costs of the plaintiff Associated Steamships Proprietary Limited and the costs of the master officers and crew of the "Adelong".

THE MASTER OFFICERS AND CREW
OF THE STEAMSHIP OR VESSEL "ADELONG"

v.

THE OWNERS OF THE MOTOR VESSEL
"TUDOR" AND HER CARGO AND FREIGHT

ASSOCIATED STEAMSHIPS PROPRIETARY LIMITED
AS OWNER OF THE "ADELONG" STEAMSHIP

v.

THE MOTOR VESSEL "TUDOR"
HER OWNERS AND HER CARGO AND FREIGHT

JUDGMENT

TAYLOR J.

THE MASTER OFFICERS AND CREW
OF THE STEAMSHIP OR VESSEL "ADELONG"

v.

THE OWNERS OF THE MOTOR VESSEL
"TUDOR" AND HER CARGO AND FREIGHT

ASSOCIATED STEAMSHIPS PROPRIETARY LIMITED
AS OWNER OF THE "ADELONG" STEAMSHIP

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THE MOTOR VESSEL "TUDOR"
HER OWNERS AND HER CARGO AND FREIGHT

In these consolidated suits the Court is asked by the several plaintiffs to assess the amount which ought to be paid to them as and for a salvage award in respect of services rendered to the motor vessel "Tudor" on the 11th, 12th and 13th June 1966. It is conceded that the plaintiffs are entitled to an award and the relevant facts have to a large extent been agreed upon and embodied in a statement of agreed facts. There is, however, some dispute concerning the degree of danger to which the "Tudor" was exposed at the relevant time and the risk to which the performance of the services exposed the "Adelong" and those on board. There is also a question whether the circumstances in which damage was caused to both ships in the course of the performance of the services should operate to diminish the amount of the award which might, otherwise, be regarded as appropriate. Involved with these matters are issues of fact relating to the weather conditions prevailing, particularly on the 11th June 1966, and the situation in which the "Tudor" found herself when, as appears from the evidence, her engines broke down at about 6.30 a.m. on that day.

The "Tudor" was first sighted by the "Adelong" between 9.30 a.m. and 10 a.m. on the day last mentioned whilst the latter vessel was in the course of a voyage from Adelaide to Fremantle. The "Tudor" was, as near as could be judged,

ten miles away from the latter ship, lying with her head to the north-west and beam on to the sea and wind. There is really little dispute as to the state of the sea - which was rough - or, to the force of the wind which was between six and seven on the Beaufort scale from the south-west. Shortly after 10 a.m. the "Adelong" received from the Regional Office of the Department of Shipping and Transport in Adelaide a general message to the effect that the "Tudor" had broken down in position 35 degrees 30 minutes south, 134 degrees 50 minutes east, and that she was drifting shorewards. Ships in the vicinity were requested to "notify if proceeding to assist". A few minutes later the "Adelong" altered course towards the "Tudor" and, having established V.H.F. contact with the "Tudor", was requested by that vessel to stand by. Shortly after 11 o'clock the "Adelong" was in the vicinity of the "Tudor" and was standing by. At this point of time the master of the "Tudor", Captain Myklebust, informed the master of the "Adelong", Captain Noble, that he was in communication with the ship's agents in Sydney and awaiting instructions. No information was given to Captain Noble as to ^{the} nature or gravity of the breakdown that had occurred, or, as to how long it was thought the "Tudor's" engines would be out of operation. When the breakdown occurred the "Tudor" was about 55 miles to the south-west of the west coast of Eyre's Peninsula and the sea and the wind were causing her to drift at a rate slightly in excess of two knots in the general direction of that part of the coast between Avoid Bay and Cape Carnot. After standing by for some time Captain Noble informed Captain Myklebust that he considered the "Tudor" to be in a very dangerous position and that if he did not accept assistance he would be ashore in ten hours. About 1 p.m. the "Tudor" requested the "Adelong" to prepare a tow-line and preparations were made on both vessels for the "Adelong"

to take the "Tudor" in tow. This was accomplished shortly after 3 o'clock but within a quarter of an hour or twenty minutes the tow-line parted. After further manoeuvring, the "Tudor's" 5½ inch insurance wire was hauled aboard the "Adelong" and shortly after 6 o'clock the tow was again made fast and under way.

On the first occasion when the "Adelong" was manoeuvring with a view to establishing a tow-line on board the "Tudor" the two vessels came into collision causing damage to each vessel and also causing injury to the master and first officer of the "Adelong" who were on the port wing of the bridge. Their injuries were, however, slight though Captain Noble was rendered unconscious momentarily. It is claimed by counsel for the defendant that the collision was caused by the failure of Captain Noble to exercise elementary care and skill in manoeuvring and it is necessary, therefore, to determine whether there was any such failure, or any conduct, on his part which ought to be regarded as disentitling the owner of the "Adelong" from having the cost of the repairs to its ship and the cost of replacing certain items of equipment taken into account in fixing a fair award for the services rendered. It is agreed that the cost of such repairs was \$13,600, the cost of replacing certain items of equipment \$1,240 and that the owner's loss attributable to the ship's delay while repairs were being effected was \$4,588.

From the evidence it appears that when requested by the "Tudor" to take her in tow, the "Adelong" made a wide sweep around the "Tudor" from a position somewhat advanced from the "Tudor's" starboard bow and approached her from aft on the starboard side. When distant some three-quarters of a mile the master of the "Tudor" informed the master of the "Adelong" that he was not then ready. The "Adelong", therefore, went off to starboard. Later when informed that those on board the "Tudor" were ready to take a tow-rope the

"Adelong" performed much the same manoeuvre, the master of that vessel intending to proceed to a position some 150 to 200 feet off the starboard side of the "Tudor" and then, with the aid of rockets or heaving lines, to pass a line and, ultimately, the "Adelong's" 4 inch insurance wire, to the "Tudor". Such an operation in the conditions then prevailing admittedly entailed risk of damage to both ships. In general, the evidence of those on the "Adelong" was that the "Adelong" had proceeded to a position where her midships were abeam of the stern of the "Tudor", her course being approximately parallel to the fore and aft line of the latter vessel, when the collision suddenly occurred. It is said that when the forepart of the "Adelong" got within the lee of the "Tudor" leaving the port quarter of the "Adelong" exposed to the wind, the latter vessel suddenly took a sheer to port. The "Adelong" had lost a good deal of way at this moment and did not immediately answer to starboard helm with the result that as the vessels rolled in the sea they came into contact.

It is, it seems to me, highly probable that this was how the collision came about. The "Adelong" was a lightly laden ship, she was standing well out of the water and had a high poop deck. But it was because the "Adelong" was a lightly laden ship that Captain Noble decided to approach the "Tudor" on the lee side. He considered that when, as was necessary in the course of the manoeuvre, the "Adelong" lost way her rate of drift to the north-east would be greater than that of the "Tudor" and that, if he were to approach on the windward side of the "Tudor", there would be grave danger of the "Adelong" driving down on the "Tudor" during the not insubstantial period when the tow-line was being passed and made fast. However, approaching as he did on the lee side, there was a possibility that having lost the wind on the forward part of his vessel she might take a sheer to port at a time when he had lost steerage way. That the collision

occurred suddenly there can be no doubt; all the relevant evidence is to this effect and ample confirmation is to be found in the fact that neither Captain Noble nor the second officer, who had stationed themselves on the port wing of the "Adelong's" bridge, had time to remove themselves from a position of danger after the risk of collision became apparent. As I see it, the collision resulted suddenly from a number of factors. The first, of course, was the sudden sheer of the "Adelong" to port and it was unfortunate that this occurred at a time when she had lost steerage way and when a sea somewhat heavier than the average at that time caused the "Tudor" to bear down a little more quickly on the "Adelong". I add that I do not think that Captain Noble agreed in cross-examination with counsel for the defendant, as was suggested, that for the last 300 or 400 yards he approached the "Tudor" at an angle. I think the effect of his evidence, when properly understood, is that he was at such an angle until 300 or 400 yards from the "Tudor" but that this angle had been taken off in the final approach to the "Tudor".

The defendant's contention that the collision was due to the lack of skill on the part of the master of the "Adelong" is, as I see it, based upon three matters. In the first place, it is said, that during the last 300 or 400 yards before the impact the course of the "Adelong" was not parallel to the fore and aft line of the "Tudor" but was inclined towards the latter vessel at an angle of about 15 degrees. This, in effect, was the evidence of the master of the "Tudor" but I am satisfied on the evidence that this was not so; her approach to the "Tudor" brought her on to a parallel course some little distance before coming abeam of the "Tudor's" stern and would, apart from the sudden sheer, have taken her about 150 to 200 feet clear of the other vessel. On this aspect of the case it is not out of place to mention the

substance of a conversation which Captain Myklebust said that he had with Captain Noble after the arrival of both vessels at Adelaide. In the course of the conversation the former said that he thought that the "Adelong" had come too close, adding that he thought the "Adelong" had lost the wind or drift on the bow whilst the wind was still on her stern. To this, Captain Noble was said to have replied: "Yes, I did, but I did not think about it then." There was no suggestion then that the "Adelong" had deliberately approached the "Tudor" at an angle and that the collision resulted wholly or partly from such a cause; on the contrary, the criticism was that the "Adelong" "had come too close", and that she had "lost the wind or drift on the bow". The latter assertion, it seems to me, provides some confirmation of the testimony of those on the "Adelong" that at the critical moment the vessel took a sudden sheer to port.

I do not take Captain Noble's answer to Captain Myklebust's comment to be an admission of negligence or unskilful conduct on his part. It may well be that after the event Captain Noble did think that he had gone too close but it was a difficult manoeuvre having regard to the state of the wind and sea and a matter of difficulty to determine how closely the "Adelong" should approach. Every witness agreed that the difficulty of handling heavy towing gear and the absolute necessity of avoiding the possibility of injury to the "Adelong's" propellers with the towing gear made it necessary that she should approach the "Tudor" as closely as possible yet, at the same time, maintain a sufficient distance between the two vessels to avoid any unnecessary risk of collision. The problem was, therefore, one of difficulty and, in the circumstances, called for much nicety of judgment and I am not satisfied that there was any default in this respect on the part of Captain Noble.

Finally, it was contended on the strength of certain evidence given by Captain Woolf - a retired master mariner of considerable experience - to the effect that the manner in which the manoeuvre had been conducted by the "Adelong" was wholly wrong. This witness said that "the usual approach would be to steam into the wind, keeping clear of the other vessel's bows and trying to get a line aboard the disabled vessel" and that it would be "unseamanlike" to come in on the lee side of the other vessel. This evidence came practically at the conclusion of the case and without any prior indication, either in cross-examination, or, otherwise, that it would be forthcoming. Nor was there any suggestion in his evidence, or in the course of his conversation with Captain Noble, that Captain Myklebust subscribed to the view that the manoeuvre adopted by the "Adelong" was unseamanlike in character; in substance, the only complaint made by the defendant until Captain Woolf gave his evidence was that the "Adelong" had approached at an angle and that she had come too close to the "Tudor". On the other hand, although Captain Woolf was cross-examined upon his evidence concerning the possibility of the "Tudor", in her disabled condition, finding a secure anchorage, he was not cross-examined concerning his assertion to the effect that the "Adelong's" manoeuvre was unseamanlike in character. Nor were any of the plaintiffs' witnesses recalled in reply to deal with this new development. It was, I think, unsatisfactory that the evidence should have been left in this state, but upon the evidence as it stands, I am by no means satisfied of the accuracy of the proposition asserted by Captain Woolf. His evidence, so far as it was tested by cross-examination, that is to say, so far as it related to the possibility of the "Tudor" in her disabled condition finding a safe anchorage, did not impress me as wholly free from partisanship or wholly accurate and I do not think it would be safe to accept it at its full face value. Further, it seems to me, that if the manoeuvre which the

"Adelong" executed was wholly unseamanlike it is, at the very least, surprising that this fact had escaped the notice of the competent witnesses in the case, on both sides of the record, who had already given evidence before Captain Woolf was called. Accordingly, in assessing my award I propose to take into consideration the cost of the repairs to the "Adelong", the cost of the replacement of lost items of equipment and the delay that was occasioned by the work of repair.

When Captain Myklebust decided to ask the "Adelong" to take the "Tudor" in tow she had drifted in a north-easterly direction for some considerable distance and when the tow finally commenced she was within 27 or 28 miles of the coast. She was still drifting and it was highly probable that unless some countermeasures were taken the rate of drift would have accelerated as she approached the coast. At this time Captain Myklebust knew that a third vessel, the "Stentor", en route from Fremantle to Adelaide, would arrive on the scene round about 7 p.m. The "Stentor", it may be mentioned, is a larger and more powerful vessel than the "Adelong". He knew also that a tug had been despatched from Adelaide at about 2 p.m. by the ship's agents. But he also knew that the tug could not arrive until the following morning. Further it was not known how long it would take to complete temporary repairs to the "Tudor's" engines or how effective the engines would be if and when the repairs had been carried out. In the meantime the weather forecast did not predict any improvement in the weather.

It seems to me that at this time the "Tudor", though not in immediate danger, was in a somewhat precarious situation and it was for this reason that Captain Myklebust elected to have the "Adelong" take the "Tudor" in tow, notwithstanding the fact that he had some doubt concerning the capacity of that vessel to handle the "Tudor". But I am

far from satisfied that, as was suggested by counsel, the position of the "Tudor" was desperate or that it was inevitable that unless she had accepted help she would have gone ashore during the night. I think that, failing effective repairs to her engines, she could have been kept in comparative safety by the judicious use of her anchors until the arrival of the tug on the following day. The temporary repairs to her engines, it may be mentioned, were completed shortly after midnight but, upon the evidence, it was a matter of speculation as to how effective the engines would have been or for how long they would have continued to function had the necessity to use them arisen. At the same time I am not disposed to take the view that the services rendered by the "Adelong" only just qualified as salvage services; they were meritorious services and resulted in preventing the "Tudor" from getting into a more precarious situation and bringing her safely to port.

All this was done at some risk to those on board the "Adelong" and to the "Adelong" herself. The risk to the "Adelong" was apparent; indeed, to a great extent it materialized and I do not think I should allow any considerable sum over and above the cost of repairs, the cost of the replacement of lost equipment and the loss caused by delay on account of this factor. The risk to the officers and crew of the "Adelong" was not so apparent and, indeed, though real in the case of some, at least, of her complement, was not great though, perhaps, special mention should be made of the first officer and those members of the crew who, after considerable effort and with some risk to themselves, overcame the difficulty occasioned by the large size of the shackle joining the "Tudor's" mooring line to the wire and finally managed to get the wire aboard.

Once the "Tudor" was finally taken in tow the vessels, in spite of the adverse weather conditions, proceeded without incident and, as already mentioned, arrived in

Adelaide two days later. It remains to be mentioned that the parties have agreed that the owner's loss on account of the "Adelong's" necessary deviation from her voyage was \$5,672. This with the figures already mentioned amounts to \$25,100.

I have found it impossible, except in a very general way, to evaluate most of the various factors which I am obliged to take into account in making my assessment. I appreciate, of course, that my difficulty is a common enough one in cases of this nature and that no award is capable of assessment with any semblance of mathematical certitude. However bearing in mind that the "Tudor" and her cargo had a very substantial value - well in excess of \$3,000,000 - this is not a case where the award should be minimal. On the other hand the value of the "Tudor" and her cargo does not make this the occasion for an extravagant award. But doing the best I can and bearing in mind the various factors to which I must have regard an award of \$52,000 would in my view represent a fair assessment. In accordance with the request of the plaintiffs I would apportion this amount as follows:

To the owner of the "Adelong" \$40,000.

To the master of the "Adelong" \$2,000.

To the officers of the "Adelong" proportionately to their basic rates of pay (the chief officer, second officer and third officer to be treated as if their rates of pay were equivalent to those of the chief engineer, second engineer and the third engineer respectively, and the radio officer to be treated as a ship's officer with a basic rate of pay equal to that of the third engineer) \$4,000.

To the members of the crew proportionately to their basic rates of pay \$6,000.

It will be observed that I have taken the somewhat unusual course of fixing a lump sum to be divided

among the officers and another lump sum to be divided among members of the crew. This course has been adopted because I do not think the difference between the basic rates of pay of the officers and crew is sufficient to mark the difference in the responsibilities which the occasion cast upon the ship's officers.

In the result there will be judgment for the plaintiffs in the consolidated action for \$52,000.

The owner of the "Adelong", on the one hand, and the master officers and crew of the vessel, on the other, were separately represented and on the hearing I invited discussion as to whether the defendant should be called upon to pay more than one set of costs. But after consideration I am not disposed so to limit my order. I may say that the major factor influencing my decision is the fact that an order of 9th October 1967, made upon an application for directions, provided that the plaintiffs in each suit should be entitled to separate representation by counsel at the trial and this order was, I understand, made without any objection or exception on the part of the defendant.