Case highlights intricacies of treasure salvage rules

Regular columnist Simon Tatham examines an October Court of Appeal judgement that demonstrates salvors that strike silver should be compensated

Wreck removal, a specialist activity usually required by coastal states when navigation or the environment is threatened, is an expensive exercise usually funded by a vessel's protection and indemnity (P&I) insurers.

In deep water, unless the bunkers or an oil cargo threaten and are removable which is not always the case, most wrecks, if they can be found, are left in peace. Indeed, after centuries of wrecks, thousands still litter the seabed.

Advances in deepsea salvage technologies have opened up the seabed to treasure salvors. By and large this is a good thing, provided the property is returned to its rightful owners and the salvors are paid for their efforts.

Irrespective of the passage of time, the ownership of treasure as with any other property, if it can be traced remains unchanged, even if all hopes of recovery have been abandoned. Ownership may be unclear of course, if for example the treasure had been stolen or captured by invading armies or during conflict.

In one recent case, 2,364 bars of Indian silver sitting in 2,500 m of water in the Indian Ocean were indisputably the property of the Republic of South Africa.

In 1942, this bullion had been shipped on free on board (FOB) terms in Bombay by the Government of India, as sellers, onto a British liner, *Tilawa*, consigned to Durban and destined for minting into coins.

The vessel was sunk en route off the Maldives by the torpedoes of a Japanese submarine and was lost with all its cargo, although 673 passengers and crew were thankfully rescued.

In 2017, salvors recovered the bullion and, believing at the time this was probably British Government property, delivered the consignment to custody of the UK Receiver of Wreck.

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In fact, many treasure cargoes with no connection to the UK are handed over to this receiver as that office allows for the fair administration of competing claims for both ownership and salvage, the payment of the award and return of the property to its rightful owners.

At that time, its value was about £32M million (US$36M), and it is worth even more today.

South Africa stepped forward to claim ownership and the salvors in turn served an 'in rem' claim on the bullion, for their salvage award.

The dispute which then followed was finally resolved by a judgment of the Court of Appeal handed down on 11 October 2022, with leave to appeal being declined.

South Africa claimed, pursuant to the 1926 Brussels Convention relating to the Immunity of State-Owned Vessels and Art.25 of the Salvage Convention of 1989, that the state-owned property be delivered up free of any salvage claim.

Both conventions are enshrined in English law and recognise sovereign immunity from salvage claims in certain limited circumstances.

The defining issue was whether both the cargo and the ship carrying it were in use or intended for use for commercial purposes at the time the cause of action arose. If not, sovereign immunity protected the property from a salvage claim.

The Admiralty Judge concluded that ship and cargo were indeed intended for commercial use in 1942. In the Court of Appeal, a majority upheld that decision and rejected arguments that the cargo lying without use or intended use since then should change matters.

For the salvage community, worried whether they may one day eventually strike gold, but be deprived of a salvage recovery, they may now rest assured.

This being the first ever decision on the subject, that governments who chose to have their cargo carried by sea pursuant to a commercial contract of carriage just like any private owner of cargo, expose themselves to claims for salvage, again just like any private owner of cargo.

When a cargo is purchased under an FOB or similar such contract and shipped pursuant to a commercial contract of carriage contained in or evidenced by a bill of lading, it is used for commercial purposes.

Readers are of course very welcome to read all 97 pages of the judgements. That is not, however, the end of it because the salvors now must proceed to have the award assessed by the Admiralty Court. Watch this space. ■

Simon Tatham is a partner of Tatham & Co and founder member of the firm's TugAdvise.com legal service