THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 369/03

In the matter between:

SWIRE PACIFIC OFFSHORE SERVICES (PTE) LTD Appellant

and

MV 'ROXANA BANK' First Respondent

THE CARGO PRESENTLY ON BOARD THE
MV 'ROXANA BANK' Second Respondent

Coram : SCOTT, FARLAM, NUGENT, CONRADIE *et* CLOETE JJA

Date of Hearing : 20 AUGUST 2004

Date of delivery : 16 SEPTEMBER 2004

Summary: Salvage – no closed list of categories of persons entitled to salvage reward – persons entitled to reward in respect of services rendered by a salving vessel not limited to the owner or demise charterer.

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] On the morning of 25 January 2002 the *MV Roxana Bank* experienced mechanical problems with her main engine while lying at anchor off the town of Mossel Bay on the east coast of South Africa. The prevailing weather conditions caused her to drag her anchor and drift in a north-westerly direction close to a submarine oil pipeline which runs from a single buoy mooring to the oil terminal at Mossel Bay. A pilot who had boarded the *Roxana Bank* requested assistance from the *MV Pacific Lance* which was anchored nearby. In response, the latter took the *Roxana Bank* under tow out to sea. Arising from this incident, the appellant subsequently commenced proceedings *in rem* in the Cape High Court against the *Roxana Bank*, as first defendant, and against her cargo, as second defendant, (now the respondents) in which it claimed a salvage reward totalling R1 000 000 together with interest and costs. The claim is a maritime claim within the meaning of para (k) in the definition of 'maritime claim' in s 1(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

[2] The appellant alleged in its particulars of claim that it was 'the operator' of the *Pacific Lance* and that her master and crew in rendering the salvage services had acted in the course and scope

of their employment with the appellant or 'alternatively in terms of their duties, having been seconded by Swire Pacific Ship Management Ltd to the [appellant].' The evidence adduced by the appellant at the trial revealed that while it had effective control over the disposition of the vessel, it was neither the owner nor the charterer of the vessel in terms of a demise charterparty; nor was it the employer of her master and crew. At the end of the appellant's case the respondents applied for and were granted absolution from the instance by the court *a quo* on the ground that the appellant had failed to make out a prima facie case that it had the necessary *locus standi* to claim a salvage reward based on the services rendered by the *Pacific Lance*. The appeal is with the leave of the court *a quo.*

[3] The respondents concede that the evidence adduced at the trial, although disputed, was sufficient to establish prima facie that the services rendered by the *Pacific Lance* were such as to render the owners of the *Roxana Bank* liable for the payment of a salvage reward. For the purpose of the appeal, therefore, this may be assumed. The question in issue is whether the evidence adduced was of such a nature as to establish a relationship between the

appellant and the *Pacific Lance* which in law would justify a salvage award being made to the appellant.

[4] The appellant is a member of a group of companies known as the Swire group, as are the companies that respectively own the *Pacific Lance* and employ her master and crew. At the head of the group is Swire Pacific Ltd, a public company registered in Hong Kong. The group is divided into five divisions. One is the shipping division which comprises about six companies. What was referred to as the 'holding company' of this division is a Bermudan company, Swire Pacific Offshore Holdings Ltd. (This company is itself a wholly owned subsidiary of another Bermudan company which in turn is a wholly owned subsidiary of Swire Pacific Ltd of Hong Kong.) One of its subsidiaries is Swire Pacific Offshore Ltd, also of Bermuda, which in turn holds all the shares in the appellant. The latter is registered in Singapore. The *Pacific Lance* is owned by a Panamanian registered company, Swire Marine Corporation Ltd, which is another wholly owned subsidiary of Swire Pacific Offshore Holdings Ltd. Her master and crew are, or were at the relevant time, employed by a Hong Kong company, Swire Pacific Ship Management Ltd, which is a wholly owned subsidiary of the company at the head of the group, Swire Pacific Ltd.

[5] The appellant's business is the provision of marine services to the offshore industry. This involves providing support for offshore oil rigs, oil platforms, drilling barges and the like. For this purpose the appellant employs a number of ships, one of which is the *Pacific Lance*. Mr Brian Townsley, who is a director of the appellant as well as other companies in the shipping division of the group, testified that the appellant is, as he put it, 'the head office' of the shipping division of the group and carries on its business with the support of other companies in that division. He explained that Swire Marine Corporation Ltd was established to do no more than own the *Pacific Lance* and other ships, and that it had no employees in Panama where it was registered. In summary, his evidence was to the effect that although there was no written agreement between the appellant and Swire Marine Corporation Ltd regarding the employment of the *Pacific Lance*, the former, with the concurrence of the latter, effectively controlled the disposition of the vessel in every respect as if it were the owner.

[6] At the time the salvage services were rendered, the *Pacific Lance* was under charter to Soekor E and P (Pty) Ltd ('Soekor'). The agreement, called a 'service agreement', was concluded between the appellant and Soekor and commenced in September

1999. Its terms largely reflect the relationship between the vessel and the appellant described by Townsley. The appellant is styled 'the owner'. The vessel is defined as meaning 'the *MV Pacific Lance* owned, chartered or leased by [the] owner [ie appellant] . . .'. The hire is payable to the appellant as 'owner', who is to deliver the vessel at Mossel Bay Harbour on the commencement date and provide a master and crew 'in numbers and classifications as set out in [an] appendix'. There are detailed provisions relating to the suspension of 'the services' by the 'owners' for the purpose of engaging in a salvage operation and for the sharing with Soekor of any salvage reward paid to the 'owners' after deducting various specified expenses. Finally, the 'owners' are obliged to procure at their own cost various insurances for the duration of the agreement, including 'workmen's compensation insurance', 'hull and machinery insurance for the full value of the vessel', 'P & I risks as covered by a full entry of the vessel in a recognised P & I club . . .' and 'insurance to the full value of the bunkers on board the vessel'.

[7] As indicated above, the master and crew of the *Pacific Lance* are employed not by the company that owns the vessel, but by Swire Pacific Ship Management Ltd. According to Townsley, their

wages are paid by the latter with funds transferred to it by the appellant expressly for that purpose. Furthermore, the master acts on the instructions of the appellant, not Swire Pacific Ship Management Ltd. Townsley explained that these were conveyed on a day to day basis to the vessel via regional 'out ports' which had one or two managers. Similarly, when instructions were sought by the master they were obtained from the appellant by the same means. The evidence of the master, Captain Stephen Holden, was to the same effect. It appears that in 1993 Swire Pacific Offshore Ltd, being the company that owns the shares in the appellant, entered into a written agreement with Swire Pacific Ship Management Ltd in terms of which the latter undertook to recruit and provide the former with crew for the vessels entrusted to it by their owners. Townsley explained, however, that by reason of a subsequent restructuring of the group's activities this agreement no longer correctly reflected the position as Swire Pacific Offshore Ltd had ceased to be actively involved and Swire Pacific Ship Management Ltd reported directly to the appellant.

[8] In the court *a quo* Davis J correctly held that the law to be applied was the English law as it existed on 1 November 1983. A South African court of admiralty immediately before the

commencement of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') would have had jurisdiction to entertain a claim for salvage by virtue of s 6 of the Admiralty Court Act of 1840 (3 & 4 Vict.Cap.65). Accordingly, and in terms of s 6(1) of the Act, the law to be applied is the law which 'the High Court of Justice of the United Kingdom' would have applied on the date on which the Act commenced. (The reference to the 'High Court of Justice' must be understood as a reference to the Supreme Court of England and Wales. See *MV Stella Tingas: Transnet Ltd v Owners of the MV Stella Tingas and another* 2003 (2) SA 473 (SCA) at 479G-H.) However, by reason of s 6(2) of the Act, the application of that law is subject to the provisions of any law of the Republic applicable to salvage. It follows that in the event of a conflict between English law and the Wrecks and Salvage Act 94 of 1996, incorporating as it does the International Convention on Salvage 1989, the latter must prevail. As far as the present case is concerned, there would appear to be no such conflict. In this regard it is to be observed that the *Pacific Lance* is not a South African ship within the meaning of the definition of such a ship in s 1 of the Wrecks and Salvage Act.

[9] Having held English law to be applicable, the learned judge appears to have accepted or proceeded on the assumption that there was a *numerus clausus* of categories of persons entitled to recover a salvage reward. He concluded his discussion on the issue thus:

'To summarise: the position in terms of English law (which is to be applied in this case as South African law) is that the master, crew, owner or demise charterer represent the categories of persons to whom a salvage reward may be due.'

Thereafter, in response to counsel's invitation to do so, he considered whether there was any justification for lifting the corporate veil to enable the appellant 'to locate [itself] within the existing categories by use of a peep through the corporate structure of the Swire Group' and decided there was none. The judge was also not prepared on the facts of the case 'to extend' the categories of persons entitled to a salvage reward to 'an operator'. He accordingly granted absolution from the instance.

[10] In this court counsel were in agreement that there was no closed list of categories of persons entitled to claim a salvage reward. This is undoubtedly so. Brice on the *Maritime Law of Salvage* 3 ed at para 1-177 says this:

‘There is no arbitrary limitation upon the class of persons or bodies who are entitled to recover salvage remuneration provided, however, that the same are recognised in law as volunteers and they render salvage services.’

In *The Sava Star* [1995] 2 Lloyds Rep 134 (Adm Ct) Mr Justice Clarke, after quoting with approval the above passage (in the second edition at para 1-154), concluded at 141:

‘There are no rigid categories of salvor. They include any volunteer who renders services of a salvage nature.’

Although ‘salvor’ is not defined in the Salvage Convention 1989 it is clear that the above approach is consistent with its terms. See Kennedy and Rose *Law of Salvage* 6 ed para 444. In the present case, however, we are concerned not with a situation where the salvor personally rendered the salvage services, but with a situation where a ship was the means by which those services were rendered. The question that arises is whether in such circumstances a person other than the owner or demise charterer can become entitled to a salvage reward.

[11] It is well established that the owner of a salving vessel is entitled to a salvage reward due in respect of the services rendered by the vessel. This is so even if the vessel is subject to a time charter. It is the owner who has the power to control the disposition of the ship and whose property or interests are placed

at risk. But the element of risk, if a requirement in the past, is no longer one; it is relevant only to the quantum of the claim. See Kennedy and Rose paras 454-458.

[12] It has also long been recognised that where the salving vessel is subject to a charter amounting to a demise, it is the charterer who is entitled to the reward. Such a charterer, it is said, becomes *pro hac vice* the owner for the duration of the charter. In *Elliot Steam Tug Company Ltd v Admiralty Commissioners; Page and others v Admiralty Commissioners* [1921] 1 AC 137 the House of Lords accepted that the demise charterer was so entitled, but without an in depth analysis and seemingly on no more than the assumption of a rule that it is the demise charterer who acquires the right to the salvage reward. Kennedy and Rose contend that what really underlies the entitlement of the demise charterer to the reward is the power that he (or she) has to direct the salving vessel to render the services and to bear the risk of her loss. They say at para 473:

‘Demise charterparties are commonly regarded as putting the charterer in the position of the owner for the duration of the charterparty, so that he automatically assumes both the liabilities and rights of the owner. In fact, of course, there is merely a transfer of possession and what really provides the charterer with the right to salvage is the power given to him (additionally to the

rights he would normally have under the employment and indemnity clause in a time charterparty) to order the ship to provide salvage services and to bear the risk of any loss to the vessel – for which he must indemnify the owner – during salvage. He has the right to decide on the employment of the ship, so he is able to contribute its services, and it is he who bears the risk.'

They add at para 474:

'It is for those reasons, and not simply because he acquires the appearance of ownership, that the demise charterer can claim salvage. The owner foregoes the services of and risk to the vessel during the demise and can be said to contribute nothing to salvage.'

This analysis strikes me as correct and I readily endorse it. The question is whether there is any reason why some person other than the owner or demise charterer who similarly has the power to provide the services of a salving vessel and who will bear the loss of the vessel (or possibly other financial loss) should not be entitled to a salvage reward. In principle, once one accepts, as I do, that there is no closed list of categories of persons who may claim salvage, I can think of no such reason; nor was counsel able to advance one in argument. In my judgment, therefore, it must be accepted that such a person is entitled to a salvage reward.

[13] To return to the facts of the present case, what is apparent from Townsley's evidence is that the power to control the

disposition of the vessel was vested in the appellant. Although the employment contracts of the master and crew were concluded with Swire Pacific Ship Management Ltd, the inference is that the appellant was *pro hac vice* their employer. It was the appellant who instructed the master and it was the appellant to whom the master turned when he sought instructions. In this way the appellant effectively exercised the day to day control over the vessel. Townsley's evidence that the appellant controlled the disposition of the vessel in every respect is moreover supported by the existence of the Soekor agreement which the appellant entered into in its own name as 'owner, charterer or lessee' of the *Pacific Lance*. Counsel for the respondent submitted that the inference arising from the evidence was that the appellant was no more than an agent and that it had entered into the Soekor agreement as agent for and on behalf of an undisclosed principal, being Swire Pacific Ship Management Ltd. Such an inference is not only inconsistent with the terms of the Soekor agreement, it is also not in accord with the direct evidence of Townsley; nor was it put to him in cross-examination. A more likely inference is that there existed, at the least, a tacit agreement between the owner and the appellant to the effect that the latter was to possess and exercise full control over the disposition of the *Pacific Lance*.

Indeed, it is clear from the evidence that the appellant's possession and control of the vessel was with the concurrence of the owner. The appellant's counsel sought to categorize the agreement as being 'akin to a demise charterparty', but no purpose is served by attempting to give it a tag.

[14] As far as the element of risk is concerned, it is apparent even from the terms of the Soekor agreement that the appellant would suffer financial loss through a failure to perform in the event of the vessel's being lost or damaged in the course of a salvage operation. But apart from that, the appellant's possession of the vessel of another gives rise, in the absence of evidence to the contrary, to the natural inference that the appellant will ultimately be obliged to return the vessel to the owner or indemnify the owner for its loss. Some support for this is to be found in the appellant's undertaking in the Soekor agreement to procure amongst others hull and machinery insurance to the full value of the vessel.

[15] In order to survive absolution, the appellant was obliged, as far as inferences are concerned, to show no more than that the inference on which it relied was one which was reasonable. See *Gordon Lloyd Page & Associates v Rivera and another* 2001 (1) SA 88 (SCA) at 92H-I. In my view the appellant succeeded in the

circumstances in establishing prima facie that it bore the risk of the loss of the vessel. It follows from what I have said above that on these facts the relationship between the appellant and *Pacific Lance* was such as to entitle the appellant in law to a salvage reward in respect of the services rendered by the vessel.

[16] It was contended on behalf of the respondent that the case the appellant ultimately sought to establish was not the case made out in its particulars of claim and that the appellant was therefore precluded from relying on the former. The case pleaded, said counsel, was that the appellant was entitled to a salvage reward as employer of the master and crew who were acting in the course and scope of their employment with the appellant or had been seconded to it, while the case sought to be established was that the appellant was effectively in control of the disposition of the vessel which in turn was the means by which the salvage was effected. The distinction between the two is, of course, a valid one, but I do not think that the particulars of claim must be construed as precluding the latter. It is clear from the allegations made in the particulars of claim that the appellant's case was always that it was the services rendered by the vessel that effected the salvage and not simply the services of the master and crew acting in the course

and scope of their employment. But the allegation that they were so employed or were seconded to the appellant makes it clear that the appellant was in a position to control the disposition of the salving vessel. The argument, therefore, cannot succeed.

[17] It follows that in my view the appeal must be upheld.

The following order is made:

(1) The appeal is upheld with costs, such costs to include the costs occasioned by the employment of two counsel;

(2) The order of the court *a quo* granting absolution from the instance is set aside and the following is substituted in its place –

'The application for absolution from the instance is dismissed with costs including the costs occasioned by the employment of two counsel.'

D G SCOTT
JUDGE OF APPEAL

CONCUR:

FARLAM J
NUGENT J
CONRADIE J
CLOETE J