2004

Brief of Alain de Foucauld as Amicus Curiae in R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel

John Paul Jones
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No. 04-1933

In the
United States Court of Appeals
For the Fourth Circuit

R.M.S. Titanic, Incorporated, successor in interest to Titanic Ventures, limited partnership,
Plaintiff-Appellant,

v.

The Wrecked and Abandoned Vessel, its engines, tackle, apparel, appurtenances, cargo, etc., located within one (1) nautical mile of a point located at 41° 43' 32" North Latitude and 49° 56' 49" West Longitude, believed to be the R.M.S. Titanic, *in rem,*
Defendant.

On Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

BRIEF OF ALAIN DE FOUCAUD AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

Alain de Foucaud hereby moves for leave to file a brief with the Court as *amicus curiae* in this proceeding, in support of Plaintiff-Appellant R.M.S. Titanic, Inc. Plaintiff-Appellant R.M.S. Titanic, Inc., has consented to this request.

INTEREST OF *AMICUS CURIAE*

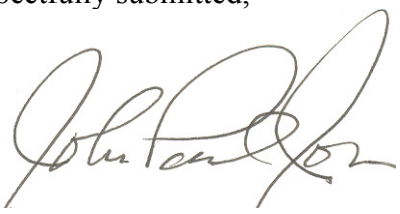
Alain de Foucaud is admitted to practice before the bar of Paris. He holds the degree equivalent to our Master of Laws from the University of Paris, as well as diplomas from the Centre d'Etudes Judiciaires, and the Institut d'Etudes Politiques de Paris. He has lectured at the Universities of Paris and Evry. He is a member of both the Paris Bar Council and the International Bar Association, and the managing partner in the Paris office of LeBouef, Lamb, Greene & MacRae. Mr. de Foucaud served as counsel for Titanic Ventures Limited Partnership in the salvage proceedings at Lorient, France that culminated in a judgment by *procès verbal* on October 20, 1993. Titanic Ventures Limited Partnership is the predecessor in interest to R.M.S. Titanic, Inc., plaintiff-appellant in this action, and it is the *procès verbal* of October 20, 1993 that is the focus of the judgment below now under review.

More than a decade after final judgment in France, the court below has refused it recognition. In the face of a claim to comity by RMS Titanic Inc., the U.S. court refused recognition because the court concluded that the French proceeding had failed to comply with French law, that its judgment was "suspect" in light of facts unknown and unknowable at the time, and that recognition under these circumstances would contravene the public policy of the United States. Mr. de Foucaud tenders in this brief the argument that the court below erred in at least its first two conclusions because of its misapprehension of the relevant law of France, with which he is very well versed, particularly as a consequence of acting earlier for Titanic Ventures.

He has undertaken to come forward not only out of the belief that the decision below is unreasonable when measured by a standard that transcends legal boundaries, but also out of concern for the unwarranted bad light cast on the law of France by the decision below.

For these reasons, Mr. de Foucaud has a compelling interest in advocating the validity of the *procès verbal* called into question by the court below in this case, and requests that his motion for leave to file a brief *amicus curiae* be granted.

Respectfully submitted,

By: 

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INTEREST OF *AMICUS CURIAE*

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More than a decade after final judgment in France, the court below has refused it recognition. In the face of a claim to comity by R.M.S. Titanic Inc., the U.S. court refused recognition because the court concluded that the French proceeding had failed to comply with French law, that its judgment was "suspect" in light of facts unknown and unknowable at the time, and that recognition under these circumstances would contravene the public policy of the United States. Mr. de Foucaud tenders in this brief the argument that the court below erred in at least its first two conclusions because of its misapprehension of the relevant law of France, with which he is very well versed as a consequence of acting earlier for Titanic Ventures. He has undertaken to come forward not only out of the belief that the decision below is unreasonable when measured by a standard that transcends legal boundaries, but also out of concern for the unwarranted bad light cast on the law of France by the decision below.

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the *procès verbal* called into question by the court below in this case, and requests that his motion for leave to file a brief *amicus curiae* be granted.

SUMMARY OF THE ARGUMENT

The court below erred in its judgment that the *procès verbal* of October 20, 1993 should be refused recognition because it is contrary to French law. Article 13 of Decree No. 61-1547 (Dec. 21, 1961) does empower a maritime affairs administrator to award goods to a salvor under the conditions of this case, and there is no basis, in the record or in comity, for a conclusion to the contrary. Legislative acts in Canada and the United Kingdom affording administrative officers in those countries similar powers in cases of wreck and salvage persuade that, to the extent that the law of France is "unlike any provision of American salvage law", 323 F. Supp. 2d 724, 732, it is nevertheless very similar to that of other leading maritime jurisdictions. The *procès verbal* complied with French law, and French law in this regard is not outlandish or bizarre, so the court below had no reason to "call[] into question the fairness and trustworthiness of the entire 1993 proceedings."

ARGUMENT

This is a case of judgment *in rem,* adjudicating title to salved artifacts in the custody of France. France has seen fit to assign jurisdiction over cases like this one to administrative officers acting in a quasi-judicial capacity. That exercise of sovereign discretion over the ordering of a traditional state function ought to be treated in courts elsewhere with deference, not disrespect. That the order awarding title to Titanic Ventures Limited Partnership (TVLP) as salvor, the *procès verbal* of October 20, 1993, followed proceedings other than those of a trial in a French court ought not to be sufficient grounds for a U.S. court thereafter to refuse comity and deny that order recognition. Contrary to the conclusion of the court below, the 1993 proceedings

conformed in all aspects with French law, so that its conclusion, the *procès verbal,* should not now be denied recognition on that basis.

I. FRENCH LAW DOES NOT REQUIRE AN ADVERSARY PROCEEDING BEFORE A COURT FOR THE TRANSFER OF TITLE TO SALVED PROPERTY UPON A SALVOR'S UNOPPOSED APPLICATION, SO THE *PROCÈS VERBAL* OF OCTOBER 20, 1993 SHOULD NOT BE REFUSED RECOGNITION BY A U.S. COURT ON THAT BASIS.

According to the court below, it is not obliged by the precedent of *Hilton v. Guyot,* 159 U.S. 113 (1895) to recognize the *procès verbal* of October 20, 1993 because the *procès verbal* "did not result from a full and fair adversary proceeding before a court." 323 F. Supp. 2d 724, 731. Setting aside for others better qualified to speak of the law of the United States the questions of whether the legal rule to be found in *Hilton* limits recognition of foreign judgments only to those that follow trial in court and whether the Article 13 proceeding in 1993 otherwise satisfies American standards of fairness for actions *in rem*, it may nevertheless be asserted here that what occurred in 1993 complied fully with French law and satisfied standards of fairness operative in France as well as in other states with mature traditions of maritime law.

In Decree No. 61-1547 can be found the jurisdictions and procedures for adjudication in France of the claims of salvors respecting salved property in French custody. Article 13 of that decree, translated in Appellant's Exhibit A, empowers *l'administrateur des affaires maritimes, chef de quartier* (hereinafter "the maritime affairs administrator"), to award to a salvor ownership of salved property. Thus, the law of France could not be clearer in its assignment of adjudicative power to an administrative officer. It is up to France to say which tribunals should wield such power, and France, not unlike other maritime sovereigns, has chosen to make that assignment elsewhere than to a court. Jurisdiction similar to that exercised in this case is exercised elsewhere not by courts but by administrative officers known as "Receivors of Wrecks". See, e.g., Canada Shipping Act, R.S. 1985, Chap. IV, R.S. 1985, c. S-9, § 422; 1989, c. 3, § 53; 1996, c. 31, § 96; Merchant Shipping Act 1995, Part IX, Chaps. 1-2 (c. 21) (U.K.).

II. FRENCH LAW DOES NOT REQUIRE A FORMAL FINDING OF FACT ON THE VALUE OF SALVED ARTICLES FOR THE TRANSFER OF THEIR TITLE UPON A SALVOR'S UNOPPOSED APPLICATION, SO THE *PROCÈS VERBAL* OF OCTOBER 20, 1993 SHOULD NOT BE REFUSED RECOGNITION ON THAT BASIS.

According to the court below, it is justified in refusing to recognize the *procès verbal* of October 20, 1993 because that judgment is "suspect" on account of failure of the maritime affairs administrator to make "formal findings regarding the value and cost" of both the recovered artifacts and the salvage services. 323 F. Supp. 2d 724, 731. As is clear from Article 13 of Decree No. 61-1547, the power of the maritime affairs administrator to make an award of title to a salvor is limited to uncontested cases in which sale of the property would produce no appreciable proceeds, but the U.S. court below erred when it treated that limitation as also a procedural mandate to make a formal finding regarding the value of the salved property before awarding it to the salvor. No such imperative is to be found in Decree No. 61-1457, and there is no other basis on which a U.S. court might presume the law of France to impose such a procedural formality. Indeed, the court below failed to point to any source for her conclusion that such a finding is dictated by the law of France. There is nothing extraordinary about the absence of such a formality in cases of this sort. Consider in this regard the direction in the Canada Shipping Act to the Receiver of Wrecks of Canada in cases where the salvor's claim is unopposed: "Where property has not been valued, the value, for the purposes of this section, shall be determined by the receiver of wrecks *or* by a valuer appointed by him." Canada Shipping Act § 461(3), R.S. 1985, c. S-9, § 526 (emphasis added).

III. FRENCH LAW DOES NOT REQUIRE A FORMAL FINDING OF FACT ON THE VALUE OF THE SALVOR'S SERVICE FOR THE TRANSFER OF TITLE TO SALVED ARTICLES UPON A SALVOR'S UNOPPOSED APPLICATION, SO THE *PROCÈS VERBAL* OF OCTOBER 20, 1993 SHOULD NOT BE REFUSED RECOGNITION ON THAT BASIS.

In the same fashion, the court below erred when it presumed that French law obliges the maritime affairs administrator, when the salvor's application is unopposed, to make a formal finding regarding the value of the salvage service before awarding the salvor title. 323 F. Supp.

2d 724, 731. No such imperative is to be found in Decree No. 61-1457, and there is no other basis on which a U.S. court might presume the law of France to impose such a procedural formality. In this regard, it is useful to compare Article 17, translated in Appellant's Exhibit B, where it is said that the salvor has a right (*droit*) to a calculation of the salvage award that includes a valuation of the services provided and the skill, risk, and equipment involved. Thus, far from imposing a mandate on the administrator, Decree No. 61-1457 gives recognition to a right enjoyed by the salvor. If the court below was inferring the formality of a formal finding about the value of salvage services from Article 17, then that court erred in presuming that a duty for the administrator must follow from the right of the salvor, especially when, as in this case, that inference would work to prejudice the right holder.

IV. FRENCH LAW AUTHORIZES TRANSFER OF TITLE TO SALVED ARTICLES ON A SALVOR'S UNOPPOSED APPLICATION WHEN THE SALVOR UNDERTAKES TO REFRAIN FROM THEIR SUBSEQUENT SALE, SO THE *PROCÈS VERBAL* OF OCTOBER 20, 1993 SHOULD NOT BE REFUSED RECOGNITION ON THAT BASIS.

The court below erred when it presumed that French law does not authorize the maritime affairs administrator to exercise his jurisdiction under Article 13 on the basis of an undertaking by the salvor never to sell the salved goods. No such limitation is to be found in Decree No. 61-1547, and there is no other basis on which a U.S. court might presume the law of France otherwise to impose it. As the law elsewhere leaves to the discretion of the administrator disposing of wrecks and salved property the manner in which value is established for disposition of the claims of salvors, so does the law of France. Compare Canada Shipping Act sec. 461(3), R.S. 1985, c. S-9, §.526; Merchant Shipping Act 1995, Part IX, Chaps 1-2 (c. 21) (U.K.). In the courts of the United States, administrative officers of France ought to be extended the courtesy of a presumption of competence and their quasi-judicial actions ought to be afforded the presumption of regularity. Contrary to the inference drawn by the court below, therefore, it should be presumed from the fact that the maritime affairs administrator took pains to incorporate the undertaking by TVLP verbatim in his *procès verbal* that such an incorporation

was proper and not superfluous to the quasi-judicial decision embodied in the *procès verbal*.

V. FRENCH LAW AUTHORIZES THE TRANSFER OF TITLE TO SALVED ARTICLES OF NEGLIGIBLE VALUE AT THE TIME UPON A SALVOR'S UNOPPOSED APPLICATION, AND A LATER REVALUATION, AFTER SIGNIFICANT ENHANCEMENTS OF THE VALUE OF THE ARTICLES, SHOULD NOT JUSTIFY A U.S. COURT'S REFUSAL TO RECOGNIZE THE *PROCÈS VERBAL* OF OCTOBER 20, 1993.

The court below erred when it concluded that the Maritime Affairs Administrator acted contrary to French law as embodied in Article 13 by awarding title in 1993 to the salvor in this case because a subsequent representation by the salvor's successor in interest valued the artifacts at US $16, 000, 000. 323 F. Supp. 2d 724, 732. In 1993, no exhibition of the artifacts had yet occurred; they had remained under the control of the French government since 1987. Prior to receiving title to the artifacts, Titanic Ventures undertook to "use the artifacts removed from the wreck of the Titanic in 1987 in a manner respectful of the memory of the original owners" and not to undertake "any operation that would cause them to be dispersed, except as needed for an exhibition, or any of them to be sold." See Letter from George Tulloch, General Partner, Titanic Ventures Limited Partnership, to M. Tricot, *l'administrateur des affaires maritimes, chef de quartier* (Lorient) (September 22, 1993), translated at A54 –A 55. In 1993, therefore, it was reasonable to conclude that the artifacts had no real, that is, market value; at most it might have been said at the time that they had some ideal value, some historical and scientific value, but that value, whatever its amount, was only potential and speculative, not actual. At the time of the judgment of the maritime affairs administrator, everything in connection with their preservation and exhibition remained to be done, and neither Titanic Ventures nor the French government could have foreseen the commercial and scientific success of the exhibitions. The valuation of $16,000,000 by Titanic Venture's successor in interest, R.M.S. Titanic, Inc., came only in the U.S. court proceeding on February 12, 2004. It takes into account the cost of the expeditions, the expense of restoration of the artifacts, the success of exhibitions organized by RMS Titanic over a period of ten years, and the value declared to insurance companies (including storage, shipping, exhibition, restoration, etc.). Motion for Salvage and/or Finds Award, February 12, 2004. A537.

It is patently the law of France (as embodied in Article 13 of Decree No. 61-1547) that, when the application of the salvor is unopposed, the Maritime Affairs Administrator may transfer title of salved property to its salvor only when the property could not be sold for an appreciable amount. It is not the law of France, however, that the jurisdiction of a Maritime Affairs Administrator to proceed according to Article 13 is vulnerable retroactively to a valuation made more than a decade later, after considerable investment in the extensive restoration of the salved artifacts and in view of a history of their successful exhibit in the meantime. No such qualification post hoc on Article 13 jurisdiction is to be found in Decree No. 61-1457, and there is no other basis on which a U.S. court might presume the law of France to impose such a qualification. Rather, it is the law of France that the legality of an administrative act is to be assessed on the basis of the facts and law known at the time. This principle can be found in the writings of legal experts, see, e.g., René Chapus, *Droit du contentieux administratif* 214 (11ème éd. 2004), and has been applied consistently in cases. See *Braun-Ortega et Buisson,* Rec. p. 264; 1994 R.F.D.A. 832, Conseil D'Etat, May 27, 1994; *Société de bourse Buisson*, Rec. p. 83, Conseil D'Etat, March 6, 1989; *E. Guillaume,* 1989 R.F.D.A. 627 concl.; *Fabre-Luce*, Rec. p. 511, Conseil D'Etat, December 20, 1967; *Société des automobiles Berliet*, Rec. p. 367, Conseil D'Etat, July 22, 1949. It is applied strictly to administrative acts that are judicial in nature. *Butin,* Rec. p. 27, Conseil D'Etat, January 22, 1982; *Ah Won*, Rec. p. 33, 1982 A.J.D.A. 440; *Chr. F. Tiberghien et B. Lasserre,* D. 1983 I.R. p. 235 (Obs. P. Delvolvé).

CONCLUSION

Because the court below misinterpreted the French law of wreck and salvage, as embodied in Decree No 61-1457, and indulged in unwarranted speculation about the value of the artifacts at the time of the salvor's application, the *procès verbal* of October 20, 1993 is entitled to recognition according to ordinary principles of comity.

Respectfully submitted.

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