Mr Justice David Steel: 6th October 2004

Introduction

1. This is an appeal by the Claimants pursuant to Section 69 of the Arbitration Act 1996. It is brought with the leave of Gross J. The appeal is against an award of Mr Nigel Teare QC (the appeal arbitrator) dated 31 October 2003 in which he varied an award of Mr John Reeder QC (the original arbitrator) dated 23 January 2003.

2. The arbitrators had been appointed pursuant to the terms of a written submission to arbitration under which they were to determine whether the Claimants were entitled to salvage remuneration in respect of services rendered by the Claimants' tugs to the jack up rig *Key Singapore* in the Eastern Mediterranean in early December 2001 and, if so, how much.

3. The Respondents' case was that the circumstances in which the services were rendered did not admit to any claim for salvage but, if they did, the situation of danger was brought about by the fault of the Claimants, thus precluding or restricting any claim for salvage.

4. The original arbitrator held that the services constituted salvage and made an award of US$1.8 million being calculated on the basis of a notional base award of US$3 million less $1.2 million to reflect the extent to which he found that the Claimants had contributed to the danger.

5. On appeal, the appeal arbitrator reduced the notional base award to US$2 million and, having also varied the original arbitrator's apportionment of responsibility for the creation of the danger, awarded US$1 million to the Claimants.

Background

6. It is only necessary to provide the briefest summary of the background facts. The rig was to be moved a distance of 38 miles from the West Akhen Field to the Port Fouad SW 2 Field, north of Port Said. The tow was expected to take about 17 hours.

7. On 20 November there had been a pre-move meeting held in Cairo between representatives of Santa Fe and Petrobel who had chartered the rig from Sante Fe. This meeting produced a pre-move checklist which recorded that three tugs with a combined horsepower of 10,000 bhp were required. The maximum weather conditions for departure were 20 knots with a wave height of 5 feet.

8. On 30 November a weather forecast from Ocean Routes was received at the Santa Fe office in Cairo. The forecast was discussed by the interested parties and the view was taken that the tow could proceed. The three tugs MD7, MD13 and MD85 duly made fast to the rig. The rig move commenced between 1210 and 1250 on 30 November.

9. The weather conditions deteriorated and at around 0700 on 1 December those on the rig decided that the rig could not pin down and the tugs were instructed to tow the rig to a stand by position to the southwest. By 1800 the conditions were still unsuitable for pinning down and accordingly the tugs were asked to tow the rig "north and south". By 2300 the wind was SW 40 knots, that is the upper limit of gale force 8, with 4-5 metre swells.

10. On 2 December the flotilla again approached the standby location but could not pin down in the prevailing weather conditions. At about 0600 the tugs were instructed to take the rig to deeper waters where the legs of the rig could be lowered for stability reasons. By 1100 the wind force was 46-50 knots (that is, reaching storm force 10).

11. At about 0930 on 3 December, whilst MD7 was towing on a heading of about 50 degrees, her tow wire parted. In the light of this development, the Respondents engaged the tug BARAKA 1. She was a much larger tug whose power exceeded the combined power of the three tugs on site. She left Ismaleh for Suez to refuel at 1300. At 1425 MD94 was also called in and departed Port Said for the flotilla.

12. At 2040, when the wind was 40-45 knots and the seas 18-20 feet, the tow wire of MD85 parted. The rig master did not allow either MD7 or MD85 to make fast again because he could not risk his crew on the deck of the rig. On 4 December MD94 and BARAKA 1 arrived at the flotilla at 0430 and 0800 respectively. The wind was now SW 50 knots with swells of 6-8 metres. The rig's crew were evacuated between 0940 and 1130.

13. During the night the weather improved to SW 25 knots and at 0600 on 5 December MD13 managed to turn the rig into the weather. BARAKA 1 attempted to put a man on board the rig but failed. However, a crewman from MD85 succeeded and remade her connection. The same crewman also made fast BARAKA 1. The towage resumed to a rendezvous position whilst MD7 was instructed to proceed to Port Said for fuel and provisions.

14. The rendezvous position was reached at 0800 on 6 December and at 1230 5 persons were put on board the rig by helicopter. An inspection revealed that a tank was breached and flooding and another space was suspected to be breached. In the afternoon the rig was again evacuated and the tugs were instructed to tow the rig to another rendezvous position. The weather had again deteriorated to SW 30-35 knots by midnight.

15. On 7 December a new team of nine, including a new rig mover, was put on board the rig by helicopter. The breached tanks could be pumped but the legs were inoperative due to electrical faults. However, by 2200 the jacking system had been repaired.

16. On 8 December the weather again deteriorated with SW winds of 45-52 knots. At 1615 the towline of BARAKA 1 parted. MD13 and MD85 turned the rig at the request of the rig so that the stern was towed into the weather with the tugs towing in parallel. At 1800 the wind was 55 knots (the upper limit of force 10) with seas of 10-12

feet and a swell of 15-20 feet. At 1940 the rig team was again evacuated. At 2050 MD 85's tow wire parted and she stood by.

17. At 2330 MD 7 departed from Port Said for the casualty. On 9 December at 0830 MD 94 put a man on board but he could not make fast a towage connection. In the early afternoon a team of 11 were put on board by helicopter and BARAKA 1 reconnected her towline. MD 94, having transferred fuel to MD 85, returned to Port Said.

18. On 10 December the wind reduced and by 1600 the rig was 1.25 miles from her intended position. The rig master ordered the tugs MD 13 and BARAKA 1 to turn towards the intended position. By 1720 the rig was pinned down and MD 13, MD 85 and MD 7 (which had refuelled and provisioned MD 13) departed on 11 December.

Article 18 of the Salvage Convention

19. The original arbitrator held that the rig came into danger to an extent to justify a claim of salvage from the moment that the connection of MD85 parted during the evening of 3 December and, thus, the services rendered by the Claimants' tugs after that time constituted salvage services for which the Claimants were prima-facie entitled to an award under Article 13 of the Salvage Convention.

20. The Respondents' primary contention was that where (as they submitted was the case here) the fault of the Claimants created the situation of danger and thus made the services necessary, the effect of Article 18 of the Salvage Convention was to deprive the Claimants of any reward.

21. Article 18 provides: -

"A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part…"

22. The original arbitrator, having found that the need for the salvage services or their degree of difficulty had arisen through the fault of both parties, rejected the Respondent's primary contention and concluded that it was necessary to assess the relative contribution of the parties' faults and only deprive the Claimants of that part of the payment for salvage otherwise due which reflected their share of the fault. The validity of this approach was accepted before the appeal arbitrator.

Apportionment

23. The original arbitrator made the following findings as to causative fault: -

i) The Respondents were at fault in making the decision to commence the tow.

ii) The Claimants were at fault in:

a) failing to equip MD7 with a longer towline;

b) failing to extend the towlines to the maximum possible for the tow;

c) failing to extend the towlines a little from time to time to limit chafing;

d) failing to ease the strain on the towlines whilst running with or across the weather.

iii) Both the Claimants and the Respondents were at fault in failing to ensure that the flotilla heaved to in due time.

24. As emerges from his award of $1.8 million dollars out of the total value of the services of $3 million, the original arbitrator regarded the Claimants as 40% at fault either for the fact that the rig found itself in a situation of danger from which it needed to be salved or for rendering the salvage operation more difficult.

25. The appeal arbitrator endorsed most of these findings of fault but held: -

a) the Claimants were also at fault in failing to fit their tugs with temporary chafing gear;

b) but, on the other hand, the Claimants were not at fault in failing to equip MD7 with a longer towline.

26. On this basis, it is also clear from the figures that the appeal arbitrator regarded the Claimants as 50% at fault for rendering the salvage operation necessary (or more difficult).

The issue of law

27. The focus of this appeal is the joint fault referred to in sub-paragraph iii above of failing to ensure that the flotilla heaved to in due time: -

(a) In reaching an overall conclusion on the relative responsibility for the situation of danger, the original arbitrator found that, when viewed in isolation, the failure to heave to was much more the fault of the rig (the Respondents) than the tugs (i.e. the Claimants): -

"158… For the reasons already given, I consider the primary responsibility for this decision lay with those on the rig. It was for those on the rig to determine what to do next, but the time had come for the lead tug at least to suggest heaving to. To head into the weather at this time would have been the prudent thing to do. Both parties must bear responsibility for this failure but the greater fault it seems to me lies with the rig."

(b) The appeal arbitrator took a different view. He held that both parties were equally responsible: -

"87. I do not consider that in terms of causative potency there is any difference between the rig's failure to order the tugs to heave to and the tug's failure to advise the rig mover that the tugs should heave to. The result of each fault was that the flotilla did not heave to. I have considered whether, in terms of blame, the tug masters are more to blameworthiness because they are the experts in knowing how to preserve the integrity of a tow line. However, both the rig and the tug masters ought to have known that the appropriate course of action was

to heave to. The need to heave to did not arise because, for example, the tow line was seen by the tug master to be under particular strain but because, having regarded the severity of the weather conditions, that was what good practice required. I have therefore concluded that those on board the rig and those on board the tugs were equally to blame for the failure to heave to."

(c) The Claimants sought leave to appeal on a large number of grounds. That which is of immediate significance is ground No.5 which read as follows: -

"*5. Apportionment of Liability as guided by two principles of law: i) the responsibilities between tugs and tow, and ii) the principles and fairness of justice.*

Whether upon the true principles to be applied to apportioning liability or fault Mr Teare was justified in disregarding Mr Reeder's finding that the rig was responsible in large measure for the decision whether or not to heave to and whether Mr Teare's finding that the tug owner should have been held 50% to blame for the failure to heave to is unfair and unjust?"

(The application went on to assert that "the decision of the tribunal was obviously wrong in that it did not properly apply the principles set out in ***The Niobe*** [1888] 13 PD 55, ***The Robert Dixon*** [1879] PD 54 and ***The Oropesa*** [1943] P 32.")

(d) Gross J gave leave to appeal pursuant to an order dated the 23rd April 2004 on the following question of law: - *"Whether, pursuant to Section 69 (3) (c) (ii) Arbitration Act 1996, the appeal arbitrator, in departing from the apportionment of the first tier arbitrator, erred in failing to take into account and/or give effect to established law concerning the relative responsibilities of tug and tow."*

Gross J went on to grant consequential leave in respect of various matters that might arise in the event that the Claimants were successful on the point of law identified.

The issue

28. As thus emerges, the Claimants seek to establish by this appeal that the conclusion reached by the appeal arbitrator that those on board the rig and those on board the tugs were equally at fault for the failure to heave to is a conclusion which is contrary to established law concerning the relative responsibilities of tug and tow.

29. The thrust of the Claimants' argument, which was accepted by the original arbitrator, but rejected by the appeal arbitrator, runs as follows; -

a) When tug and tow are both manned, it is necessary that the overall control should reside with one or the other. Overall control usually resides with tow: see ***The Niobe*** *supra*.

b) In those circumstances, the tug is obliged to obey the directions of the tow: see ***The Robert Dixon*** *supra*. But, if the orders of the tug give rise to danger to tug and tow, the tug must warn of the potential danger: see ***The Duke of Manchester*** 2 W Rob 470.

c) In the present case, the tow was in overall charge of the move and, accordingly, primary responsibility for the decision whether or not to heave to lay with the rig. The basis of this proposition was summarised in the Claimants' skeleton argument as follows: -

"Where party A has overall responsibility and command, and party B has a duty to obey such commands as are given, together with a duty to warn if any of those commands are believed to be flawed, it is obvious that party A is more to blame for giving flawed commands than is party B for failing to warn of those flaws. This is inherent in the notion of responsibility."

30. In his award, the appeal arbitrator dealt with the submissions made to him along the lines set out above as follows: -

"85. I am not at all sure that decisions from the late 19 century concerning the authority of a merchant ship under tow to control or direct the navigation of a tug assist in determining whether those on board a jack-up rig in the early 21st century bear primary responsibility for a failure to heave to. But in any event there was no dispute in the present case that those on board the rig had authority to instruct the tugs in the course of the tow. Nor can there be any doubt that in principle safety requires there must not be a divided command. …. I agree with the arbitrator that the rig mover's authority to instruct the tugs in the course of the tow and the tugs duty to obey such instructions are clear indications that those on the rig are in overall charge of the tow... But parallel with that responsibility is the duty of the tugs to advise those on board the rig if its orders were flawed. That duty does not limit or restrict the authority of the rig. Where both those on board the rig and those on board the tugs had failed in their duties, the one by failing to order that the tugs heave to and the other by failing to advise that the order given is flawed, I do not consider that the assessment of relative responsibility for such faults which is required by Article 18 of the Salvage Convention can be made by reference to the fact that those on board the rig are in overall charge of the tow.

86. I consider in assessing the extent to which salvage operations have become necessary because of fault or neglect on part of the salvor, for the purposes of Article 18 of the Salvage Convention, it is necessary (as in other areas of law where relative responsibility for an event has to be assessed e.g. Section 187 of The Merchant Shipping Act 1995) to assess the causative potency and blameworthiness of the salvor's faults relative to the causative potency and blameworthiness of the rig's faults. Indeed that was the arbitrator's general approach and was not challenged by other party."

31. I agree with the appeal arbitrator. I am unable to accept that, in approaching the matter as he did, he was failing to give effect to (or "*take into account*" which was the preferred complaint advanced in oral argument by the Claimants) established law concerning the relative responsibilities of tug and tow.

The authorities

32. A number of authorities were cited which were said to support the proposition that, as a matter of law, when both parties to a towage operation are at fault in a particular respect, the identity of the party in overall control of the tow imported with it a concomitant finding that that same party was more to blame than the other.

33. It is convenient to consider them in chronological order: -

(a) In the ***The Duke of Manchester*** [1846] 2 W Rob 470, a claim for salvage was dismissed on the grounds that the salvors themselves put the vessel in danger by towing her aground. Dr Lushington had this to say on the role of the tug when towing a vessel with a pilot on board: - *"I will now state another proposition of law which has a most important bearing upon the present consideration, and I will state it clearly, that if I am wrong my statement may be examined elsewhere and corrected, - and that proposition is, that where a steamer, as in the present instance, is towing a vessel with a licensed pilot on board the steamer is not relieved from the responsibility of watching the course which the licence pilot pursues. If she finds to a certainty that the course pursued by the pilot will lead the vessel into danger and destruction, it is the duty of the steamer to make the circumstances known to the master of the vessel, that he may take such measure as may be necessary under the circumstances of the case: it is not for the steamer to maintain a sulky silence and make herself instrumental in the destruction of life and property. … "*: p. 836

The case in due course went to appeal before the Privy Council: (1847) 6 Moo. PC 90). The opinion of the board was given by Lord Campbell who having referred to Dr Lushington's proposition cited above, commented: - *"Their Lordships are entirely of the same opinion and consider it is the joint duty of the licensed pilot and of the master of the tug to do their utmost for the safety of the ship. Therefore, however much the licensed pilot may misconduct himself, if the master of the tug through gross negligence omits to do what was in his power to keep the ship in a proper direction that she may reach a place of safety and thereby the ship is lost, or is led into peril as great as that from which she has been rescued, all claim to salvage is forfeited."*

(b) In ***The Christina*** [1848] 6 Notes of Cases 4, the factual situation was almost the complete reverse. The pilot on a tow ordered the tug to steer westward to avoid a collision with a third vessel. The master of the tug thought the better course was to steer eastward and was dilatory in obeying the order. The tug was deprived of its towage dues. The basis of the decision was set out in the judgment of Dr Lushington at page 12: - *"My opinion in this case is, that I must pronounce against this claim. I am well aware that mischiefs may arise from pilots having the entire control over steam tugs, and giving directions contrary to the experience and judgment of the masters of those tugs, conversant as they are with every part of the waters in which they are employed: but I am equally well aware that it would be difficult indeed to fix a limit to the evils which would arise from two conflicting pilots engaged in navigating one and the same vessel. There would be two controlling powers and a divided and uncertain responsibility. I am of opinion in this case that although the pilot may not have exercised a sound discretion to the orders that he gave, yet it is satisfactorily established in my mind there is no justification of the master of the steam tug in refusing to obey and carry into effect those orders; and if that be the case, he did not fulfil the contract…"*

(c) In a further decision of the Privy Counsel in ***The Julia*** [1861] 14 Moo PC 210, a tug was in collision with another vessel whilst undertaking a tow of the Julia. The tug owners brought proceedings against the owners of the tow on the basis that the collision had been brought about by the negligence of the crew of the tow in failing to act on the directions of the pilot. The owners of the Julia unsuccessfully contended that the tug was also at fault. In the opinion of Lord Kingsdown at page 230, he considered the implied obligations of tug and tow to each other under the terms of the towage contract: -

"*When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken.*

If, in the course of performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskillfulness on her part contributed to the accident."

(d) In ***Smith v St Lawrence Towboat Co.*** (1874) LR 5 PC 308, the Privy Counsel (in a Canadian appeal) was concerned with the vessel under tow in thick fog. The tow did not order the tug to stop albeit it was dangerous to proceed. The claim by the owners of the tow against the owners of the tug failed on the ground that tow had contributed to the ensuing grounding. Sir Barnes Peacock said this at page 314: - *"The vessels were proceeding in dense fog; there were no means of seeing the banks of the river, nor of knowing where they were going; and no doubt there was negligence, on the part of both those on board the ship and of those on board the Hero, in proceeding in the way in which they did during the fog. If the Silver Cloud had given orders to the Hero to stop and the Hero had neglected to obey those orders, then the negligence would have been solely on the part*

of the Hero. But if, on the other hand, those on board the Silver Cloud did not give proper orders to the Hero to stop, then it appears to their Lordships that they were consenting to proceed in the fog and that they contributed to the accident which occurred. The rule was clearly laid down by Lord Kingstown in the case of the Julia."

(e) In ***The Robert Dixon*** (1879) 5 PD 54, a tug failed to recover salvage remuneration when she had carelessly towed a vessel too close a lee shore and, following failure of the towage connection, had to embark on a rescue of the tow. The Court of Appeal rejected the tug's appeal. Brett LJ commented at p.58 on the fact that command of the operation had remained with the master of the tow throughout: - *"I am very much inclined to think that a tug is bound to obey the orders of the captain, and if the captain had insisted on the tug in keeping that course, the tug would have been bound to obey; certainly the captain could not have complained of the tug obeying him. But here, on the plaintiff's own showing, the only evidence was that at the beginning of the towage the tug was directed to tow the ship in a particular course. I assume that to have been the right course; but on the way the weather became threatening. Assuming that no further order was given by the captain, it was the duty of the tug to use reasonable care and skill, and unless she was ordered to the contrary she had the command of the course."*

(f) In ***The Isca*** (1887) LR 12 PD 34, the plaintiff's vessel was damaged in a collision with a bridge whilst under tow. The relevant law was summarised by the President as follows at p.35: - *"As to the law applicable to the present case, it has been contended that it is the duty of the vessel in tow to give directions to the tug. It is true that the general direction is to be given by those on the vessel in tow, and also if a specific order is given by her to the tug, the responsibility must rest with the vessel in tow for the consequences of such order. But it does not follow from this rule that the vessel in tow is to be constantly interfering with the tug, it must depend on the place and on the circumstances, as whether there are numerous small vessels about. Those in charge of the tug must exercise their judgement and must not be constantly expecting to receive orders from the vessel in tow, which may be a considerable distance astern of them."*

(g) In ***Spaight v Tedcastle*** (1881) 6 App. Cas 217, the issue of the relative obligations of tug and tow was considered the House of Lords. The tow had a compulsory pilot. In the course of the tow, the vessel ran aground. In an action against the tug owners, there was a plea of contributory negligence in failing to cast off the towline when danger was imminent. This plea succeeded in first instance and in the Court of Appeal. It failed in the House of Lords. During the course of his judgment at p. 221 Lord Blackburn reiterated the effect of the decision in the ***Julia*** as regards the significance of orders from tow to tug: - *"... as the duty of the tug was to carry out directions received from the ship, and the pilot who was in charge of it, the tug would not be guilty of neglect of duty by pursuing an injudicious course, if it was pursued in obedience to the pilot's orders."*

(h) In ***The Niobe*** (1888) 13 PD 55, a tug with a vessel in tow collided with another vessel. In the claim brought by the third vessel against the tow, the court concluded that the collision might have been avoided had there been a good lookout on the vessel in tow in that she could and should have warned the tug of the dangerous course being pursued. At p.59 the President considered (obiter) the proposition that the tow was not responsible for the negligence of the tug as it was an independent contractor: - *"But it appears to me that the authorities clearly establish that the tow has, under the ordinary contract of towage control over the tug. The tug and tow are engaged in a common undertaking, of which the general management and command belongs to the tow, and in order that she should efficiently execute this command it is necessary that she should have a good lookout and should not merely allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. As Dr Lushington has pointed out, it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot if there be one takes his station on his tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation than those of the tug."*

Discussion

34. There is in my judgment nothing in these decisions to support the Claimants' proposition that overall command of a towage convoy imports with it an enhanced degree of fault in circumstances where both tug and tow have fallen short of their mutual duty to take care. Perhaps this is not surprising since none of them were directed to the issue of comparative fault. Such could not arise since they were made against the background of contributory fault being a complete bar to any claim.

35. To the extent that relative fault is even touched on, the indications are inconsistent with the Claimants' case. For example, in ***The Duke of Manchester*** *supra*, Dr Lushington stated at page 482….. *"I further think that in addition to a neglect of her own duty the "Copeland" was guilty of a great breach of all moral obligation in persisting in the course which she took, without giving warning to the persons on board the "Duke of Manchester". In my judgment that culpability is not in the slightest degree diminished by any error which might have been committed by the pilot on board the "Duke of Manchester" because it is impossible, as I conceive that the steamer could have been misled by the directions given by him, or could have believed that the course was the proper or due course."*

36. The decisions emphasise the fact sensitive nature of any such analysis. In ***The Christina,*** *supra*, the court identified the need to balance the need for singular control by the tow on the one hand and the need to have regard to the navigational experience and judgment of the tug master on the other. This is much to point in the present case where the appeal arbitrator was attracted to the possibility that the tug masters were more to blame because of their expertise in preserving the integrity of the towage connection.

37. As regards the decision in ***The Niobe***, *supra* which was relied heavily upon by the Claimants and referred to extensively in the award of the original arbitrator, it is not supportive of the Claimants' case as advanced on this appeal. It merely recognises that overall control is relevant to the identity of those who may be at fault. It does not support the argument that the degree of any such fault is, as a matter of law, to be treated as greater than that of the party controlled.

38. Only one example of apportionment of liability between tug and tow was brought to my attention namely ***The Minnie Sommers v The Francis Batey*** (1921) 8 Ll. L. Rep 247. The tow had brought proceedings against its tug. Having failed in the first instance, the Court of Appeal found each vessel equally to blame but made no suggestion that overall command was a material consideration in the apportionment: - *"To what extent the tug is in direction with the navigation and to what extent the tow is in direction depends on the circumstances of the case sometimes the tug has a great deal more to do with the navigation than in others."*

39. My attention was drawn to a number of further authorities said to support the general proposition that a person who, being in overall charge, has given faulty commands is more to blame for the outcome than the person who, in receiving those instructions, failed to warn of their defects: e.g. ***Edward Lindenburg v. Joe Canning*** [1993] 62 BLR 152, ***Theodore Goddard v. Fletcher King services Ltd*** (1997) 32 EGLR 90. I found these decisions of no assistance. They reflect no point of principle but turn on their own special facts in circumstances not remotely analogous to the present case.

Conclusion

40. I conclude therefore that the Claimants fail on their primary ground of appeal and, accordingly, the other issues do not arise.

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Timothy Brenton QC (instructed by Ince & Co) for the Respondents