THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 283/2023

In the matter between:

MV *'NEW ENDEAVOR'*	**FIRST APPELLANT**
ELLY MARITIME SA	**SECOND APPELLANT**
PORTO EMPORIOS SHIPPING INC.	**THIRD APPELLANT**

and

INDIAN OIL CORPORATION LIMITED	**RESPONDENT**

Neutral citation: *MV 'New Endeavor' and Others v Indian Oil Corporation Limited* (283/2023) [2024] ZASCA 67 (03May 2024)

Coram: MOLEMELA P and MBATHA, MEYER and WEINER JJA and SEEGOBIN AJA

Heard: 15 February 2024

Delivered: 03 May 2024.

Summary: Admiralty law – arrest of an associated ship in terms of ss 3(6) and (7) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act) – arrest for security in terms of s 5(3) of the Act – reconsideration in terms of rule 6(12)*(c)* of the Uniform Rules of Court – onus of establishing an association in a security arrest discharged – source of control established where the respondent asserted alternative sources of power.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Sibiya J, sitting as a court of first instance):

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

JUDGMENT

Mbatha JA and Seegobin AJA (Molemela P and Meyer and Weiner JJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the KwaZulu-Natal Division of the High Court, Durban per Sibiya J (the high court) (exercising its Admiralty Jurisdiction), dated 15 December 2022. The high court dismissed, with costs, an application for reconsideration brought in terms of rule 6(12)*(c)* of the Uniform Rules of Court of an order of arrest made on 30 May 2022. The order of arrest was in respect of the first appellant, the MV '*New Endeavor*' (*New Endeavor*),[1] as an associated ship of the MT '*New Diamond*' (*New Diamond*),[2] that was arrested for security in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act).

Background

[2] On 5 August 2020, the respondent, Indian Oil Corporation Limited (Indian Oil), concluded a voyage charterparty with the third appellant, Porto Emporios

[1] Also referred to as the 'associated ship'.
[2] Also referred to as the 'ship concerned'.

Shipping Inc. (Porto), for the carriage of 277 564 metric tonnes of crude oil (the cargo) on Porto's ship, the *New Diamond*, to India.

[3] En route from Kuwait to India, the *New Diamond* caught fire and, subsequently, salvage services were rendered, a general average was declared, and the voyage was abandoned. As a result, Indian Oil transhipped its cargo to two other vessels for onward carriage to India. Part of the cargo was lost, and, Indian Oil incurred losses in the amount of approximately USD 70 000 000. Consequently, Indian Oil is seeking payment from Porto in the sum of USD 73 047 429,33 plus Indian Rupees (INR) 701 361 274,99, together with interest and costs, being damages suffered by it, as a result of Porto's breaches of its obligations, under the bill of lading and charterparty, alternatively as a result of Porto's negligence or breach of its obligations to Indian Oil in bailment. Indian Oil is pursuing a claim for damages against Porto by way of arbitration proceedings in India.

[4] Indian Oil's claim has been partially secured by Porto through its P & I Club (Protection and Indemnity) pursuant to a flag arrest of the *New Diamond* in Panama. In addition, security was provided, pursuant to the arrest on 19 September 2021, at Richards Bay, KwaZulu-Natal, of the MV *'New Elly'* (*New Elly*). The *New Elly* is owned by the second appellant, Elly Maritime SA (Elly Maritime), which has its registered office in Monrovia, Liberia, and is registered as a foreign company in Greece.

[5] An urgent application for reconsideration of the order of arrest of the *New Elly* was heard by the high court (per Bedderson J), and dismissed with costs. An appeal against the judgment and order of Bedderson J is currently pending before a full court of the KwaZulu-Natal Division of the High Court, Durban.

[6] On 30 May 2022, Indian Oil brought an urgent *ex parte* application before the high court for additional security for the arrest of the *New Endeavor* as an associated ship of the *New Diamond* in terms of s 3(6) read with s 3(7) of the Act. The application served before Mathenjwa AJ who granted an order in favour of Indian Oil. An application by *New Endeavor* for reconsideration of the above order in terms of rule 6(12)*(c)* of the Uniform Rules and for its release was dismissed with costs by Sibiya J on 15 December 2022. The present appeal serves before us with leave of the high court.

Issue for determination

[7] The single issue that falls to be determined in this appeal is whether Indian Oil discharged the onus of establishing, on a balance of probabilities, the alleged association between the respective ship owning companies of the *New Endeavor* and the *New Diamond*, in circumstances where, rather than alleging a single source of control, Indian Oil asserted alternative sources of control. There was no dispute that Indian Oil had established the other requirements for an arrest in terms of s 5(3)[3] of the Act, namely, a *prima facie* case and a genuine and reasonable need for security.

[3] The relevant parts of s 5(3) of the Act provides as follows:
'. . .
(3)*(a)* A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest 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 which would be so enforceable but for any such arbitration on proceedings.
*(a*A*)* Any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such or pending the outcome of any such arbitration or proceedings.
(b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.'

Onus

[8] Contrary to the findings made by the high court in paragraphs 6[4] and 37[5] of its judgment with regard to the issue of onus, it is well established that Indian Oil bore the onus of proving the alleged association on a balance of probabilities. This was endorsed by this Court in the decisions of *Cargo Laden and Lately Laden on board the MV Thalassini Avgi v MV Dimitris*,[6] *Bocimar NV v Kotor Overseas Shipping Ltd*,[7] and *MV Silver Star: Owners of Silver Star v Hilane Ltd (Silver Star)*.[8]

[9] Equally trite, is that security arrests in terms of s 5(3) can be brought by the arrest of an associated ship to the ship concerned. The arrest of an associated ship is not an easy task. In the textbook titled *The Associated Ship & South African Admiralty Jurisdiction* (*The Associated Ship*), the author, M J D Wallis, expressed himself on this issue as follows:

'The task of proving the association is complicated by the relative inaccessibility of the key information required to demonstrate the identity of the person or persons who control the two ship-owning companies . . . In the circumstances an applicant for arrest is confronted with the heavy burden of proving a disputed matter on a balance of probabilities on the papers when it has

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[4] In para 6, the high court said the following:
'The onus to show the association in an application for arrest is on the applicant. However, once the arrest has been authorised the association is taken as established, and the onus is on the respondents to show that the ship arrested and the vessel concerned have not been shown to be associated ships.'

[5] In para 37, it said the following:
'The applicable standard of proof is the civil standard of the preponderance of probabilities, and not proof beyond a reasonable doubt. The annexures relied on by the applicant demonstrate, on a balance of probabilities, that the first respondent and the vessel are associated ships as contemplated in section 3(6) read with section 3(7) of the Admiralty Act. Having concluded that a *prima facie* case of association was correctly found to be established, this is sufficient for the refusal of the reconsideration application, without more.'

[6] *Cargo Laden and Lately Laden on board the MV Thalassini Avgi v MV 'Dimitris'* [1989] ZASCA 76; [1989] 2 All SA 436 (A)1989 (3) SA 820 (A) at 833B-D.

[7] *Bocimar NV v Kotor Oversea Shipping Ltd* [1994] ZASCA 5; [1994] 2 All SA 245 (A); 1994 (2) SA 563 (AD) at 583 E-F.

[8] *MV Silver Star: Owners of MV Silver Star Owners of the Silver Star v Hilane Ltd* [2014] ZASCA 194; [2015] 1 All SA 410 (SCA); 2015 (2) SA 331 (SCA) (*Silver Star*) para 39.

no direct access to the relevant information and may well be confronted with the withholding of information, disingenuousness and downright dishonesty.'[9]

Proving an 'association'

[10] It is not in dispute that Indian Oil proved that it had a maritime claim against the *New Endeavor* in terms of ss 1(1)*(g), (h), (j), (k), (t)* and the all-embracing s 1(1)*(ee)* of the Act. The question that requires determination, is whether the relevant vessels are associated with each other, and, who is the controlling force behind the companies that own the vessels. It is important that we highlight the relevant provisions of the Act that set out the requirements for association. Section 3(6) of the Act provides as follows:

'An action *in rem* other than an action in respect of a 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] Section 3(7)*(a)* recognises three scenarios where the ship is considered to be an associated ship:

'(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; or

(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; or

(iii) 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.

(b) For the purposes of paragraph *(a)*–

(i) 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 are owned by the same persons;

[9] M J D Wallis *The Associated Ship & South African Admiralty Jurisdiction* (2010) (*The Associated Ship*) at 292. This was subsequently quoted, with approval, by Ponnan JA at para 39 of *Silver Star*.

(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;

(iii) a company includes any other juristic person and anybody of persons, irrespective of whether or not any interest therein consists of shares.

(c) If at any time a ship was the subject of a charter-party the charterer or sub-charterer, 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 charterer or the sub-charterer, and not the owner, is alleged to be liable.'

[12] In *Silver Star*,[10] this Court set out the purpose of the Act and the circumstances in which ships are said to be associated:

'The purpose of the Act is to make the loss fall where it belongs by reason of ownership, and in the case of a company, ownership or control of the shares (*Berg* at 712A). And, as Marais JA pointed out (albeit in a minority judgment) in *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) (*Heavy Metal*) para 4:

"The way in which this was done was, first, by describing in s 3(7)*(a)*(i), (ii) and (iii) the circumstances in which ships were to be regarded as associated and, secondly, by enacting certain deeming provisions in s 3(7)*(b)*(i), (ii) and (iii) which are obviously designed not only to defeat defensive stratagems which ship owners might deliberately deploy to ward off potential arrests of associated ships by disguising their ownership or their control of such ships, but also to allow it to be shown even in a case where no such motive existed where power of control *really* lay."

Those sections require that in relation to both the ship concerned and the associated ship, a "person" must be identified who "controls" (or controlled) the companies in question. The level of control required is that the person must control the overall destiny of the company (*The Kadirga 5 (No 1) JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS* SCOSA C12 (N) at C14E).'

[13] The judgment of this Court in *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD Belfry Marine Ltd v Palm Base SDN BHD* (*Heavy*

[10] *Silver Star* para 40.

Metal),[11] dealt with the interpretation of the provisions of s 3(7)*(a)*, *(b)* and *(c)* of the Act. This Court carefully analysed the provisions in s 3(7)*(a)*(i), (ii) and (iii) with regard to the circumstances in which ships were to be regarded as associated and the deeming provisions in s 3(7)*(b)*(i), (ii) and (iii) which were designed to defeat defensive strategies deliberately employed by ship owners to ward off potential arrests of associated ships by disguising their ownership or control of such ships.

[14] In *Heavy Metal,* this Court, in considering the aforementioned provisions of the Act, had regard to the language used, the purpose of the provision, its context and the objects of the Act as a whole. It held that the object of the associated ship provisions was to enable the associated ship to be arrested in respect of the maritime claims and the purpose was to afford the claimant with an alternative defendant to enforce its claim. It went on to say that the subsection distinguishes between 'direct' and 'indirect' control. Direct control can be exercised by a person wielding power behind the scenes '*de facto*' or by a person who was in '*de jure*' control of the company. This Court recognised this as '[the] extension of *de jure* power to *de facto* power [which] is in line with the objective of the section: to prevent the true "owner" presenting a false picture to the outside world, from concealing assets from attachment and execution by creditors'.[12] The Court concluded that the same approach should be adopted in the deeming provisions of the Act, ie s 3(7)*(c)*, 3(10)*(a)*(i) and (ii) and *(b)*, and 3(11)*(b)* of the Act.

[15] The question of control is a legal and a factual one. In line with this, the judgment in *Heavy Metal* stated as follows:

'The subsection [3(7)(*b*)(ii)] elaborates upon and refines the concept of control by that person. Control is expressed in terms of power. If the person concerned has power, directly or indirectly,

[11] *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* [1999] ZASCA 44; [1999] 3 All SA 337; 1999 (3) SA 1083 (SCA) (*Heavy Metal*).
[12] Ibid para 10.

to control the company he/she shall be deemed ("geag . . . word") to control the company. "Power" is not circumscribed in the Act. It can be the power to manage the operations of the company or it can be the power to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter which, in my view, the Legislature had in mind when referring to "power" and hence to "control".'[13]

[16] According to *The Associated Ship*, the process of comparison that follows upon this identification is intended to be a simple one. He adds:

'The maritime claimant identifies the party who controls the company that owned the ship concerned and identifies the party who controls the company that owns the associated ship that it seeks to arrest. The result of those exercises is then compared. If they correspond, in the sense that the same person or persons control both companies, then the requisite association is established. If they are not the same then the association is not established.'[14]

Difficulties in establishing control arise where the company, which owns the ship, may be a shelf company or is owned by a nominee who may be just an agent for a principal. This is also the case where the shareholding is held at 50/50. As a result, control cannot be attributed to a 50% shareholder.[15] The shareholders also lose control when the company gets deregistered or is placed in liquidation.

[17] Control is never easy to prove. The Act allows for admission of hearsay evidence in terms of s 6(3) in order to prove control, hence the reliance on hearsay evidence from Lloyds list of records, investigative reports and newspaper reports in this matter. Section 6(3) which provides for the admissibility of hearsay evidence provides as follows:

'A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such direction and conditions as the court thinks fit'.

The Associated Ship points out that:

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[13] Ibid para 8.

[14] *The Associated Ship* at 187.

[15] *MV La Pampelouis Dreffus Amateurs SNC v Tor Shipping* [2006] ZAKZHC 3; [2006] 3 All SA 464 (D); 2006 (3) SA 441 (D) para 54-55.

'In its original form section 3(7)(a)(ii) referred to ownership or control of the shares of a company and not to control of the company itself.'[16]

In support of this, *The Associated Ship*, refers to a judgment in *East Cross Sea Transport Inc v Elgin Brown & Hamer (Pty) Ltd*,[17] where the court held that the fact that two owning companies had a common director, did not mean that the vessels were associated in terms of the Act. This was aptly confirmed in the *Heavy Metal* judgment, where this Court held that the only interpretation to be attributed to s 3(7)*(b)*(ii) is that a person shall be deemed to control a company if he has power directly or indirectly to control the company.

[18] Control over a company can be exercised even without a majority shareholding. The learned author, G Hofmeyr, in his textbook titled *Admiralty Jurisdiction Law and Practice in South Africa*,[18] states that 'control is not defined in the Act. It could denote only power to determine the direction and fate of the company'. He refers to the *Heavy Metal* judgment where the court succinctly stated that:

'In my view, therefore, 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; and indirect power to the *de facto* position of the person who commands or exerts authority over the person who is recognised to possess *de jure* power (i.e. the beneficial "owner" as opposed to the legal "owner"). This extension of *de jure* power to *de facto* power is in line with the objective of the section: to prevent the true "owner", by presenting a false picture to the outside world, from concealing his assets from attachment and execution by his creditors.'[19]

The reconsideration application

[19] One of the arguments raised before us on behalf of Indian Oil was that an adverse inference should be drawn against the appellants for their failure to file an

[16] *The Associated Ship* at 121.
[17] *East Cross Sea Transport Inc v Elgin Brown & Hamer (Pty) Ltd* 1992 (1) SA 102 (D) at 107E-F.
[18] G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) (*Admiralty Jurisdiction Law and Practice*) at 141-142.
[19] *Heavy Metal* para 10.

answering affidavit in the reconsideration application in order to counter the allegations made by Indian Oil concerning the issue of association. Counsel for the appellants, however, argued that there was no need for the appellants to file any affidavits as they were entitled to argue, on the basis of the application papers alone, that no case had been made out for any relief.

[20] A similar debate ensued between the parties in *Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation) and Others.*[20] In addressing this issue this Court said the following:

'Rule 6(12)*(c)* does not prescribe how an application for reconsideration is to be pursued. The absence of prescription was intentional and the procedure will vary depending upon the basis on which the party applying for reconsideration seeks relief against the order granted *ex parte* and in its absence. A party wishing to have the order set aside, on the ground that the papers did not make a case for that relief, may deliver a notice to this effect and set the matter down, for argument and reconsideration, on those papers. It may do the same if it merely wishes certain provisions in the order to be amended, or qualified, or supplemented. The matter is then argued on the original papers. It is not open to the original applicant, save possibly in the most exceptional circumstances, or where the need to do this has been foreshadowed in the original founding affidavit, to bolster its original application by filing a supplementary founding affidavit.

The party seeking reconsideration is not confined to this route. It may file an answering affidavit, either traversing the entire case against it, or restricted to certain issues relevant to the reconsideration. In many instances such an affidavit will be desirable. Even if an affidavit is filed, however, it does not preclude the party seeking reconsideration arguing at the outset, on the basis of the application papers alone, that the applicant has not made out a case for relief. That is a well-established entitlement in application proceedings and there is no reason why it should not be adopted in reconsideration applications.

If an affidavit is filed in support of the application for reconsideration then the party that obtained the order is entitled to deliver a reply thereto, subject to the usual limitations applicable to replying affidavits. When that is done, and the party seeking reconsideration does not argue a

[20] *Afgri Grain Marketing (Pty) Ltd v Trustees of Copenship Bulkers A/S (in liquidation)* [2019] ZASCA 67; [2019] 3 All SA 321 (SCA); 2024 (1) SA 373 (SCA) paras 12-16.

preliminary point at the outset that the founding affidavit did not make out a case for relief, the case must be argued on all the factual material before the judge dealing with the reconsideration proceedings. That material may be significantly more extensive and the nature of the issues may have changed as a result of the execution of the original *ex parte* order.'

The proper approach to this appeal is, therefore, to have regard to the factual material that was placed before the high court for the purposes of reconsidering the order originally granted by Mashile J.'(Emphasis added.)(Footnotes omitted.)

[21] Before considering the nature of the evidence presented by Indian Oil, it is necessary to point out that proceedings in admiralty should be given a generous interpretation consistent with its manifest purpose of assisting maritime claimants to enforce maritime claims. This point was made in *NYK Isabel, MV: Northern Endeavour Shipping Pte Ltd v Owners of the MV NYK Isabel*:[21]

'It follows in my view that the provisions of the Act should be given a generous interpretation consistent with its manifest purpose of assisting maritime claimants to enforce maritime claims. That construction is also consistent with the right of access to courts afforded to everyone in terms of s 34 of the Constitution. There is, however, a need for balance when the courts exercise the expansive powers of arrest and attachment of vessels embodied in the Act. Sections 5(2)*(b)* and *(c)* give courts the means to balance the interests of claimant and defendant by ordering counter-security in appropriate cases and attaching conditions to orders of arrest or attachment. Thus it is commonplace for an arrest to be subject to the provision of security for the costs of an application to set the arrest aside, or for any loss suffered in consequence of that arrest if it is subsequently set aside.'

The evidence

[22] The evidence relied on by Indian Oil was based on information obtained from documents, emails and other correspondence provided to it by Mr Mark Lloyd (Mr Lloyd), a partner at Kennedys Law Firm in London. Mr Lloyd acts on behalf of Indian Oil on instructions from WE Cox Pty Ltd, a recovery and loss adjusting company, which was, in turn, instructed directly by the insurers of Indian

[21] *NYK Isabel, MV: Northern Endeavour Shipping Pte Ltd v Owners of the MV NYK Isabel* [2016] ZASCA 89; [2016] 3 All SA 418 (SCA); 2017 (1) SA 25 (SCA) para 45.

Oil. Information was also obtained from Francisco Carrera-Pitti, an attorney admitted in 1976 in Panama and practising as Carrera-Pitti Attorneys and from Captain Rajiv Thakar, a casualty and complex claims director at WE Cox Claims Group (Europe) Ltd.

[23] Reliance was also placed on a report compiled by Gray Page (the Gray Page report) that was commissioned by Indian Oil. Gray Page is a specialist consulting group that investigates, *inter alia*, the ownership and control of vessels. On instructions from Indian Oil, Gray Page carried out an investigation into the ownership and control of the *New Diamond* as well as the ownership and control of several other ships potentially associated with her, including the *New Endeavor*. The Gray Page report, together with certain relevant annexures, was attached to the founding affidavit. Reliance was also placed on two newspaper articles, namely the 2013 *TradeWind's* article and the 2014 *Espresso* article.[22] The contents of these articles will be dealt with here below.

[24] Ms Barnwell stated as follows:

'89. As set out in detail below, the applicant respectfully submits that the first respondent is an associated ship to the vessel on the basis that there is the same single repository of control in respect of the vessel as the "ship concerned" and the: First Respondent at the times stipulated in the Act on the following basis:

89.1 At the time the maritime claim arose, the vessel was owned by the Third Respondent;

89.2 At the time when the maritime claim arose, the Third Respondent was owned or controlled by New Shipping Limited which was in turn owned or controlled by Adam Polemis on his own, alternatively Adam Polemis together with his children;

89.3 At the time of this application, the First Respondent is owned by the Second Respondent; and

[22] Shipping publications.

89.4 At the time of this application, the Second Respondent is owned or controlled by New Shipping Limited which is in turn owned and controlled by Adam Polemis on his own, alternatively Adam Polemis together with his children.'

[25] Placing reliance on the information contained in the Gray Page report, the following allegations were made:

'91. In March 2013, the vessel was purchased by Porto Emporios Shipping Inc. of Liberia, the Third Respondent and named the mt *Diamond Warrior*.

92. At that time, her technical managers and commercial operators were reflected as being Polembros Shipping Limited (PSL) of 57A Poseidonos Avenue, Moschato, 183 44, Athens, Greece.

93. PSL is a family-owned ship management company that has been operating in London since 1974. The company was established by Greek brothers Spyros and Adam (Avamantios) Polemis in the 1970s and over the next 20 years Polembros grew to become one of the ten largest Greek shipping groups. These facts were reported in the TradeWinds daily shipping newspaper on 1 June 2014 and 23 May 2014.

94. In 2014, new reports reflected that after 40 years of partnership running PSL, Spyros and his younger brother, Adam, intended splitting their shipping interests. The reports reflected that the decision was driven partly by their intention to accommodate the two brothers' children and grandchildren who will one day succeed them and who would play a role in the future management of the business. Spyros and his children would keep the name of PSL, which Spyros would run together with his son, Leonidas.

95. Adam and his two children, Leonidas and Alina would transfer their ships from PSL to New Shipping Limited (NSL) which is another family interest company founded in 2005. NSL is a company with limited liability established in accordance with the laws of Greece, which carries on business at 57A Poseidonos Avenue, Moshcato, Athens, Greece. According to Gray Page's local repositories in Greece, familiar with the Polemis family, Adam uses NSL to manage his shipping interests for the benefit of his two children Leonidas and Alina.

96. Copies of the aforesaid news articles are attached, marked "O" and "P" respectively. Pertinently, these news articles report that:

2013 Article (annexure O) - TradeWinds

96.1 "*Polembros is taking advantage of attractive prices for secondhand assets and demolition sales in a continuing rejig of its fleet ["]*;

96.2 "*This week the company was again reported to have bought the 300,000 dwt tanker Ikomasan (built 2000), this time for US$27.3m*";

96.3 PSL is referred to as "*the Greek owner*";

96.4 "*The owner has also moved onto dry bulk buying and selling*" (details of the purchase of various bulkers are given);

96.5 PSL has scrapped two bulkers that year, on favourable terms;

96.6 "*This year the company will start taking delivery of a series of 205,000 dwt bulker new buildings*".

2014 Article (annexure P):

96.7 The brothers are going to "*divide their property*" and separate their fleet;

96.8 Spyros will continue "*to run*" PSL together with his son;

96.9 Adam and his children will "*pass their respective ships . . .*" to NSL, another "*family interest company*";

96.10 PSL has bought several ships since the beginning of the year (2014) "*some of which – as it seems – are destined for the New Shipping fleet*";

96.11 Adam informed shipping circles that his part of the fleet to be held under NSL will number about 23 ships.'

[26] Ms Barnwell further stated:

'97. It is evident from these news articles that PSL and NSL are not mere ship-management companies but are used as vehicles to control the companies which own the ships in the fleets managed by them. As reported by Gray Page, each ship is registered in the name of a separate ship-owning company. These companies are effectively single-purpose vehicles ("SPVs") whose sole function is to own a ship. It is evident that PSL and NSL exercise control over the SPVs, not only in the sense of day-to-day management but the control of their ultimate fate and destiny. It is reported that:

97.1 PSL and NSL make strategic decisions to expand and contract their fleets from time to time by purchasing, selling and scrapping vessels.

97.2 Control of PSL and its fleet initially vested in both brothers, who in 2014 made the strategic decision to separate the fleet into two branches, which they implemented by moving the management of certain vessels across to NSL.

97.3 In this way the Polemis family beneficially owns and controls the fleet of ships which it has acquired over the years.

97.4 Although the Polemis family owns the ships through the vehicles of separate companies, it controls those companies through PSL (Spyros and family) and NSL (Adam and family).'

[27] Ms Barnwell concludes that the ships which 'the Applicant alleges are associated ships for the purposes of this application, (*viz* the Vessel and the First Respondent) are both ships within the NSL stable'. The following allegations are also made by Ms Barnwell:

'100. In May 2014, the vessel's name was changed to *mt New Diamond* but it remained in the ownership of the Third Respondent.

101. The Third Respondent is a Liberian company, with its registered address at 80 Broad Street, Monrovia. This is the registered address for the hundreds of ship-owning companies registered in Liberia. Liberian law is such that the applicant is unable to obtain details of the company's shareholding and corporate officers. However, the bill of sale for the purchase of the *mt Diamond Warrior*, (subsequently renamed *mt New Diamond*) reflects that the attorney in fact acting for the purchaser was Eftstratios Gogis. He is a person known to be connected to the Polemis family and acts as a director of the family's hotels and tourism business in Greece, Hydra Hotels Hellas SA, which has the same registered address as PSL and NSL – as reflected in the attached extract from the Kompass database for this company marked "Q".

102. Gogis is reflected as the secretary of the Third Respondent, according to the articles of amendment of that company, which also reflects the President as being Antonis Stellas.

103. NSL is a Liberian-registered entity which carries on business in Greece and is accordingly registered under Law 89/1967 as a foreign company operating in Greece. As reflected above, NSL's registered address in Greece is the same as for PSL.

104. On 24 February 2011, NSL filed a Certificate of Election and Encumbrance in Greece which reflects Evangelos Stathopoulos as President/treasurer and Pandelis Pangalos as Vice-President and secretary.

105. Pangalos remains the general manager of NSL in Greece and was formerly a director of PSL in London until 2017.

106. On 30 November 2018, NSL filed a further document amending the company's Articles of Incorporation. This is the same date as a similar filing for the Third Respondent. The amendment reflected that the new corporate officers of NSL were Stellas as President and Gogis

as secretary. Stellas is the operations manager for NSL, as recorded in the attached LinkedIn profile marked “R”.

107. The Ministry of Merchant Shipping reflects that Gogis has been the legal representative of NSL in Greece since 1 April 2014. Prior to this, Pangalos held the position. NSL’s Board of Directors as recorded in the Law 89 Register in Greece, is comprised of Georgios Vakirtzis (as Chairman/director) and Gogis (as secretary/director).

108. The Third Respondent was placed under the management of NSL on 7 May 2014 and the person signing the letter of assignment of behalf of the Third Respondent was Gogis.

109. The management of the Third Respondent by NSL ceased on 31 December 2020, after the applicant’s claim arose, and around the time that the Vessel was scrapped.

110. NSL is reflected as being the managers of 19 tankers and 15 bulk carriers each owned by separate single purpose ship-owning companies. Of these ships, 14 are registered in Panama, 2 in the Marshall Islands and 19 in Liberia.

111. In preparation for the arrest of the mv New Elly, Gray Page originally carried out investigations into seven of the companies registered in Panama being the owners of the mt Karo, mv New Amorgos, New Andros, New Dynasty, New Naxos, Paros, Trident Hope and New Hydra. The investigation did not include the mv New Endeavor because, at that stage, she did not seem to be trading to South Africa.

112. In every case, the Liberian Companies Register reflects the President of each owning company as Stellas and the Secretary as Gogis.’

[28] Under the heading ‘Information Relating to the First Respondent’, Ms Barnwell states that ‘[t]he Second Respondent is the registered owner of the First Respondent. This is reflected in the attached Lloyd’s List Intelligence report marked “S1”.’ This report, which bears the heading ‘Vessel Report’ (Your Vessel Report for ‘New Endeavor’), is significant as it reflects Adam Polemis (Adam) as the beneficial owner of the *New Endeavor*, with its registered owner being Elly Maritime SA and its technical manager and commercial operator being NSL.

[29] With regard to information pertaining to the second appellant, Elly Maritime, Ms Barnwell avers that it is the registered owner of the *New Endeavor*.

On 25 May 2022, Gray Page was instructed by Indian Oil to conduct an investigation into the *New Endeavor* and Elly Maritime and to consider whether the *New Endeavor* was an associated ship of the third appellant, Porto.

[30] According to the further investigations conducted by Gray Page, the *New Endeavor* is currently registered with the Panama Flag administration and was first registered in Panama on 19 May 2011. A bill of sale evidences proof of the transfer of ownership of the *New Endeavor* to Elly Maritime on 18 May 2011. The first preferred mortgage deed for the *New Endeavor* was dated 2 June 2011 and one, Effie P Paraskevopoulou, was a signatory thereto on behalf of Elly Maritime. This deed was cancelled on 24 October 2019 and, at the time of preparing the founding affidavit, there were no further mortgages registered with the Panama Administration for the *New Endeavor*.

[31] The Gray Page report further states that the Articles of Amendment of the Elly Maritime filed in Liberia in November 2018 reflect that Stellas is the President and Gogi is the secretary of Elly Maritime. This is the same position as with the other Liberian companies that own the vessels managed by NSL in the NSL fleet. Ms Barnwell drew the high court's attention to the fact that many of the vessels in the NSL fleet, including the *New Endeavor* and the vessel owned by Porto, bear the prefix 'new', being the same as the prefix in NSL. In addition, all these vessels bear the same logo on their funnel. We point out that flags of convenience are very common in shipping business empires. Panama and Liberia are the most common owners of ships though they do not own any fleets of ship.[23] Flags of convenience are used for various purposes, including lower taxes, avoiding strict regulations and avoiding legal action as nominee directors are used in registering the ship in these countries.[24]

[23] *The Associated Ship* at 41-42.
[24] Ibid at 42-43.

[32] Ms Barnwell asserts that:

‘On the basis of the information set out above, it is respectfully submitted that the applicant has established, on a totality of the evidence, that it is more probable than not that the first respondent is an associated ship to the vessel, as contemplated by sections 3(6) and 3(7) of the Act. More particularly, it has established on a balance of probabilities that the companies that owned the vessels at the relevant times are ultimately owned or controlled by the same person or persons being NSL, which is in turn controlled by Adam Polemis on his own, alternatively Adam Polemis together with his children.’

[33] The founding affidavit concludes with the following:

‘128. The Gray Page report and the founding affidavit both state that the ship-owning companies in question are controlled by Adam Polemis through the vehicle of NSL and that Adam has brought his children into the business, who will one day succeed him as owner. Whether and to what extent Adam Polemis is assisted by his children is irrelevant to the inquiry. The identical repository and manner of control applies to each ship-owning company. This factual conclusion satisfies the test for association.

129. In any event, it is submitted that it is not necessary to determine who controls NSL. Once it is found that each ship-owning company is controlled by NSL, this establishes common control and there is no need to go further and establish who in turn controls NSL.

130. Even if the way in which the NSL fleet was controlled was one out of three different alternatives, provided each ship-owning company was controlled in the same way, this would suffice. There is no question of any of the ship-owning companies in the NSL fleet being subject to control by a different “person” to the others. Control is the same for both at the stipulated times.’

Appellants’ submissions

[34] The appellants contended that, on a sensible construction of the founding affidavit, what is alleged is that Adam, on his own, or, separately with his children, control the respective ship owning companies. It was accordingly submitted that, the attempt in the founding affidavit to assert that NSL owned or controlled the

respective ship owning companies, is misguided. This is so, because Indian Oil asserts that NSL 'is in turn controlled by Adam on his own, alternatively Adam together with his children'. The significance of this is that NSL itself is an object of control.

[35] It was emphasized that Indian Oil's case on association must be confined to the control exercised by Adam 'on his own' alternatively, 'together with his children'. It was submitted that the use of the word 'alternatively' serves to introduce another option of control in circumstances where the alternatives postulated are inconsistent: it is either one or the other, they cannot co-exist as repositories of control or power. The conclusion by the high court that 'Adam controls NSL and that he exercises such control personally' simply ignores, so it was submitted, the fact that such control is stated to be in the alternative. This implies, at the very least, that it is either Adam on his own, or Adam, together with his children, who exercise actual control. In other words, both cannot exercise control independently. It was thus contended that, by alleging alternative powers of control, Indian Oil failed to prove a single *locus* of control and, therefore, failed to establish the association asserted on a balance of probabilities.

Respondent's submissions

[36] Indian Oil contended that the appellants' argument was based on certain mischaracterisations and illogicality. It listed three respects in which the appellants had mischaracterised its case. The first was that Indian Oil had never deviated from its central allegation, namely, that there was at all material times a single source of control. It merely said that the identity of the single source was one or the other. This was mainly because the appellants had refused to disclose who was in control. The second, was that, when Indian Oil had alleged that NSL was in turn controlled by Adam, either by himself or together with his children, the appellants took the

view that Indian Oil's case on association, therefore rested on two mutually destructive alternatives. According, to Indian Oil, however, there was no question of who the two different repositories of control of each ship owning company were. Control of both companies was exercised through a single source of control, namely, NSL. The third mischaracterisation was to the effect that there was nothing in the founding papers to demonstrate the degree to which Adam controls his children. Indian Oil's answer to this was that the founding affidavit makes it clear that it is Adam who controls and who 'has brought his children into the business, and who one day will succeed him as owner. . .whether and to what extent Adam is assisted by his children is irrelevant to the inquiry.'

[37] In concluding that an association had been established by Indian Oil, the high court relied on the evidence contained in the founding affidavit. That evidence, so it held, proved, on a balance of probabilities, that Adam was the central figure of control of NSL and that, at the time the claim arose, the *New Endeavor* and the *New Diamond* were associated ships, both owned by NSL. It mattered not whether Adam exercised such control either by himself as head of the family or together with his children. The high court further held that, whilst no adverse inference could be imputed to the appellants, their failure to file an answering affidavit was not without consequences. As we attempt to show hereunder the findings by the high court are unassailable.

Analysis and findings

[38] *The Associated Ship* points out that, whilst ownership was recognised as a basis for association, the broader concept of control provides the principal focus of the associated ship jurisdiction in practice. Dealing with a single controlling interest under the heading of 'the statutory provisions' he says the following:

'Sections 3(7)(*a*)(ii) and (iii) contain three references to the control of a company in similar but not identical terms. Thus both subsections refer to a "person who controlled the company which

owned the ship concerned" and sub-section (iii) refers, in relation to the associated ship, to "a company which is controlled by a person.". . . They do convey, on the face of it quite unequivocally, that in applying these provisions the search is for a single *locus* of control . . . All that the sections require is that in relation to both the ship concerned and the associated ship a "person" must be identified who "controls" or "controlled" the companies in question. The process of comparison that follows upon this identification is intended to be a simple one. The maritime claimant identified the party who control the company that owned the ship concerned and identifies the party who controls the company that owns the associated ship it seeks to arrest. The result of these exercise is then compared. If they correspond, in the sense that the same person or persons control both companies, then the requisite association is established. If they are not the same then the association is not established. The proper conclusion from the language of section 3(7)(*a*) is that the legislature was of the view that for each company it would be possible to identify a single person or persons who controlled that company at the statutorily relevant time.'[25]

[39] It is important to have regard to what is said by *The Associated Ship* in a footnote emanating from the above extract. The footnote reads as follows:

'This should not be understood as saying that it is essential to the proof of association that a specific natural person or persons must be identified as controlling the two companies. *It will suffice if the chain of control in both instances leads back to a common source of control, even if the applicant is unable to identify that source. The source may itself be corporate. What is important is that it is common to both ship-owning companies*.'[26] (Our emphasis.)

[40] *The Associated Ship* goes on to state that:

'Lastly and at its most general control may refer to actual or ultimate control of the company's activities, however exercised, and irrespective of the controller's economic stake in the company. This control is distinct from managerial control in that it has within itself the power to control the manager and direct what they do. It consists in a general oversight of the activities of the company and hence the vessel and the power to continue or alter or discontinue its activities, to

[25] *The Associated Ship* at 186-187.
[26] Ibid fn 4 at 187.

lay up the vessel or to sell it. It is the ability to control and direct that is significant here not the actual day to day activities of the person in whom that power vests.'[27]

[41] In *Heavy Metal*,[28] Smalberger JA said that '[t]he principal purpose of the Act is to assist the party applying for arrest rather than the party opposing it'. The Appellate Division (as it then was), in *Euromarine International of Mauren v The Ship Berg and others*,[29] accepted the explanation by the draftsman of the Act that:

'. . . the purpose of the Act was to make the loss fall where it belonged by reason of ownership, and in the case of a company, ownership or control of shares.'

[42] In concluding on the concept of control, we quote from *The Associated Ship* once more, where Wallis stated as follows with regards to the proper meaning of control:[30]

'It is submitted that the following are features of the concept of control that emerge from a correct analysis of the statutory provisions governing associated ship arrests. Firstly, what must be sought is a single repository of control. Secondly, and flowing from the first, it is actual control that must be identified. Thirdly, the subject matter of control must be the direction and policy of the ship-owning company, not necessarily its day to day management. In other words, what is sought is the directing mind and will behind the company. Fourthly, it matters not whether control is exercised directly or indirectly. What is important is that the actual repository of the power to control the company must be identified. Fifthly, the court is not in general concerned with the niceties of the corporate law of the jurisdiction where the company is incorporated. The fact that for the purposes of the domestic law of the company recognition is only given in regard to its affairs to a person's status as registered shareholder will not matter if in fact the person concerned acts on the directions of a third party who is by some legal means entitled to give those directions.'

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[27] Ibid at 188.
[28] *Heavy Metal* para 13.
[29] *Euromarine International of Mauren v The Ship Berg and Others* [1986] ZASCA 4; [1986] 2 All SA 169 (A); 1986 (2) SA 700 (A) at 712A-B.
[30] *The Associated Ship* at 222.

[43] Indian Oil's case from the outset was that the person who exercised ownership and control in the requisite sense of the *New Endeavor* and the *New Diamond* at the time the claims arose, was Adam and that he did so through the mechanism of NSL. The factual evidence contained in the Gray Page report dated 15 September 2021 as well as the 2013 *TradeWinds* and the 2014 *Espresso* articles all point to Adam being the central controlling figure.

[44] The Gray Page report and the further evidence set out in the founding affidavit establish conclusively that the ship owning companies in question are controlled by Adam through the vehicle of NSL. The high court correctly found that the extent to which Adam is assisted by his children is irrelevant to the inquiry. The identical repository and manner of control applies to each ship-owning company. This factual conclusion, in the absence of any evidence to the contrary from the appellants, satisfies the test for association. This Court, in *Wright v Wright and Another*,[31] stated that '[l]itigants are required to seriously engage with the factual allegation they seek to challenge and to furnish not only an answer but also countervailing evidence, particularly where the facts are within their personal knowledge'. The appellants failed to do so in the present instance.

[45] As the Gray Page report details, Polembros Shipping Limited (PSL) is a large shipping company that was established in the 1970's by Greek brothers Spyros and Adam. In 2014, Spyros and Adam decided to split the shipping interest between them in order to facilitate the succession of their children. It was decided that Spyros would run PSL together with his son whilst Adam would transfer his fleet of ships from PSL to NSL. Adam currently uses NSL to manage and control his shipping interests for himself and for the benefit of his two children Leonidas and Alina. It is evident from the evidence adduced by Indian Oil, in the founding

[31] *Wright v Wright and Another* [2014] ZASCA 126; 2015 (1) SA 262 (SCA) para 15; see also *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

affidavit, that PSL and NSL continue to make the strategic decisions to purchase, sell and scrap vessels in their fleets.[32]

[46] In the 2013 *TradeWinds* article, PSL (prior to the split) is referred to as a 'Greek owner'. Details are provided in the article of PSL's recent purchases of five different vessels (one of which is the *Ikomasan* which later became the *New Diamond*). PSL is reported to have ordered another ten new build bulkers from two different shipyards. PSL is also said to be buying and selling dry bulk vessels as well as tankers. PSL is reported to have scrapped two Capesized vessels in that year.

[47] In the 2014 *Espresso* article, the following is reported. Brothers Spyros and Adam are dividing their property and separating their fleet. Adam and his children will pass their ships and others assets to NSL which is described as 'another family interest company'. Adam has informed shipping circles that NSL will own about 23 ships.

[48] It seems that family control is sufficient to establish association, and this kind of control is prevalent in Greek shipping. *The Associated Ship* explains family control as follows:

'. . . the operation of the fleet as a single entity managed by a single manager (often itself a family company) indicates that there is sufficient measure of common control for the vessel in the fleet to be associated ships. This may be especially the case where certain key members of the family are in effect responsible for all decision in regard to the conduct of the business of the fleet . . . it matters not in that situation whether one says that the key members of the family directly control the ship owning companies or that the family as a collective entity controls the entire group of companies.'[33]

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[32] This is also confirmed by the Gray Page investigative report especially para 12 thereof.
[33] *The Associated Ship* at 223-224.

[49] The high court was referred to the above passage in the reconsideration application. The high court no doubt relied on the passage when it found that ultimate control of both ship-owning companies at the relevant times vested in Adam and that it made no difference as to whether Adam exercised this alone (as the ultimate controller) or acted together with his children.

[50] The single repository of common control of the two ship-owning companies at the material times is also evident from the following facts. Elly Maritime (second appellant) and Porto (third appellant) have the same President (Antonis Stellas) and Secretary (Efstratios Gogis). Stellas and Gogis are also the President and secretary of NSL. Gogis is also the legal representative of NSL in Greece. Stellas is NSL's operations manager. Gogis further signed important documents on behalf of Porto, including the bill of sale for the purchase of the *New Diamond* and the letter of assignment to place her under NSL's management. Gogis is also the director of the Polemis family's hotel business in Greece, Hydra Hotels Hellas SA. This commonality of officers is no coincidence – the Polemis family controls its shipping empire through the two management companies with the brothers Spyros and Adam being ultimately in control.

Concluding remarks

[51] For all the reasons mentioned above, we are satisfied that Indian Oil had discharged the onus resting on it on a balance of probabilities. The high court's findings on the issue of association were correct. In pleading the issue of control in the alternative as it did, Indian Oil was perhaps being cautious. This is understandable. It was up to the appellants to controvert the evidence by placing credible evidence before the court. They failed to do so. This was sufficient to tip the balance in favour of Indian Oil. As *The Associated Ship* explains:

'There is always some evidence available to a claimant and as long as it can produce enough to constitute at least a *prima facie* case of association that will suffice to force the owners of the two

vessels to produce in response some direct evidence that they are not in truth associated . . . In the absence of countervailing evidence from the owners of the shares in the ship-owning companies that will usually suffice to discharge the onus of proof on the claimant even in the face of a bare denial of the fact of association. This flows from the well-established principle that less evidence will be required to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party.'[34]

[52] As a result, the following order is made:

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

Y T MBATHA
JUDGE OF APPEAL

R SEEGOBIN
ACTING JUDGE OF APPEAL

[34] *The Associated Ship* at 129-130.

Appearances

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