

# Salvage awards

*Ishfaq Ahmed examines The Ocean Crown and its implications for salvors in times of economic uncertainty*

*Owners of the Vessel Ocean Crown, Her Bunkers, Stores & Cargo & 5 Ors v Five Oceans Salvage Consultants Ltd [2009] EWHC 3040 (Admlty)*

In *The Ocean Crown*, ship and cargo interests (the appellants) appealed to Gross J from the Lloyd's Salvage Appeal Arbitrator's award increasing the salvage remuneration awarded to the respondent salvors (the contractors) by the first instance arbitrator from US\$34,500,000 plus interest and costs to US\$40,750,000 plus interest and costs.

The case raised two broad points of interest. Firstly, the relevance of future economic conditions post-termination of the salvage operations, as specific factors enhancing a salvage award (the encouragement issue). Secondly, the application of the *The Amerique* principle to complex and comprehensive salvage cases (the moderating principle issue).

## Background facts

In August 2007 the m.v. OCEAN CROWN (the ship), laden with 49,850.6 tonnes of copper concentrates in bulk, ran aground on an uncharted rock in the Canal Darwin during a voyage from Chile to Indian ports. Subsequently, an agreement on the LOF standard form was signed.

The grounding location itself was "reasonably well sheltered" but in a pollution sensitive area, very remote from any major port, so posing a logistical challenge for the contractors. Importantly, the salvaged fund was very high in value as follows – the ship and stores (at the termination of the LOF services and so after the casualty): US\$66,096,259.79, bunkers: US\$243,291 and the cargo: US\$99,846,280.00, making a total salvaged fund of US\$166,185,830.79.

The casualty was immobilised until assisted by a professional salvor with the resources to perform the service. A lengthy period of immobilisation was itself a serious risk for a ship and cargo of this value (the grounding impacted on the copper concentrates market). The physical risks were serious. Hold No. 1 had flooded and the casualty was hard aground on her port side from about the

aft end of No. 3 hold and the forward end of No. 4 hold to about amidships. There was a short term risk of further damage and flooding of No. 3 hold, which, in the course of events, became much more serious, carrying with it a risk of flooding No. 4 hold with a prospect of the casualty in the future becoming unsalvageable. There was also some pollution risk. The services were lengthy (66 days to ship redelivery, 107 days to redelivery of the transhipped cargo), successful and rendered with exemplary speed and efficiency in a remote and difficult location.

The vast majority of the salvage services were performed by sub-contractors engaged by the contractors, who took a very significant commercial risk, at a total cost of a little under US\$18 million (leaving out financing costs). The contractors themselves were a young company, but the experience and professionalism of their officers and employees were well known because they had, by their activities and impressive investment, quickly established themselves as a major player in the salvage business. They were described as top class international salvors entitled to the full encouragement accorded to salvors in this category and, on any view, were entitled to a substantial award. However, the appellants submitted that, in coming to his award, the appeal arbitrator erred in law as now discussed.

## The encouragement issue

The fundamental principle of "encouragement" is of long-established vintage in salvage law, pre-dating its express mention in art 13 of the London Salvage Convention 1989 ("Criteria for fixing the reward") which states that the reward must be fixed with a view to encouraging salvage operations, taking into account the specific listed criteria. The judgment refers to leading salvage texts emphasising encouragement through assessing the reward in a generous way (for example *Kennedy & Rose, Law of Salvage* (6th ed.) and *Brice on Maritime Law of Salvage* (4th ed.)).

The appellants argued that the following paragraph (para 258) of the



appeal award disclosed an error of law:

*"... another factor to be borne in mind, is that encouraging awards provide the professional salvor with a cushion in difficult times. When this service was performed the market was very buoyant, as demonstrated by the high rates of hire for the lightning vessels and hull values. Since then there has been a dramatic collapse. If this service were performed today it would perhaps cost less, but the difficulty in obtaining loans and credit in the current economic climate offsets that consideration. Without some reserve, salvors face a financing problem in larger cases."*

The court agreed with the appellants. The judge held that if, in para 258, the appeal arbitrator had in mind as a specific enhancing factor the risk of future downturns, then his reasoning could not be sustained. A fortiori, if in doing so, he took account of actual economic conditions experienced between the termination of services and the appeal award. The judge gave the following reasons:

- i. Article 13 of the 1989 Convention does not mention this risk and instead looks to the position pertaining at the commencement of, during or at the termination of the salvage services in question, rather than to future risks. Therefore, salvage operations are to be encouraged for the future, by reference to factors prevailing at the time of the salvage in question.
- ii. Otherwise there was the risk of double counting. Contractors would enjoy the benefit of having salvaged a very large fund enjoying a higher value than would have been the case had good economic times not prevailed at the time the services terminated. To further enhance the award because of the risk of a future downturn would give salvors the best of both worlds and would not be fair

- to all parties.
- iii. If the question was to be debated in arbitration at anything other than the level of generalities or truisms, then there was a risk that expert evidence would be needed of likely economic fluctuations to evaluate specific risks of downturn. The judge doubted this would be a wise development in salvage litigation or arbitration.
  - iv. If an award was to be enhanced because of an anticipated economic downturn, how was a likely economic upturn to be addressed? It could not be right and it would certainly be novel if a salvage award during an economic downturn offered “reduced” encouragement because of evidence of an anticipated, relatively imminent, upturn.
  - v. It would be difficult to delve into the risk of future economic downturns without straying into a consideration of post-termination events. But for very good reason, the law of salvage has adopted the date of termination of services as the relevant cut-off point. Thus, for example, if the fund is lost (say, because the casualty sinks) after termination, the salvor is not deprived of his remuneration. If, however, regard was to be had to actual economic conditions experienced between the date of termination of the services and the date of any award, fairness might well dictate having regard to post-termination changes in the value of the salvaged fund as well. To do so seemed wrong in principle, but not to do so would serve to heighten the risk of double counting already identified.

The appellants were therefore entitled to relief.

### The moderating principle issue

In *The Amerique* (1874) LR 6 PC 468 it was stated that although the value of the property salvaged is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered by the salvors (known as the “moderating principle”).

In his reasons the appeal arbitrator dealt specifically with the high fund value. He reasoned that the moderating principle had full force and effect in cases involving straightforward services; however, its significance dwindled in complex and arduous cases of almost continuous activity requiring contractors

to exhibit diverse salvage skills. According to the appeal arbitrator, a sense of proportion had to be maintained in all cases, but liberality was merited in complex cases such as here. He went on to state that here the *The Amerique* principle did not apply in terms: “Rather general considerations of proportionality and balance are to be applied.”

The appellants challenged this. The contractors on their part accepted that the principle of *The Amerique* was applicable in all cases. The judge held that the appeal arbitrator’s reasoning on this issue did disclose an error in stating that the moderating principle “does not apply in terms” in complex cases.

The judge usefully summarised the legal position:

- i. The salvaged fund’s value is in any case a significant element in the assessment of an award. Additionally and in accordance with the principle of encouragement, where the value of salvaged property is very high and it is at risk of damage or loss in the absence of assistance, then it is right “to give some real effect to the very high value of the salvaged property” beyond simply recognising it as furnishing a sufficient fund out of which to reward salvors.
- ii. However, the fund’s high value must not be allowed to raise the quantum of an award to an amount altogether out of proportion to the services actually rendered (the moderating principle). Moreover, where the value of the property is high, an award of a small proportion may well provide adequate compensation.
- iii. The moderating principle is equally applicable to all types of salvage cases, whether straightforward, or involving high dangers or complex services or comprehensive cases.
- iv. However, the application of this moderating principle is necessarily fact sensitive; whether an award will be “altogether out of proportion” to the services actually rendered must involve a consideration (inter alia) of the applicable dangers and the nature of the salvage services. So, an award which is “altogether out of proportion” in a case of low dangers, involving short and simple salvage services may well not be disproportionate where the risks to the salvaged property are serious and complex salvage services have been provided. The key point is that the value of the salvaged property by itself must not be allowed to result in an

award “altogether out of proportion” to the services actually rendered.

### Relief

The appeal award was remitted to the appeal arbitrator for reconsideration.

### Comment

Although this case may appear to be contrary to salvors’ interests, it is tentatively suggested that salvors on the whole will welcome at least some aspects. If anticipated economic changes had been accepted by the court as a valid factor in determining the appropriate award level, then, in cases of anticipated economic upturn, ship/cargo interests would be able to argue that the award should be reduced. If the court or tribunal accepted this argument and any expert evidence of a future upturn and reduced the award accordingly, but such an upturn did not actually materialise, then it could place some salvors in difficulty. It may impact especially those who have equipped salvage vessels, pumps and other equipment in a state of (idle) readiness for quick disaster responses, the very salvors that the law seeks to encourage. Advising on quantum would also be difficult and involve speculation about future economic conditions. Thus, taking assessment as at the date the services terminate rather than relying on what may turn out to be wrong and difficult expert evidence is perhaps the best and more certain approach in the circumstances.

With regard to the moderating principle, the court confirmed that the assessment of an award is not a simple arithmetical exercise and no simplistic “percentage” approach can be adopted. However, arbitrators and parties must be guided by the moderating principle rather than any broader considerations of “proportionality and balance”. In *The Voutakos* [2008] 2 Lloyd’s Rep 516 the principle’s requirements had been referred to as “well recognised”. In the present case, the judge stated that the moderating principle is and ought to be a part of the reasoning of a court or tribunal seised of such issues. The parties should therefore ensure that the tribunal is referred to it (and refers to it) to avoid any potential challenges to an award on this ground.

*Ishfaq Ahmed is a barrister at Stone Chambers*

*Timothy Hill QC of Stone Chambers acted on behalf of the respondent salvors*