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 – APPLICATION TO COMPEL

BOZALEK J:

[1] This is an admiralty action in which the plaintiffs' complaint against the defendant is in delict, alleging that the latter negligently allowed their pontoon, floating dock and barges to strand at Jacobsbaai on the South African West coast. Its craft were wrecked and plaintiff now claims significant damages from the defendants.

[2] The defendants now seek an order directing that the plaintiffs furnish certain particulars sought in a further request for trial particulars dated 30 April 2015.

[3] The plaintiffs replied to the request on 26 May 2015 but the defendants were dissatisfied with the plaintiffs' refusal to provide any further particularity in certain respects.

[4] The litigation in this matter commenced as long ago as 2009 and the plaintiffs' particulars of claim were initially only 16 paragraphs long. In March 2014 the defendants filed a request for particulars for trial totalling 42 pages and comprising 201 main paragraphs. The plaintiffs' reply to the defendants' original request ran to 57 pages. A further reply was filed of 124 pages (including annexures). The latest request for trial particulars runs to 59 pages comprising 224 main paragraphs. The plaintiffs furnished a reply comprising of 51 pages, excluding annexures.

THE GENERAL PRINCIPLES APPLICABLE

[5] Rule 13 of the Admiralty Rules provides as follows:

> *'13 Request for Further Particulars*
>
> *1. At any time after the close of pleadings a party may deliver a request for further particulars with regard to the pleading of any other party to the action for the purpose of enabling the party delivering the request to prepare for trial.*
>
> *2. (a) Particulars may be requested of a denial or with regard to any matter deemed to have been put in issue.*
>
> *(b) It shall not be an objection to any such request that the purpose of the request is to obtain an admission of a matter placed in issue.*
>
> *3. Any answer to a request for further particulars shall bind the party giving the answer in relation to all parties to the action and not only in relation to party requesting the particulars.'*

[6] It is well established that the purpose of permitting a party to call for further particulars for trial is:

1. to prevent surprise;
2. that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat such allegations; and
3. having regard to the aforegoing, nevertheless not to tie the other party down and limit his or her case unfairly at the trial.[1]

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[1] See in this regard *Thompson v Barclays Bank DCO* 1965 (3) SA 365 (W) at 369 D – E. Note that the phrase *'to combat counter allegations'* in paragraph D – E of *Thompson* is clearly incorrect and confusing. It emanates from the judgment in *Samuels and Another v William Dunn and Co SA (Pty) Ltd* 1949 (1) SA 1149 (T) at page 1159 where Ramsbottom J expressed the purpose of further particulars as being *'to be told with greater precision what the plaintiff is going to prove at the trial so that he may prepare to combat the plaintiff's allegations'*.

[7] More recently in *Ruslyn Mining and Plant Hire Ltd v Alexcor Ltd* [2012] 1 All SA 317 (SCA) at para [18] Heher JA gave the following exposition regarding further particulars for trial:

> *'To deal first with the principle, the case as cited by the learned Judge all deal with applications to amend pleadings. Further particulars for trial are not pleadings. The opportunity to request them arises after the close of pleadings: Uniform Rule 21 (2). They are limited to obtaining information that is strictly necessary to prepare for trial. They do not set up a cause of action or defence by which a party is, in the absence of amendment or tacit concurrence, bound and by which the limits of his evidence are circumscribed. Nor can they change an existing cause of action or create a new one (as the trial Judge appears to have believed). The purpose of particulars for trial is to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponements to seek evidence to meet a case. See for example, Thompson v Barclays Bank DCO 1965 (1) SA 365 (W) at 369 D – E … Such particulars are only required if and when the other party asks for them and what will be furnished is to a large extent dependent on the skill and foresight adopted in the formulation of the request. Because they are not pleadings they do not limit the scope of the case being made by the party that supplies them. A party has a right to rely on all and any evidence that is admissible and relevant to his pleaded cause and defence and, save within the parameters set by the purpose of such particulars insofar as ensuring a fair trial is concerned, no stultification of that right should be permitted. Thus, unless there is clear evidence of bad faith in furnishing of the original further particulars or in the withholding of the intention to change the thrust of the evidence or irremediable prejudice to the other party caused by reliance on incorrect or insufficient particulars furnished by his opponent relevant evidence which goes beyond the terms of particulars for trial should be admitted subject to a postponement, if necessary and an appropriate award of costs to clear the element of surprise'.*

[8] In the aforementioned case of *Samuels*, Ramsbottom J, dealing with the question of what constitutes particulars stated:

> *'An examination of the cases in our courts to which we were referred shows that it is in this sense that the word 'particulars' is used. The particulars required 'to fill in the picture of the plaintiff's claim' may be required in order that the defendant may plead to the claim – in which case they will be ordered before plea. Or they may not be required to enable the defendant to plead to the declaration but they may be required to prevent him from being taken by surprise at the trial and to enable him to prepare his case; in that event they may be ordered after plea and before trial. But in either case, the facts which the plaintiff is required to state are facts which 'fill in the picture of the plaintiff's cause of action'; they are not facts which form no part of the plaintiff's cause of action but which the defendant wishes to allege and upon which he wishes to file a plea and confession and avoidance.*
>
> *… The case is no authority for the proposition that a plaintiff can be ordered to supply information which forms no part of his cause of action to enable his opponent to formulate a defence … or the defendant may require the particulars in order to avoid being taken by surprise at the trial and to enable him to prepare his defence …; in the latter case he requires to be told with greater precision what the plaintiff is going to prove at the trial so that he may prepare to combat the plaintiff's allegations.'*

[9] In *Purdon v Miller* 1961 (2) SA 211 (AD) the Court held that whilst it was fundamental that a party should be adequately apprised of the case he has to meet, *'the ingenious inquisitor should not be permitted, under the guise of a request for further particulars of a pleading, in effect to submit a series of interrogatories to the opposite party. The increasing tendency on the part of practitioners to do, or attempt to do, just that is to be deprecated. Properly used in appropriate cases, the further particulars*

procedure is a useful procedure. Its true function, however, is neither to afford a refuge to the slovenly pleader nor to be the vehicle of what in reality amounts to a fishing expedition'.

[10] I can see no reason why these restrictions should not apply to Admiralty matters and this conclusion is not weakened by the absence of the words *'strictly necessary'* in Admiralty Rule 13. The particularity sought must at the very least be reasonably necessary. I accept furthermore, that the particulars which are sought must relate to *'facts'* as opposed to *'evidence'* as appears from the judgment of Munnik AJ in *Hardy v Hardy* 1961 (1) SA 643 (WLD). In that matter the learned judge held that where a party has pleaded a bare denial of the allegations made by his opponent the court will not order such party to give particulars of any matters placed in issue by such a denial. It must be noted, however, that this ruling is in effect countermanded by the provisions of Admiralty Rule 13(2)(b) which states that it *'shall not be an objection to any such request that the purpose of the request is to obtain an admission of a matter placed in issue'*. Nonetheless, the following general remarks made by Munnik AJ (as he then was) are of assistance in determining the reach of the rule in the present circumstances:

> *'Mr. Schwarz contended that, if the particulars sought were not furnished, he may be taken by surprise by the nature of the plaintiff's evidence. I fail to see how he can be taken by surprise by 'the nature of her evidence', because, on the pleading, he must reasonably anticipate 'the nature of her evidence', viz. that her financial circumstances have not altered. If his fear is based on the fact that the details of the evidence which she produced in this regard may come as a surprise to him, this, in itself, does not entitle him to such particulars, as he will then be merely experiencing one of the hazards of his profession, as there is no rule which obliges a party to disclose the details of his, or her, evidence. On the contrary, there is ample authority indicating that a party is not entitled to the details of his*

opponent's evidence. Mr. Schwarz also contended that in the absence of particulars, he will not know what evidence to lead. The answer to this is that the defendant has made the allegations in the pleading and must, therefore, lead such evidence as he has to his disposal (sic). A simple analogy will show the fallacies inherent in the contentions advanced on behalf of the defendant. In running down cases one frequently finds an allegation that the defendant was travelling at an excessive speed, and as frequently one finds that this allegation is denied. It is true that by such denial the question of the defendant's speed is put 'in issue', but it would be a startling proposition indeed that defendant, by pleading such denial, is obliged to give particulars of the speed at which he was in fact travelling, although in fact the question of speed is in issue. The plaintiff in such a case knows that he has to lead evidence of the excessive speed which he has alleged, and he knows that there will be evidence by the defendant to the contrary. Clearly, therefore, he is both able to prepare his own case, and cannot be said to be taken by surprise if the defendant does lead evidence negativing the allegation of excessive speed, even though plaintiff does not, in advance, have the details of such evidence at his disposal'.

[11] Against this background of the general principles applicable I turn to the specific request.

PARA [66] AND [142] OF THE REQUEST (PARA [64] AND [134] OF THE TRIAL PARTICULARS)

[12] LJ Boer Handel BV advanced a claim for loss of profits in the amount of €13,132,80.00, alternatively €9,367,952. Having regard to annexure POC1 to the particulars of claim the larger sum is comprised of a claim for €8,491,080 alternatively €4,726,952.00 in respect of the loss of use of the floating dock plus a claim of €4,641,000.00 in respect of the loss of the use of the pontoon. The claim in relation to the floating dock is brought by Handel and Vastgoed whilst the alternative claim in respect of the floating dock is brought by Vastgoed jointly with Handel or in the

alternative to Handel. The claim in respect of the pontoon is brought by Handel and Vastgoed. In para [66] of the request the defendant seeks particularity regarding the nature of the profits that Handel claims it has lost in the following terms:

> *'66. What is the nature of the profits that LJBH claims that it has lost? In particular, but without derogating from the generality of the aforegoing, in relation to both of the amounts claimed, do the plaintiffs contend that:*
>
> *66.1 LJBH's claim relates to the rental of the floating dock by or to another entity? If so, the identity of the entity is required.*
>
> *66.2 LJBH's claim relates to the operation of the floating dock by LJBH itself?*
>
> *66.3 LJBH's loss of profits arose in some other manner relating to the floating dock? If so, full details of the manner in which the claim arose are required.'*

[13] The plaintiffs respond as follows:

> *'Save to state that LJBH claims the whole of the amount of € 8, 491,080.00, alternatively €4,726,952.00, in its capacity as the owner at the time of the loss, the remaining particulars sought are not required for any of the purposes envisaged in terms of the Rules of Court and are accordingly refused.'*

[14] In addition the defendants seek particularity regarding the profits that the plaintiffs claim to have lost arising from the loss of pontoon in the following terms:

> *'142. What is the nature of the profits that LJBH claims that it has lost? In particular, but without derogating from the generality of the aforegoing, in relation to both of the amounts claimed, do the plaintiffs contend that:*
>
> *142.1 LJBH's claim relates to the charter of the pontoon by or to another entity? If so, the identity of the entity is required;*
>
> *142.2 LJBH's claim relates to the operation of the pontoon by LJBH itself?*
>
> *142.3 LJBH's loss of profits arose in some other manner relating to the pontoon? If so, full details of the manner in which the claim arose are required.'*

[15] The plaintiff responds as follows:

> *'Save to state the LJBH claims lost charter hire in the amount of €4,641,000.00 in its capacity as the owner at the time of the loss, the further particularity sought is not required for any of the purposes envisaged by the Rules of Court and is accordingly refused.'*

[16] However, on the defendant's own argument it is already clear from the trial particulars that the plaintiffs' case is that:

1. at the time of the stranding the floating dock and pontoon were owned by Handel;
2. it was intended that in due course the floating dock and pontoon would be transferred by Handel to Vastgoed and that the floating dock would be sold to Vastgoed at its cost price;
3. that the floating dock would then be rented to a third entity ('SWB') for operation by it;
4. that after transfer to Vastgoed the pontoon would be chartered to third parties;
5. that Handel's claim for €8,491,080.00 is made up of earnings the plaintiff alleged the floating dock would have generated before income tax, depreciation and amortization during the provisional claim period of 1 September 2009 – 31 December 2012;
6. Handel and Vastgoed's claim for €4,726,952.00 is made up of rental that the plaintiff's alleged that SWB would have paid to Vastgoed (€700,000.00 per annum adjusted on a yearly basis for inflation) and that Handel's claim for rental payable to Vastgoed is not included in the loss of profits claimed;
7. Handel and Vastgoed's claims for €4,641,000.00 are made up of charter hire based on the assumption that the pontoon would be chartered out for six years.

[17] It would appear then that the defendants already have substantial information concerning the nature of the loss of profits claimed and its computation. In my view the real difficulty of which they complain is the rationality of the basis upon which Handel and Vastgoed claim the components parts of the loss of profits claim, either in whole or in part and either alone, jointly or in the alternative to the other party.

[18] These somewhat confusing permutations adopted by the plaintiffs appear in turn to arise out of the lack of certainty as to whether the claim for loss of profits at the material time vested either in Handel or Vastgoed. This uncertainty appears to be compounded by the complexities relating to the actual and intended ownership of the various assets and the corresponding lack of legal certainty as to which system of law, South African or English, operates in regard, inter alia, to the question of whether any such claim must be advanced by an owner, beneficial owner or both. This legal debate has been aired and has evolved, at least insofar as English law is concerned, through the cases of the 'Aliakmon', Lloyds Law Report [1986] Vol II and Shell UK Ltd and Others v Total UK Ltd and Another, a judgment of the High Court of Justice handed down on 4 March 2010.

[19] The import and impact of these judgments in relation to the present matter lies beyond the scope of this application since in my view the question of which party is entitled to bring the loss of profits claimed in the present matter i.e. the owner or the beneficial owner, is an issue which can only be determined on trial.

[20] On balance, I consider that the defendants have been given more than adequate information relating to the nature of the plaintiffs' claim for loss of profits and are not entitled to the further particulars demanded under these paragraphs.

PARA [70] OF THE REQUEST (PARA [68] OF THE TRIAL PARTICULARS)

[21] The request reads:

> *'70. If not provided in response to the questions posed above, the plaintiffs are requested to detail all gross income or revenue and all costs and expenses taken into account in calculating both of (Handel's) claims for loss of profits'.*

[22] The reply reads as follows:

> *'Save for what is set out above and in annexures 'R24' and 'R25', the remaining particulars sought are not required for any of the purposes envisaged in terms of the Rules of Court and are accordingly refused.'*

[23] Annexures R24 and R25, provided by the plaintiffs gives a highly detailed breakdown of the actual costs of and earnings from two floating docks operated by the plaintiffs between 2009 and 2015 and how those figures were adjusted to provide the model for the likely loss of earnings and costs in relation to the floating dock lost on the stranding insofar as a loss of profits claim related to that asset.

[24] Having regard to the wealth of detail already provided by the plaintiffs in the aforesaid annexures and elsewhere, I have no doubt that the defendants are not entitled to the further particularity sought.

PARA [94] OF THE REQUEST (PARAS [90 - 91] OF THE TRIAL PARTICULARS)

[25] The requests reads:

> *'94. Both annexures FRTP1 and FRTP2 contain a scale on the bottom left corner of the diagram. The plaintiffs are requested to make a rectangle roughly to scale (length of the floating dock being 151.2m and breadth 33m), on each of FRTP1 and FRTP2, reflecting the position or positions at which the floating dock was allegedly to be moored and operated during the claim period.'*

[26] The reply reads:

> *'90. It was intended that on 1 September 2009 the floating dock would have been moored in the waters owned and/or rented by IHC, which waters form part of the area depicted by the numbers 8637 and 8627 on Annexure FRTP1.*
>
> *91. Save as aforesaid, the remaining particulars sought are not required for any of the purposes envisaged in terms of the Rules of Court and are accordingly refused'.*

[27] The defendants case is that they require to know with more precision where the plaintiffs intended to operate the floating dock at the t'Plaatje development during the provisional claim period so as to be able to obtain advice from their experts as to whether or not it would have been physically possible to operate the floating dock at the position in question.

[28] The plaintiffs contend that it is inappropriate of the defendants to demand by way of trial particulars that the plaintiff must draw roughly to scale where the floating dock was to be situated on diagrams not even referred to in the defendants' pleadings. They point out that the defendants already know the intended location of the floating dock, which was to be moored somewhere in a relatively small area. Bearing in mind that as a result of the stranding the floating dock never reached Holland and was never installed,

they point out that its precise location would always have an element of uncertainty. In these circumstances to tie the plaintiffs to a hypothetical location now would be contrary to the Rules. The plaintiffs point out furthermore that the tenor of the defendants' case appears to be that the defendants intended setting up a positive defence that the plaintiffs could not operate the dry dock at Sliedricht and, to the extent that the defendants intend relying upon the depth of the water there as a factor in this defence, the defendants should have pleaded these facts. Not having done so, plaintiffs contend that the defendants may not embark on a series of interrogatories which are unrelated to any issue on the pleadings.

[29] In my view, in the circumstances of this matter it goes beyond the scope of the Rules to demand that the plaintiffs indicate on a diagram where they would have located the floating dock given that the dock never arrived, the existing degree of precision already given and the relatively small area where the floating dock could have been moored. To the extent that the defendants may wish to put up a defence or argue that the floating dock could not have feasibly have operated at the development, they already have sufficient particularity from the plaintiffs of the intended site for the location of the dock to prepare such case. These particulars then are not compellable.

PARAS [104 – 105] OF THE REQUEST (PARA [100] OF THE TRIAL PARTICULARS)

[30] The request reads:

> *'104. The plaintiffs are required to specify the maximum (should read 'minimum') depth of water required for the operation of the floating dock.*
>
> *105. What was the depth of the water at the location or locations at which the floating dock was allegedly to be moored in situ and operated at t'Plaatje?'*

[31] The reply reads:

> *'Save to state that the depth of the water and the substrate thereunder were sufficient for the operation of the floating dock, the remaining particulars sought are not required for any of the purposes envisaged in terms of the Rules of Court and are accordingly refused.'*

[32] The defendants' case is that they need to know what the depth of the water is at the position in question to enable them to properly brief an expert to advise whether it would have been possible to operate the floating dock at that location during the claim period as alleged by the plaintiffs.

[33] The plaintiffs' case is that the defendants know the specifications of the floating dock and apparently intend to do a bathymetric survey of the t'Plaatje waters in any event. In the result the defendants will obtain whatever information they could possibly require concerning the depth of water in the development. They contend furthermore, that the particularity sought does not relate to causation i.e. whether the stranding was the cause of the loss or whether the proposed floating dock could ever operate there in the first place, since any insufficiency in the depth of the water would have been corrected by dredging and would merely have impacted upon the quantum of the loss.

[34] In para 103 of the request the plaintiffs were asked to specify the submerged draught and operating draught of the floating dock and were advised, in para [99] of the reply, that these figures were approximately 3.2m if submerged and 0.5m if unsubmerged. In my view that is sufficient information regarding the specifications of

the floating dock to prevent the defendants from being taken by surprise at the trial and to enable them to prepare any defence relevant to this point.

[35] Regarding the second of the questions or requests the plaintiffs point out that the defendants have not pleaded any defence to the effect that it was not lawful or not physically possible to operate the floating dock at all; furthermore, that the defendants know well that the plaintiffs intended to operate the floating dock in those particular waters and all of the specifications and plans for the floating dock had been previously discovered.

[36] For much the same reasons as apply to the request dealt with in the latter parts of paras 28-29 above I consider that having regard to the purposes of the Rule the defendants are not entitled to the further particulars sought. In my view they will not at all be hamstrung in briefing an expert to advise on the feasibility of the floating dock project at t'Plaatje or mounting any defence or attack upon the basis of the claim in the respects envisaged. These particulars may not be compelled.

PARA 110 – 111 OF THE REQUEST (PARA 105 – 107 OF THE TRIAL PARTICULARS)

[37] In para 109 of the request the plaintiffs were asked whether any agreements had been concluded between them and/or any other entity in the Boer group of companies on the one hand and/or the Sliedrecht Municipality, on the other in relation to the mooring of the floating dock and its operation at t'Plaatje. In response the plaintiffs advise that an agreement had been reached between Vastgoed and the Municipality and made reference to a minute of such meeting.

[38] The request reads:

> *'110. In relation to the paras 108 and 109, if any such agreement(s) were concluded, and were in writing, the plaintiffs are requested to identify the agreement(s) in the discovered documents.*
>
> *111. Further in relation to the above paragraphs, if any such agreement(s) were concluded, and were oral, the following particulars are requested in relation thereto:*
>
> *111.1 when and where was/were the agreement(s) concluded?*
>
> *111.2 who were the contracting parties?*
>
> *111.3 who represented the respective parties in concluding the agreement(s)?*
>
> *111.4 what were the terms of the agreement(s).'*

[39] The reply reads:

> *'105. Part of the agreement between IHC and/or IHCB and LJBV, and part of the agreement between Sliedricht Municipality and LJBV is recorded in the minute of a meeting at which Sliedricht Municipality, IHC, LJBV were represented, and an English translation thereof is annexed hereto marked 'R26' ('February 2009 Minute').*
>
> *106. At all material times in these negotiations, LJBV acted on its own behalf and/or on behalf of SWB and/or any other company in the Group which ultimately would have operated the floating dock.*
>
> *107. Save as aforesaid, the particularity sought is not required for any of the purposes envisaged by the Rules of Court and is accordingly refused.'*

[40] The defendants' case is that the existing answer is inadequate and they require the particulars requested in order to be able to properly brief their experts to advise on whether the plaintiffs had any entitlement or prospect of operating the floating dock at the t'Plaatje development during the provisional claim period and that whether or not the plaintiffs were possessed of all the required private law permissions to moor and operate the floating dock at the t'Plaatje during that period is one of the issues in dispute. The plaintiffs' case is that the defendants have already been furnished with a

minute of the meeting between various interested parties in the Sliedricht Municipality. They add that since the floating dock never arrived no agreements were formalised and accordingly the defendants are not entitled to the further particulars which they seek. They contend furthermore that the further particulars sought constitute evidence to which the defendants are not entitled.

[41] Two difficulties arise, however, for the plaintiffs, namely, that it is not the tenor of their reply that no such agreements exist or that any such documentation evidencing such agreements is already in the hands of the defendants; secondly, their reply to the effect that *'part of the agreement'* is recorded in the minute logically implies that there is another part of the agreement, either oral or written, elsewhere but which has not been identified by the plaintiffs. Given the potential importance of any such agreement, whether written or oral, and its relevance to the issue of whether the floating dock could have been lawfully operated at the t'Plaatje during the claim period, I consider that the defendants are entitled to the further particulars sought.

[42] In essence the plaintiffs must indicate whether, extending beyond the minute, there were any other agreements, written or oral, which were concluded and must respond to the questions posed in para [111] in relation thereto.

PARAS 112 – 114 OF THE REQUEST READ WITH PARAS 125.4 - 125.6 THEREOF (PARAS 108 READ WITH PARA 118 OF THE TRIAL PARTICULARS

[43] The defendants did not persist with their prayer that the plaintiffs be compelled to furnish the particulars requested herein but reserved their right to renew their application in due course should it prove necessary to do so.

PARA 145 OF THE REQUEST (PARA 140 OF THE TRIAL PARTICULARS)

[44] The request reads, to the extent that it is relevant:

> *'144. For what period does LJBH and/or LJBV claims loss of profits? A start date and an end date is required.*
>
> *145. if not provided in response to the questions posed above, the plaintiffs are requested to detail all gross income or revenue and all costs and expenses taken into account in calculating both parties' claims for loss of profits'.*

[45] The reply reads:

> *'140. The amount of €4,641,000.00 reflects the gross income or revenue. The costs and expenses associated with the operation of the pontoon would have been borne by the charterers'.*

[46] The defendants' case is that they are entitled to details of the costs that would have been incurred in operating the pontoon and earning profits therefrom so as to be able to brief experts to assess the reasonableness of the plaintiffs' claim.

[47] In their founding affidavit the defendants contend that it is inconceivable that Vastgoed would not have incurred any expenses in carrying on the business as the pontoon owner and operator and give examples of such expenses.

[48] The plaintiffs point out that this is an instance of where the defendants are in effect interrogating the reasonableness of their response inasmuch as they contend that the answer is not correct. As they correctly point out, however, such a contention does not create an entitlement to further particulars i.e. principally for the purpose of assessing the *'reasonableness'* of the particularity already provided by the plaintiff in regard to the costs and expenses related to the pontoon.

[49] In the result in my view the defendants are not entitled to the further particularity sought.

PARA 189 OF THE REQUEST (CORRESPONDING TO PARA 214 OF THE TRIAL PARTICULARS)

[50] It is common cause that the pontoon was insured in terms of a hull contract insurance policy concluded with the Peoples Insurance Company of China ('PICC'). The plaintiffs replicated that after the stranding *'and in order to ensure that the correct party was paid'* Ningbo concluded a tripartite agreement with PICC and Handel in terms of which it was agreed that the proceeds of the insurance policy would be paid to Handel. Requested to identify the *'correct party'* the plaintiffs responded that it was Handel 'and/or' Vastgoed.

[51] The request reads:

'189. Who is the 'correct party' referred to by the plaintiffs?'

[52] The response reads:

'214. LJBH (Handel) and/or LJBV (Vastgoed)'

[53] The defendants' case is that they are entitled to know, for the purposes of preparing for trial, whether the plaintiffs contend that the correct party was in fact Handel or Vastgoed or both Handel and Vastgoed. Their case is further that on a reading of the plaintiffs' particulars of claim there is no basis for suggesting that Vastgoed was the *'correct party'* and that they require such particulars inasmuch as the answer will have an effect on the issue of the plaintiffs' locus standi to recover as part of

the alleged damages, the amount claimed in this respect of the pontoon and whether or not the plaintiffs are obliged to deduct the proceeds of the hull contract insurance from their claim.

[54] For the plaintiffs Mr MacWilliam candidly conceded that because it was not entirely certain where ownership of the pontoon lay at the relevant time the plaintiffs were keeping their options open as to who the correct party was. He asked, rhetorically, what difference any further particularity would make for the purposes of the defendants' trial preparation. He pointed out, furthermore, that both Handel and Vastgoed fall within the Boer Group of companies. As I see it the defendants seek to compel the plaintiffs to commit themselves to one or other of the plaintiffs as being the lawful beneficiary of the insurance payments with a view to advancing the possible defence or point that one or other of the plaintiffs had no locus standi to the extent of such payment. That issue is, however, one for determination by the trial court once all the evidence has been led and the particulars sought rely on the assumption, as yet unproven, that it will make a difference which party or parties i.e. Handel or Vastgoed, both within the Boer Group of companies, was entitled to that particular insurance payment. Put differently, the particularity sought seeks to compel an answer to a question which may very well be a legal conclusion rather than an issue of fact.

[55] Whatever the case may be I do not consider that the particularity sought is necessary for the defendants to prepare for trial or that the absence of such particularity will have the result that the defendants are taken by surprise at the trial. In the result the further particularity sought cannot be compelled.

PARA 193 OF THE REQUEST (PARA 218 OF THE TRIAL PARTICULARS)

[56] The request reads:

> *'193. Leaving aside the parties' respective rights and obligations under the tripartite agreement:*
>
> *193.1 Do the plaintiffs allege that the first plaintiff was entitled to payment by the PICC under the hull policy?*
>
> *193.2 If so, upon what basis do the plaintiffs allege the first plaintiff was entitled to payment by the PICC under the hull policy?*
>
> *193.3 do the plaintiffs allege that Ningbo was entitled to payment by PICC under the hull policy, and the first plaintiff entitled to payment from Ningbo?*
>
> *193.4 If so:*
>
> *(1) upon what basis do the plaintiffs allege that Ningbo was entitled to payment under the hull policy by PICC?*
>
> *(2) upon what basis do the plaintiffs allege that the first plaintiff was entitled to payment by Ningbo?'*

[57] The reply reads:

> *'218. Save to state that in terms of the shipbuilding contract Ningbo was obliged to effect insurance of the pontoon for and on behalf of LJBH as well as any entity to whom Handel may have transferred any interest or title therein, and that Handel and/or such entities were entitled to the proceeds of the insurance payments, the remaining particulars sought are not required for any of the purposes envisaged by the Rules of Court and are accordingly refused.'*

[58] The defendants' case is that they are entitled to the particularity requested since this impacts on the issue of the plaintiffs' legal right to recover, as part of the alleged damages, the amount paid under the hull contract of insurance, and whether or not the plaintiffs are obliged to deduct the proceeds of the hull insurance from their claims.

[59] The plaintiffs' case is that the answer provided has sufficient particularity and in any event, relying on *Hardy v Hardy* (supra), the defendants are not entitled to elicit particularity to allow it to formulate its defence.

[60] All the insurance agreements and payment agreements or provisions are in the hands of the defendants and they are free to rely on their interpretation of these documents. To the extent that they require further particularity it appears to me that the defendants are seeking to compel an answer which may well be a legal conclusion.

[61] Whatever the case, in my view the defendants are not entitled to the further particularity sought for the purposes of preparing for trial or so as not to be caught by surprise.

PARAS 194 – 195 OF THE REQUEST (PARA 219 OF THE TRIAL PARTICULARS)

[62] The request reads:

> *'194. In concluding the hull loss settlement agreement with PICC, did Ningbo act:*
>
> *194.1 On its own behalf? and/or*
>
> *194.2 As agent for one or both of the plaintiffs?*
>
> *195. In the event that Ningbo acted as agent for one of the plaintiffs the plaintiffs are requested to identify which was represented by Ningbo.'*

[63] The response reads:

> *'219. Both on its own behalf and on behalf of the plaintiffs.'*

[64] The defendants' case is that they are entitled to know whether the plaintiffs contend that Ningbo acted for both of the plaintiffs jointly in concluding the hull loss settlement agreement or, in the event of it being alleged that Ningbo acted for one of the plaintiffs, whether this was Handel or Vastgoed.

[65] However, the response given by the plaintiffs is clear and unequivocal notwithstanding that it may be at odds with correspondence passing between the parties. Furthermore, the particularity sought appears designed to compel a legal conclusion or position with a view to the defendants advancing a special defence relating to locus standi. The Rule relating to trial particulars does not encompass of such a purpose.

[66] In the result the particularity sought cannot be compelled.

PARAS 201 – 204 AND 210 – 213 OF THE REQUEST (PARAS 225 & 228 OF THE TRIAL PARTICULARS)

[67] The request reads:

> *'201. Do the plaintiffs allege that that one of both of them are under a duty to account to PICC for any amount recovered in damages from the defendants relating to the loss of the pontoon?*
>
> *202. If so, up to what amount are either or both plaintiffs obliged to account?*
>
> *203. Do the plaintiffs allege that PICC has waived or abandoned any right of recovery or subrogation which it might have in relation to the amount paid by it under the hull policy?*
>
> *204. Do the plaintiffs allege that one or both of them is/are pursuing the claim for damages arising from the loss of the pontoon at least partially as agent(s) for PICC?'*

[68] Paragraphs 210 to 213 ask the identical question in relation to the loss of the barges and/or floating dock.

[69] The plaintiffs' response reads:

> *'225. Save to state that these are matters which arise between the plaintiffs and PICC, the remaining particulars sought are not required for any of the purposes envisaged by the Rules of Court and are accordingly refused.'*

[70] A similar reply is given in relation to the particulars sought in respect of the loss of the barges and/or floating dock.

[71] The defendants' case is that in terms of their special plea they allege that in terms of Chinese law the insured and recipient of a payment made by an insurer under a contract of insurance lose their right to claim any loss that they might have suffered in respect of which the insured has been indemnified by the insurer in terms of the insurance policy up to the amount of the indemnity. A right to claim compensation up to the amount of the indemnity is transferred and assigned to the insurer. In their replication the plaintiffs allege that, even if the defendants' allegations as to Chinese law are accepted, they nonetheless deny that they lost or were deprived of the disputed right and aver that they are entitled to make this claim by reason of the fact that PICC, inter alia, has approved the steps taken and being taken by the plaintiffs to prosecute the disputed right.

[72] The defendants' case is further that they are entitled to the particulars requested since they are relevant to the issue of whether or not the plaintiffs have a legal right to sue for recovery of amounts paid by PICC and whether the amounts so paid fall to be deducted from any damages if the plaintiffs are held to be entitled to recover from the defendants.

[73] The plaintiffs' case is that the further particularity demanded relates to conclusions of law which confer no entitlement to further particulars; furthermore that these requests relates to the defendants so-called *'locus standi'* defence and that the defendants are not entitled to seek further particulars in relation to their special defences.

[74] In my view the further particularity being demanded relates to conclusions of law in a situation, moreover, where the issue of what system of law applies is still to be determined. It is not clear to me how the defendants will be hampered in their preparation for trial if they are not afforded the particularity sought. They will no doubt take advice and, if necessary, lead evidence on what system of law is applicable in a situation where the proceeds of insurance policies were received by Handel or Vastgoed but where one or more of which nevertheless proceeds to claim without first deducting the proceeds of such payments.

[75] In the result I consider the particularity sought is not compellable.

PARAS 206 – 209 OF THE REQUEST (PARAS 227 OF THE TRIAL PARTICULARS)

[76] The request reads:

> *'206. Notwithstanding that the amount of €12,280,000.00 was apparently paid into the first plaintiff's account at Rabobank, do the plaintiffs admit that each of them was paid by PICC under the cargo policy in proportion to their respective insured interests?*
>
> *207. Was the payment allocated to the plaintiffs in proportion to their respective insured interests?*
>
> *208. If so, what amount was allocated to each plaintiff?*

209. If the amount was not allocated to each plaintiff in proportion to their respective insured interests, then to whom was the payment allocated and in what proportion?'

[77] The response reads:

'227. Save that the plaintiffs admit that they were paid pursuant to the PICC Cargo Policy, the remaining particulars sought are not required for any purposes envisaged by the Rules of Court and are accordingly refused.'

[78] The background to this request is that the plaintiffs aver that in February 2010 PICC paid the aforesaid sum into Handel's account at Rabobank, such payment being made pursuant to PICC's obligations under the cargo contract of insurance. The plaintiffs allege, furthermore, that at the time of the stranding the barges were owned by Vastgoed and the pontoon by Handel. It is common cause that PICC insured the barges and the floating dock against all risks.

[79] The defendants' case is that they are entitled to the particulars sought inasmuch as the information is relevant to the legal right of both the plaintiffs to claim damages, including those amounts paid to them by the PICC in terms of the cargo contract of insurance.

[80] The plaintiffs' case is that the particularity sought concerns the defendants' special defence of *'locus standi'* and for this reason alone cannot be compelled. They point out that the *'loss settlement agreement'* which provided for the payment of the insurance compensation to the plaintiffs was itself put up by the defendant and makes no provision for an apportionment. In my view this fact gives weight to the contention that the defendants are not entitled to the particulars sought.

[81] A further relevant factor is that both Handel and Vastgoed form part of the Boer Group and since they both advance the claim for loss of profits, apparently making no deduction for payments already received, the allocation of any payments received may well be irrelevant. In my view, whatever the case may be, the absence of the particularity sought will not hamper the defendants in the preparation of their defence inasmuch as it relates principally to a defence which they have raised and in respect of which they are not entitled to compel the particularity sought.

PARA 217 OF THE REQUEST (PARA 232 OF THE TRIAL PARTICULARS)

[82] It is also common cause that a contract of insurance was concluded in the Netherlands in terms of which the barges were insured in terms of a policy the insurance described as the *'Buyers Interest Contract of Insurance'* and that the full insured sum of €2,734,000.00 was paid after the stranding.

[83] The request, to the extent that it is relevant:

> *'216. Which of the plaintiffs, if any, was the recipient of the payments made by SAA totalling €2,734,000.00?*
>
> *217. Which of the plaintiffs, if any, was the beneficiary of the aforesaid payments?'*

[84] The plaintiffs response was:

> *'232. Handel and/or Vastgoed.'*

[85] The defendants' case is that it is *'inconceivable'* that both Handel and Vastgoed could have been the beneficiaries of the insurance payments given that the plaintiffs allege that at the time of the stranding Vastgoed was the owner of the barges and it was not alleged that Handel was the owner or had any proprietary interest in the barges at

the material times. The defendants' case is further that they are entitled to know the identity of the beneficiary of the payment since this is relevant to the legal right of that party to sue for damages including the amount of the insurance payment.

[86] The plaintiffs' case, once again, is that the particularity sought relates to the defendants' special defence regarding *'locus standi'* and, for the reasons furnished in relation to the previous particulars dealt with above the particularity cannot be compelled. The plaintiffs also contend that they have provided an answer sufficient for the defendants to prepare for trial and that the particularity sought is in reality an attempt by the defendants to dictate to the plaintiffs how they should answer the question.

[87] I am in agreement with the plaintiffs' reasoning and consider that, for the reasons furnished in relation to the particulars dealt with above the particularity sought is not necessary for the defendants to prepare for trial and cannot be compelled.

THE STRIKING OUT APPLICATION

[88] The plaintiffs have applied to strike out paras [14] and [18] – [35] of the defendants' founding affidavit on the grounds that they contain averments which are vexatious and/or irrelevant.

[89] In the paragraphs in question the defendants' deponent has given a lengthy and detailed history of the plaintiffs' loss of profits claimed in the litigation the formulation of which has gone through a number of permutations over the years. They argue further that this lengthy exposition is necessary in order to give a background to the

defendants' attempt to obtain clarity on the plaintiffs' claims through the request for further particulars and the application to compel.

[90] For their part the plaintiffs contend that the background is completely unnecessary since the defendants' request for further particulars can relate only to the plaintiffs' of claim in its present formulation. For that reason all previous permutations are irrelevant.

[91] The plaintiffs are, strictly speaking, correct in this last submission but in my view the background was of some assistance, albeit marginal, in understanding the evolution of the loss of profits claim/s and in understanding the case which the defendants seek to make out for the further particularity which they wish to compel. In the circumstances, in the exercise of my discretion I do not consider that the material objected to falls to be struck out. In this regard I note that both parties in this litigation appear to have been prolix in this and other interlocutory applications which they have launched against each other.

COSTS

[92] The defendants have succeeded in compelling only one of the thirteen items in respect of which they have sought to compel further particularity. I do not consider that this can be regarded as substantial success entitling them to their costs. The hearing lasted three days spread over four days and had the application been directed at only that item in respect of which they were ultimately successful, might have been concluded on the first day. On that first day, 16 September 2015, however, the parties first concluded argument in the separation application. In the result the order which I

make is that the plaintiffs are awarded their costs in the application including the costs of two counsel but limited to two days of the hearing viz 5 and 6 October 2015.

[93] The following order is made regarding the further particulars sought:

1. The plaintiffs are ordered to furnish the particulars sought in paras 110 – 111 of the defendants request for trial particulars dated 30 April 2015.

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BOZALEK J

APPEARANCES

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