1978 May 8

[HADJIANASTASSIOU, J.]

KATARINA SHIPPING INC.,

Plaintiffs,

v.

THE CARGO NOW ON BOARD THE SHIP "POLY"

Defendants.

IN RE APPLICATION FOR THE WARRANT OF ARREST OF THE CARGO LADEN ON THE SHIP "POLY".

Admiralty Action No. 232/77).

Admiralty—Jurisdiction—Action in rem—Claim against cargo for freight—Arrest of cargo—Setting aside writ and warrant of arrest for want of jurisdiction—Highly debatable questions of law raised including issue of fraud—Which could not be decided at a preliminary stage without hearing on oath all parties concerned—Issue of jurisdiction left to be decided after close of pleadings and during the hearing when all the facts would be ascertained—Warrant of arrest discharged by consent.

The plaintiffs in this action issued a writ of summons claiming, *inter alia*, an amount of U.S. $ 458,700.90 freight due to the ship s/s Poly by the cargo on board the ship by virtue of a booking note dated May 20, 1977 and by virtue of bills of lading. On the day of issuing the writ of summons the plaintiffs applied, *ex parte*, and obtained a warrant for the arrest of the cargo in question under the provisions of the Cyprus Admiralty Jurisdiction Order, 1893 rule 50 (quoted at p. 274 *post*). In the affidavit in support of the application for the issue of the warrant of arrest the plaintiffs alleged that the cargo-owners acted fraudulently in connection with the settlement of the freight account.

The cargo-owners opposed the issue of the warrant of arrest of the cargo in question and invited the Court to discharge it because the plaintiffs (the ship-owning company) had no right

to arrest the cargo. The cargo owners contended that once the bills of lading have been issued, marked "freight paid" the ship–owning company was estopped from claiming freight and representation on those bills that freight was paid, was considered as exclusive evidence that the freight had been paid.

In addition to opposing the warrant of arrest of the cargo, the cargo–owners moved to set aside the writ of summons on the ground that the Court had no jurisdiction in rem to entertain the action against them.

Subsequently the plaintiffs consented to an order for the release of the whole cargo under arrest and accepted security in the form of bail, to their complete satisfaction, by the owners of the cargo.

Held, (1) that even if counsel for the defendant cargo was right in saying that the plaintiffs had no right at all to arrest the cargo and that the cause of action could not be sustainable against the consignees, once highly debatable questions of law have been raised at this preliminary stage of the proceedings it is not right to decide all those issues once both parties particularly have accepted the release from arrest of the cargo; that there is another reason why this Court thinks it unnecessary to decide all the rest of the issues raised, *viz.*, that the action was not sustainable in law, because the point of fraud was raised and was relied upon by the plaintiffs; and though long affidavits have been filed on the issue of fraud this issue cannot be decided without hearing further evidence on oath.

(2) That it is not proper to set aside the writ of summons at this preliminary stage of the hearing without hearing on oath all parties concerned and that, accordingly, the action should proceed in the usual way (see *The St. Elefterio* [1957] 2 All E.R. 374).

(3) That at the appropriate time when the pleadings would be closed and all the facts during the hearing would be ascertained, due consideration would be given to all arguments, or to any further arguments, with a view to deciding whether the ship–owning company would be entitled to damages or not.

(4) That the warrant of arrest of the cargo will be discharged.

Order accordingly.

Cases referred to:

The St. Elefterio [1957] 2 All E.R. 374;

Howard v. *Tucker*, 109 E.R. 951;

The Christiansborg [1885] 54 2 L.J. 87;

Hartlepool [1950] 84 Lloyd's Rep. 145

The Soya Margareta [1960] 2 All E.R. 756;

Reederei Schulte v. *Ismini Shipping Co. Ltd.*, (1975) 1 C.L.R. 433;

Grade One Shipping Ltd. v. *Cargo on board the Ship Crios II* (1977) 11 J.S.C. 1760 (to be reported in (1976) 1 C.L R.)

Application.

Application for the discharge of a warrant for the arrest of the cargo on board the ship s/s Poly and for setting aside the writ of summons in an Admiralty Action whereby plaintiffs claimed, *inter alia*, for a declaration that they were entitled to a lien against the above cargo in accordance with the terms of a charter party dated 19th May, 1977, a booking note dated 20th May, 1977 and the bills of lading.

Ch. Mylonas, for the plaintiffs-applicants.

C. Erotocritou, for the defendants-respondents.

Cur. adv. vult.

The following judgment was delivered by:

HADJIANASTASSIOU J.: In this action in rem, the plaintiffs, Katarina Shipping Inc., of 80 Broad Street, Monrovia, claimed a declaration of this court (a) that the plaintiffs were *entitled to a lien* against the cargo now on board the S/S Poly in accordance with *the terms of the charter party dated May* 19, 1977, *a booking note dated May* 20, 1977, *and the bills of lading*; (b) *an order enforcing the lien of the plaintiffs against the cargo laden on board the S/S Poly by selling the cargo by public auction or private treaty*; (c) an amount of U.S. $. 458,700.90 freight due to the ship S/S Poly by the cargo on board the ship by virtue of the booking note of May 20, 1977, and/or by virtue of the bills of lading. Damages over and above the amount claimed under (c); (d) an amount of U.S. $. 500,000 as damages and/or otherwise for the detention of the plaintiffs' ship by the defendants' cargo and/or otherwise; (e) an amount of U.S. $. 500,000 for freight, demurrages, detention, discharging expenses and other incidental charges for breach of the Booking Note dated 20.5.77 and/or for failure to pay freight on the Bills of Lading already issued; (f) interest and costs.

On the same date when the writ of summons was issued on August 23, 1977, and before the writ was served, *the plaintiffs applied for a warrant for the arrest of the cargo in question* under the provisions of the Cyprus Admiralty Jurisdiction Order 1893, rule 50. This rule provides that "*In an action in rem*, any party may at the time of, or at any time after the issue of the writ of summons, *apply to the Court or a Judge for the issue* of a warrant for the arrest of property. The party so applying shall, before making his application, file in Court an affidavit containing the particulars prescribed by the following rules.....".

In pursuance of this rule, an affidavit was sworn and the deponent, Mr. Emile Dechaine, the Managing Director of Sea Transport Service Co. of Antwerp, said that the S/S "Poly" was time chartered by her owners to their company by virtue of a time charter dated May 19, 1977; and that by virtue of a booking noted dated May 20, 1977, the time charterers as disponent owners agreed with Euro-African Lines Ltd. of England that the latter would load full and complete cargo on the S/S Poly at a lump sum of U.S.$.564,000 basis free in and stowed/liner out one discharge port Nigeria.

The deponent further alleged that the whole cargo of whatsoever its quantity or quality was liable for the payment of a full agreed freight, that is for the payment of U.S.$.564,000, but for practical reasons, it was agreed that upon payment of a provisional amount of U.S.$.60 per freight ton, the merchants (Euro Africa Lines Ltd.) would take up the bills of lading corresponding to the shipment. This practice, the deponent added, was without prejudice to the rights of the time charterers against the shippers-merchants for the payment of a minimum/maximum freight of U.S.$.564,000.

The ship in question, when it arrived at Antwerp, the first loading port on June 6, 1977, remained there waiting for the cargo to be loaded by the merchants until June 29, 1977. During the loading, the shippers/merchants produced to the Master the bills of lading which were duly signed by him. The freight as per the booking note was agreed to be pre-paid on signing the bills of lading. Against the payment of the agreed freight of U.S.$.564,000, the merchant shippers paid on account U.S.$.22,979.40 an amount of U.S.$.18,680.37 by way of disburse-

ments at loading port and U.S.$.4,299.03 by way of cash payment as well as an additional sum of U.S.$.30,000 by way of three advances by cheque of U.S.$.10,000 each and Belgium francs 178,000 and English Pounds 5,000.

It was further alleged that *the net amount due to them by the merchants/shippers and by the cargo by way of unpaid freight was U.S.$.458,700.90.* There was a further allegation by the deponent that whilst *the ship was remaining at Antwerp, the merchants through their agents Anglo Belgium Liner Agency N.V., and particularly through their director, a certain Mr. J. Gilbert, deceived the master of the ship and took possession of a set of original bills of lading, probably on the understanding that they should be brought to Sea Transport Co., for settlement of the freight account or other fraudulent allegations* made by them to the Master, and ever since the said Mr. J. Gilbert disappeared *and no freight had been paid to Sea Transport Co. for the said cargo.*

Finally the deponent said that in view of the situation they were driven, *because of the default of the merchants/shippers, they applied for a warrant of arrest against the cargo for the enforcement of their contractual, statutory and/or common law rights against the cargo.*

On August 23, 1977, this court issued, in accordance with rule 50, a warrant of arrest, in spite of the fact that five original bills of lading, alleged to have been in the hands of the plaintiffs, were not produced—counsel undertaking to produce them at a later stage. The court in granting the warrant of arrest of the cargo in question, made it clear to counsel that the cargo owners affected by the said warrant of arrest should have been informed by telex with regard to this new position.

There is no doubt that although the destination of the ship Poly was Nigeria, for reasons not given, the ship stopped in Cyprus instead of proceeding to its proper destination. The court thought it necessary to inform the cargo owners that the cargo was arrested. Counsel appearing on behalf of the plaintiff company was so directed and indeed, did inform the cargo owners by telex.

The application for a warrant of arrest was fixed for further directions on August 30, 1977, but on August 26, the owners,

or some of the owners of the cargo—having been informed by telex through their counsel—applied also for an order of this court, *viz.*, for the issue of a warrant of arrest of the ship Poly. In the order sought, it was made clear that the owners of the ship Poly, her servants, or agents, should be restrained by an order from discharging the cargo belonging to the plaintiffs in Action 235/77. The said application was supported by an affidavit made by Mr. Ioannis Erotokritou of Nicosia. The Court issued also a warrant of arrest of the ship in question and ordered that the unloading of the cargo should stop, pending the determination of the proceedings in question.

In the meantime, the opposition was filed showing cause why the warrant of arrest should not continue regarding the cargo in question; and in lengthy proceedings, counsel appearing for the cargo in question invited the Court to take the view that the warrant of arrest should be discharged because the ship owning company had no right to arrest the cargo at all.

Furthermore, counsel at the very beginning informed the Court that he has given notice to the owners of the ship in question to produce all original bills of lading in respect of the defendant cargo signed by the Master and allegedly held by them. It was further stressed by counsel that from the affidavit of Mr. Emile Dechaine, a set of bills of lading has been issued by the Master, *and apart from* 18 *bills of lading alleged to have been stolen*, the rest were not made available. On the other hand, counsel appearing on behalf of the ship " POLY", made a statement to the effect that the bills of lading which should have been attached to the affidavit, in applying for the warrant of arrest of the cargo, were now in his hands, and his colleague for the other side could have a look at them at his convenience. In fact, counsel added that he knew that he was expected to produce them in Court and that the said documents were brought to Cyprus from Athens *before* the notice was served on them. Furthermore, counsel agreed to produce the cargo manifest also.

It is interesting to add that on September 8, 1977, there were already before the Courts of Cyprus 13 actions representing cargo owners, and a lot more were forthcoming. As I said earlier, the hearing of the application to show cause has taken a number of days, because both counsel were very lengthy in

addressing the Court as to whether the issue of the warrant of arrest was justified or not, and in fact they were trying in this preliminary issue, to decide actually the fate of the whole case itself. When finally the case was concluded, it was reserved for the simple reason that the result of this decision would in effect influence action 235/77. There cannot be any doubt that, because of the lengthy proceedings which have been protracted unduly in my view, and fully realising that such delay would inevitably cause a lot of inconvenience and loss to both the cargo owners and the ship owning company, I had issued directions with a view to enabling both the cargo owners and the ship owners to provide satisfactory security in the nature of a bail or a bank guarantee with a view to releasing finally both the cargo and the ship. Inspite of those directions and the observations I have made regarding *The St. Elefterio Schwarz Co., (Grain) Ltd.*, v. *St. Elefterio ex Arion* (owners) [1957] 2 All E.R. 374 pp. 377, 378, nothing has materialized, and for reasons unknown to me both the cargo and the ship in question remained under arrest. Be that as it may, it appears that even before the filing of this action the ship owning company was complaining to the charterers that it had not received the hire due and made it clear that unless a suitable solution or settlement was found, the owners of the ship would take immediate legal and practical steps to safeguard their interest and to deliberate the vessel, by refraining from additional financial losses. (See a telex dated July 28, 1977, addressed to both Euro Africa Line Liverpool and Sea Transport Co., of Antwerp). (*Ex.* 77).

There was a further exchange of correspondence and telexes, and on August 1, 1977 (Ex. 81) the ship owning company by a telex, was again complaining that payment of two drafts, accepted by the charterers and which were payable on July 9, 1977 and July 15, 1977, representing hire and bunkers, was refused and the two documents were returned unpaid. Then the ship owning company protested in this strong language:

> " We are very much astonished and concerned for the dishonour of these drafts and we request you to inform us immediately what practical steps you are taking to pay them and the further hire due by you before we shall be forced to take judicial steps which may lead to unhappy

legal consequences for your firm, including its bankruptcy."

In reply, the charterers, by a telex to the ship owning company (Exh. 82) expressed their regrets for not being in a position to honour their drafts, and added that although they are the contracting party with them, *and accept their full responsibility* in that matter, they put the blame on the sub-charterers who did not fulfil their obligations towards them. Finally, they concluded in these terms:

"We would appreciate very much if you could await settlement of these drafts until we *finish our joint action against sub-charterers.*"

In view of the failure of the charterers to pay the amounts due, the ship-owning company addressed once again a new telex dated August 11, 1977, pointing out what was the financial position until that date and the balance due to the ship owners amounting to U.S.$. 184,885.52. Having requested quick payment, this telex proceeds as follows:

"Our position is extremely awkward as the owners are *spending daily U.S.$. 1,500 running expenses and vessel is in distress.* We regret but we shall *be compelled to declare your company in bankruptcy. Please hurry and answer soonest possible.*"

This was the position until that time: the ship owning company was complaining against the charterers for not honouring their obligations, and the charterers were blaming the sub-charterers. Finally, it appears that the ship owning company, instead of proceeding with the joint action as suggested by the charterers they filed the present action against the cargo owners only.

In spite of the fact that no comments were made by counsel, I think I would revert once again to the application for the warrant of the arrest of the cargo, and I would reiterate that the ship owning company was claiming, *inter alia*, under (c) an amount of freight due to the ship "S/S POLY" by the cargo on board the ship by virtue of the booking note dated 20th May, 1977 and/or by virtue of the bills of lading. But once again no satisfactory explanation was given regarding the bills

of lading which were stamped "freight prepaid". I may also add that when the warrant of arrest was issued, and an undertaking was given by Mr. Ch. Mylonas to the Registrar to pay the amount of £10,000, to be answerable to the cargo owners in case it was proved that the order was issued on insufficient grounds, strangely enough, on the same date, on August 23, 1977, the very same counsel appearing on behalf of the ship owning company, appeared also on behalf of the "Sea Transport Company" N.V. of Antwerp and entered a caveat against the release of the cargo laden on board the ship " POLY" arrested by virtue of the order of the Court. As I have said earlier, in the opposition filed on September 6, 1977 on behalf of the consignees of the cargo, it was clearly put forward that the ship owning company had no claim for a lien against the cargo, once in the bills of lading it was clearly stated that freight had been paid and that the original bills of lading had been endorsed or otherwise negotiated to the consignees in Nigeria.

Indeed, the main complaint of counsel for the consignees was all along that once the bills of lading have been issued, marked "freight paid" either by the master of the ship, or by the agent of the ship, or by people who had ostensible authority to issue such bills of lading, the ship owning company was estopped from claiming freight, and representation on those bills that freight was paid, is considered as exclusive evidence that the freight had been paid. This proposition finds support in *Howard* v. *Tucker* English Reports, volume 109, 951. The facts in that case shortly are these. Goods being shipped in India for London, on account of a person there, the bill of lading was forwarded to him and he indorsed it over for value. The bill of lading, signed by the captain, *stated that the freight to have been paid in Bengal, but it was found after the above transfer, that the freight never had been paid through default of the shipper.* It was held, that *the ship owners, who detained the goods, could not claim payment of the freight from the assignees of the bill of lading.* The brokers employed by these latter parties sold the goods, but when called upon for delivery, found them to be stopped for freight, which, to obtain possession of the property, they paid; although their principals had formerly directed them not to do so as the freight had been paid in Bengal. It was further held, that this advance by the brokers was made in their own wrong, though the freight had not in fact been paid in Bengal as the principals supposed.

Lord Tenterden C.J. said at p. 952:

" The freight had, in fact, not been paid in Bengal. The captain stated that he had signed the bill of lading in its present form, in that country, *at the desire of Charlton, the shipper*, and on the understanding that he meant to pay *the freight before the ship sailed*; and it appeared *that Charlton had afterwards said, in excuse for not doing so, that he had remitted all his money to England, and forgotten the freight.* The defendants, in order to get the goods from the East India Company, paid the freight: they then delivered the saltpetre to the purchaser, and received the price; but in accounting to the plaintiffs for the proceeds, they claimed to retain the amount of the freight; and this was the sum now in dispute. Lord Tenterden was of opinion that the defendants, by making the payment in spite of a direction to the contrary, had placed themselves in the same situation with the parties claiming and receiving the freight; that those parties had no right so to do, the captain, who was their agent, having signed a bill of lading which stated the freight to have been paid in Bengal and the plaintiffs having thus perhaps been induced to receive the bill of lading for a value to which they might otherwise have thought it inadequate; that the captain might be answerable to his principals for having signed an instrument which contained an incorrect statement but that third persons who took the bill of lading for value on the faith of such statement ought not to suffer loss by it. He therefore considered that the defendants had made the payment in their own wrong, and were not entitled to claim the amount, and he directed a verdict for the plaintiffs, giving leave to the defendants to move to enter a nonsuit."

In spite of this weighty judicial pronouncement which remains still good Law, nothing was done by either side; they have failed to take seriously into consideration the observations of the court in filing sufficient guarantee or bail with a view to obtaining the release of the cargo and of the ship in question.

In the St. Elefterio, *supra*, the plaintiffs issued a writ claiming "damages arising out of bills of lading relating to the carriage of goods in the defendants' steam ship or vessel, St. Elefterio", and caused a warrant to be issued under which the ship was

arrested. The defendants moved to set aside the writ and warrant of arrest, contending that the court had no jurisdiction in rem to entertain the action. The main complaint of counsel on behalf of the defendants was that on the true construction of the Administration of Justice Act, 1956, and in particular section 1 (1) (h) and section 3 (4) thereof that court had no jurisdiction in rem to entertain the action.

Willmer J., in dealing with that complaint thought that the main argument turned on the construction of section 3 (4), and in his elaborate judgment he reached the conclusion that he had jurisdiction in that matter. Then he made these observations at p. 377:

> " But clearly, if the action did succeed, the person or persons who would be liable would be the owner or owners of the steamship St. Elefterio. In such circumstances, in the absence of any suggestion that the action is frivolous or vexatious, I am satisfied that the plaintiffs are entitled to bring it and to have it tried, and that whether or not their claim turns out to be a good one, they are entitled to assert that claim by proceeding in rem."

Finally Willmer, J., feeling exactly, as I have felt all along in listening to the long arguments put forward before me in the present case, and fully aware of the difficulties with regard to the release of St. Elefterio, made these observations further down:

> "..... if the judge takes the wrong view, there is no practicable way of putting him right in the Court of Appeal without the possibility of inflicting irreparable damage on the party against whom the decision goes. I make that observation because it adds point to what I want to say in conclusion, namely, that any construction of s. 3 (4) of the Act other than the construction which I have sought to put on it, would, it seems to me, lead to the most intolerable difficulties in practice. *If counsel for the defendants is right in saying that the plaintiff has no right to arrest a ship at all, unless* he can show in limine a cause of action sustainable in law, what is to happen in a case (and, having regard to the argument I have listened to, this may be just such a case) *where the questions of law raised are highly debatable, and questions on which it may be desired to take*

the opinion of the Court of Appeal or even of the House of Lords? Suppose, for instance, following the argument of counsel for the defendants, that this court comes to the conclusion, on the preliminary argument held at this stage of the action, that the action is not one that is sustainable in law, it will presumably set aside the writ and the warrant of arrest. It is possible . . . that a higher court might take a different view; but in the meantime the ship which is a foreign ship, has been freed from arrest, has gone, and may never return to this country. It might be that in those circumstances the plaintiffs would have lost their right for ever to entertain proceedings in rem in this country.

The fact, is and this is the sanction against abuse, that the plaintiffs, if their alleged cause of action turns out not to be a good one, will be held liable for costs, and those costs will include the costs of furnishing bail in order to secure the release of the ship. The defendants can always secure the release of their ship by the simple expedient of furnishing bail. It is perfectly true that if, as they say it will, the action fails, they will probably not recover inter partes the whole of the costs of furnishing the bail; but in that respect I do not know that they are in any different position from other defendants in other types of action."

Finally his Lordship said:

"That is one of the incidents of litigation which parties have to accept in modern conditions The simple remedy for the defendants, if they want their ship released, is to put in bail. The action will then be tried, and at the appropriate time—when all the facts have been ascertained – due consideration will be given to the arguments on law which the defendants desire to advance In my judgment, therefore, this motion is misconceived and I find myself unable to accede to it."

Having in mind those observations and no doubt fully aware of his difficulties, counsel for the ship owning company, quite properly in my view, even at a very late stage, consented to an order for the release of whole cargo under arrest, and accepted security in the form of a bail to his complete satisfaction by owners of the cargo.

Speaking about the effect of bail Fry L.J. had this to say in *The Christiansborg* [1885] 54 2 L J.R. at p. 87:

" The bail is a release, and the meaning of it is that the proceeding is not to go on against the res. Different considerations arise to the case of actions in personam. The result of giving bail is the release of the ship, and it means that the ship is released from the effect of the collision..... If the effect of the guarantee was not equivalent to bail, it may be considered as a private convention and agreement, so that the release has been purchased by the guarantee."

In *The Hartlepool* [1950] 84 Lloyd's Rep. 145 Willmer J., said at p. 146:

" Over and over again it has been held that once a ship has been arrested and bail or security has been furnished, the ship's release has been purchased, and she is free from further arrest in any country in respect of the same claim."

See also *The Soya Margareta* [1960] 2 All E.R. 756.

In *Reederei Schulte etc.* v. *Ismini Shipping Co. Ltd.*, (1975) 1 C.L.R. 433, in delivering the judgment of the Court as to the effect of bail I said at p. 453:

" The security given is in effect giving bail. The bail is a release and the meaning of it is that the proceeding is not to go against the res. In my view the giving of bail is the release of the ship and certainly it means that the ship is released from the effect of the collision, but even if the effect of the guarantee was not equivalent to bail, it may be considered as a private agreement so that the release has been definitely purchased by the guarantee."

But regretfully, even after that consent order was given for the release of the whole cargo, there was a further delay because the said order was attacked on a number of applications, and for a number of reasons, which were finally decided on appeal, and the protracted litigation came to an end and the said cargo was released to the consignees and or owners and was shipped on another ship with a view to reaching finally the owners in the distant land of Nigeria.

In my opinion therefore, even if counsel for the defendant cargo was right in saying that the plaintiffs had no right at all

to arrest the cargo and that the cause of action could not be sustainable in rem against the consignees, nevertheless once highly debatable questions of law have been raised at that preliminary stage of the proceedings, I do not think it was right to decide all those issues once both parties particularly have accepted the release from arrest of the cargo in question. However, there is another reason why I thought it unnecessary to decide all the rest of the issues raised viz., that the action was not sustainable in law, because the point of fraud was raised and was mostly relied upon by the ship owning company in that application.

As I said earlier, on the issue of fraud I had before me long affidavits sworn by both sides, as well as a great number of documents in support of the two affidavits. In going through all those affidavits, I have reached the conclusion that I cannot tell who is right and who is wrong, without hearing further evidence on oath on that issue—irrespective of the fact that the so-called deceiver Mr. Rolf was present in court. I have therefore decided, having regard to the facts before me, to discharge the warrant of arrest issued by this court on August 23, 1977, for the reasons I have given at length; and also directing myself with those weighty judicial pronouncements in St. Elefterio *supra*, not to set aside the writ of summons at this preliminary stage, without hearing on oath all parties concerned. (See also *Grade One Shipping Ltd.* v. *Cargo on board the ship Crios II* (1977) 11 J.S.C. 1760.)*

I would reiterate once again, that it is not proper to set aside the writ of summons at this preliminary stage of the hearing, without hearing on oath all parties concerned, and with this in mind the action should proceed in the usual way; and at the appropriate time, when the pleadings, would be closed and all the facts during the hearing would be ascertained, due consideration would be given to all arguments, or indeed to any further arguments, with a view to finally deciding whether the ship owning company would be entitled to damages or not.

The warrant of arrest, therefore, is discharged but I think the question of costs should be reserved to be decided at the end of the trial of the action itself.

Order accordingly.

* To be reported in (1976) 1 C.L.R.