[HIGH COURT OF AUSTRALIA.]

HUDDART PARKER LTD. . . . . PLAINTIFF;

AND

THE SHIP *MILL HILL* AND HER CARGO. DEFENDANTS.

MASTER AND CREW OF THE TUG *FOREMOST* . . . . . PLAINTIFFS;

AND

THE SHIP *MILL HILL* AND HER CARGO. DEFENDANTS.

H. C. OF A. 1950.

MELBOURNE, *Oct.* 12, '16; *Nov.* 8.

DIXON J.

Arbitration—Shipping—Salvage—High Court—Admiralty jurisdiction—Application of State laws—Stay of proceedings—Submission to arbitration—Power of shipowner to bind master and crew by agreement as to compensation for salvage services—Colonial Courts of Admiralty Act 1890 (*Imp.*) (53 & 54 *Vict. c.* 27), *s.* 2—*Judiciary Act* 1903-1948 (*No.* 6 *of* 1903—*No.* 65 *of* 1948), *ss.* 79, 80—*Arbitration Act* 1928 (*No.* 3637) (*Vict.*), *s.* 5.

By reason of s. 79 of the *Judiciary Act* 1903-1948 such a State law as s. 5 of the *Arbitration Act* 1928 (Vict.) is applicable to the High Court exercising its Federal jurisdiction in the State so as to give the Court the power, which apart from statute it would not have, to stay—at its discretion—the proceedings which are before it on the ground that the parties have agreed to submit the matter in issue to arbitration; and s. 2 (1) of the *Colonial Courts of Admiralty Act* 1890 (Imp.) operates to give the Court the like discretion when it is exercising the Admiralty jurisdiction conferred by that Act.

Although in some circumstances it is competent to a shipowner to make such an agreement for the rendering of salvage services as will bind the

master and crew of his ship as to the character and amount of the reward they are to receive in respect of the salvage services, it is not competent to him to bind them in respect of the forum to be available for the assertion of rights in respect of the services.

The Dictator, (1892) P. 304, at pp. 310, 319-323, *Lady Carrington Steamship Co. Ltd.* v. *Commonwealth*, (1921) 29 C.L.R. 596, *Cohen* v. *Cohen*, (1929) 42 C.L.R. 91, at p. 99, *Musgrave* v. *Commonwealth*, (1937) 57 C.L.R. 514, at pp. 531, 532, 543, 547, 548, 551, *McIlwraith McEacharn Ltd.* v. *Shell Oil Co. of Australia Ltd.*, (1945) 70 C.L.R. 175, at pp. 189, 201, 204, 216, *The Cap Blanco*, (1913) P. 130, at p. 135, *Bristol Corporation* v. *John Aird & Co.*, (1913) A.C. 241, at pp. 259, 260, *Metropolitan Tunnel and Public Works Ltd.* v. *London Electric Railway Co.*, (1926) Ch. 371, at pp. 389, 390, *The Inchmaree*, (1899) P. 111, at p. 117, *The Friesland*, (1904) P. 345, *The Margery* (1902) P. 157, *The Alice Richardson*, 3 Maritime Law Cases Digest 68; *The Leon Blum*, (1915) P. 90, at pp. 103, 295-297, *The Nasmyth*, (1885) 10 P.D. 41, *The Powerful*, (1860) 8 L.T. noted at p. 335, and *The City of Calcutta*, (1898) 79 L.T. 517, referred to.

SUMMONSES.

In the Admiralty jurisdiction of the High Court two suits were instituted against the ship *Mill Hill* and her cargo for compensation for salvage services. On behalf of the defendants application was made by summons in each suit for a stay of proceedings. The grounds on which the stay was sought appear hereunder in the judgment of *Dixon* J., by whom the summonses were heard together.

O. J. Gillard K.C., for the defendants.

E. R. T. Reynolds K.C., and *R. L. Gilbert*, for the plaintiff in the first suit.

G. A. Pape, for the plaintiffs in the second suit.

Cur. adv. vult.

Nov. 8.

DIXON J. delivered the following written judgment:—

These are two suits in the Admiralty jurisdiction of the Court. The endorsement upon the writ of summons in each case claims compensation for salvage services rendered by the plaintiffs to the defendant ship *Mill Hill* and her cargo. The services are said to have been rendered by the steam tug *Foremost* and the plaintiffs in the first suit are her owners and in the second suit her master

H. C. OF A. 1950.

HUDDART PARKER LTD. v. THE SHIP MILL HILL.

DIXON J.

and crew. It appears from affidavits that *Mill Hill* had loaded a cargo of pig iron at Whyalla and was westward bound across the Great Australian Bight when, on 19th August 1950, she got into difficulties. She encountered bad weather and her cargo shifted. She was at the eastern end of the Bight south or south-west of Cape Radstock. About 5 p.m. on 19th August, a Saturday, she wirelessed for urgent assistance. Eventually she anchored approximately four miles off Cape Radstock. There a west-bound tramp steamer *Culross* went to assist her. She stood by from about 2 a.m. until dawn on Sunday, 20th August, and then took off the master and crew from *Mill Hill*. In the meantime the agents in Adelaide of *Mill Hill* had been informed of her wireless message or messages asking for assistance. In the course of Saturday evening they arranged with the agents of the plaintiffs, Huddart Parker Ltd., that their tug *Foremost* should be sent early next morning to the assistance of *Mill Hill*. It was orally agreed that the form of agreement commonly used by the plaintiffs, Huddart Parker Ltd., should be signed. Subsequently such a form of agreement was signed and dated as of 19th August 1950. The applications of which I have now to dispose depend upon provisions of this agreement, but, before dealing with its terms, it is better to complete the statement of the events. The tug *Foremost* left Port Adelaide about 4 a.m. on Sunday, 20th August, and sighted *Culross* about one o'clock on the morning of 21st August or a little before that hour. After an exchange of signals about the possibility of transferring the master and crew of *Mill Hill* from *Culross* to the tug, *Culross* proceeded to Adelaide with the master and crew, and the tug, under instructions obtained by wireless, continued her course to the abandoned ship *Mill Hill*, which she reached about 5.15 p.m. on Monday, 21st August 1950. A heavy S.W. swell is said to have been running which, with a moderate S.E. wind, made the boarding of the heavily listed ship a matter of difficulty or hazard. It was found necessary to cut *Mill Hill's* anchor chain adrift and to do this took some hours. Not long before midnight, however, she was freed and a towing wire was passed aboard and made fast. The tug then began a tow towards Sceale's Bay, which is northerly from Cape Radstock. Another tug arrived about 8.30 a.m. on Tuesday, 22nd August, and, after some difficulties which it is unnecessary to recount, *Mill Hill* was brought into Port Lincoln in Spencer Gulf on the morning of 25th August, where she was safely moored. On 7th September 1950 Huddart Parker Ltd. issued a writ *in rem* out

of the Principal Registry against *Mill Hill* and her cargo and obtained a warrant for her arrest, which was duly executed. An appearance was entered in the Principal Registry for the ship and her cargo on 25th September 1950 and four days later, without taking any further step in the suit, the defendants applied by summons for an order that all proceedings in the suit be stayed pursuant to s. 5 of the *Arbitration Act* 1928 (Vict.). On 12th September 1950 the plaintiffs the master and crew of the tug *Foremost* issued a writ *in rem* out of the Principal Registry against the ship *Mill Hill* and her cargo, but a warrant for her arrest was not sought in that suit. The defendants appeared in the same Registry and made a similar application by summons for a stay. Bail was given in the first suit and the ship and her cargo were released. The basis of these applications consists in a provision in the form of agreement signed by the agents of the tug-owners and the agents of the ship *Mill Hill*. The defendants say that the provision amounts to a submission to arbitration which covers the subject matter of the suits. The agreement itself is designed to give the tug a salvage reward if the ship is brought to port, or her safety is otherwise secured, by or with the assistance of the tug, but in the contrary event to give the tug a remuneration by way of hire calculated at so much an hour. The agreement provides when the period of service, in that event, shall commence and end, what addition there shall be to the hire rate, if the crew are necessarily paid increased rates, what charge shall be made for the use of the tug's hawser, and what shall be the minimum charge for the services of the tug. The agreement is expressed to be between the plaintiffs, Huddart Parker Ltd., who are described as "the company," and the agents "on behalf of the owners of the ship *Mill Hill* and as agents for the said ship and her cargo and freight." The leading provision is to the effect that the company's tug *Foremost* was thereby engaged to proceed from Port Adelaide and to endeavour to salve or assist the ship *Mill Hill* described as being then in a position approximately four miles off Cape Radstock, South Australia. Then follows a provision 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 ensue dealing with the remuneration of the tug in the contrary event. After incorporating the terms of the company's usual towage contract so as to give the company the benefit of the

H. C. OF A. 1950.

HUDDART PARKER LTD. v. THE SHIP MILL HILL.

DIXON J.

exemptions from liability the towage contract contains, the agreement ends with the three clauses upon which these applications depend. They are as follows:—"7. If the parties cannot agree upon the amount of salvage remuneration, it shall be submitted to the Admiralty Court in London for decision under the Short Cause Rules or to an Arbitrator in London to be agreed by the parties. 8. For the purposes of the Arbitration the Masters of the ship and the tug shall sign an Agreed Statement of Facts and in so far as they cannot agree, their log book entries and reports shall be submitted to the Arbitrator. The London representatives of the Company and of the ship and/or their respective Legal Advisers may express their views in writing direct to the Arbitrator including their views as to the value of the ship, her cargo and freight. 9. Until satisfactory security has been given, the Company's right of lien over the ship, her cargo and freight for the services rendered, and its right to commence legal proceedings to enforce such lien shall not be affected by this agreement".

The interpretation of cl. 7 and its relation to cl. 9 perhaps require some consideration. First as between the Admiralty Court in London and an arbitrator in London to which tribunal does cl. 7 mean that the parties must primarily have recourse? I think that it means that the salvage remuneration is to be determined by the Probate Divorce and Admiralty Division of the High Court of Justice in London unless the parties agree on an arbitrator in London. Probably under such a provision if the parties fail to agree on an arbitrator the court's power under s. 5 of the *Arbitration Act* 1889 (U.K.) would not arise. The agreement to refer is conditional upon the parties concurring in the choice of an arbitrator and the course to be followed is appointed, if they do not do so. Next, what operation is to be given to cl. 9 in relation to cl. 7? I think that it was intended that the agreement to proceed in London contained in cl. 7 should not prevent the enforcement of the lien for salvage by proceedings *in rem* and the arrest of the ship in any jurisdiction to which the plaintiffs might otherwise resort. Probably the intention is that the amount shall be settled in London whether the lien is enforced elsewhere or not. For cl. 7 speaks only of the amount of the salvage remuneration. But to invoke one jurisdiction to enforce the obligation and another to quantify it involves or may involve some difficulty. No doubt if in a given case to which the clauses applied the amount of the salvage reward were first determined in Admiralty in London in an

action *in personam*, it might become desirable afterwards to attempt to enforce it by a proceeding *in rem* elsewhere. But a contrary order of proceeding involves inconvenience if not difficulty. After all, proceedings *in rem* form the commencement of a suit, and if it is a claim for salvage that means that the purpose of the suit is the assessment and apportionment of the award resulting in a proper judgment for payment out of the *res* or perhaps *in personam* (see per *Jeune* J. in *The Dictator* (1)). If the amount of the reward has not been ascertained, it is not easy first to invoke the jurisdiction of another court over a salvage claim by proceedings *in rem* and then to ask that court to stay its hand pending the ascertainment of the amount of the reward in London. The difficulty is not lessened by the fact that the ascertainment of the reward may not necessarily include its apportionment. It is the defendants, however, and not the plaintiffs, who seek the stay in the present cases. Apparently they are content to give bail in this Court and then obtain a stay, while they await the institution and result of proceedings in London. They base their application to this Court on the supposition that as a result of s. 79, or perhaps s. 80, of the *Judiciary Act* 1903-1948 the Court possesses statutory power to stay proceedings on the ground that there is an agreement to refer them to another tribunal or to arbitration. There is no express statutory power conferred upon this Court to stay, on such a ground, proceedings otherwise properly brought in its original jurisdiction. It is not a power that can arise otherwise than from statute. Section 79 provides that the laws of each State, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable. This section is based on a provision of the law of the United States which has a long and controversial history, originating as it does in the thirty-fourth section of the *Judiciary Act* of 1789. See for example *Camden & Suburban Railway Co.* v. *Stetson* (2). But s. 79 is more widely expressed than the American provision and I think that it should be interpreted and applied liberally. Notwithstanding the doubts expressed in *Lady Carrington Steamship Co. Ltd.* v. *Commonwealth* (3), I should be prepared to regard such a provision as s. 5 of the Victorian *Arbitration Act* 1928,

(1) (1892) P. 304, at pp. 310, 319-323.
(2) (1900) 177 U.S. 172 [44 Law. Ed. 721].
(3) (1921) 29 C.L.R. 596.

H. C. OF A. 1950.

HUDDART PARKER LTD. v. THE SHIP MILL HILL.

Dixon J.

corresponding to s. 4 of the *Arbitration Act* 1889 of the United Kingdom, as made applicable to the High Court exercising its federal jurisdiction: cf. *Cohen* v. *Cohen* (1) and *Musgrave* v. *Commonwealth* (2). But in Admiralty this Court exercises powers given by the *Colonial Courts of Admiralty Act* 1890 of the United Kingdom: see *McIlwraith McEacharn Ltd.* v. *Shell Oil Co. of Australia Ltd.* (3). It is said for the plaintiffs that in exercising these powers so derived the Court does not exercise Federal jurisdiction within the meaning of s. 79 of the *Judiciary Act* 1903-1948. But however that may be, s. 2 (1) of the *Colonial Courts of Admiralty Act* 1890 provides that the Court for the purpose of its jurisdiction as a Colonial Court of Admiralty exercises all the powers which it possesses for the purpose of its other civil jurisdiction. On the view which I take that, in the "other civil jurisdiction" of this Court, s. 79 would operate to confer on this Court the power given by s. 5 of the *Arbitration Act* 1928 of Victoria to State Courts, the expressions quoted from s. 2 (1) of the *Colonial Courts of Admiralty Act* 1890 are enough to make the same power applicable in Admiralty.

The provision standing as s. 5 of the Victorian *Arbitration Act* 1928 has been interpreted as covering an agreement referring matters to the jurisdiction of a foreign Court: see per Sir *Samuel Evans* P. in *The Cap Blanco* (4) and the cases cited by his Lordship. It is a result which seems to take little account of the definition of the word "submission" (s. 27 of the Act of the United Kingdom), but it is sufficiently well settled.

It follows that, in my opinion, this Court has power to stay the suits if, upon a proper exercise of the Court's discretion, it appears that it is a course which should be taken. Under the statutory power expressed in s. 5 of the *Arbitration Act* 1928 (Vict.) the Court or the judge, assuming that the other necessary conditions are fulfilled, must be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. This language might appear to place the burden upon the defendants applying for a stay. But the Courts begin with the fact that there is a special contract between the parties to refer, and therefore in the language of Lord *Moulton* in *Bristol Corporation* v. *John Aird & Co.* (5), consider the circumstances

(1) (1929) 42 C.L.R. 91, at p. 99.
(2) (1937) 57 C.L.R. 514, at pp. 531-532, 543, 547, 548, 551.
(3) (1945) 70 C.L.R. 175, at pp. 189, 201, 204, 216.
(4) (1913) P. 130, at p. 135.
(5) (1913) A.C. 241, at p. 259.

of a case with a strong bias in favour of maintaining the special bargain or as *Scrutton* L.J. said in *Metropolitan Tunnel and Public Works Ltd.* v. *London Electric Railway Co.* (1), " A guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it." At the same time, as is shown by the two cases cited, the Court's discretion has not been restricted by any exclusive definition of the circumstances which will warrant a refusal of a stay: see per Lord *Parker* in *Aird's Case* (2), and per *Scrutton* L.J. in the *Metropolitan Tunnel Case* (3).

The circumstances of the present case are unusual. In the first place the primary agreement is to refer the quantum to a Court of Admiralty in London as opposed to other Courts of Admiralty. If I have correctly interpreted cl. 7 of the contract, it is not a question between litigation in court and arbitration out of court. The provision for arbitration out of court is dependent on agreement upon the arbitrator and in effect is not an absolute agreement to refer. It is a question between proceedings in court in London and proceedings in court here. I do not think that cl. 8 of the contract applies to a suit in the Probate Divorce and Admiralty Division in London. But perhaps it is desirable to state that it would not in my opinion supply the tribunal to which it does apply with adequate materials for determining and apportioning the salvage reward in the present case. As between an Australian Court and the High Court in London it would, in my opinion, be better to allow the matter to proceed in the Australian Court. All the evidence of what occurred is here, with the exception of any evidence which may come from the officers and crew of *Culross*. If the matter were tried in London it would be necessary for the more important evidence in the case to be taken on commission. No doubt *Mill Hill* herself will not remain on this coast, but if the matter is not brought to trial at once, as it well might be, the evidence of her officers and crew can be taken here. There does not appear to me to be any really practical reason for sending this inquiry to London when it can be so much more conveniently and expeditiously conducted here. It is evident that the oral testimony of the master and crew of the tug must be the most important in the case and I should imagine that the matter could better be decided where the Court can hear it tested on *viva voce* examination and cross-examination.

(1) (1926) Ch. 371, at p. 339.
(2) (1913) A.C., at p. 260.
(3) (1926) Ch., at pp. 389, 390.

H. C. OF A. 1950.

HUDDART PARKER LTD. v. THE SHIP MILL HILL.

DIXON J.

The evidence of the making of the contract will perhaps be uncontradicted or not the subject of contest but that evidence is also here. The conditions in which *Mill Hill* was left when her master and crew were transferred to *Culross* form a not immaterial part of the case, but, apart from the *Culross* altogether, the officers and crew of *Mill Hill* should be able to establish what those conditions were and their evidence is at present available here.

Upon these considerations alone I would be prepared to refuse a stay, but there is a further reason or reasons. In the first place, it is dubious how far if at all the cargo-owners are affected by the agreement. Then the plaintiffs, the master and crew of the tug *Foremost*, contend that the contract between the owners of the tug and the agents for *Mill Hill* does not operate to prejudice their right to maintain a suit for salvage. The decided cases, of which there are not many, show that some difficulty has been felt in defining the extent to which a shipowner may bind the master and crew of a ship in respect of salvage services she renders. The shipowner cannot bind them by an agreement made with respect to salvage services already rendered: *The Inchmaree* (1); *The Friesland* (2). He cannot bind them by a general agreement that his ships will not claim ordinary salvage remuneration for services rendered to ships of an association for insurance purposes to which he belongs and will claim only the value of the assistance settled by a form of arbitration: *The Margery* (3); *The Alice Richardson* (4); cf. *Leon Blum* (5). But in some circumstances the owner has authority to bind the master and crew with respect to the future services of the vessel. In *The Margery* (6) Sir *Francis Jeune* P. said:—"I am not at all prepared to say that under certain circumstances an agreement made by the owners on behalf of the crew might not bind them, just as an agreement made under certain circumstances by the master may bind the owners. It is clear that if, before the salvage service is rendered, the masters of the two ships meet together, they may make an arrangement by which, subject to the jurisdiction of this Court to see whether it is equitable or not, the masters can undoubtedly bind the owners. I should not be prepared to deny that an agreement made under similar circumstances by the owners on behalf of the master and crew might bind the master and crew; but the reason for that is the

(1) (1899) P. 111, at p. 117.
(2) (1904) P. 345.
(3) (1902) P. 157.
(4) 3 Maritime Law Cases Digest 68.
(5) (1915) P. 90, at pp. 103, 295, 297.
(6) (1902) P., at p. 165.

necessity of the case. The service has to be rendered on the spur of the moment, and if the agreement cannot be made by the only persons who are there to make it, it cannot be made at all. Therefore *ex necessitate* an agreement so made binds; but that is a very different thing from saying that, when there is not stress at all, an arrangement made by the owners binds the master and crew, without any notice to the master and crew."

In *The Nasmyth* (1) *Butt* J. held that an agreement made between the masters of the salvaging vessel and the vessel to be salvaged before the services were entered upon did bind the crew of the salvaging vessel as to the amount of the reward. In *The Powerful* (2) the Court of Admiralty appears to have held that the master and crew of a steam tug going out to render assistance to a ship were not bound by an agreement made between the agents of the tug-owners and the crews of some luggers employed to accompany the tug. The agreement purported to leave the allotment of salvage earned by the services to the discretion of the agents.

In the present case I think that in the circumstances that existed on the evening of Saturday, 19th August 1950, it was competent to the owners of the tug to make an agreement for her to render assistance and thereby to bind the master and crew as to the character and amount of the reward. But after consideration I have come to the conclusion that the authority would not extend to such a provision as cl. 7 of the actual contract. That appears to me to go beyond the question of the services to be performed, the conditions governing their performance and the remuneration. It goes to the forum to be available for the assertion of rights in respect of the services and lies outside the scope of any authority that can fairly be implied from the relationship of the master and crew to the owners of the tug and from the exigency or the circumstances: cf. *City of Calcutta* (3).

It would follow that a stay could not be granted in the suit in which the plaintiffs are the master and crew. I think that it would be absurd to have the two suits heard separately, one in London and one here.

For these reasons I shall dismiss the two summonses for a stay but I shall make the costs costs in the causes. Certify.

(1) (1885) 10 P.D. 41.
(2) (1860) noted 8 L.T., at p. 335.
(3) (1898) 79 L.T. 517.

H. C. OF A. 1950. HUDDART PARKER LTD. v. THE SHIP MILL HILL.

On the summonses for directions I am prepared to make an order for consolidation and for trial without pleadings and to fix an early date for the trial if it is considered urgent.

Order accordingly.

Solicitors for the defendants, *Middleton, McEacharn & Shaw.*

Solicitors for the plaintiffs, *Malleson, Stewart & Co.*; *Baker, McEwin, Millhouse & Wright*, Adelaide.

E. F. H.