1985 July 24

[A. LOIZOU, J.]

ABDU ALI ALTOBEIQUI,

Plaintiff,

v.

M/V NADA G. AND ANOTHER,

Defendants.

(Admiralty Action No. 297/84).

Admiralty—Jurisdiction in rem—Founded upon the sevice of the writ on the res or upon its arrest.

Admiralty—Jurisdiction in personam, when defendant out of the jurisdiction—Orders 23 and 24 of the Cyprus Admiralty Jurisdiction Order, 1893—The necessary prerequisites for giving leave to seal and serve a writ or notice thereof out of the jurisdiction under Order 24—In this case leave was granted but the defendants applied to set aside the service of the notice of the writ and/or to discharge the order whereby leave was granted—The main question in this case is whether the case "is a proper one to be tried in Cyprus"—As the plaintiffs' application to obtain leave to seal and serve out of the jurisdiction is made ex parte plaintiffs should frankly and fully disclose all relevant facts—Failure to do so is a ground for the discharge of the order whereby leave was granted—Other grounds for such a dischage are: (a) An agreement of the parties as to exclusive jurisdiction of a foreign Court and the fact that the parties relations are governed by foreign law and (b) the fact that Cyprus is not the forum conveniens.

Words and Phrases:—"Proper" in Order 24, of the Cyprus Admiralty Jurisdiction Order, 1893.

In the present action a writ in rem and in personam was issued on one form claiming inter alia the value of

goods which were shortlanded and/or lost and which were loaded by virtue of a bill of lading dated 31.7.1980 on board the defendant ship at Porto Marghera to be be carried to Gizan.

Along with the filing of the writ there was filed and granted by the Court an ex-parte application based on Orders 23, 24, and 25 of the Admiralty Jurisdiction Order, 1893 for leave to seal and serve the writ or notice thereof out of the Jurisdiction on the second defendants.

The ship was neither served nor any application for her arrest was made; indeed it appears that no effort to serve her was made as the relevant service fees had never been paid.

Upon service being effected on defendants 2 conditional appearance was entered on their behalf and an application by them in compliance to an order of the Court was filed praying inter alia for an order setting aside the service and/or discharging the order authorising such service.

The facts relied upon in support of this application are in short that the defendants are a company incorporated in Lebanon and had never established any office or offices in Cyprus, that the writ was not served on the defendant ship, that throughout the transaction relating to the carriage of the goods by the said ship they did not act as principals but as agents of the defendant ship and/or another company, that the bill of lading contained a clause to the effect that any dispute shall be decided in the country where the carrier has his place of business and the Law of such country shall apply and that both the plaintiff and defendants 2 are foreigners and are not residents of Cyprus and the case has no connection with Cyprus whatsoever. They further alleged that the ship had never been to Cyprus. The last allegation created a conflict in the affidavit evidence, which if it had to be resolved, it would have been in the circumstances of this case resolved in favour of the defendants.

Held, (1) The jurisdiction in rem is founded upon service of the writ on the res or upon its arrest. Until

then, though the plaintiff has opportunity to file an action in anticipation of the res coming within the jurisdiction, the jurisdiction of the Court is not founded.

(2) The jurisdiction of the Court in personam against defendants 2 was invoked through the provisions of Orders 23 and 24 of the Cyprus Admiralty Jurisdiction Order, 1893. The prerequisites of Order 24 are the following: (a) That evidence must be produced to Court or Judge that the plaintiff has a good cause of action (b) that the action is a proper one to be tried in Cyprus (c) that evidence should be produced as to the place or country where the defendant is or may probably be found and as to his nationality. In this case the main question is whether the action "is a proper one to be tried in Cyprus."

(3) The word "proper" means "fit, apt, suitable, fitting, befitting; especially appropriate to the circumstances; right." It is, therefore, apparent that a most relevant consideration are the circumstances of the case in question. The jurisdiction of the Court is essentially discretionary. Interpretation of rule 24 must so long as its wording permits proceed by analogy and along the same lines as the exercise of the discretion under the corresponding provisions of the Civil Procedure Rules. The discretion is one which should be exercised with extreme caution and with full regard in every case to the circumstances.

(4) As the application to obtain leave to serve a writ out of the jurisdiction is made ex parte a full and fair disclosure of all the facts ought to be made. In the present case the plaintiffs failed to disclose in the affidavit in support of their application for leave to serve notice of the writ out of the jurisdiction all relevant facts. This is sufficient to discharge the order, whereby such leave was granted.

(5) In addition to the above ground of failure to make a full and frank disclosure the said Order should be discharged on the following grounds (1) The agreement of the parties that a particular foreign Court should have exclusive jurisdiction and the fact that the relations

between the parties are governed by a foreign law and (2) Cyprus cannot be considered as the forum conveniens.

(6) The alleged by the plaintiff presence of the defendant ship in Cyprus and the fact that an action in rem can be filed against her in anticipation of her arrival in Cyprus, does not make her owners, i.e. defendants 2, a necessary or proper party to the proceedings.

(7) An action in rem is an action against the ship itself and its owners may take part, if they think proper in defence of their property but this is a matter for them to decide and if they decided not to take part in the proceedings no personal liability can be established against them in such action in rem. It follows that the plaintiff's submission that on account of the presence of the ship in Cyprus the Court had jurisdiction in personam against the second defendants fails.

Application granted. Order to seal and serve defendants 2 out of the jurisdiction discharged. Costs against respondents-plaintiffs.

Cases referred to:

Artemis Co. Ltd. v. *The Ship Sonja* (1972) 1 C.L.R. 153;

"The Nautic" [1885] P. 121 and *Aspinals Reports of Maritime Cases,* Vol. 7, New Series 1890-1895 p. 591;

R. v. *Arthurs* ex p. *Port Arthur Shipbuilding Co.* (1967) 1 O.R. 272;

Cordova Land Co. Ltd. v. *Victor Brothers Inc.* [1966] 1 W.L.R. 793;

The Hagen [1908] P. 189;

Phassouri Plantations v. *Adriatica* (1985) 1 C.L.R. 290;

Cubazucar and Another v. *Camelia Shipping Company Ltd.* (1972) 1 C.L.R. 61;

Sonco Canning Ltd. v. *Adriatica* (1972 1 C.L.R. 210;

The Brabo [1949] A.C. 326;

The Burns [1907] P. 137.

Application.

Application by defendants No. 2 for an order of the Court setting aside the issue and/or service of notice of the writ.

C. Indianos with *Kl. Frangou-Pissiri (Mrs.),* for applicants-defendants No. 2.

A. Theofilou, for respondent-plaintiff.

Cur adv. vult.

A. Loizou J. read the following judgment. In the present action a writ in rem and in personam was issued on one form and the prayer for relief is for:

"A. 19,635 U.S.A. Dollars being the value of 1546 Bags wheat flour which were shortlanded and/or otherwise lost and which were carried on board Defendant Ship by virtue of a bill of lading No. 1, dated 31.7.80 and which were loaded on Defendant Ship at Porto Marghera to be carried to Gizan on or about 31.7.80. Alternative of the above A.

B. Damages for breach of Contract of carriages evident in the bill of lading No. 1 dated 31.7.80 for the carriage of goods from Ports Marghera to Gizan which 1546 bags wheat flour were not delivered.

C. Interest.

D. Costs."

Although this practice of so joining them is not pres-

cribed by the Rules, a combined writ is accepted by the Registry and it has become a matter of frequent occurrence, unlike England where this is done in very rare cases. Though it may be useful in certain respects, in normal cases it creates problems, as it will be seen shortly.

I had the occasion, in *Artemis Co. Ltd.*, v. *The Ship SONJA*, (1972) 1 C.L.R. p. 153, to deal with the possibility of commencing actions in rem and in personam by means of a single writ, and again, I pointed out that that should be done only in comparatively rare cases.

Along with the filing of the writ there was filed and granted by the Court an ex-parte application for leave to seal and serve out of the jurisdiction the writ of summons and/or notice thereof on the second defendants, who were stated to be and were indeed outside the jurisdiction.

This application was based on Orders 23, 24 and 25 of the Admiralty Jurisdiction Order, 1893 and the inherent powers of the Court.

The ship, which was described in the writ of summons as lying at the time at the Port of Limassol, was neither served—in fact there does not appear any effort to have been made in that direction as no service fees were paid—nor any application for its arrest was made.

It is true that there is now no reason why a res must be arrested merely because the action is in rem as there may be accepted service of the writ and an undertaking to enter an appearance and provide bail or similar security be given, but—and this is significant for the purposes of our case—service on the res is required in order to get the action properly under way. (See *British Shipping Laws, Admiralty Practice* para. 50).

Upon service, however, being effected on defendants No. 2, conditional appearance was entered on their behalf and an application by them in compliance to an order of the Court was filed praying for:

"a. an order of the Honourable Court setting aside the issue and/or service of notice of the writ

and/or discharging the order authorizing such service and/or an order staying all proceedings against them for lack of jurisdiction.

b. Any other order the Court may deem fit to make under the circumstances.

c. The costs of the application."

The facts relied upon in support of this application were set forth in the accompanying affidavit. They are as follows:

"4. Defendants No. 2 are a company incorporated in Lebanon in accordance with the Lebanese Laws and carrying on business as shipowners and/or Operators/Managers of merchant ships. Defendants No. 2 have never established and do not have any office or offices in Cyprus.

5. The above instituted Action was commenced by a writ of summons dated 21.7.84, notice of which was served on the defendants 2 in Tripolis-Lebanon pursuant to an Order of the Court to that effect dated 30.8.84. No notice of the said writ was ever served on defendant No. 1.

6. On the 15.12.84 the defendants 2 appeared under protest and/or conditionally and by an order of the Court of even date they were allowed to apply within 40 days for an order of the Court setting aside the issue and/or service of notice of the writ of summons and/or discharging the order authorising such service and/or an Order staying all proceedings against them for lack of jurisdiction.

7. The plaintiff's claim is for 19,635 U.S. Dollars being the value of 1546 bags wheat flour which were allegedly short landed and/or otherwise lost, at Gizan-Saudi Arabia, from a total cargo of 82,450 bags which were loaded on defendants 2 m/v "Nada G" which is defendant No. 1, at Porto Marghera-Italy, between 29th July, and 11th August 1983 for Gizan-Saudi Arabia. In respect of this quantity, one Liner Bill of Lading marked

with the name of defendant was issued on 31.7.83 at Porto Marghera Italy photocopy of which is attached hereto marked exhibit "A". Throughout this transaction defendants No. 2 did not act as principal but acted solely as an agent of Blossom Shipping Co. Ltd., and/or the ship defendant No. 1.

8. The following clause appears on the front part of the aforesaid Bill of Lading:-

> '...In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the Merchant...'

9. The following clause appears in paragraph 3 of the reverse side of the said Bill of Lading under heading "Jurisdiction":

> 'Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business and the Law of such country shall apply except as provided elsewhere herein.'

10. The said B/L was issued in Porto Marghera-Italy. The plaintiff's Claim and/or the present action have no connection with Cyprus whatsoever. The plaintiff and defendants No. 2 are foreigners and are not residents of Cyprus and the alleged damage and/or missing of bags and/or shortlanding (which are strongly denied by the defendants No. 2) occurred and/or was noticed in Gizan-Saudi Arabia where the cargo was discharged and or disposed of."

The plaintiffs, in the affidavit filed in support of the notice of opposition to the present application, claim that the defendant ship was, on the date of the filing of the action, namely on the 21st August, 1984, "as they had been informed" in the Port of Limassol but till the action was served the ship left the Port of Limassol and/or Cyprus. On the other hand in the affidavit filed on behalf

of the applicants-defendants the following was stated:

"3. Defendant No. 1 is a ship owned by defendants No. 2, managed by Blossom Shipping Co. Ltd., of Piraeus. The ship has never been to Cyprus and when the present proceedings commenced the movements of the vessel were as follows:

19th-28th June,	1984 Loading Galatz
3rd-27th July,	1984 Discharging at Tripoli, Lebanon
19th-27th August,	1984 Loading Castellon, Spain
4th-9th September,	1984 Discharging Tripoli, Lebanon."

This creates a conflict in the affidavit evidence which I would normally have to resolve and if I were to do so in the instant case I would have no difficulty in deciding in favour of the applicants who were positive in their asssertions and were indirectly supported by the conduct of the plaintiffs who as already stated have sought neither service of the writ of summons, nor the issue of a warrant for the arrest of the ship in question.

This is the factual background in brief and I turn now to examine the legal aspect of the case.

In the Admiralty Practice (supra) para. 21 it is stated:

"A consideration which may lead a plaintif to sue in personam is that service of a writ in rem can only be effected within the jurisdiction. This means that although a writ in rem and a warrant of arrest may be issued even if the res is not within the jurisdiction, in order for either to be effective the res to be proceeded against must be, or come, within the jurisdiction unless service is accepted by a solicitor, whereas service of a writ in personam can often be effected abroad provided that the conditions laid down in the Rules of the Supreme Court are satisfied."

It is further apparent from the statement of the law appearing in para. 378 of the Admiralty Practice, (supra), under the heading "Not essential for res to be under

arrest" that it is the service of the writ on the res that gives the Courts jurisdiction to pronounce judgment despite the absence of the res. The said statement reads as follows:

> "The rule does not require the arrest of the res as a condition precedent to judgment by default although unless the res is in the hands of the Court the decree which is drawn up following the judgment has no immediate practical value. Cases of this description are exceedingly rare but in *The Nautik* [1885] P. 121 a writ and warrant of arrest had been issued and the writ had been served on the vessel. Before the warrant could be served, however, the master clandestinely put to sea. It was held that the service of the writ gave the Court jurisdiction to pronounce judgment despite the absence of the res."

The *Nautik* is, also, reported in *Aspinnals Reports of Maritime Cases,* Vol. 7 New Series 1890-1895 p. 591 where, at p. 592, the following is stated:

> "But all that is necessary to found jurisdiction is to give formal notice to the persons interested that a claim is made against them or against their property in a court of competent jurisdiction, and that, if they do not appear to vindicate their rights judgment may be given in their absence. The rules of the Supreme Court have directed that actions in rem shall be commenced by writ, and I think the service of the writ on the property has the same effect, so far as notice to the persons interested in the property is concerned, as service of the warrant had under the former practice. To confer jurisdiction it is not, I think, necessary that the property the subject matter of the suit, should be actually in the possession of the court or under the arrest of the court, it is enough that it should be, according to the words of Lord Chelmsfold, in the case of *Castrique* v. *Imrie* (23 L.T. Rep. 54; 3 Mar. Law Cas. O.S. 460; L. Rep. 4 H of L. 448), within the lawful control of the state under the authority of which the court sits. The same view is expressed by Jessel, M.R., in The *City of Mecca*

(44 L.T. Rep. 754; 4 Asp. Mar. Law Cas. 416; 6 P. Div. 112). That learned judge says: 'An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship'."

From the above authorities it can clearly be discerned that the jurisdiction in rem is founded upon service of writ on the res or upon its arrest. Until then, though a plaintiff has opportunity to file an action in anticipation of the res coming within the jurisdiction, the jurisdiction of the Court is not founded.

As regards the action in personam the jurisdiction of the Court against defendants 2 was invoked through the provisions of Orders 23 and 24 of the Cyprus Admiralty Jurisdiction Order, 1893 which read as follows:

"23. Where the person to be served is out of Cyprus application shall be made to the Court or Judge for an order for leave to serve the writ of summons or notice of the writ.

24. The Court or Judge before giving leave to serve such writ or notice of the writ shall require evidence that the plaintiff has a good cause of action, that the action is a proper one to be tried in Cyprus, and evidence of the place or country where the defendant is or may probably be found and of his nationality."

The prerequisites of Order 24 are the following:-

(a) That evidence must be produced to Court or Judge that the plaintiff has a good cause of action; (b) that the action is a proper one to be tried in Cyprus; (c) evidence as to the place or country where the defendant is or may probably be found; and (d) his nationality.

We are essentially concerned in the present proceedings with the meaning of the expression "the action is a proper one to be tried in Cyprus."

The word "proper" is defined in the Shorter "Oxford Dictionary" as meaning "fit, apt, suitable, fitting, befitting: especially appropriate to the circumstances; right."

This dictionary meaning was adopted in *R.* v. *Arthurs ex p. Port Arthur Shipbuilding Co.*, (1967) 1 O.R. 272 at p. 276. From the said definition of this word it is apparent that a most relevant consideration are the circumstances of the case which make something being appropriate or proper.

It is unfortunate that though the regulation of the question of service out of jurisdiction has gone through extensive development and elaborate provisions are to be found in our Civil Procedure Rules and more so in the English Rules, yet, we have been left with this brief provision of Order 24 of the Admiralty Jurisdiction Order to govern the situation.

No doubt the jurisdiction of the Court under this provision is essentially discretionary and the Court may if it seems fit decline to allow the service or even the issue of the writ and thus decline to exercise its jurisdiction. Interpretation of rule 24 must so long as its wording permits, proceed by analogy to and along the same lines as the exercise of discretion under the corresponding provisions in the Ordinary Rules.

The position is aptly summed up in The Conflict of Laws by Dicey and Morris, 9th edition as part of the commentary to rule 23 to be found in page 172 which is as follows:

> "The Court has jurisdiction to entertain an action in personam against a defendant who is not in England at the time for the service of the writ whenever it assumes jurisdiction in any of the cases mentioned in this Rule."

The Commentary at p. 173 reads:

> "Five cardinal points have been emphasised in the decided cases. First, the court ought to be exceedingly careful before it allows a writ to be served on a foreigner out of England. Secondly, if there is any doubt in the construction of any of the subheads of Order 11, r.1(1), that doubt ought to be resolved in favour of the defendant. Thirdly, since applications

are made ex parte, a full and fair disclosure of all the facts of the case ought to be made. Fourthly, the Court will refuse leave if the case is within the letter but outside the spirit of the Rule. Fifthly, if the parties have agreed that the dispute between them shall be referred to the exclusive jurisdiction of a foreign court, leave will probably be refused."

The position under Order 11 of the New English Rules also is clearly stated in the Supreme Court Practice of 1979 at pp. 81-82 under the heading "Discretion and Forum Conveniens." I need not, however, set it out here verbatim as not all considerations on this question are relevant to our case. It may, however, be stated that the discretion is one "which should be exercised with extreme caution and with full regard in every case to the circumstances." *(Cordova Land Co. Ltd.,* v. *Victor Brothers Inc.* [1966] 1 W.L.R. 793 at p. 796) and as stated in Cheshire's Private International Law 9th Edition at p. 86:

"Thus leave to serve a writ will be refused if England is not the forum conveniens, as, for example. where the defendent is a foreigner resident abroad and where the circumstances do not justify the expense and inconvenience that he will suffer from a trial in England."

In opposing the application counsel for the respondents/plaintiffs has argued that in spite of the term in the bill of lading giving jurisdiction to the Lebanese Courts, this Court still had jurisdiction against defendants 2 as a Forum Conveniens for the following reasons which are to be found in paragraph 5 of the affidavit of the 8th April, 1985, filed by them:

"(a) that the Lebanese Courts do not function on account of the political situation.

(b) Less difficulties and expenses are created in Cyprus than elsewhere.

(c) Apart from Lebanon, where the filing of an action is, as mentioned, impossible, the parties have no relation to any other forum, and

(d) that Cyprus offers itself for both sides as less expensive than any other choice."

On the basis of the aforesaid I was invited that I should have exercised my discretion and assume jurisdiction, whereas it was contended on behalf of the applicants that I should decline to exercise my discretion in favour of the plaintiffs and that in view of the contents of the bill of lading which were not fully disclosed in the application for leave to serve out of the jurisdiction and for a number of other reasons set out in their affidavit filed in support of the application to set aside the issue and/or service of the writ which should succeed.

As already seen since such applications are made ex parte a full and fair disclosure of all the facts of the case ought to be made. As stated in the Supreme Court Practice 1979 in relation to Order 11 rule 4 at p. 89

> "The affidavit should contain a full statement of the facts on which the application is based, and which justify the issue of the writ, and the statement must be frank *(Reynolds* v. *Coleman* [1887], 36 Ch. D. 462, C.A.; *The Hagen* [1908] P. 189 at p. 201, C.A. The mere failure to make a full and frank disclosure would justify the Court in discharging the order, even though the party might later be in a position to apply again (The *Hagen* ibid.). The provisions of the rule should be strictly complied with *(Collins* v. *N.B. Mercantile Insurance,* [1894] 3 Ch. 228, at pp. 234-235; *Vaudrey* v. *Nathan,* (1928) W.N. 154, C.A.)."

A similar statement is to be found in the Annual Practice of 1960 at p. 152. Moreover in an application to set aside the order or service the issue is whether upon the whole of the evidence the plaintiff shows a good arguable case within one of the sub-rules of Order 11 or in the court's discretion the order ought not to have been or to stand or the writ or notice was wrongly issued or the service is irregular so that on these or other grounds the order of the writ or service ought to be set aside. (See the Annual Practice 1960 p. 154).

On the question of the exercise of the Court's discretion for a stay in relation to the existence of foreign jurisdiction clauses in bills of lading reference may also be made to the judgment of the Full Bench in *Phassouri Plantations* v. *Adriatica* (1985) 1 C.L.R. 290 and of course to the earlier cases of *Cubazucar and Another* v. *Camelia Shipping Company Ltd.*, (1972) 1 C.L.R. 61 and the *Sonco Canning Limited v. "Adriatica"* (1972) 1 C.L.R. 210.

Moreover in Halbury's Laws of England 4th edition Volume 1 paragraph 312 regarding actions in personam it is said:-

> "Subject to the important exception of claims in respect of collision and other similar cases, which is discussed below, the Admiralty jurisdiction of the High Court may in all cases be invoked by an action in personam. The exercise of jurisdiction may, however, be inhibited by the operation of the rules of court relating to service of proceedings outside the jurisdiction.
>
> The exception mentioned applies to claims for damages, loss of life or personal injury arising out of a collision between ships, out of the carrying out or omission to carry out a manoeuvre by one or more of two or more ships, or out of non-compliance with the collision regulations."

In the present case there was no full and frank disclosure of all relevant facts in the affidavit filed in support of the application for leave to issue and serve notice of the writ out of the jurisdiction. That is to my mind sufficient on the authority of the *Hagen* case (supra) to discharge the order, as there ought to have been stated several facts including a clear reference to the foreign jurisdiction clause contained in the relevant Bill of Lading and to the fact that the case had no connection whatsoever with Cyprus.

Now that I have all the relevant facts before me and guided by the principles of Law hereinabove expounded, I have come to the conclusion that the order giving the leave to seal and serve out of the jurisdiction notice

of the writ on defentants 2 should be discharged and that service of the notice of the writ on defendants 2 should be set aside in view of the totality of the circumstances of the case.

In arriving at this conclusion I took into consideration, in addition to the above ground of failure to make a full and frank disclosure of the relevant facts in the affidavit filed in support of the application for leave and to the following grounds:-

First, that the parties had agreed that a particular foreign Court should have exclusive jurisdiction over their disputes and that in the circumstances, foreign law is the one governing their relations. Secondly, Cyprus cannot be considered as being the forum conveniens, as defendants 2 are foreigners, residents abroad. Cyprus has no connection whatsoever with the case and the circumstances do not justify the expense and inconvenience that these defendants will suffer if the case is allowed to proceed here. Within the context of the term inconvenience I include the procedural difficulties that they will face, such as summoning witnesses, who are all from distant countries, and the absence of any machinery to compel their attendance.

The alleged presence of the defendant ship in Cyprus and the fact that an action in rem could be filed against her in anticipation of her arrival here does not make defendants 2 her owners, a necessary or proper party to the proceedings. On this latter point reference may be made to the *Brabo* [1949] A.C. p. 326, where Lord Simonds said at p. 350 as regards the application of the relevant English Rule:-

> "I will conclude by saying that, whether in considering the interpretation of the rule or in exercising the discretion that arises when a case is brought within it, the underlying and guiding principle is that which was long ago stated by Pearson, J., in *Société Générale de Paris* v. *Dreyfus Brothers* (29 Ch. D. 239, 24-23) that it 'ought always to be considered a very

serious question... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country...'. I agree that the appeal should be dismissed."

In conclusion I shall deal with a point raised in the affidavit filed on behalf of the respondents/plaintiffs in support of the opposition, namely that on account of the presence of the ship in Cyprus, the Court had jurisdiction also in personam against defendants 2, the ship-owners independently of their place of residence and work. I do not accept this submission and I base my approach on the fact that an action in rem is an action against the ship itself and its owners may take part, if they think proper in defence of their property, but whether or not they will do so, is a matter for them to decide and if they do not decide to make themselves parties to the suit in order to defend their property no personal liability can be established against them in that action. (See British Shipping Laws Admiralty Practice p. 9 and the reference to *The Burns* [1907] P. 137 from which the aforesaid extract is taken from the judgment of Moulton L.J. by reference to the Longford).

As already seen the jurisdiction of the Court in rem is founded only upon service of the writ of summons on the arrest of the ship or acceptance of service on its behalf on the assumption that the ship was present within the territorial jurisdiction of the Court, that fact alone could not give jurisdiction in personam against the defendants if the difficulties presented by the rules regarding service out of the jurisdiction could not be overcome. The position of the owners of a ship in an action in rem is that which has been just now stated to be by reference to the judgment of Moulton J., in the *Burns* case.

For all the above reasons the application must succeed. The order to seal and serve defendants No. 2 out of the jurisdiction is discharged and consequently service made

thereunder on them is hereby set aside, with costs in favour of the applicants.

The action however, in rem against the res may remain pending inasmuch as the writ of summons is still in force and will expire only on the 20th August, 1985, when the plaintiffs will have to consider whether they will apply for its extension or not.

Application granted with costs in favour of applicants.