THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: AC81/2009

Name of ship: MT 'Salvaliant'

In the matter between:

THE OWNERS AND PARTIES WHO BEAR RISK IN AND TO THE PONTOON 'MARGARET' AND THE CARGO OF TWO FLOATING DOCKS AND TWELVE BARGES — **Applicant/Plaintiff**

and

THE MT 'SALVALIANT' — **Respondent/Defendant**

Admiralty action in rem

Case No: AC144/2010

Name of ship: MT 'Salvaliant'

In the matter between:

L J BOER HANDEL B.V. — **1st Applicant/Plaintiff**

L J BOER VASTGOED B.V. — **2nd Applicant/Plaintiff**

and

SEMCO SALVAGE (VI) PTE LTD — **1st Respondent/Defendant**

POSH SEMCO PTE LTD

Admiralty action in personam

Coram: **BOZALEK J**

Heard: **15 -17 September 2015 & 5 – 6 October 2015**

Delivered: **16 NOVEMBER 2015**

JUDGMENT – SEPARATION OF ISSUES APPLICATION

BOZALEK J:

[1] The plaintiffs, two Dutch companies, part of the LJ Boer Group, claim damages from the defendants, two Singapore based companies, for damages arising out of the stranding of the pontoon *'Margaret'* and its cargo of barges and two halves of a floating dock (together referred to as *'the tow'*) at Jacobs Bay on the coast of South Africa on 24 June 2009. The tow was stranded after the tow-wire from the tug Salvaliant parted whilst it was being towed from Shanghai to Rotterdam. The plaintiffs' case is that the parting of the tow-wire and the stranding was attributable to the negligence of the tug and/or those responsible for it. An action in rem was instituted against the Salvaliant in this Court in September 2009 and in 2010 the plaintiffs also instituted an action in personam against the owner and demise charterer of the Salvaliant, the defendants, the cause of action in the two actions being essentially the same. These actions were consolidated in 2013.

PARTICULARS OF CLAIM

[2] The particulars of claim allege that the second defendant *('Vastgoed')* was the owner of the twelve barges and *'Handel'*, the first plaintiff, was the owner of the pontoon and the two halves of the floating dock. They allege, in great detail, that the defendants owed the plaintiffs a legal duty to take all reasonable steps to prevent harm to the tow

and loss to the plaintiffs notwithstanding that the former had no contractual relationship with them and had taken no steps to contract directly with them. They allege further that the damage suffered by the tow as a result of the stranding was physical damage which was readily foreseeable by the defendants and that the loss of profits and/or income claimed by the plaintiffs are the direct and natural consequences of the physical damage to the tow, were readily foreseeable by the defendants and do not result in indeterminate liability for them.

[3] In para [8] they allege that the defendant tug and the defendants were negligent in numerous respects in the manner in which they executed the tow inter alia in that they failed to obtain any or adequate advice with regard to the routing of the tug and the tow around the South African coast at the material time. In para [9] the plaintiffs allege that were it not for the negligent conduct ascribed earlier the tow would not have stranded.

[4] In the premises the plaintiffs claim as a consequence of the stranding of the tow and the breaches of duty and fault alleged damages in the sum of €34,172,792.61, US$2,102,493.48 and R10,919,417.96 being comprised of the value of the ttow, salvage costs, wreck reduction costs, miscellaneous damages suffered by Boer, contractual penalties and a loss of profits/loss of income claim in the amount of €13,132,080.00 alternatively €9,367,952.00. This last claim has been the subject of much dispute and controversy between the parties and has been the subject of repeated amendments by the plaintiffs with its validity being consistently challenged and interrogated by the defendants.

THE PRESENT APPLICATION

[5] In February 2015 the plaintiffs brought their initial application to separate certain issues which was set down together with an application for postponement brought by the defendants and a further application by the plaintiffs to amend their particulars of claim.

[6] On 17 February 2015 the application for postponement of the trial was granted and during March 2015 some argument was heard in the plaintiffs' application to amend. In the event the parties resolved that application by agreement and the plaintiffs effected certain amendments to their particulars of claim in both the action in rem and the action in personam.

[7] The parties then sought to reach an agreement on the terms upon which the matter would proceed to trial on the basis of a separation, broadly put, of the merits and quantum.

[8] In pre-trial meetings the plaintiffs put up a draft order setting out their proposed terms for the separation which draft forms the subject matter of the present application for separation.

[9] The parties could not agree on those terms, however, the defendants' position being that they would agree to a separation of issues but on different terms. The plaintiffs accordingly supplemented their original application for separation with a supplementary founding affidavit, further affidavits were exchanged and this application was argued.

[10] In essence then the position is that the parties are in apparent agreement that a separation of issues should be ordered with the *'merits'* being heard first, to be followed, if needs be, by the later determination of *'quantum'*. However, the parties are at odds as to what issues make up the *'merits'* and what make up the *'quantum'* issues.

THE RELIEF SOUGHT BY THE PLAINTIFFS AND THE PLAINTIFFS' CASE

[11] In its application for a separation in terms of Rule 33(4) the plaintiffs describes the *'quantum'* issues as the questions arising from para [16] and [19] of the plaintiffs' particulars of claim in the *in personam* action and paras [32] and [34] of the defendants' plea therein as well as the equivalent question in the in rem action.

[12] They ask that these issues be stayed until all the other questions in the consolidation action have been finally disposed of.

[13] In para [16] of their particulars of claim the plaintiffs set out the damages which they claim with an introductory averment that these were sustained *'as a consequence of the stranding of the tow and the breaches of duty as aforesaid'*. Para [19] merely alleges that the first and/or second defendants are liable to pay the plaintiffs these sums.

[14] In paras [32] of their plea the defendants plead that in the event of one or both being held liable to pay any damages any such sum must be reduced by:

1. the sum of €15,929,000.00 being the total amount paid to the plaintiffs in respect of a hull contract of insurance and a cargo contract of insurance;

2. by the sum of €2,734,000.00 being the amount paid to the first plaintiff in respect of certain buyers interest contract of insurance.

[15] In para [34] of their plea the defendants plead that in the event that one or both of them are held liable to pay any damages to the plaintiffs, the plaintiffs failed to take reasonable steps to mitigate their alleged claims for loss of profits and for miscellaneous damages.

[16] According to the plaintiffs a separation of issues on these terms would leave the following broad issues to be determined first as part of the *'merits':*

1. the ownership of the tow;

2. whether the defendants or their servants were negligent and whether this caused the stranding;

3. whether the plaintiffs' claims are precluded because the terms of the towing contract concluded between one of the defendants and Ningbo, a Chinese entity and seller of the tow, has application to the plaintiffs, either on the basis of their being a party thereto or on the basis of bailment;

4. whether the defendants are entitled to limit their liability in terms of sec 261 of the Merchant Shipping Act to a specified number of Special Drawing Rights;

5. whether certain insurance payments made by a Chinese insurer, PICC, to the plaintiffs in respect of a portion of their loss had the effect of depriving the plaintiffs of their *'locus standi'* to sue the defendants;

6. whether the plaintiffs ought to make a deduction equivalent to the amounts received from the insurers.

[17] In its barest outline the plaintiffs' case is that the separation they advocate is sensible since all the *'merits'* issues save for one are decisive of the case as a whole. The one exception is the defendants' defences arising out of the insurance payments

which were received by the plaintiffs as a result of the wreck of the Tow. However, the defendants had insisted that this issue be dealt with as part of the merits and the plaintiffs therefore accommodated them in this regard as it was a discreet, finite issue.

THE DEFENDANTS' PROPOSED ORDER AND ITS CASE

[18] The order for a separation of issues proposed by the defendants, which was contained in the defendants' counter-application for a separation of issues, proposes that the determination of the following issues be stayed until all other questions have been finally disposed of:

1. the quantum of the damages described in para [16] and [19] of the plaintiffs' particulars of claim in the personam action;
2. the issues embodied in para [34] of the defendants' plea in that action;
3. the equivalent issues in the rem action.

These numbered paras have been described above.

[19] The order proposes that the determination of the above issues be stayed '*until all other questions …. have finally been disposed of*'. So far, so good. However, a further paragraph in the defendants' proposed order reads as follows: *'for the avoidance of doubt, the identity of the plaintiff or plaintiffs who, it is alleged, suffered the damages described in the categories listed in para [16.1] – [16.6], and the entitlement of such plaintiff or plaintiffs to claim payment of the damages described in the aforementioned categories from the defendants shall be decided ….'* as parts of the merits issues.

[20] The defendants' case is that the separation sought by the plaintiffs conflates issues of causation and quantification, leaving those for determination in a later

'quantum hearing' and the deferment of the determination of some of these issues will at the least cause substantial inconvenience to the Court, if not be unworkable.

[21] Before dealing with the plaintiffs' cases in greater detail a recapitulation of some of the guiding principles in the application of Rule 33(4) is called for.

[22] Rule 33(4) provides as follows:

> *'If, in any pending action, it appears to the Court mero motu that there is a question of law or fact which may conveniently be decided before any evidence is led or separately from any other question, the Court may make an order directing the disposal of such question in such manner it may deem fit and may order that all further proceedings be stayed until such question has being disposed of, and the Court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'*

[23] As was noted in *Braaf v Fedgen Insurance Ltd*[1] the Rule enjoins the Court to *'accede to the application and make the necessary order 'unless it appears that the questions cannot conveniently be decided separately'. Thus it is incumbent on the plaintiff (the party opposing the separation on those terms) to satisfy the Court that the application should not be granted'.*

[24] The Court went on to point out that *'(c)onvenient'* connotes not only *'facility or ease or expedience',* but also *'appropriateness; the procedure would be convenient, if in all the circumstances it appeared to be fitting and fair to the parties concerned'*.

[25] In *Denel (Edms) Bpk v Vorster*[2] the Court highlighted the need to *'clearly circumscribe'* with *'clarity and precision'* the issues that are sought to be separated on

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[1] 1995 (3) SA 938 (C) at 939 G – H
[2] 2004 (4) SA 491 (SCA) para [3]

the pleadings and warned against the separation based on unspecific generic terms such as *'merits'* and *'quantum'*.

[26] In *Absa Bank v Bernert*[3] a similar warning was issued by the Supreme Court of Appeal and the following passage is particularly relevant to the present case:

> *'[20] Before turning to the detail of the evidence there is an observation I that I need to make. Before the trial commenced the parties agreed to separate some of the issues in the case, as envisaged by rule 33(4). They recorded their agreement in a pre-trial minute, in which they said that they agreed to separate the 'merits' from the 'quantum', and went on to define what they meant by the 'merits', with reference to certain paragraphs of the particulars of claim. Amongst other things they said that 'the merits . . . consist of . . . paragraphs 11 to 18 (excluding 18.1 to 18.3)'. In para 18 of the particulars of claim it was alleged that '(a)s a result of the [allegedly unlawful acts], [Rotrax] suffered damages computed as follows' and the subparagraphs set out the calculation of the alleged damages. In the course of the evidence of the first witness the learned judge interposed to note that the parties had agreed to separate the 'merits' from the 'quantum', and to obtain confirmation that he was to try only the 'merits'.*
>
> *[21] It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. Where issues are to be separated rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision. In some cases it might be appropriate to order the separation of the 'merits' and the 'quantum' of the claim. <u>But to use that terminology when the causative link between the wrongful act and the damage is a contested element of the claim, as it was in this case, is bound to create uncertainty</u>.* ***[my underlining]***

[3] 2011 (3) SA 74 (SCA)

[22] In this case the court made no separation order as it was required to do by rule 33(4), and it gave no indication at the outset of the trial of what it understood the 'merits' of the claim to entail. In its judgment it found that the conduct of Absa Bank was unlawful and that it was 'both factually and legally the cause of the transaction failing', and it said in one sentence, without more, that 'causality has been established'. It then made an order declaring 'that [Absa Bank] is liable for the proven or agreed damages suffered by [Mr Bernert]'.

[23] At the outset of the hearing before us the legal representatives of the parties said that they understood the court below to have disposed of the 'merits' as they had been defined in their agreement with reference to the pleadings. Thus they understood the order to mean that Absa Bank was declared to be liable to Mr Bernert for the loss of the anticipated sales of the cars. All that remained for determination, they said, was the monetary value of those sales.

[24] I have difficulty accepting that that was indeed what the court below intended, because an order to that effect would be breathtaking. The evidence in this case comes nowhere near establishing that if Absa Bank had not acted as it did, Rotrax would probably have constructed its plant and manufactured and sold the cars. Indeed, the establishment of that causative link was not even touched upon in the evidence.

[25] … If the causative link was indeed one of the issues that the court was called upon to decide then the claim ought to have failed on that ground alone. Indeed, that causative link is inherently so speculative that I think the claim was always doomed from the start.'

THE PLAINTIFFS' CASE IN MORE DETAIL

[27] The plaintiffs described the quantum issues as being the assessment of the damages which they suffered and whether they ought to make a deduction equivalent to the amounts received from the insurers. They contend that the deferment of these

issues would be sensible and convenient since the issues encapsulated in the merits are decisive of the case as a whole. They criticised the defendants' proposed formulation and in particular the defendants' contention that *'the determination of the issues of whether the loss of the tow in fact caused the plaintiff to suffer the damages of the nature claim, including … loss of profits, and if so which plaintiff suffered the loss and/or has the requisite necessary locus standi'* as being *'an issue of causation',* as being fundamentally flawed. They argue instead that the issue of *'causation'* is dealt with simply in para [11] of the particulars of claim in the following terms: *'as a consequence of the stranding the tow suffered irreparable damage and has been wrecked'*. They argue further that in order to succeed on the merits the plaintiffs must prove the above allegation in which case it is axiomatic that a diminution of their patrimony would have been caused.

[28] This last assertion may indeed be so but this does not apply to the plaintiffs' case as a whole since a large and important component of their claim is that for loss of profits. That particular claim, as it stands on the pleadings, is placed squarely in issue both in relation to the identity of which plaintiff suffered any loss and whether any loss was suffered at all. In the result it is, in my view, an over-simplification for the plaintiffs to contend that the issue of causation is in effect comprehensively dealt with in para [11] of the particulars of claim. Accordingly, if the separation is ordered on the terms sought by the plaintiffs and the plaintiffs succeed wholly or partially on the merits, in the deferred hearing on quantum there will not simply be a hearing on the computation of any damages suffered by them. That hearing, at the least insofar as the claim for loss of profits is concerned, would deal with issues of causation in the sense that the Court will

have to determine whether, accepting that the defendants negligently caused the stranding of the tow, was this indeed the effective cause of the damages suffered by the plaintiffs.

[29] In my view, at least insofar as the claim for loss of profits is concerned, the circumstances in the present matter are similar to those which applied in *Bernert*. In that matter the merits were defined with some precision with reference to particular paragraphs of the particulars of claims and, in the understanding of the parties and of the trial Court, this left only a relatively straightforward exercise of computing the value of various motor vehicles not manufactured in order to assess damages. However, as Nugent JA made clear, even when the plaintiff succeeded in its case on those specific issues delineated as the *'merits',* a great deal more than the computation of the monetary value of the loss of the anticipated sales of motor vehicles remained for determination. As Nugent JA pointed out, *'the establishment of a causative link'* had not been touched upon in the evidence on the merits.

[30] Thus, as I see it, were a separation to be ordered on the terms proposed by the plaintiffs and were they to succeed on the issues defined as the *'merits'*, in the *'quantum'* hearing they will, at least as far as the loss of profits claim is concerned, be seized with the onus of proving the element of causation and, quite conceivably, the issue of the identity of the party which suffered that loss, which issues may well be interlinked.

[31] The conclusion which I have reached does not necessarily preclude a separation of the issues on the terms proposed by the plaintiffs. What must still be considered is

whether a separation on these terms would be convenient in the sense that this phrase has come to be understood through the case law. However, before dealing with this question I consider the convenience of a separation on the terms proposed by the defendant.

[32] As noted by Mr MacWilliam on behalf of the plaintiffs, the incorporation of para [3] of the defendants' proposed order, with its reference to *'the identity of the plaintiff or plaintiffs'* who have suffered the damages listed under the various heads and their *'entitlement'* to claim payment of such damages being stipulated as part of the *'merits'* issues, for the *'avoidance of doubt',* points in the first place to the imprecision of the preceding description of the quantum of the damages and the merits issues. Secondly, the formulation itself introduces a concept, the *'entitlement'* of such plaintiff or plaintiffs, which is vague and not defined in relation to any particular averments in the pleadings. As such it introduces an element of imprecision into the formulation of the separation of issues which could, in time, prove confusing and counterproductive to a smooth and convenient hearing of the case.

[33] A further important factor in considering whether a formulation along these lines is feasible and convenient was Mr Wragge's concession, on behalf of the defendants, that if that formulation is adopted the plaintiffs, in order to succeed under each head of a damage, will have to prove in the merits hearing that they have suffered at least some damages under each such head. This in effect means that the plaintiffs will have to lead all the evidence necessary to prove their claims, both on the merits and on the quantum under each of the heads of damages save that they will not have to prove exactly how

much damages they suffered. When it was put to Mr Wragge that in effect this would leave for the second (quantum) hearing no more than, simply put, an arithmetical computation of the damages suffered under each head he was constrained to concede that this was indeed the case.

[34] These factors alone, in my view, make it quite clear that a separation of issues along these lines would definitely not be convenient. Such a separation would mean that as part of the merits hearing the plaintiffs would have to call all the evidence necessary to prove the loss of their damages save that it would not be incumbent upon them to prove the exact amount of such damages suffered. Although the Court can only see through a glass darkly at this stage as regards what evidence and witnesses the plaintiffs may see fit to lead to prove their damages, it takes little imagination to envisage that the plaintiffs will, in that situation, have to call a number of Dutch witnesses such as accountants, engineers, marine specialists and public officials concerned with the granting of permission for the floating dock to operate in Sliedricht to prove the viability of some of the heads of damages, most notably the loss of profits. If their evidence stops short of the exact computation of such damages and these are not resolved by agreement then clearly many of these witnesses will have to return to testify in the quantum hearing. Similar considerations may apply to witnesses the defendants may call.

[35] Such an exercise is likely to be unproductive, time consuming, inconvenient and inefficient. If such witnesses are to be called then they may as well round off their evidence by testifying as to the exact amount of the damages suffered. In effect half of

their evidence will have to be heard and they will have to return at a later stage to complete their evidence. The situation would be similar in all respects to that of a claimant who is paralysed in a motor vehicle accident and sues for loss of income/loss of earning capacity. Assuming that the claimant was an accountant but must now practise wheelchair-bound he/she would be called upon, in a situation in which the merits are defined in the manner presently proposed by Mr Wragge on behalf of the defendants, to prove in the merits hearing that whatever s/he might earn as an accountant wheelchair-bound would be less than what s/he earned had s/he not been so injured. I would venture to suggest that in such a situation it would seldom, if ever, be convenient to hear the claimant's claim for damages in two tranches. The experts called to establish the existence of damages would sensibly give their full evidence at one hearing and not in instalments.

[36] Accordingly, for these broad reasons I am satisfied that a separation of the issues as proposed by the defendants will not be convenient and should not be acceded to.

THE SEPARATION PROPOSED BY THE PLAINTIFFS

[37] I return now to the separation on the terms proposed by the plaintiffs. As I have indicated a separation of issues proposed by the plaintiffs at least has the merits of greater clarity than that proposed by the defendants. However, the question is whether a separation on these terms in the circumstances of this case would be convenient.

[38] As has been demonstrated, a separation as proposed by the plaintiffs would probably not dispose of all issues of causation. A separation on those terms will leave at

least the following issues to held over for determination in the hearing concerned with the assessment of damages:

1. which of the two plaintiffs, if any, suffered the various heads of damages;

2. whether Handel is entitled to advance the loss of profit claim relating to the floating dock and pontoon as owner;

3. whether all the various heads of damages listed in paras [16] of the amended particulars of claim were caused by the defendants' negligence or breach of duty.

[39] In arguing against a separation on the plaintiffs' terms the defendants point out that the identity of which plaintiff claims the damages, under at least several of the heads of damages, is not clear, the formulation *'Handel and/or Vastgoed'* and other formulations *'in the alternative'* being not uncommon. Furthermore, in their trial particulars the plaintiffs allege that Handel was going to sell the pontoon to Vastgoed which was going to charter it out to third parties. Nonetheless Handel claims damages for loss of profits in relation to the chartering out of the pontoon jointly with or in the alternative to Vastgoed. Furthermore, it is pleaded that Handel was going to sell the floating dock to Vastgoed which was going to rent it to another entity, SWB, for operation. Notwithstanding this Handel claims damages in relation to the operation of the floating dock in a sum which indicates that it is a claim arising out of the rental of the floating dock by Vastgoed to SWB. For their part the plaintiffs contend that this formula is entirely defensible in that Handel and Vastgoed are part of a group of companies and that in terms of current English law claims such as they advance lie at the instance of

the owner or another party such as a beneficial owner provided those parties are cited together in the action.

[40] It would be premature to express a view on this question of law, let alone the prior question of which system of law applies in a situation such as the present where there are possible contending legal systems which are applicable. It is sufficient that, once the evidence as a whole has been heard, the identity of a particular plaintiff/claimant, the role which it played in the chain of events leading up to the stranding and its envisaged role had the stranding not taken place, may well be relevant and important to the consideration of whether any particular head of damage has been suffered and, if so, by which party. It is also instructive that both Handel and Vastgoed claim the salvage costs, wreck reduction costs, miscellaneous damages and contractual penalties. To the extent that the actual claimant is not the owner of the property in respect of which the aforesaid claims are made, those can also be seen as claims for pure economic loss.

[41] In these circumstances it may well be that the Court cannot make a determination regarding the wrongfulness of the defendants' conduct vis-a-vis the plaintiff without determining which of the plaintiffs has suffered damages in the form of a loss of profits or in the form of the other damages that may fall to be categorised as pure economic loss.

[42] As far as the claim for loss of profits is concerned the fact that a defendant faces a consequential claim for loss of profits from the owner of property is a material factor which the Court might take into account in deciding whether the defendant owes a legal

duty to the prospective owner of that property which also advances a consequential loss of profit claims in relation thereto. The question of which plaintiff suffered the loss may well become vital and it would be inconvenient should this issue be dealt with by a witness, such as Mr Boer, in a second hearing when this could be just as more conveniently addressed when he first gives evidence in the *'merits'* hearing.

[43] In short, given the plethora of factual and legal disputes in this matter, many of them relating to the identity of the plaintiffs vis-a-vis the various claims brought, I am not persuaded that a separation of the issues along the lines proposed by the plaintiffs will conduce to the convenience of the Court and/or the parties.

[44] It is entirely conceivable to me that a separate hearing along the lines proposed by the plaintiffs will result in an order where the issues remaining for assessment in the *'quantum stage'* are less than clear and may very well require the re-calling of witnesses whose evidence was taken in the first hearing. Worse still, certain issues may have to be re-visited, thus placing the Court in a position similar to that which the Court found itself in *Bernert*, having seemingly determined certain issues in the first hearing, but where, in truth, these have not been dealt with. A further concern I have is that, even if the issues described as part of the merits are determined, a clear and workable order may not be capable of being formulated.

[45] Whatever separation formulation is adopted, it appears to me that there are a considerable number of defences and legal points in issue which will have to be determined before liability in any particular sum can be established. I can readily envisage a situation where one or more of the disputes between the parties could be

disposed of initially such as, for example, the simple question whether the stranding of the tow off Jacobsbaai was a result of the negligence of the defendants or, by way of a further example, whether the tow contract excludes liability on the part of the defendants. Neither party, however, suggested the isolation of one or more of these questions or other isolated instances.

[46] Having regard to the nature of the issues and the defences raised by the defendants I consider the most convenient and cost effective way of dealing with this particular litigation may well be for the parties to join battle on all issues in one hearing. I am not persuaded that a separation of the issues along the lines proposed by the plaintiff will necessarily be more convenient. In this regard I take into account that a separation of the issues on those terms, even if feasible and convenient, will likely lead to a prolonged hearing. The litigation in this matter already commenced some six years ago and the breaking up of the trial into two parts will inevitably prolong it with the result that it could be a decade after the stranding of the tow that a decision is reached in the court of first instance.

[47] The result is that neither party has persuaded the Court that it would be convenient to separate the issues on the terms that they propose. Although there are issues which could be more readily and uncontroversially isolated for prior determination, these have not been proposed by the parties and I am not in a position to reach a clear conclusion that if one or more of such issues were initially disposed of this would conduce to a more convenient disposition of the matter as a whole. In the result it seems to me that both the application and the counter-application to separate fall to be

dismissed and the parties must ready themselves for a hearing in which all issues are tried.

COSTS

[48] Both parties, although adopting the stance that a separation of issues would be convenient, have failed to make out a case that a separation on the terms they propose should be ordered. In that sense neither party has succeeded and both have failed. In these circumstances I do not consider that it would be appropriate to award costs to either party. Nonetheless, the applications to separate have generated a significant amount of paper and were argued over the course of several days. I consider that the trial court will probably be in a better position to determine whether, in hindsight, the separation on one or other basis would have been appropriate. It may well emerge later that either or both separation applications were stratagems to have the trial determined in the manner best suited to the strengths or weaknesses of their respective cases. This is a further reason why no costs order should be granted in this application since, as the trial unfolds, it may well become clear whether the matter could have been conveniently separated, on what terms and whether separation was resisted on cogent grounds or simply for strategic reasons. In the result I consider that the most appropriate costs order would be that the costs of the separation application stand over for later determination.

[49] The Court's order is that both the plaintiffs' and defendants' application for a separation of issues are refused and the costs of the application/s will stand over for later determination by the trial court.

BOZALEK J

APPEARANCES

For the Applicants/Plaintiffs:	Mr RWF MacWilliam SC
	Mr D Cooke
	Instructed by:
	Assheton-Smith Inc
For the Respondents/Defendants:	Mr M Wragge SC
	Mr JD Mackenzie
	Instructed by:
	Norton Rose Fulbright SA