KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA
(Exercising its Admiralty Act)

REPORTABLE
Case No: A56/2012

Name of ship: *MVAsian Forest*
Arrest of *MV Sino West*

In the matter between:

SINO WEST SHIPPING CO. LIMITED **APPLICANT**

And

NYK – HINODE LINE LIMITED **RESPONDENT**

In the matter of an application to set aside the Respondent's deemed arrest of the *MV Sino West*.

JUDGMENT

MADONDO J

Introduction

[1] On 24 May 2012 and at the instance of NYK –Hinode Line Limited (the respondent) this Court granted an order for the arrest of the *MV Sino West* (the vessel) in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act, No. 105 of 1983 as amended (the Admiralty Act) for the purpose of obtaining security for the respondent in an arbitration contemplated in London between the respondent and CPM Corporation Ltd (CPM) of China relating to a claim for damages arising out of the breaches of a time charter party concluded between the respondent and CPM in respect of the *MV Asian Forest* ship and indemnity given in such charter party relating to the sinking of the said vessel off New Mangalore, India, in July 2009.

[2] Pursuant to the order issued by this Court the vessel was duly arrested. On 7 June 2012. Security was furnished on behalf of the applicant for a maximum amount of US$316720.00. The vessel has since been released from arrest and sailed. The Sino West Shipping Co. Limited (the applicant) now seeks an order setting aside the respondent's deemed arrest of the vessel effected pursuant to an order made by this Court and ancillary relief. The application is grounded on that the arrested ship was not at the time of its arrest an associated ship of the "Asian Forest" ship, which sank off the India coast.

Parties

[3] The applicant is Sino West Co. Limited, a company duly incorporated in accordance with the company laws of Hong Kong, carrying on business as the shipping company at Shanghai, China, and the registered owner of the arrested vessel.

[4] The respondent is NYK – Hinode Line Limited, a company duly incorporated and registered in accordance with the company laws of Japan and carrying on business as an operator of ships at Yuden Buildings, 3-2 Marunouchi 2-Chome, Chiyoda-ku, Tokyo, Japan.

Factual Background

[5] The respondent's claim arises from the sinking of the *Asian Forest* following the liquefaction of a cargo of iron ore fines loaded on the said vessel at the Indian Port of Mangalore and Paradip. The owner of the "Asian Forest" had time charted the vessel to NYK Global Bulk Corporation (NYK -Global) which in turn sub chartered the vessel to respondent. The respondent in turn sub chartered the vessel to CPM and which in turn voyage chartered it to Sundial Shipping Company Limited. The latter then ordered the vessel to sail for New Mangalore, India, where it loaded a cargo of iron ore fines, loading

in all a total of 13,600mt of cargo. On completion, the vessel left for her destination Zhang Jia Gang, China, on 17 July 2009. Shortly, after her departure she developed a list and sank 3 nautical miles off New Mangalore on 17 or 18 July 2009.

[6] The respondent avers that the sinking of the said vessel was caused by a breach by CPM of the terms of the claim of charter parties in that the cargo iron ore fines loaded on board the vessel constituted "dangerous goods". Alternatively, the respondent alleges that CPM was in breach of an implied indemnity given by it arising from the respondent having followed the instructions of CPM to load the cargo of iron ore which the respondent contends was responsible for the vessel sinking. The vessel was a total loss and its value was US$ 21 million. According to the respondent the reason for the vessel to develop a list and sank was the liquefaction of the cargo iron ore fines. In particular, the respondent alleges that unbeknown to the master and crew of the *Asian Forest* the cargo had moisture content in excess of her transportable limit and that it was therefore dangerous and improperly declared.

[7] It is trite that for an applicant seeking the arrest of property in terms of section 5(3) of the Admiralty Act to obtain security for proceedings contemplated or pending in the Republic or elsewhere must demonstrate, firstly, that it has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or against a ship which is an associated ship of the ship concerned. Secondly, that it has a prima facie case in respect of such claim which is enforceable in the nominated forum and, thirdly, that it has a genuine and reasonable need for security in respect of the claim. It is common cause between the parties that all the aforesaid requirements have been satisfied.

[8] The respondent avers that at the time when its claim arose against CPM, CPM was controlled by Mr Wang Minggang (Wang) who also controlled Sino West Shipping Company Limited at the time of the arrest of the *Sino West* vessel. The respondent, therefore, alleges that *Sino West* vessel was an associated ship of the *Asian Forest* vessel as described in section 3(6) and (7) of the Admiralty Act.

Issue

[9] The issue between the parties is whether or not the *MV Sino West* was at the time of her arrest an associated ship of the *MV Asian Forest* in terms of section 3(6) and (7) of the Admiralty Act.

[10] Section 3(6) of the Act provides:

> "An action in rem, other than an action in respect of maritime claim referred to in paragraph (d) of the definition of 'maritime claim' may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose."

[11] "Associated ship" is defined in subsection (7) as follows:

> " (7) (a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose –
>
> (i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose;
>
> (ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; and
>
> owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned or controlled the company which owned the ship concerned, when the maritime claim arose."

[12] The respondent avers that at the time when its claim against CPM arose Mr Wang was controlling CPM and owned all the shares in Sino West Shipping Company Limited at the time of the arrest of the vessel. As a consequence Mr Wang was in control of both

companies. CPM was therefore the deemed owner of the *Asian Forest* vessel and Mr Wang the de jure owner of the *Sino West* vessel.

[13] The argument of the respondent involves consideration of two questions; first whether or not at the time when the claim of the respondent arose Mr Wang was in control of CPM; and second; whether at the time of the arrest of the *Sino West* Mr Wang was controlling Sino West Shipping Company Limited, a company owning the vessel.

[14] Mr Wragge for the applicant has argued that because there is a dispute of fact on the papers relating to Mr Wang's power to control CPM and Sino West at the relevant times in point, the rule formulated in Plascon Evans Paints Limited v Riebeck Paints (Pty) Limited 1984(3) SA 623(A) should apply. The famous rule formulated in the said case is:

> "Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justifying such an order."

[15] The general rule was first stated in Stellenbosch Farmers' Winery Ltd v Stellenvalle Winery (Pty) Ltd 1957(4) SA 234 (C) at 239 E-G. However, in both cases it was held that in certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. In my opinion the evidence and the facts contained in the papers in this regard are far adequate to enable this Court to resolve the issue at hand on the balance of probabilities. However, if the need arises the general rule formulated in Plascon Evans case can always be resorted to.

[16] I propose to first deal with the question whether Mr Wang was at the relevant time in question in control of CPM. The answer to the question lies in the proper interpretation of the deeming provisions of section 3(7) (b) (ii) of the Admiralty Act in terms of which a person:

> "shall be deemed to control a company if he has power, directly or indirectly, to control the company."

[17] In EE Sharp and Sons Ltd v MV Nefeli 1984(3) SA 325(C) at 326I-327A, it was held that this relates to overall control, such as is exercisable for instance by a majority share holder or his nominee of the assets and destiny of the company, it does not refer to its day to day management and administration.

[18] The meaning to be attributed to the words "power, directly or indirectly to control" was considered and authoritatively decided by the Supreme Court of Appeal in MV Heavy Metal: Belfry Marine Limited v Palm Base Maritime CDN BHD 1999(3) SA 1083 (SCA). At 1106D-G, Smalberger JA, delivering the majority judgment, construed "indirect power" as referring to the defacto position of the person who commands or exerts authority over the person who is recognized to possess de jure power (the beneficial owner as opposed to the legal owner). On the other hand, the Learned Judge of Appeal construed "direct power" as referring to someone who wields direct power vis-à-vis the company and the outside world and who therefore in the eyes of the law (i.e. de jure) controls the shareholding and that this determines the direction and fate of the company. The same person may in given circumstances exercise both defacto and dejure control.

[19] At 1112G Marais JA held that it is not the power to manage the operations of the company but the power to determine its direction and fate which is what counts. In essence the direct power refers to de jure authority over the company by the person who according to the register of the company is entitled to control its destiny .*See GHS Hofmer: Admiralty Jurisdiction Law and Practice in South Africa, 2nd ed. p142*

[20] In determining who controls the company one looks at the immediate legal control of the company. In the case of an incorporated company, a person in control is the person who in accordance with the appropriate legal system is regarded as controlling the affairs of the company for the purposes of the law. Technically, it is only the registered shareholder who can exercise the votes attaching to a share and thereby directs the affairs of the company. Hence the registered shareholder whose shares carry the majority vote will for legal purposes control the company. *See Malcolm John Davis Wallis : The Associated Ship and South African Admiralty Jurisdiction pp 187;1190; Inland Revenue Commissioners v Bibby and Sons Ltd [1945] 1 All ER 667 at 668- 670:*

[21] The applicant avers that CPM was not controlled by Mr Wang but by Mesdames Wang Bo and Zhang Xinying who own shares in CPM in equal parts. CPM was incorporated in Hong Kong on 5 November 2004 with shares issued to three parties including 62 of such shares issued to Bothwin Shipping Company. Thereafter, the shares in CPM were sold to Sinofu Group Incorporated (Sinofu). The balance of the shares, were transferred to Sinofu on 27 July 2005. Until 29 October 2005 Mr Wang was a director of Sinofu which then was the 100% shareholder in CPM.

[22] The applicant alleges that on 1 April 2006 the shares in CPM were transferred from Sinofu to two persons: Ms Wang Bo and Ms. Zhang Xinying. The consideration of

each share was the nominal price of HK$50. However, the said sale of shares in CPM was not recorded in writing. The share certificates in respect thereof were only signed towards the end of May 2012 when a need arose to produce same, when the application to arrest the vessel was lodged.

[23] The respondent contends that the close relationship existing between Mr Wang and the alleged two lady shareholders smacks of collusion between Mr Wang and the two ladies to deceive the outside world to believe that the said two ladies are majority shareholders in the CPM while the converse is true. Such close relationship according to the respondent manifests itself in the following:-

[24] As the employees of CPM, a non- mainland Chinese registered company, Mesdames Wang Bo and Zhang Xinying could not pay into Chinese National Social Security Fund. Both Mesdames Wang Bo and Zhang Xinying state that they had to devise a manner for continuing payments into the Chinese National Social Security Fund, and they asked to be registered as nominal employees of Vasteast and concluded contracts with Vasteast in order to access the relevant benefits as full time employees of Vasteast.

[25] The second aspect of association between Mr Wang and CPM relates to the "mortgage or charge details" relating to the Dragon Glory Shipping Limited, a company where Mr Wang is recorded as being the sponsor of the mortgage and CPM, Vasteast, Pheachian Shipping Company Limited, and Sino South Shipping Company Limited are recorded as guarantors of the mortgage. The respondent avers that the circumstances surrounding a mortgage obtained by Dragon Glory Shipping Co. Ltd for a loan facility granted for the purposes of financing part of the purchase price of newly built vessel, the

"Dragon Glory" provides a confirmation that Mesdames Wang Bo and Zhang Xinying were nominees of Mr Wang when the respondent's claim arose. Mr Wang is described as sponsor of the loan and CPM as one of the guarantors of the loan.

[26] On the other hand, the applicant contends that that CPM was one of the guarantors does not constitute any evidence that Mr Wang had the power at the time the respondent's claim arose to control the destiny of CPM. In particular, the applicant alleges that Mr Wang asked Mesdames Wang Bo and Zhang Xinying to agree to CPM guaranteeing the loan in return for a commission of one percent (1 %) of the loan agreement value.

[27] To the contrary, the respondent contends that it would be unusual for a tender to require a borrower to obtain independent guarantors. It avers that guarantors would normally have an actual interest in the underlying transaction. It is therefore the respondents' contention that as the guarantor was independent it would require security in the extent of a default of the loan by the borrower and had to pay upon the guarantee. No arrangement was made in that regard in the commission agreement. For those reasons the respondent believes that the arrangements relating to the mortgage and charge are consistent with CPM being controlled by Mr Wang, the sponsor of the loan.

[28] On 31 March 2009 an agency agreement was concluded between Vasteast and CPM in terms of which CPM appointed Vasteast as its exclusive agent in relation to charters, carriage of cargo, appointment of port agents and other related issues, Mr Wang is the sole shareholder of Vasteast, CPM and Vasteast share the same floor and reception area in Shanghai at China Development Bank Tower 500 Pudong Road.

[29] On 13 July 2009, a few days before the *MV Asian Forest* sank; Messrs Hioyuki Rokuta and Kazunari Tago of NYK Bulkship (China) Ltd visited the offices of CPM, on a general business trip to China to conduct research into the Chinese shipping market. Tago considered Mr Wang to be in control of both CPM and Vasteast. Messrs Rokuta and Tago were told that Vasteast conducted the so called "near sea business" and CPM the "long distance business" since 2004. During such visit Mr Wang did not at any stage introduce Mesdames Wang Bo and Zhing Xinying as the directors or majority registered shareholders of CPM.

[30] On the contrary, Mr Wang states that he did not at anytime advise Mr Tago that he controlled CPM. He goes on to say that it is possible that Mr Tago may have formed that view by virtue of the fact that Vasteast was the general agent of CPM in China. Nevertheless, Mr Wang concedes that at one stage CPM and Vasteast shared a reception area where the logos of both companies were displayed.

[31] Mr Gordon for the respondent has argued that regard being had to the fact that Mesdames Wang Bo and Zhang Xinying are relatively young and inexperienced, the prospect that the said two young ladies could build a gigantic company in a few short years is highly unlikely. He added that this is even more so when it is considered that the alleged shareholders bought the company at a nominal price and had no written record of their acquisition until it was necessary to produce the share certificates in CPM following upon the arrest of the *MV Sino West.* This makes it more improbable than not that the shares in CPM were all transferred to Mesdames Wang Bo and Zhang Xinying. He concluded by submitting that this could well be all the more so because on their version it is not beneath them to rely upon fictitious employment contracts because they do not reside in mainland China.

[32] It is, therefore, the respondent's contention that in the light of the aforegoing Mr Wang still holds the entire shareholding in CPM and Mesdames Wang Bo and Zhang Xinying are on the probabilities his nominees in CPM and that an effort has been made to disguise the identity of the controlling shareholder in CPM because CPM is the deemed owner of the *MV Asian Forest* and Mr Wang is the de jure controller of the arrested vessel. Accordingly, the vessels are associated within the meaning and purpose of the South African Law.

[33] The applicant states that Mesdames Wang Bo and Zhang Xinying are both graduates from Dalian Maritime University and have worked for shipping companies. Mr Wragge for the applicant has submitted that the decision by Mesdames Wang Bo and Zhang Xinying to take over CPM was based upon a careful consideration of the company and the shipping market at the time and, in fact, it turned out to be a commercially sound decision. In so far as the youthfulness of Mesdames Wang Bo and Zhang Xinying is concerned, the applicant's contention is that Mr Wang was born on 23 January 1974 and was therefore three years older than Ms Wang Bo and approximately a year older than Zhang Xinying.

[34] I now propose to deal with the factors outlined above which the respondent contends that they provide evidence that at the time when its claim arose, Mr Wang was the owner of CPM and thus controlling its destiny: Firstly, the investigation conducted on behalf of the respondent has revealed that Mr Wang is the sole shareholder in and the sole director of Vasteast. Both Mesdames Wang Bo and Zhang Xinying are currently registered employees of Vasteast and they have been so employed for the period of ten (10) years. They are neither the officers nor the shareholders in it. In the applicant's

affidavit this is not disclosed. Though Mesdames Wang Bo and Zhang Xinying are referred to as the joint registered shareholders and directors of CPM incorporated on 5 November 2004 it could still reasonably be inferred from their employment by Vasteast that they are nominees of Mr Wang in CPM. Such an inference is bolstered by the fact that it is highly improbable that the owners of CPM would work as the employees of Vasteast, a third party, rather than dedicating their time fully to their own business.

[35] Secondly, Wang Bo and Zhang Xinying were never introduced to the representatives of the respondent, Messrs Rokuta and Tago, during the formal meetings held at the shared premises of CPM and Vasteast or social events that normally followed such meetings. At the reception held by CPM at Pudong Shanglila in Shangai in 2008 for all its customers and service providers hosted by Mr Wang, only Mr Wang made a speech and acted as the main host of the event.

[36] While it is common cause that shortly prior to the sinking of the *MVAsian Forest* Messrs Rokuta and Tago visited Mr Wang in China and had some discussions with him. Mr Wang could not tell why Messrs Rokuta and Tago might have believed that he ran the CPM Company, as according to him this was not the case. On the other hand Messrs Rokuta and Tago categorically state that Mr Wang left distinct impression in them that he ran CPM on the grounds that he dominated the conversations on behalf of CPM acting as if he was its chief executive and he explained the relationship between Vasteast and CPM. The only distinction drawn between CPM and Vasteast was that the business of Vasteast focused on Asia and near sea whereas CPM focused on business further a field. In my opinion the probabilities are that Mr Wang was in control of CPM at the particular time in point.

[37] Thirdly, the fact that Mesdames Wang Bo and Zhang Xinying bought the CPM company shares at a nominal price and had no written record of their acquisition for a period of more than six years after the alleged purchase until it became necessary to produce the share certificates in CPM following upon the arrest of the vessel in question, in my view, raises eyebrows and serves to confirm the suspicion of the respondent that the alleged sale was not genuine but an effort to disguise and conceal the identity of the controlling shareholder of the CPM.

[38] Fourthly, the guaranteeing of the mortgage by the CPM on the nominal commission percentage of one percent (1%) of the loan agreement value without requiring security in extent of a default of the loan by the borrower and the commitment to pay upon the guarantee, viewed in the light of the fact that Mesdames Wang Bo and Zhang Xinying had allegedly purchased the shares in CPM at alarmingly lower price, creates a serious doubt that the aforesaid two ladies were true owners of the company concerned. Judging from their pecuniary position as it is evidenced by their purchase of the shares in CPM with nominal price coupled with their relative youthfulness; it was highly unlikely that Mesdames Wang Bo and Zhang Xinying would agree to be responsible for paying a debt involving large sums of money in the event of the borrower defaulting to pay. In the premises, I agree with Mr Gordon for the respondent that this serves to confirm the suspicion the respondent has that Mr Wang, the sponsor of the mortgage, not Mesdames Wang Bo and Zhang Xinying, the purported owners of CPM, would foot the bill instead, in the event of a loan default by the borrower.

[39] Fifthly, the fact that in order to secure social benefits from the Chinese National Social Security Fund in collusion with Mr Wang, Mesdames Wang Bo and Zhang Xinying were registered as nominal employees of Vasteast clearly shows that they are all

devoid of integrity and honesty. Being so, the possibility could not be ruled out that Mesdames Wang Bo and Zhang Xinying could easily camouflage as a majority shareholders of CPM in order to disguise and conceal the identity of Mr Wang as the controlling shareholder of CPM.

[40] Lastly, more so, on applicant's version on the business cards Mr Wang is described as the president of Vasteast Shipping Co. Ltd and CPM a term, according to the applicant, outside the Peoples Republic of China is the equivalent of a legal representative. Nevertheless, the applicant contends that these business cards do not in any way show that Mr Wang controlled CPM and the applicant at the relevant time.

[41] On 26 January Mr Tago attended a reception held by CPM at the Pudong Shangila Hotel in Shanghai which was hosted by Mr Wang, and at such meeting it was said that Mr Wang was the president and owner of CPM. Mr Rokuta understood from what was being said that CPM and Vasteast belonged to and were under the control of Mr Wang.

[42] In Oxford Advanced Learner's Dictionary of Current English (International Student's Edition) by AS Hornby 8 ed, the word "president" is defined as the leader of a republic, the person in charge of some organizations, clubs, colleges etc and the person in charge of a bank or a commercial organization.

[43] Reader's Digest Oxford: Complete Word Finder, edited by Sara Tulloch and published by the Reader's Digest Association Limited, defines the word "president" as the elected head of a republic state, the head of the society or council etc, the head of certain colleges, the head of a company, etc and a person in charge of a meeting council.

It can also mean a chief, leader, principal, governor, director, managing director or a chairperson.

[44] The ultimate analysis of the word "president" shows that it refers to a person who is in charge of particular institution, organization or company. It could not therefore be said to be the equivalent of the word "legal representative", the ordinary meaning of which can be construed as a person who has formally been appointed or chosen to act or speak on behalf of another or others. No evidence has been adduced to show that Mr Wang, as an individual, has been appointed to perform such function, other than that Vasteast Company has been appointed as an exclusive agent of CPM. This supports the view of Messrs Rokuta and Tago that Mr Wang ran CPM and that he has at all times relevant hereto been known as the head of the CPM Company.

[45] In the premises, I find the version of the respondent more plausible and probable as compared to the version of the applicant in so far as Mr Wang being in control of CPM at the relevant time in point is concerned and as such the respondent's version provides sufficient circumstantial evidence from which the only reasonable inference that can be drawn is that Mesdames Wang Bo and Zhang Xinying were at the relevant time in point not majority registered shareholders or owners of CPM, as the applicant alleges, but mere nominees of Mr Wang. The inevitable conclusion, therefore, is that Mr Wang was in control of the CPM Company.

[46] Section 3(7)(c) of the Admiralty Act provides:

> "If at anytime the ship was the subject of a charter-party the charter or sub charter, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charter or the sub charter, and not the owner, is alleged to be liable."

It is common cause that CPM had sub chartered the *Asian Forest* vessel to Sundial Shipping Company Limited and that the latter ordered it to sail and load a cargo of iron ore fines at New Mangalore, India. Accordingly, in terms of the provisions of subsection (7)(c) CPM is the deemed owner of the *Asian Forest* vessel.

[47] Having found that Mr Wang was in control of CPM at the time the respondent's claim arose and that CPM was the deemed owner of *MV Asian Forest* at the particular time in point, I now turn to consider the question whether or not at the time when the vessel was arrested Mr Wang was a de jure controller of Sino West Shipping Company Limited, a company owning the vessel. Whether or not Mr Wang was at the time of the arrest of the vessel in control of Sino West Shipping Company is a question of fact which should be proved on the balance of probabilities. *See MV Iran Dastghay B Islamic Republic of Iran Shipping Line v Terra Maine SA 2010 (6) SA (SCA) 509E; Bocimar NV v Kotor Oversea`s Shipping Ltd 1994 (2) SA 563(A) at 582B*

[48] It is trite that in determining who controls the company one looks at immediate legal control of the company. In the case of an incorporated company, a person in control is the person who is in accordance with the appropriate legal system regarded as controlling the affairs of the company for the purposes of the law.

[49] Sino West Shipping Company Limited was incorporated in Hong Kong on 8 January 2010 as an international business company. The applicant avers that Mr Wang held shares in Sino West Shipping Company Limited as nominee for a number of investors until 18 July 2011 when those shares were transferred to Smoothie Goodie, a Seychelles Company. Mr Wang allegedly transferred his shares to Seychelles Company

because he was no longer prepared to be reflected on the applicant's public records as the sole registered shareholder of the company when in fact he was not the beneficial owner of the shares and exercised no control over the applicant through his registered shareholding. Mr Wang believed that being reflected as the sole shareholder of the applicant might have an effect on his business interest in the Far East. In fact Smoothie Goodie was interposed as the registered holder of all the shares in the applicant rather than Mr Wang.

[50] However, it is common cause between the parties that at the time of the arrest of the vessel on 24 May 2012 Mr Wang was the registered owner of all the shares in Smoothie Goodies Limited. According to the applicant Mr Wang holds shares in Smoothie Goodie Limited as the nominee for a number of investors and in fact he is the beneficial owner of only 20% of the shareholding. The applicant alleges that the law of Seychelles recognizes a split between beneficial and nominal ownership of shares and that a nominal shareholder may hold shares for the benefit of a beneficial shareholder in a trust relationship.

[51] The applicant avers that as such Mr Wang was obliged to comply with the instructions of the investors as regards the operations of the companies and had no discretion to act otherwise in relation to Smoothie Goodie Limited and Sino West Company. The relationship between Mr Wang as nominee shareholder and the beneficial shareholder is regarded as being legitimate according the laws of Seychelles and enforceable as between the normal shareholder and the beneficial shareholders.

[52] It is the applicant's contention that Mr Wang has no discretion to act in relation to Smoothie Goodie Limited. Nor does he have power, directly or indirectly to control

Smoothie Goodie Limited or Sino West shipping Company. The explanation given for Mr Wang to hold the shares as a nominee on behalf of a number of investors is that in corporation of Smoothie Goodie Limited was to enable Mr Wang to continue holding the shares therein as nominee for the investors who had earlier beneficially owned the shares in Sino West Shipping Company Limited. There was a gentleman's agreement in place between Mr Wang and the investors pursuant to which it was agreed that Mr Wang would be registered as the nominee shareholder

[53] It may be true, as the respondent has correctly pointed out, to say if Mr Wang held shares in the applicant as a nominee and transferred the shares to Smoothie Goodie for the same investors, it would be extraordinary in the light of the contentions made on his behalf that he would become the sole registered shareholder of the shares in Smoothie Goodie Limited.

[54] The applicant alleges that Mr Wang is the registered owner of all the shares in Smoothie Goodie Limited and the investors have actual and beneficial ownership of the shares in Smoothie Goodie. Zhao Yunsheng allegedly owns 28.8476%; Wang Bing 8.5%; and Zinyi 3.0%. The remaining 39.6544% of the shares in Smoothie Goodie is said to be a beneficial owned by a number of small shareholders.

[55] Nominee means a person nominated or appointed by another to hold shares in his name or on others behalf. See Sammel v President Golding Mining Co 1969(3) SA 629(A) 666,668. The nominee is simple an agent with limited authority, holding shares in name only on behalf of his nominator or principal from whom he takes instructions. See *Oakland Nominees v Gloria Mining Investment Co. 1976(1) SA 441(A) 453; Standard Bank of South Africa v Ocean Commodities Inc 1980(2) SA 175(T) 186C-F*.

[56] In terms of section 103 of the Companies Act 61 of 1973, the precursor of the Companies Act 71 of 2008, a member of the company is a person whose name is entered as a member in the register of members of a particular company. Section 37(9) (a) (b) of the Companies Act 71 of 2008 provides that a person acquires the rights when the name of the person is entered into the certified securities register and likewise loses those rights if a transfer is entered into the register. The rights arising from being the registered holder in respect of the shares belong exclusively to such shareholders. See *Simpson v Molson's Bank (1895) AC 270 (PC) at 279; RC v Bibby and Sons Ltd [1945] 1 All ER 667(HC) at 671; TRC v Silverts Ltd [1951] 1 All ER 703 (CA) at 706-709; Sammel case, supra, at 666-667.*

[57] Section 137(3)(a)(b) of the Companies Act 71 of 2008 and the corresponding section 193 of the Companies Act 61 of 1973 provides that every member has a right to vote at a general meeting in respect of each share held by him. Whereas, the nature of the rights and obligations of the nominee and his nominator inter se is governed by the contract or relationship between them.

[58] In terms of section 57(1) of the Companies Act 71 of 2008 a shareholder means the holder of a share issued by a company and who is entered as such in the certified or uncertified securities register. A shareholder also includes a person who is entitled to exercise a voting rights in relation to a company, irrespective of the form, title or notice of the securities to which those rights are attached.

[59] Section 57 (2) of Act 71 of 2008 provides:

> "(2) If a profit company, other than a state owned company, has only one shareholder-

(a) that shareholder may exercise any or all of the voting rights pertaining to that company on any matter, at any time, without notice or compliance with any other internal formalities, except to the extent that the Companies Memorandum of Incorporation Provides otherwise"

[60] The principal who does not appear on the register of members of the company is usually described as the "beneficial owner" of those shares. The exact relationship between nominee and the beneficial owner, although is usually one of agency, will depend on the facts of each case. The policy is that a company shall concern itself with the registered holder and not the owner or beneficial owner of shares. See *Oakland Nominees case, supra, at 453A-B.*

[61] In Sammel and others case, at 666D-E, it was held that the word "nominee" comes from the English statute. The policy of that law is that a company shall concern itself only with the registered shareholder and not the owner of the shares 666D-E. In this regard, Palmer, Company Law, 19th Ed, at P103 says:

"Where the registered holder is a nominee for some other person who really controls the share this fact does not appear on the register. This is prohibited by sec 117 of the Act of 1948. This enables the persons who are really in control of a company to conceal their position from the shareholders and from the public a state of affairs which sometimes leads to abuse, and even fraud."

[62] In cases where no guidance can be found in our common law, our courts have no option but to draw from the experience of English law on the point in issue, and to follow the English precedents, if justified. The control of a company resides in the voting power of its shareholders. This means that the control must be derived solely from voting power attached to shares which are held by the directors and of which the directors are the absolute beneficial owners. See *Inland Revenue Commissioners v Bibby and Sons Ltd[1945] 1 All ER 667 at 668- 670*: In determining the power of controlling in the

company the voting power of its directors is sufficient, not their beneficial interest in the company. See *Inland Revenue Commissioners v Silverts Ltd [1951] 1 All ER 703 at 707.*

[63] In Inland Revenue Commissioners v Bibby and Sons Ltd, supra, at 672, the word "interest" was construed as meaning no more than that the directors must have an interest such as enables them to control the activities of the company; it does not require some personal financial interest on their part which control enables them to control the fact that a vote –carrying share vested in a director as trustee is as far as the company concerned immaterial. The general rule is that the trustee shares must be excluded from consideration since as trustees they have no "interest" in the shares, and as beneficiaries they had no "control" over the company. (at 668)

[64] In Inland Revenue Commissioners v Silverts, where the National Provincial Bank was the registered holder of all the shares and was not mere a nominee or bare trustee, the court held that the controlling interest was in the bank, and that it was not permissible to investigate the character in which the bank exercises its voting.

[65] In Inland Revenue Commissioners v J Bibby and Sons Ltd case, supra, at 671, it was held that a trustee shareholder may, as between himself and his c*estuis que* trust, be under a duty to exercise his vote in a particular manner, or a shareholder may be bound under contract to vote in a particular way. But such restrictions the company has nothing to do. It must accept and act upon the shareholders' vote not withstanding that it may be given contrary to some duty which he owes to outsiders.

[66] In Pulbrook v Richmond Consolidated Mining Company (1878) 9CLD 610 at 615 Jessel MR said"

> "The company cannot look behind the register as to the beneficial interest but must take the register as conclusive and cannot inquire … into the trusts affecting shares".

[67] In Standard Bank Of South Africa Limited v Ocean Commodities Inc 1983(1) SA 276(A) at 288H – 289A, it was held that normally the person in whom the shares rests is the registered shareholder in the books of the company and has issued to him a share certificate specifying the share, or shares, held by him. Indeed, such a share certificate, duly issued, affords prima facie evidence of his title to the shares specified (section 94 of the companies Act 61 of 1973) in some instances; however, the registered shareholder may hold shares as the nominee, i.e. agent of another, generally described as the "owner" or "beneficial owner" of the shares. The fact does not appear on the company's register, as it is the policy of the law that a company should concern itself with the registered owner of the shares (at 289A-B).

[68] The term "beneficial owner" denotes the person in whom, as between himself and the registered shareholder, the benefit of the bundle of rights constituting the share vests. See Oakland Nominees case, supra, 447H-453A. In The Ya Mawlaya (No1) Delray Shipping Corporation v Eridiana Spa 1999 SCOSA C30 (D) it was held that a party alleging a person to be the beneficial owner of a ship is bound by the ordinary rules of procedure and must discharge the onus of providing such beneficial by furnishing details of the share ownership of the company owning the ship in question.

[69] Section 27 of the Seychelles Companies Act, International Business Act, 24 of 1994, provides:

"27. (1) A company incorporated under this Act shall state in its Articles whether or not certificates in respect of its shares shall be issued;

(2) Where a company incorporated under this Act shall issue certificates in respect of its shares, the certificates shall be evidenced by the signature of a director or officer of the company; ….

(3) A certificate issued in accordance with subsection (2) specifying a share held by a member of the company shall be prima facie evidence of the title of the member to the share specified therein."

[70] Section 28 (1) (a) (b) (c) of the Seychelles Companies Act requires a company incorporated under this Act to keep one or more registers known as Share Registers containing the names and addresses of the persons who hold registered shares in the company; the number of each class and series of registered shares held by each person and the date on which the name of each person was entered in the Share register.

[71] In the present case, in my view, the applicant has not discharged the required onus since it has not disclosed the names and identities of the alleged investors and what share holding they have. The general rule is that a person who alleges must prove. See *Pillay v Krishna 1946 AD 946*.

[72] The shareholding set out in the applicant's affidavit regarding Smoothie Goodie, a company incorporated and registered under Seychelles Companies Act, is not supported by any scrap of paper in the form of a share certificate as section 27 (3) of the said Act provides. Nor does the Seychelles Companies Act make provision for the principal of persons holding shares as a nominee, as the applicant alleges.

[73] However, the issue involving the interpretation of the Admiralty Act has to be determined by reference to the law of South Africa. It appears from the decided authorities that the claimant cannot look beyond the register of members and seek the individual who controls the company concerned in order to enforce his or her maritime claim against that particular company. Likewise, in my view, the court cannot look beyond the company and declare a person, who is not the registered shareholder of the company concerned, to be in control thereof. The ultimate control over a company's affairs is exercised by its members in general meetings. See *MV Heavy Metal Palm Base Maritime CDN BHD v Dahlia Maritime 1998(4) SA 479 (CPD) at 492D.*

[74] In MV Heavy Metal (Cape) case , supra, at page 491A-B it was held that by providing in section 3(7) (b) (ii) of the Admiralty Act that the claimant need establish no more than that the person concerned has the power to control the company concerned, directly or indirectly, the Legislature came to the aid of the claimant who seek to rely on the associated ship provisions of the act in order to recover money due to him from the owner of an associated ship. It is frequently difficult for a claimant in this position to establish and prove who the beneficial owners of the shares in a particular ship – owning company are, because they are concealed from him.

[75] In the present case Mr Wang is the sole registered shareholder in Smoothie Goodie Limited, which in turn, holds hundred (100%) percent shareholding in Sino West Shipping Company Limited. Therefore, it follows that Mr Wang has eventually controlling interest in Sino West Shipping Company Limited, owning the arrested ship. The words "controlling interest" were construed in Inland Revenue Commissioners v J Bibby and Sons Limited case, supra, at 670 as meaning "controlling voting power" that is the interest in view not beneficial interest. The words "controlling interest" do not refer to

the directors' "beneficial interest" in the company but to the power of controlling by votes the decisions binding on the company in the shape of resolution passed at a general meeting. See *Inland Revenue Commissioners v J Bibby and Sons Ltd case, supra, at 669.*

[76] Section 3(7) (b) (i) of the Admiralty Act provides:-

> "For the purposes of paragraph (a) – ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of the shares in the ships is owned by the same persons."

[77] A link between Mr Wang and the two companies is a question of fact which should be proved on the balance of probabilities. Mr Wang as the sole registered share holder in Smoothie Goodie Ltd, he has ultimate beneficial ownership and control over the company's affairs as well as over Sino West Shipping Co. Ltd through Smoothie Goodie limited. It therefore follows that Mr Wang has power directly to control both companies by voting the majority of the shares in their shareholders meetings.

[78] Whether or not Mr Wang in fact exercises that power himself or whether it is exercised through him by others is immaterial. He is deemed to control Sino West Shipping Company Limited whether he does so and in fact not so. In MV Heavy Metal (Cape) at page 491C-D it was held that this is the situation in which the Legislature sought to achieve finality, as regards the identity of the person or persons who control such companies, even at the expense perhaps of artificiality.

[79] Even if Mr Wang holds the shares in Smoothie Goodie Limited as a nominee for various investors, as the registered shareholder he has the power directly to control the both companies by voting of their shares in their shareholders meeting. In essence, this means that as the majority shareholder of both companies, Mr Wang has overall control

over Smoothie Goodie and Sino West Shipping Company Limited, and as a consequence he can exercise control over their assets and their destinies. See *MV Heavy Metal (Cape): Belfry Marine Limited case, supra, at 492F; Section 57(2)(a) of the Companies Act 71 of 2008.*

[80] In MV Heavy Metal (SCA) case, supra, at page 1106G it was held that if the person who has de jure power controls, at the relevant times, the company owning the ship concerned and the company owning the alleged associated ship, the statutory nexus between the two companies will have been established. See also *Transgroup Shipping (Pty) Ltd v Omes of Kiyoju 1984(4) SA 210 (D) at 214H-J*. Marais JA in MV Metal (SCA) case at page 1112F took the same view as Smalberger and held that the purpose of subsection 3(7) (b) (i) of the Admiralty Act is to allow a claimant to pierce the veil of apparent or ostensible power to control a company and so reveal the identity of the real holder of power to control the company.

[81] Smalberger JA at 1106F found the extension of de jure power to defacto power to be in line with the objective of the subsection to prevent the 'owner', by presenting a false picture to the outside world, from concealing his assets from attachment and execution by his creditors.

Conclusion

[82] In the premises, I hold that the respondent as the arresting party has succeeded on the balance of probabilities to discharge the onus resting on it to prove that Mr Wang was at the time when its claim arose in control of CPM, the deemed owner of *Asian Forest* ship, and that at the time of the arrest of *Sino West* vessel Mr Wang exercised de jure control over Sino West Shipping Company Limited, a company owning the arrested

vessel, through Smoothie Goodie Company Limited. As a consequence the *Sino West* vessel was an associated ship of the *Asian Forest* ship at the time of its arrest.

Order

[83] In the result, the application is dismissed with costs.

Date reserved:	11 December 2012
Date delivered:	8 March 2013
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