Labroy Offshore Ltd *v* Master Marine AS and others
[2011] SGHC 234

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Decision Date	: 27 October 2011
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Steven Lim (Clasis LLC), and Prakash P Mulani and Bhaskaran Sivasamy (M&A Law Corporation) for the plaintiff; Chan Leng Sun and Joanne Chia (Ang & Partners) for the first defendant; Lee Eng Beng SC and Lynette Koh (Rajah &Tann LLP) for the second, third and fourth defendants.
Parties	: Labroy Offshore Ltd — Master Marine AS and others

Banking – Contractual Interpretation

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 79 of 2011 was allowed by the Court of Appeal on 18 April 2012. See [2012] SGCA 27.]

27 October 2011

Andrew Ang J:

Introduction

1 The plaintiff, Labroy Offshore Ltd ("Labroy") entered into a construction contract dated 28 March 2007 ("the Construction Contract") with the first defendant, Master Marine AS ("MM") under which Labroy was to construct a self-elevating offshore unit ("the Rig") for MM. Under the Construction Contract, MM was to pay the contract price in six instalments according to certain milestones. The first five instalments were deemed to be "advances" to Labroy, with the sixth and final instalment due upon delivery. Labroy was obliged to provide Refund Guarantees for repayment of each of the first five instalments, which it did by arranging banker's guarantees from the second, third and fourth defendants in MM's favour ("the Refund Guarantees") to guarantee the refund of MM's advances upon certain contingencies. The second, third and fourth defendants are Oversea-Chinese Banking Corporation Ltd, United Overseas Bank Ltd and DBS Bank Pte Ltd respectively (collectively, "the Banks"). MM later purported to rescind the Construction Contract under various articles thereof and issued demands for payment under the Refund Guarantees to the Banks. Labroy applied for an injunction to restrain the Banks from paying MM and to enjoin MM from receiving payment thereby.

2 After hearing the submissions of Labroy, MM and the Banks, I granted Labroy's application for an injunction against MM. There was no need to make an order against the Banks because they adopted the same position as Labroy. On MM's request, I reserved my decision on the question of costs. I set out below my reasons for allowing Labroy's application against MM.

Background facts

3 As the factual matrix of this case is fairly complex, it will be helpful to explain first the relevant provisions of the Construction Contract and the Refund Guarantees respectively, before explaining the genesis of the dispute.

The Construction Contract and the Refund Guarantees

4 As explained above at [1], under Art 3.8 of the Construction Contract, the contract price was to be paid in six instalments, the first five of which were deemed "advances". In respect of these advances, Labroy was obliged to provide Refund Guarantees for its repayment upon certain contingencies. The Refund Guarantees were initially set to expire one month following the original delivery date, *ie*, 31 September 2010. However, if Labroy anticipated that delivery of the Rig would be delayed, the Refund Guarantees were to be extended at least 14 working days before the Refund Guarantee(s) expired. The extension was to be "for a further thirty (30) days, *always ensuring that the Refund Guarantee(s) is valid until the date falling thirty (30) days beyond the delivery of the rig*" [emphasis added]. Failure to extend the Refund Guarantees at least 14 working days before the expiry of the Refund Guarantees is itself an event of default under the Construction Contract, entitling MM to rescind the Construction Contract and demand a refund of the advances.

The "demands" under the Refund Guarantees

5 The Refund Guarantees (and not the Construction Contract) provide for three types of "demands", *ie*, three sets of circumstances in which MM may demand for a refund of the relevant advances. While each of the advances is secured by three Refund Guarantees by the Banks (each as to one-third of the advance), the Refund Guarantees are in identical terms pertaining to the "Demands" as set out below.

6 The first type of "demand" is the "Initial Demand": under sub-para (b) of the first sub-para of para 3 of the Refund Guarantees – the sub-clauses are unfortunately not numbered – the Banks are obliged to make payment to MM within 14 Singapore banking days following the receipt of a written demand from MM for refund, such demand stating that the Construction Contract has been cancelled or rescinded by MM.

7 However, if within five Singapore banking days from the date of the receipt of an Initial Demand the Banks receive notification from MM that Labroy disputes MM's claim for refund and that the matter has been referred to arbitration, the Banks are entitled to defer payment of the sum claimed under the Initial Demand. The Banks would then only be liable to make payment of the sum eventually adjudged to be due to MM pursuant to an arbitration award or agreed pursuant to a settlement agreement. The sum would be payable immediately upon receipt from MM of a further written demand for such a sum. This is the second type of "demand", *ie*, a "Deferred Demand", referred to in the second sub-para of para 3 of the Refund Guarantees.

8 The third type, the "New Demand", is that which gave rise to the contention between the parties. The fourth sub-para of para 3 of the Refund Guarantees set out the circumstances in which a New Demand may be made, and they are linked to Labroy's obligation to provide replacement guarantees to MM. Under the Refund Guarantees, MM was entitled to request replacement guarantees from Labroy:

(a) in the event of any possible delay in the delivery of the Rig; or

(b) if an Initial Demand has been made and MM's claim for a refund of its advances was disputed and referred to arbitration but the said arbitration could not reasonably be expected to conclude 30 Singapore banking days before the Refund Guarantees expired.

The replacement guarantees were: (a) to be issued by the Banks on similar terms; (b) had to carry an expiry date 30 calendar days from the new anticipated date of delivery of the Rig or the conclusion of

the arbitration, as the case may be; and (c) had to be furnished to MM no later than 14 Singapore banking days before the expiry date of the existing Refund Guarantees. If Labroy did not comply, MM was entitled to make a written demand to have its advances refunded (*ie*, a New Demand). Under this New Demand, the entire sum claimed by MM had to be paid immediately by the Banks.

9 I pause here to clarify that although the language of Art 3.8 of the Construction Contract and the language of the Refund Guarantees differ in that Art 3.8 refers to "extensions to the Refund Guarantee" while the latter refer to "replacement guarantees", all parties used the expressions "extensions to Refund Guarantee" and "replacement guarantees" interchangeably. When asked, all parties accepted that in effect the two were the same, *ie*, extending the validity period of the Refund Guarantees.

The genesis of the dispute

MM's request for replacement guarantees

10 Upon realising that there would be a delay in the delivery of the Rig, MM sent letters to Labroy (dated 12 and 28 January, 14 February, 6 and 17 March and finally 6 April 2011) stating that given the anticipated delay in the delivery of the Rig, the validity period of the Refund Guarantees would have to be extended. While the content of these letters varied, they each ultimately contained some variation of the following:

(a) a statement that, given the anticipated delay in the delivery of the Rig, a later validity/expiry date of the Refund Guarantees was necessary and, accordingly, that the recently procured extensions to the Refund Guarantees were *not* in accordance with the Construction Contract/Refund Guarantees; and

(b) a request for Labroy to issue valid replacement guarantees in accordance with the terms of the Refund Guarantees and the Construction Contract.

Labroy disputed (a) and argued that the validity/expiry dates were extended in accordance with Art 3.8 and that MM had reached the above conclusion through an erroneous interpretation of Art 3.8.

11 All parties agreed that the final day for Labroy to procure extensions of the validity period of the Refund Guarantees from 30 April to 31 May 2011 was 12 April 2011. Labroy applied for the said extensions on 6 April 2011; on 8 April 2011 the Banks duly extended the Refund Guarantees to 31 May 2011. However, MM was only informed of these extensions on 12 April 2011.

MM rescinds the Construction Contract and invokes the Refund Guarantees

12 On 11 April 2011, at 9.48pm, Pal Are Sund ("Pal") from MM wrote to Ms Pearl Ann Jeyaraj of Labroy ("PAJ") enquiring why Labroy had not sent MM "new [replacement guarantees] within the time frame given in the [Construction Contract]". PAJ replied on the same day at 10.17pm informing Pal that she was told "that [Replacement Guarantees] will be issued tomorrow (14 working days prior to 30th April)" (*ie*, 12 April 2011).

13 On 12 April 2011, MM sent Labroy a Notice of Rescission, purporting to rescind the contract on two grounds:

(a) That Labroy had failed to secure replacement guarantees by 7 April 2011 in accordance with the Construction Contract, and by 11 April 2011 in accordance with the original guarantee;

and

(b) That Labroy had failed to deliver the Rig for a period in excess of 180 days after the delivery date and failed to deliver the Rig for a period in excess of 270 days after the delivery date, such number of days being the maximum allowable as the total accumulated delay of non-permissible delay and *force majeure* delay under the Construction Contract.

14 Later that day, after the purported rescission, MM served letters of demand to the Banks, seeking payment under the Refund Guarantees. These letters of demand stated that the Construction Contract had been rescinded pursuant to Labroy's failure to provide extensions to and/or replacement of the Refund Guarantees and to deliver the Rig on the agreed delivery date. Specifically, two types of demands were made by MM:

(a) New Demands on the ground that Labroy had failed to provide replacement guarantees at least 14 Singapore banking days before the expiry of the Refund Guarantees;

(b) Further, or in the alternative, Initial Demands on the basis that the Construction Contract had been validly rescinded.

Later that night, at 9.42pm, Labroy responded to the Notice of Rescission by e-mail asserting that the Refund Guarantees had been validly extended.

15 On 13 April 2011, MM acknowledged receipt of Labroy's 12 April 2011 e-mail and stated that without prejudice to the service of the Notice of Rescission, the guarantee extensions furnished on 12 April 2011 did not comply with the Construction Contract.

Reference of dispute to arbitration

16 Labroy and MM agreed to arbitrate their dispute, *ie*, whether MM was entitled to rescind the Construction Contract either on the ground that Labroy failed to issue replacement guarantees in accordance with the Construction Contract or that it failed to deliver the Rig within the time stipulated in the Construction Contract (see [13] above). Accordingly, MM notified the Banks, following up from the Initial Demands made, that its claim for refund of its advances was disputed and had been referred to arbitration (see [7] above).

Summary of pleadings

Labroy's submissions

17 First, Labroy submitted that having made an Initial Demand it was abusive and unconscionable, taking into account the purpose of the Initial Demand and the New Demand within the scheme of Refund Guarantees, for MM to also make a New Demand. Further, it asserted that MM had received the benefit of its bargain and the purpose of the New Demand was consequently extinguished, the purpose of both the Initial Demand and New Demand being to secure MM's right to a refund of the advances. Labroy emphasised that the Refund Guarantees remained valid and MM's right to a refund of its advances remained secure, provided MM proved its right to rescind the Construction Contract in arbitration. Further, it argued that MM's veiled purpose in making the New Demand was to enable MM to circumvent having to wait for the arbitration award or settlement agreement before the Banks are obliged to make payment.

18 While Labroy accepted that the extension to the Refund Guarantees were procured a day late,

it argued that:

(a) this was due to inadvertence on its part, failing to take into account the Good Friday public holiday;

(b) that MM knew of this mistake; and

(c) that MM had failed to exercise its right to rescind during the requisite five-day time frame.

Accordingly, it argued that MM's making of the New Demands in these circumstances was unconscionable.

19 Second, Labroy submitted that the New Demands were invalid under the terms of the Refund Guarantees. It argued that the relevant clause in the Refund Guarantee (see [8] above) contemplated two separate situations:

(a) Where an Initial Demand has not been made and where there was a possible delay to the delivery of the Rig ("limb (i)"); and

(b) If an Initial Demand has been made and arbitration is not expected to conclude within 30 days before the expiry of the Refund Guarantee ("limb (ii)").

It urged the court to adopt a contextual, purposive construction and, accordingly, reach the following conclusions: first, that MM's right to make a New Demand under limb (i) only applies where an Initial Demand has not been made; and second, that MM is entitled to make a New Demand under limb (ii) only where an Initial Demand has been made. It asserted that this interpretation best accorded with the parties' intentions and accepted purpose of the New Demand (*ie*, to function as security for the Refund Guarantees). Alternatively, it argued that it is an implied term of the Refund Guarantees and/or the Construction Contract that MM cannot simultaneously make a New Demand and an Initial Demand.

MM's submissions

20 It should be noted that counsel for MM clarified during the hearing in chambers (on 6 June 2011) that they were relying only on a New Demand under limb (i), to use Labroy's terminology above at [19]. Accordingly, MM's case was built on the basis that it made valid New Demands under limb (i) of the Refund Guarantees on 12 April 2011.

21 Second, MM denied Labroy's allegation of unconscionability. MM contended that, first, it played no part in Labroy's inadvertent failure to procure the replacement guarantees; and, second it would be unconscionable to "deprive an innocent party of its contractual rights merely because the party in breach failed to exercise its own diligence in ensuring compliance". In support of this, it cited in support *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 at [50]; *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd* [2011] 1 SLR 449 ("*Astrata*"); *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [47]; and, finally, *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at [32].

22 Third, it denied Labroy's allegation of bad faith on its part in rescinding the Construction Contract, arguing that these were matters to be resolved in arbitration and had no relevance to the instant suit.

23 Finally, it relied on *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, to argue that Labroy's late payment ought not be excused and the cause of Labroy's lateness was irrelevant since deliberate non-performance or negligence is not a requirement for contractual default. It cited *The Laconia* [1977] 1 Lloyd's Rep 315 at 325 to urge the court to prioritise "certainty ... in all commercial transactions" and not "[torture] the language of the charter in an effort to extract from it a meaning which it does not bear, but might, if it did, lead to a less harsh result".

The Banks' submissions

24 The Banks supported Labroy's application for an injunction. They accepted that they were bound by the Refund Guarantees to make payment if the requisite conditions were satisfied but submitted that, contrary to MM's argued position, the said conditions had not been met.

25 First, they argued that limbs (i) and (ii) had to apply to distinct, mutually exclusive circumstances: limb (ii) applied where the Construction Contract had been rescinded and an Initial Demand had been served by MM, while limb (i) conversely applied where the Construction Contract remained in force.

26 Second, they argued that a New Demand on the basis of limb (i) could not be made in the instant scenario because if the Construction Contract truly had been validly rescinded as MM alleged (in their letters of demand to the Banks and Notice of Rescission to Labroy, all dated 12 April 2011), then a "possible delay in the delivery of the Rig" could not be of issue. They asserted that there could be a possible delay in the delivery only if the Construction Contract remained in force. Reference was also made to correspondence between the parties (found in PAJ's third affidavit at pp 29, 31 and 35) that indicated that limb (i) was only to apply where the Construction Contract had *not* been rescinded.

27 They also made arguments regarding the non-applicability of limb (ii) to the instant case. However, these were dropped during the chambers hearing following MM's clarification that MM would only be relying on limb (i) (see above at [20]) to demonstrate that they had made valid New Demands.

28 Third, proceeding on the conclusion that the New Demands were invalid, the Banks reasoned that MM should dispense with the call for refund of its advances and instead proceed with arbitration and make a Deferred Demand after the conclusion of arbitration or a settlement agreement. They pointed out that if arbitration was not reasonably expected to conclude in the requisite time period (*ie*, within 30 Singapore banking days of the expiry of the Refund Guarantees), MM would be entitled to request for replacement guarantees from Labroy. If Labroy failed to furnish the replacement guarantees within the requisite time period (*ie*, no later than 14 Singapore banking days before the expiry of the Refund Guarantees), *only then* would MM be able to validly make a New Demand.

The issues before the court

29 It is crucial to set out the parameters of the dispute before me. The dispute between Labroy and MM was a fairly wide-ranging one. The affidavits and pleadings before me included facts and arguments as to how and why there was a delay in the delivery of the Rig and the consequence of events surrounding Labroy's application for replacement guarantees upon MM's request, and whether Labroy had complied with its obligations under Art 3.8 of the Construction Contract to procure the Refund Guarantees and to ensure that the Refund Guarantees included a certain rate of interest up to the expiry of the validity date thereof. However, *in so far as these facts and arguments pertain to the parties' dispute under the Construction Contract, they are irrelevant to the application before*

me. As established above at [16], Labroy and MM have referred their disputes under the Construction Contract – specifically, whether MM was entitled to rescind it on either of the two grounds it relied on – to arbitration. Indeed, there is no dispute that the application proceeded before me on the basis that:

(a) MM was not relying on its letters of demand as Initial Demands (see [14] above). This was clearly correct because in so far as the letters of demand amounted to Initial Demands, the Banks were not obliged to make payment under the Refund Guarantees once they had received notification from MM that its claim for refund of its advances was disputed and referred to arbitration. In such a situation, MM could only make a Deferred Demand upon receiving an arbitration award or settlement agreement in its favour (see [7] above).

(b) the Construction Contract *had* been rescinded on 12 April 2011.

30 The only question before me, therefore, was really a narrow one: on an interpretation of the Refund Guarantees, was MM entitled to make a *New Demand* when the Construction Contract had been rescinded? I came to the conclusion that it was not and therefore allowed Labroy's application for an injunction.

Analysis

Was MM entitled to make a New Demand under the Refund Guarantees when the Construction Contract had been rescinded?

31 As set out at [8] above, the Refund Guarantees provided that MM was entitled to request for a replacement guarantee if:

(a) there was any possible delay in the delivery of the Rig (defined at [19] above as "limb (i)"); or

(b) (an Initial Demand having been made and MM's claim for refund of its advances having been disputed and referred to arbitration) the said arbitration could not reasonably be expected to conclude within 30 Singapore banking days before the expiry date of the Refund Guarantee(s) (defined at [19] above as "limb (ii)).

32 The replacement guarantees were then to be procured by Labroy with an expiry date 30 calendar days from the "new anticipated date of the delivery" of the Rig to MM (in a situation under limb (i)) or conclusion of the arbitration (in a situation under limb (ii)). The replacement guarantees were to be furnished to MM no later than 14 Singapore banking days before the expiry of the Refund Guarantee(s). Failing this, MM would be entitled to make a New Demand. MM's entitlement to make a New Demand can therefore be seen as a culmination of three stages:

(a) A "trigger event" under either limbs (i) or (ii);

(b) MM's request for replacement guarantees with new expiry dates; and

(c) Labroy's failure to provide these replacement guarantees to MM at least 14 Singapore banking days before the original expiry dates of the Refund Guarantees.

33 The issue before me pertained to the first stage, *ie*, how to interpret the relationship between limbs (i) and (ii): specifically, whether limbs (i) and (ii) applied to *mutually exclusive* situations.

34 Labroy and the Banks took the position that limbs (i) and (ii) were mutually exclusive, specifically, that limb (i) *applied only when the Construction Contract was alive* whereas limb (ii) applied only when the Construction Contract had been rescinded. This was crucial because, as established above at [20], MM confirmed that it was only relying on limb (i) for the purposes of this application. If limb (i) applied only where the Construction Contract had *not* been rescinded, MM clearly was not entitled to make a New Demand and Labroy's application had to be granted. MM obviously took the contrary position and argued that a "plain and ordinary meaning of the words" showed that limb (i) was not conditional on the Construction Contract still being in force.

35 In my view, it was clear that limb (i) only applied where the Construction Contract had not been rescinded. The plain language of limb (i) shows that it is premised on a delay in delivery of the Rig, with the replacement guarantees to have an expiry date of 30 calendar days from the "new anticipated date of delivery". I accepted Labroy's and the Banks' submission that it would be nonsensical to refer to a "new anticipated date of delivery" if the Construction Contract had been rescinded with the result that MM would not be taking delivery of the Rig *at all*.

36 Furthermore, this reading accorded with the overall scheme of the Refund Guarantees. MM had undertaken, in the Construction Contract, to make advance payments to Labroy before receiving the benefit for which it had entered into the Construction Contract, *ie*, the Rig built and delivered in accordance with the terms of the Construction Contract. The Refund Guarantees secured Labroy's obligation under the Construction Contract to return the advances should Labroy act in such a way as to entitle MM to rescind the Construction Contract. Cutting through the intricacies of when and how Labroy was obliged to procure replacement guarantees in MM's favour, the ultimate purpose of the Refund Guarantees was patently clear from Art 3.8 of the Construction Contract where it referred to Labroy's obligation to "*always ensur[e] that the Refund Guarantee(s) is valid until the date falling thirty (30) days beyond the delivery of the Rig*" [emphasis added] (see above at [4]). Despite the complexity of their mechanics, the Refund Guarantees were meant to secure MM's right to repayment of the advances under the terms of the Construction Contract.

37 However, the Refund Guarantees were also structured in such a way as to strike a balance between the parties' competing interests where there is a dispute between them as to whether MM was entitled to rescind the Construction Contract. This is why, if MM purports to rescind the Construction Contract and makes an Initial Demand against the Banks on the basis of their being entitled so to rescind, this Initial Demand is held in abeyance once their right to rescind is disputed and referred to arbitration. Until the arbitral tribunal makes an award in MM's favour or the parties reach a settlement under which a refund is called for (see above at [7]), MM's right to a refund of the advances is deferred. However, after such award or settlement, if Labroy fails to make due refund, MM could make a Deferred Demand under the Refund Guarantees calling for immediate repayment.

38 I found that Labroy and the Banks were correct to argue that MM's reading of limb (i) was inconsistent with this overall scheme. If MM were entitled to a New Demand even where the Construction Contract had been rescinded and the validity of the rescission referred to arbitration, it would mean that MM would be able to get around the deferral of its right to a refund pending the resolution of the parties' dispute over the validity of the rescission. In my view, what was crucial here was that there was an arbitration pending with regard to the validity of MM's purported rescission of the Construction Contract. As MM's letters of demand to the Banks (see above at [14]) were Initial Demands, they were in abeyance pending the outcome of the arbitration, following which MM would be entitled to make a Deferred Demand (see above at [7]) *if* the outcome of arbitration proved to be in its favour. It is inconceivable to me that the parties intended limb (i) of the Refund Guarantees to operate in such a way as to allow MM to drive a coach and four through this process and thereby undermine the entire rationale for "deferring" the legal effect of MM's Initial Demand.

39 Labroy argued that this made it "unconscionable and abusive" for MM to have made New Demands in the circumstances and its application for an injunction should be allowed. It relied on *JBE Properties v Gammon Pte Ltd* [2011] 2 SLR 47 and *Astrata* ([21] *supra*). I should clarify that I did not find it necessary to go this far. As explained above, I accepted that MM was not entitled to make the New Demands when its rescission of the Construction Contract was the subject of arbitration proceedings because it would undermine the overall scheme of the Refund Guarantees. However, in holding this, I essentially held that *MM had no legal right under the Refund Guarantees to make the New Demands*.

40 In contrast, the doctrine of unconscionability applies where a party *does* have certain legal rights but the court finds that it would be unconscionable in equity for the party to *assert* these legal rights – the threshold for this is high (see, for example, *Astrata* at [73]–[74]). Since I held that MM had no legal right to make the New Demands under the Refund Guarantees, it was unnecessary for me to consider whether the New Demands were unconscionable.

41 In conclusion, I found that the plain language of limb (i) as well as the overall scheme of the Refund Guarantees supported Labroy's and the Banks' reading that limbs (i) and (ii) applied to mutually exclusive circumstances: limb (ii) applied where the Construction Contract had been rescinded and an Initial Demand had been made, whereas limb (i) applied only where the Construction Contract was still in force and the delivery of the Rig was still envisioned by the parties. MM could not invoke limb (i) if it had purported to rescind the Construction Contract. Given that:

(a) all parties agreed that this application proceeded on the basis that MM had rescinded the Construction Contract; and

(b) MM confirmed that it only relied on limb (i) in this application (see above at [29]),

I granted Labroy's application for an injunction to restrain MM from receiving payment from the Banks on the basis of its New Demands. Crucially, *MM would suffer no prejudice as a result of this injunction*.

42 There is no dispute that Labroy has continued to procure replacement guarantees pending the conclusion of the arbitration between the parties, and has undertaken to continue to procure such replacement guarantees on a rolling basis so as always to ensure that the expiry date of the Refund Guarantees falls at least 30 days beyond the anticipated conclusion of the arbitration. *MM's right to demand repayment of its advances therefore still remains intact*, should the arbitrator find that it had validly rescinded the Construction Contract. Per contra, if MM were allowed to recover the advances pursuant to limb (i) of the New Demands and the arbitrator's award eventually turned out to be in favour of Labroy, the latter would be left in the lurch.

Conclusion

43 For the reasons above, I allowed Labroy's application for an injunction.

44 At the request of parties, I reserved the question of costs to be heard at a later date.