REPORTABLE
Case No: 323/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

BELFRY MARINE LIMITED **Appellant**

and

PALM BASE MARITIME SDN BHD
NAME OF SHIP: MV "HEAVY METAL" **Respondent**

CORAM: SMALBERGER, NIENABER, MARAIS JJA, MELUNSKY and FARLAM AJJA

HEARD: 8 MARCH 1999

DELIVERED: 31 MAY 1999

JUDGMENT

. . . SMALBERGER JA

SMALBERGER JA:

[1] I have had the benefit of considering the judgment of my colleague Farlam. I share his views, and the conclusions reached by him, in regard to the first two issues on appeal. I disagree, however, with his approach and conclusion in respect of the third issue.

[2] To recapitulate, the third issue is whether it was established that Lemonaris, or some other person or persons, had "power, directly or indirectly, to control" Dahlia and the appellant at the relevant times.

[3] The answer to the third issue lies in the proper interpretation of sec 3(7)(b)(ii) of the Act ("the subsection") which provides that

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

[4] It was pointed out in *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas and Another* 1995(3) SA 112 (A) at 119 F - G that a person may control a company without controlling all the shares in the company; and control over a company can be exercised even without a majority shareholding. In the present case there is no suggestion that Dahlia and the appellant were controlled in any way

other than *via* their majority shareholdings, and it is common cause that Lemonaris was, in terms of the respective share registers, the majority shareholder of both companies.

[5] When interpreting the subsection, and in order to give proper effect thereto, regard must be had to the language used, the apparent purpose of the provision, its contextual setting and the object of the Act as a whole.

[6] The object of the associated ship provisions in the Act is to enable an associated ship to be arrested instead of the ship in respect of which the maritime claim arose ("the guilty ship"). Its purpose was to benefit a party applying for arrest by providing it with a method of recovery against an alternative defendant thereby affording relief to which it would not otherwise have been entitled.

[7] Sec 3(7)(a) deals with the meaning of an associated ship. Sec 3(7)(a)(ii) and (iii) both contemplate a situation where either the guilty ship or the ship which it is sought to arrest as an associated ship ("the targeted ship"), or both, are owned by a company or companies controlled by a particular person.

[8] The subsection 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, 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". In South African legal terminology that means (essentially for the reasons given by the court *a quo* at 1998(4) SA 479 (C) at 492 C - F ("the reported judgment"); see also sec 195(1) of the Companies Act 61 of 1973) the person who controls the shareholding in the company. Foreign law is a question of fact. If the appellant wished to make out a case that the law of the Republic of Cyprus differed significantly from the law of South Africa, it should have adduced evidence to that effect. It did not do so. Consequently there is no reason to surmise that the applicable law in Cyprus differs materially

from that of South Africa (*cf Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998(3) SA 938 (A) 954 B - E).

[9] The subsection clearly distinguishes between "direct" and "indirect" power. That distinction must be given a meaning. Indirect power can only refer to the person who *de facto* wields power through, and hence over, someone else. The latter can only be 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 thus determines the direction and the fate of the company. On the facts of the present case Lemonaris is the person in that situation. Of course, the same person may in given circumstances exercise both *de facto* and *de jure* control.

[10] 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.

[11] From the above analysis it follows in my view that if the person who has *de jure* power happens to control, at the relevant times for such control, both companies concerned (i.e. the company which owns the guilty ship and the company which owns the targeted ship), the statutory requirement of a *nexus* between the two companies will have been satisfied. This is the position in which Lemonaris found himself.

[12] On the other hand, if *de jure* control of the respective companies vests in different hands it would still be open to the applicant for arrest to establish that the same person was in *de facto* (i.e. indirectly) in control of both, thereby also supplying the required statutory *nexus* to satisfy the provisions of sec 3(7)(a) of the Act.

[13] The principal purpose of the Act is to assist the party applying for arrest rather than the party opposing it. While the section is designed, in the interests of an applicant, to cater for the situations

referred to in paras [12] and [13] above, it is not, in my view, designed to cater for the converse situation where *de jure* control over both vessels (companies) vests in one person but the owner of the targeted ship is able to show that such person is a mere puppet dancing at the string of two different masters. If the latter approach were to be the correct one, the distinction drawn by the legislature between "direct and indirect control" would fulfil no purpose. The only issue, on that approach would be *de facto* control. If that had been the legislature's intention it need only to have spoken of the "power to control" in the section. Any approach which effectively negates a clear provision in an Act cannot be sound unless there are compelling reasons to the contrary. No such compelling reasons have been advanced in the judgment of my colleague.

[14] It needs to be emphasised that the subsection does not speak merely of the "power to control". If it did, the decision in *Barclays Bank Ltd v Inland Revenue Commissioners* [1961] AC 509 (HL) referred to by my colleague may have been of greater relevance to its interpretation. There is much to be said for the view that where one

speaks simply of a "power to control" one is concerned with a single repository of power - the person who is in actual, overall control. But the power to control directly or indirectly envisages two possible repositories of power, one *de jure* and one *de facto*. Either form of control can be satisfied to bring the subsection into operation. If there can only be one repository of power in terms of the subsection it would follow that the person who has *de jure* control could be ignored once it has been established that someone else has *de facto* power. This would appear to be contrary to the clear wording of the subsection. By using the words "directly or indirectly" the legislature clearly intended to extend and not restrict the expression "power to control" (*cf Olley v Maasdorp and Another* 1948(4) SA 657 (A) at 665 - ff and *Lipschitz NO v UDC Bank Ltd* 1979(1) SA 789 (A) at 797 D - E).

[15] In my view, and on the undisputed facts, the respondent therefore succeeded in establishing the requisite *nexus* for the conclusion that the Heavy Metal was an associated ship of the Sea Sonnet. If that conclusion results in the bizarre position referred to in

para 57 of my colleague's judgment, that is the direct and foreseeable consequence of a shipowner choosing to operate behind a cloak of secrecy. It is precisely for that reason, because the creditor is at such a disadvantage in tracing the assets of his debtor, of which this case is a prime example, that the subsection was worded as it is. The result is not as unfair as it may at first blush seem, for it lies within the power of the shipowner to arrange his affairs and his relationship with the company in question so as to avoid any prejudicial consequences to himself (*cf National Iranian Tanker Co v MV Pericles* 1995(1) SA 475 (A) at 485 C).

[16] Apart from that, it seems to me that the appellant in any event failed to rebut the inference arising on the papers, that the power behind Lemonaris in respect of the Heavy Metal is in fact the same entity who is the power behind Lemonaris in respect of the Sea Sonnet.

[17] The appellant had no difficulty in disclosing the identity of the beneficial owner of the Sea Sonnet but it steadfastly refused to disclose the identity of its own beneficial owner. In those

circumstances the respondent, in launching its application, had little option but to list a host of objective factors which it submitted pointed, *prima facie* it not conclusively, to a duality of control between the guilty ship and the targeted ship, and to speculate as to the identity of the common controller. (As to these see, for example, the reported judgment at 489 B - G.)

[18] In the light of the appellant's policy of presenting a distorted picture to the outside word by spuriously holding out Lemonaris as its majority shareholder and, when that fact was exposed, by refusing to reveal the true power behind the throne when challenged to do so, the respondent cannot fairly be criticised for not leading contradicting evidence or for deviating, between its founding and replying affidavits, in its speculation as to the controlling force behind the appellant's affairs.

[19] Admittedly the dispute of fact on the issue of who controls Lemonaris had to be approached in line with what was stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634 E - 635 C. Due allowance must, however, be made

for the fact that the appellant deliberately concealed the identity of the true beneficial owner of the Heavy Metal in circumstances where that was the central issue in dispute. In my view that silence and the failure of the appellant to offer an adequate explanation for it, when the appellant must have appreciated that it ran the risk of an inference being drawn against it, justifies the conclusion that the appellant had every reason not to be candid with the court and,consequently, that the dispute raised by Lemonaris as to the beneficial ownership of the Heavy Metal was a contrived one and as such was not a genuine dispute of fact.

[20] In my view, those considerations, read against the background of the *prima facie* case made out by the respondent, are enough to overcome Lemonaris's express denial that there was a relevant connection in the ownership of the Sea Sonnet and the Heavy Metal. It can therefore not be accepted as an established fact, as the judgment of my brother seems to do, that Lemonaris was not controlled in respect of the Heavy Metal by either Tsavliris, or someone who in turn controlled Tsavliris. On the facts of this case, as presented by the

appellant, one simply does not know.

[21] With regard to whether the deeming provision in the subsection gave rise to an irrebuttable finding (the fourth issue on appeal) I agree with Thring J where he said, at 491 D - E of the reported judgment:

> "In other words, this is a 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. Had it not sought this result, it seems to me that the Legislature would not have used the very strong word 'deemed' in the subsection (Afrikaans text: 'geag'): it would have used some less far-reaching expression such as 'presumed until the contrary is proved'."

[22] This conclusion is fortified by a consideration of other deeming provisions in the Act (see eg secs 3(7)(c), 3(10)(a)(i) and (ii) and (b), 3(11)(b)) all of which have an element of finality with regard to that which is deemed. It is unlikely that the legislature would have adopted an inconsistent approach towards the effect of the various deeming provisions.

[23] In the result the appeal is dismissed with costs, including the costs of two counsel.

J W SMALBERGER

JUDGE OF APPEAL

NIENABER JA)
)Concur
MELUNSKY AJA)

FARLAM AJA/...

[1] This is an appeal with the leave of the court *a quo* from a judgment of Thring J sitting in the Cape of Good Hope Provincial Division exercising its admiralty jurisdiction in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 (to which I shall hereinafter refer as "the Act").

[2] The order against which the appeal is brought was for the arrest of the appellant's motor vessel Heavy Metal, in terms of section 5 (3) of the Act, the purpose of the arrest being to provide the

applicant therefor, the respondent in this court, with security for a claim for US $2 737 776,49 (plus interest and costs) which is to be the subject of an arbitration which the respondent contemplates bringing in London against a company known as Dahlia Maritime Limited (to which I shall hereinafter refer as "Dahlia").

[3] This claim, which is alleged to be a maritime claim in terms of section 1(1)(c) of the Act, arose from a dispute under a memorandum of agreement dated 23 October 1996, in terms of which the respondent, Palm Base Maritime SDN BHD**,** a Malaysian company, purchased the MV Sea Sonnet (to which I shall hereinafter refer as "the Sea Sonnet"), which was later (after she became the property of the respondent) renamed the MV Seri Ibonda, from Dahlia. Both Dahlia and the appellant are companies incorporated in the Republic of Cyprus, with their registered offices at the same address.

[4] The respondent's claim against Dahlia is based on an alleged breach of clause 11 of the memorandum of agreement, which reads as follows:

"11. Condition on delivery

The vessel with everything belonging to her shall be at the Sellers' risk and expense until she is delivered to the Buyers, but subject to the conditions of this contract, she shall be delivered and taken over as she is at the time of inspection, fair wear and tear excepted.

However, the vessel shall be delivered with present class free of recommendations. The Sellers shall notify the Classification Society of any matters coming to their knowledge prior to delivery which upon being reported to the Classification Society would lead to the withdrawal of the vessel's class or to the imposition of a recommendation relating to her class."

[5] According to a report furnished to the respondent by Michael Cheyne, a consultant marine engineer, "numerous problems with the vessel were uncovered after [her] delivery and these were matters which should have been reported to ... the seller's classification society". He stated further that in his opinion, Dahlia, the seller, was "unquestionably in breach of clause 11" of the memorandum of agreement.

[6] Mr Cheyne expressed the view in his report that if the "matters [in question] had been reported to class then recommendations would have been imposed". Attached to his report was a "schedule of losses" totalling US $ 2 737 776,49, which losses

had arisen, according to Mr Cheyne "due to seller's breach of the [memorandum of agreement]".

[7] The respondent sought the arrest of the Heavy Metal on the basis that she was, so it was alleged, a vessel associated with the Sea Sonnet in terms of section 3 (6) and (7) of the Act and that it had a genuine and reasonable need for security in the arbitration.

[8] In the founding affidavit filed on the respondent's behalf the allegation that the Heavy Metal and the Sea Sonnet were associated ships was put on two bases.

[9] The first was that one Emilios Lemonaris, a Cypriot advocate, was the majority shareholder and sole director of both Dahlia and the appellant.

[10] The second was that the same person, probably one Nikolaos H Vafias, exercised what was called ultimate control over an entire group of vessel owning companies, plus a company called Brave Maritime Corporation Inc, which is incorporated in Greece, and which managed and operated a fleet of vessels which included the Heavy Metal and the Sea Sonnet, when it belonged to Dahlia.

[11] As far as Lemonaris was concerned it was stated in the affidavit filed on behalf of the respondent that he was "probably a nominee for Mr Vafias and his family". The deponent of the affidavit continued: "To the best of the knowledge and belief of those instructing me, he is not directly involved in the business of owning or operating ships but serves as a 'postbox' and registered office for the Brave Maritime group of companies, and possibly in other roles, such as the authorised signatory of the companies. If I am wrong in this speculation, however, in any event he has a controlling interest in all of the vessels by virtue of his position as majority shareholder".

[12] Earlier in the affidavit it was submitted that the Sea Sonnet and the Heavy Metal were associated because Lemonaris "apparently has the power directly or indirectly to control the vessels".

[13] In an opposing affidavit filed on behalf of the appellant, Mr Lemonaris stated that the shares he held in Dahlia and in the appellant were held by him as nominee for non-residents of Cyprus**.**

He added:

"It is normal practice in Cyprus for Advocates to be appointed as nominee shareholders and Directors. We act

on the instructions of beneficial owners, which instructions are often given through intermediaries. We are required by the laws of Cyprus to abide strictly by, and carry out, these instructions and we are more often than not, as in the case of my relationship with [Dahlia] and [the appellant], simply 'postboxes'.

> I am therefore merely a nominee Director and shareholder of [Dahlia] and [the appellant] in which I have no interest or ownership. I exercise no control over these companies and, indeed, I have no discretion to represent these companies without having received instructions as I have, for example, for the purpose of dealing with this application.

Cypriot Advocates are not, in terms of the ethical rules applicable, permitted to disclose information given to them in confidence by their clients. The information contained in the instructions given to me when I attended to the registration of [Dahlia] and [the appellant] was given to me in confidence and I am accordingly not at large to disclose this information.

I am, however, able to disclose that Mr Nikolaos Vafias did not own or control [Dahlia] at the time of the delivery and sale of the MV 'Sea Sonnet' or at any other material time."

[14] While admitting that the Sea Sonnet was managed by Brave Maritime Corporation Inc he denied that the vessel was operated by it and also denied that a document annexed to the affidavit filed on the respondent's behalf and relied on by it to show that the

Heavy Metal was operated by Brave Maritime Corporation Inc indicated that fact. He said, correctly, in my view, that the document concerned showed no more than that Brave Maritime Corporation Inc was an agent for the Heavy Metal.

[15] He denied the allegation in the founding affidavit that he had a controlling interest in all the vessels allegedly managed by Brave Maritime Corporation Inc. including the Heavy Metal. He admitted the earlier allegation made on behalf of the respondent, which has been quoted in paragraph [11] above, that he served as a "postbox" for Dahlia and the appellant.

[16] In response to the allegation that he "apparently had the power directly or indirectly to control" the Sea Sonnet and the Heavy Metal he pointed out that it was alleged elsewhere in the affidavit that the ultimate control over the vessels rested with Vafias and that he, Lemonaris, was merely a nominee for Vafias and his family.

[17] In a subsequent affidavit filed on behalf of the appellant Mr Lemonaris stated that during the whole of the period from 23 October 1996, the date of the memorandum of agreement

relating to the sale of the Sea Sonnet, to 9 December 1996, the date the vessel was delivered to the respondent, the Sea Sonnet was owned by Dahlia, the shareholding in which, during that period, was held as to 52% of the shares by himself, as nominee on behalf of a Liberian corporation called Carnation Finance Inc, and as to 48% by another Liberian Corporation called Wichita Maritime and Trading Inc. He stated further that during the whole of the period in question all the shares of Carnation Finance Inc were owned by one Nikolaos Tsavliris and that he had, for the purposes of the application, been specifically authorised to disclose the identity of Mr Tsavliris as "the ultimate beneficial owner of the MV Sea Sonnet at the time of the conclusion of the memorandum of agreement of sale of the vessel and the subsequent delivery thereof to the purchaser".

[18] He also stated in this affidavit, as he had in his earlier affidavit, that

> he "acted as a nominee shareholder in respect of the controlling interest in the MV Heavy Metal. I am not authorised by the beneficial owner of the MV Heavy Metal to disclose to the above Honourable Court the true identity of such owner. However, I can state that Mr Nikolaos Tsavliris had no interest, whether as owner or otherwise, in the MV Heavy Metal on 1

April 1988 or at any time to date hereof."

[19] In an answering affidavit filed on behalf of the respondent it is stated that Lemonaris's "bald statement that he is 'merely a nominee Director and shareholder in [Dahlia] and [the appellant] in which I have no interest or ownership' cannot be accepted in the absence of corroboration", this despite the statement in the founding affidavit that "it seems likely that Lemonaris is probably a nominee for Mr Vafias and his family".

[20] Later in the answering affidavit appears the following statement:

> "In the circumstances I respectfully submit that Mr Lemonaris' bald and uncorroborated statement that he holds the shares in [Dahlia] and [the appellant] as nominee only and that Mr Vafias did not own or control [Dahlia] at any material time should not be accepted as materially placing in dispute the [respondent's] allegation that the Sea Sonnet and the [Heavy Metal] are indeed associated ships in terms of section 3(6) read with section 3(7) of Act 105 of 1983 as amended."

[21] Before I set out the issues which have to be considered in this appeal it is desirable to set out the relevant sections of the Act.

Section 3, as far is material, provides as follows:

"(1) Subject to the provisions of this Act any maritime claim may be enforced by an action *in personam.*

....

(4) Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* -

(a) if the claimant has a maritime lien over the property to be arrested; or

(b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

(5) An action *in rem* shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

(a) The ship, with or without its equipment, furniture, stores or bunkers;

...

(6) Subject to the provisions of subsection (9), an action *in rem*, other than such an action in respect of a maritime claim contemplated 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.

(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;

(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 any body 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 subcharterer, 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 subcharterer, and not the owner, is alleged to be liable."

Section 5 (3) is in the following terms:

"(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 or proceedings.

(aA) Any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such claim 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."

[22] The action *in rem* dealt with in section 3 (5) is instituted by the arrest of the ship "against or in respect of which the claim lies", sometimes referred to as the "guilty ship": see, eg, *Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at 708 B - C.

[23] Four issues arose for decision in the court *a quo* and arise again for decision in this Court.

The first two flow from the fact that the respondent did not cancel the sale of the Sea Sonnet when the defects therein were discovered after delivery. When the Heavy Metal was arrested, as a ship "associated" with the Sea Sonnet no action *in rem* could have been brought by the respondent in terms of section 3 (4) (b) against the Sea Sonnet because it was its own property and not the property of

Dahlia.

[24] The first issue argued before the learned judge in the court below and before this Court on appeal was whether, before the associated ship provisions (section 3 (6) and (7)) can be utilised by a claimant, such claimant has to have a claim *currently* enforceable by an action *in rem* in terms of section 3 (4) against the "guilty ship". Put differently, is an action *in rem* against an associated ship (under section 3 (6) and (7)) available to a claimant only as an alternative to a presently existing action *in rem* against the guilty ship?

[25] The second, third and fourth issues are all linked to the question as to whether the Heavy Metal was a ship associated with the Sea Sonnet within the meaning of section 3 (7) of the Act.

[26] The second issue was: at what time did the respondent's claim arise? The appellant contended that it arose when the Sea Sonnet was delivered to the respondent and simultaneously with the passing of ownership of the vessel to the respondent and that accordingly, as the Sea Sonnet was the property of the respondent when the claim arose, from that time on there could be no association

between her and the Heavy Metal which belonged to the appellant, even if Dahlia and the appellant were controlled at all material times by the same person.

[27] The third issue was whether it was proved that Lemonaris or some other person or persons had the "power, directly or indirectly, to control" Dahlia and the appellant so that the deeming provision in section 3 (7) (b) (ii) of the Act came into operation.

[28] The fourth issue was whether, even if the deeming provision came into operation, it gave rise to an irrebuttable presumption incapable of being refuted by what the appellant's counsel described as "explicit evidence to the contrary".

[29] In his judgment in the court *a quo*, which is reported as *MV Heavy Metal, Palm Base Maritime SDN BHD v Dahlia Maritime Ltd and Others* 1998 (4) SA 479 (C), Thring J found in favour of the respondent on all four issues.

[30] On the first he followed the judgment of a Full Bench of the Natal Provincial Division in *October International Navigation Inc v MV Fayrouz IV* 1988 (4) SA 675 (N), in which it was held (at 679 C

- D) that section 3(6) and (7) of the Act "provide an extension of the remedy provided by Section 3 (5) and an alternative action *in rem*". Thring J said (at 486 B) that, although he was not bound by the *Fayrouz IV,* as a decision of a Full Bench it nevertheless had strong persuasive value and added that unless he was persuaded that it was clearly wrong he proposed to follow it. He stated (*ibid*) that although there was, in his view, considerable force in the argument advanced by the counsel who appeared before him for the appellant, he was not persuaded that the *Fayrouz IV* was clearly wrong with the result that he followed it.

[31] He added that it seemed to him that the decision in the *Fayrouz IV* case was supported by what had been said earlier in this Court in *Euromarine International of Mauren v The Ship Berg and Others*, *supra*, at 712 C - D to the effect that section 3 (6) gives a claimant

> "a right which he never had before, namely to recover what is due to him from a party who was not responsible for the damage suffered by him. It provides the claimant not only with a method for recovery but with an additional or alternative defendant."

(Whether the use of the phrase "*additional or* alternative" was happily chosen need not presently be considered: *cf MV Fortune 22 : Owners of the MV Fortune 22 v Keppel Corporation Ltd* 1999 (1) SA 162 (C) at 166 D - F.)

[32] On the second issue Thring J found that the respondent's claim arose before ownership of the Sea Sonnet passed to the respondent and when she was still owned by the appellant. In this regard he held that the respondent's claim arose when delivery of the vessel was *tendered* by Dahlia to the respondent after the former had failed to perform the obligations imposed on it by Clause 11 of the Memorandum of Agreement. He referred in this regard to the following statement by F S Steyn J in *Hawken v Olympic Pools (Pty) Ltd* 1979 (3) SA 224 (T) at 227 A - B:

> "As the debtor might remedy his prior breach at any stage during the execution of the contract, the right of action will only accrue when the contract has been completed and the debtor *offers* his completed, but defective work as ostensible performance of his obligation."
> (The emphasis was Thring J's.)

[33] On the third issue Thring J held that Lemonaris as the

majority shareholder had the power directly to control Dahlia and the appellant.

After stating that Lemonaris said nothing in his affidavits "to indicate that in the law of Cyprus companies are controlled differently in any material respect from the manner in which they are controlled in our law", he continued (at 492 A - H):

> "His statement in para 19 of his first affidavit that 'I exercise no control over these companies' when read in its context means no more, to my mind, than that the manner in which he acts in relation to the first and third respondents is subject to direction by others. He does not say that under Cypriot law he has no power to control the companies. In the absence of evidence to the contrary it is presumed that foreign law is the same as ours, being the *lex fori*: see *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692D - E; Forsyth: *Private International Law* 3rd ed 100 - 1.

In s 440A of the Companies Act 61 of 1973 'control' is defined as

> '... a holding or aggregate holdings of shares or other securities in a company entitling the holder thereof to exercise, or cause to be exercised, the specified percentage or more of the voting rights at meetings of that company, irrespective of whether such holding or holdings confer *de facto* control.'

The ultimate control over a company's affairs is exercised by its

members in general meeting, although immediate and direct control may vest in its directors, but they are answerable to the company's members in general meeting who may, of course, determine who the directors are to be. (See *Henochsberg on the Companies Act*, 5th ed, vol I p 327.) It is the policy of the law that a company should concern itself only with the registered owners of its shares: see *Sammel and Others v President Brand Gold Mining Co Ltd* 1969(3) SA 629 (A) at 666 C - 667 A; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976(1) SA 441 (A) at 453 A - B and *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 289 A-B. It follows that even if he holds the shares of the first and third respondents as a nominee for others, Lemonaris, as the registered shareholder, has the power directly to control these companies by voting the majority of their shares in their shareholders' meetings. This means that as the majority shareholder of both companies Lemonaris has overall control over them; he can exercise control over their assets and their destinies: see *EE Sharp & Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C) at 327A. Moreover, as their sole director, he is probably the only person with managerial powers in them. In my view it does not matter that other persons or entities, as beneficial owners of the shares held by Lemonaris, may be entitled by reason of arrangements made *inter se* to direct Lemonaris as to how he exercises his powers: the companies are obliged to give effect to his legitimate wishes as the registered holder of the majority of their shares and are therefore subject to his direct control."

[34] On the fourth issue Thring J held that the deeming provision in section 3 (7) (b) (ii) gave rise to an irrebuttable finding with the result that Lemonaris, who was found to have the power to

control Dahlia and the appellant,

was to be conclusively regarded as controlling the companies whether he did so in fact or not and whether or not that power was exercised through him by others. (See the reported judgment at 491 C - E.)

[35] I turn now to deal with the first question which arises for decision in this appeal, *viz*, whether a claimant has to have a claim currently enforceable by an action *in rem* in terms of section 3 (4) before the associated ship provisions (section 3 (6) and (7)) can come into play.

[36] On this part of the case I shall assume that the other issues are to be decided in favour of the respondent, i e, that the Sea Sonnet was the property of Dahlia when the respondent's claim arose and that Dahlia was controlled by the same person when the claim arose as the person who controlled the appellant when the action was commenced. That is to say, I assume in the respondent's favour that the provisions of section 3(7)(a)(iii) have been complied with so that the Sea Sonnet and the Heavy Metal are to be regarded as "associated

ships".

[37] The question to be considered therefore is whether on a proper interpretation of section 3 (6) the respondent had to have an action *in rem* available to it against the Sea Sonnet when it arrested the Heavy Metal.

[38] It will be recalled that section 3 (6), as far as is material, reads as follows:

> "... an action *in rem* ... may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose."
>
> The Afrikaans text of the subsection, which is the signed text, reads as follows:
>
> "... 'n aksie *in rem* [kan] ... ingestel word deur die inbeslagneming van 'n geassosieerde skip in plaas van die skip ten opsigte waarvan die maritieme eis ontstaan het."

[39] Mr *Gauntlett*, who appeared together with Mr *Berthold* on behalf of the appellant, contended in favour of a restrictive interpretation of section 3 (6). He pointed out that the associated ship provisions in the Act and similar provisions in England (section 3 (4)) of the Administration of Justice Act, 1956 (4 & 5 Eliz 2, cap 46), now

section 21 (4) of the Supreme Court Act, 1981 (29 & 30 Eliz 2, cap 54)) have their root in article 3 of the International Convention relating to the Arrest of Sea-going Ships, which was signed at Brussels in 1952. (In what follows I shall refer to this convention as the "Arrest Convention".) He submitted further that it was clear from the debates at the conference which preceded the signing of the Convention that the provisions of the Convention were to be restrictively interpreted.

[40] He contended further that any form of arrest is under our common law a drastic invasion of proprietary rights or personal liberty which will not readily be accepted as having been intended unless there are compelling reasons for doing so. He relied in this regard, *inter alia*, on a passage in the dissenting judgment of Didcott J in *Katagum Wholesale Commodities Co Ltd v The MV Paz*, 1984 (3) SA 261 (N) at 269 H - 270 B where the learned judge spelt out the drastic consequences for a shipowner or charterer if a vessel is arrested.

[41] He also submitted that the use of the words "*in plaas van* die skip" in section 3(6) indicated that a narrower interpretation of the

section is to be favoured.

[42] As was pointed out by the South African Law Commission in its Report on the Review of the Law of Admiralty, Project 32, 1982, p 10, there were great developments in maritime law in the period after 1890, when the British Parliament enacted the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict Cap 27), which formed the basis of admiralty practice in South Africa until the coming into operation of the Admiralty Jurisdiction Regulation Act 105 of 1983. Among these developments was the Arrest Convention which endeavoured to produce a unification of rules relating to the arrest of sea-going ships. As most of these developments had not been incorporated in South African legislation South African maritime law had become out of date and filled with anachronisms. In the report it was also pointed out (at 13) that it was desirable that there should be as great a degree of consistency as can be achieved with other systems of maritime law.

[43] In the circumstances it comes as no surprise that the Arrest Convention served as the basis for a number of provisions in

the Act, which was enacted by Parliament following the presentation of the Commission's report to the Minister of Justice in terms of section 7 (1) of the South African Law Commission Act 19 of 1973, in particular the definition of maritime claims in section 1. In addition the provisions in the Arrest Convention for the arrest of sister ships, i e, ships in the same ownership as the guilty ship, were not only taken over but also extended to cover associated ships, so that the device adopted by many shipowners of registering so-called "one ship companies" in order to evade the sister ship provisions of the Convention could be countered by what may be described as a statutory mode of piercing the corporate veil. As far as I have been able to ascertain, none of the other major maritime nations has adopted legislation which goes as far as we do in this regard. It follows that where our legislation goes further than that of other maritime nations their case law can obviously provide no guidance as to the interpretation of our provisions. Where, however, provisions in the Act are clearly modelled upon articles in the Arrest Convention and the legislation of other countries which have adopted it, it is

appropriate, in my opinion, for our Courts to have regard to the Convention and the case law of those countries in order, *inter alia*, to help to bring about that degree of consistency among maritime nations to which I referred earlier.

[44] Section 3 (6) is modelled on article 3 (1) of the Arrest Convention which reads as follows:

> "... a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail ..."

[45] The purpose of the Arrest Convention was considered by Lord Diplock in the opinion he delivered in *The Jade, The Eschersheim,* [1976] 1 All ER 920 (HL) at 923 f - j, where he said the following:

> "The purpose of that convention was to provide uniform rules as to the right to arrest seagoing ships by judicial process to secure a maritime claim against the owner of the ship. Article 1 defined by reference to their subject-matter various classes of maritime claim in respect of which alone a right of arrest was to be exercisable; while arts 2 and 3 granted and confined the right of arrest to either (a) the particular ship in respect of which a maritime claim falling within one or more of those classes arose, or (b) any other ship owned by the person who was, at the time when the maritime claim arose, the owner of the

particular ship.

> The provisions of art 3 represented a compromise between the wide powers of arrest available in some of the civil law countries (including for this purpose Scotland) in which jurisdiction to entertain claims against a defendant could be based on the presence within the territorial jurisdiction of any property belonging to him, and the limited powers of arrest available in England and other common law jurisdictions, where the power to arrest was exercisable only in respect of claims falling within the Admiralty jurisdiction of the court and based on a supposed maritime lien over the particular ship in respect of which the claim arose."

(I take it that by referring to "a supposed maritime lien over the particular ship in respect of which the claim arose" Lord Diplock was referring not only to maritime liens properly so-called but also to statutory rights of action *in rem* (sometimes called "statutory liens" - see *The Zafiro* [1960] P 1 per Hewson J at p 13). In the case of both maritime liens and statutory rights of action *in rem* in England prior to the coming into operation of the Administration of Justice Act, 1956, the procedure *in rem* to arrest a ship only applied to the ship to which the cause of action related: see *The Beldis*, [1936] P 51 (CA).)

[46] The effect of the Arrest Convention was also summarised

by Lord Denning MR in *The Banco*, [1971]) P 137 (CA) (at 151 F - H) as follows:

> "In 1952 there was an International Convention held at Brussels. ... It was held because of the different rules of law of different countries about the arrest of seagoing ships. Some countries, like England, did not permit the arrest of any ship except the offending ship herself: whereas many continental countries permitted the arrest, not only of the offending ship, but also of any other ship belonging to the same owner. In the result a middle way was found. It was agreed that *one* ship might be arrested, but only *one*. It might *either* be the offending ship herself *or* any other ship belonging to the same owner: but no more. This was an advantage to plaintiffs in England because it often happened previously that, after a collision, the offending ship sank or did not come to these shores. So there was nothing to arrest. Under the Convention the plaintiff could arrest any other ship belonging to the same owner whenever it happened to come to England."

A similar view of this effect of the Convention and the 1956 Act was taken by Cairns LJ (see his judgment at 161 B).

[47] That Lord Denning MR was right in saying that article 3 (1) of the Convention authorised arrest of a sister ship even when the "guilty ship" was not available to be arrested because she had sunk seems to follow from the nature of the compromise arrived at Brussels between the English "guilty ship" approach and the continental

approach (which is also our own in non-admiralty matters where property is arrested to found or confirm jurisdiction).

[48] In my opinion an important indication of Parliament's intention in this regard is to be found in section 3(7)(a)(i) of the Act which, it will be recalled, provides that an associated ship is a ship, other than the guilty ship, "owned, at the time the action is commenced, by the person who *was* the owner of [the guilty ship] at the time when the maritime claim arose". All that is required therefore for ships to be associated in terms of section 3(7)(a)(i) is that they should have a common owner (1) who *was* the owner of the guilty ship when the claim arose and (2) who *is* the owner of the associated ship when the action is commenced, ie, when the associated ship is arrested.

[49] I accordingly agree with the following passage in Shaw, *Admiralty Jurisdiction and Practice in South Africa*, pp 37 - 38:

> "If, therefore, A, at the relevant time (that is, at the time of the arrest) owns a ship, that ship will be an associated ship if A, at the time when the maritime claim arose, was the owner of the ship concerned [the guilty ship]. Changes of ownership in the ship concerned after the time when the maritime claim arose are irrelevant, as is the question whether the ship which is an

> associated ship was owned by A at the time when the maritime claim arose."

[50] In my opinion the language in the Afrikaans text is capable of being interpreted to cover a case where an arrest of an associated ship takes place where the guilty ship can no longer be arrested at all (because she has sunk) or is no longer in the hands of her owner at the time the claimant's right of action arose (in cases falling under section 3 (4) (b)) because she has since been disposed of. In such cases it can be said that the associated ship was arrested "in plaas van" the guilty ship.

[51] In the circumstances I am satisfied that Thring J was correct in deciding the first issue in favour of the respondent.

[52] I proceed now to consider the second issue which arises for decision in this case, *viz,* whether the respondent's cause of action arose at a time when the Sea Sonnet was still the property of the appellant.

[53] It is clear in my opinion that if the appellant failed to notify the Classification Society before delivery of "problems" which

it encountered with the vessel which should have been so reported, as the respondent alleges, the appellant breached clause 11 of the memorandum of agreement before delivery. It is true that the appellant could have remedied this alleged failure at any time up to delivery but that does not detract from the fact that the alleged breach (if there was one) was committed *before* delivery. One can only ascertain *after* delivery by when the "problems" encountered had to be reported but this does not alter the time when the alleged breach took place, *viz*, before delivery. In the circumstances it is not necessary for me to express any opinion as to the correctness of the dictum by F S Steyn J in *Hawken v Olympic Pools (Pty) Ltd*, *supra*, upon which Thring J relied.

[54] I now turn to consider the third issue in this matter, which it will be remembered was whether it was proved that Lemonaris or some other person or persons had "power, directly or indirectly, to control" Dahlia and the appellant.

[55] Mr *Gauntlett* contended on this part of the case that the respondent did not prove that Lemonaris had the power, directly or

indirectly, to control Dahlia and the appellant. He submitted that the respondent failed to adduce any evidence to contradict what Lemonaris had said and that his version ought to have been accepted, namely, that he was a mere nominee or puppet and had no actual control over either Dahlia or the appellant.

[56] Mr *Gauntlett* submitted further that in the circumstances the deeming provision contained in section 3 (7) (b) (ii) does not come into operation because the requisite power on the part of Lemonaris was not proved to exist.

[57] He argued that what the provision was concerned with was purely factual: who actually has the power to control the company. If it were to be held that a mere nominee director and majority shareholder, who acts on the instructions of the beneficial owners of two companies (being different persons), who is required by the laws of his country to abide strictly by and to carry out those instructions, and who exercises no control over the companies concerned and is a mere "postbox" for the beneficial owners in the case of each company, has power to control the companies, with the

result that vessels belonging to the two companies concerned are to be regarded as associated ships for the purposes of section 3 (6), then the purpose which the subsection is designed to achieve will not be achieved, ships which are not truly associated will wrongly be associated for the purposes of section 3 (6) and a bizarre position will result.

[58] The law to be applied in a case such as this, where final relief is sought on papers without resort to oral evidence was, as Mr *Gauntlett* submitted, set out by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A), at 634 E - 635 C, as follows:

> "[T]he affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:
>
> > '..... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G - 924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, 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, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882 D- H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the

remarks of Botha AJA in the *Associated South African Bakeries* case, *supra* at 924A)."

[59] Applying the law as set out in that passage to the facts of this case, I do not think that Lemonaris's denials can be regarded as so far-fetched or clearly untenable that they can be rejected merely on the papers nor can it be said that the respondent's factual averments are inherently credible. I also do not agree with the submission made in the respondent's papers that Lemonaris's statement that he held the shares in Dahlia and the appellant as a nominee only should not be accepted as materially placing in dispute the respondent's allegation that the Sea Sonnet and the Heavy Metal were associated ships.

[60] Lemonaris's statement regarding the legal position in Cyprus was not refuted by the respondent despite the fact that it had a firm of lawyers practising in Nicosia which made investigations on its behalf in Cyprus.

[61] His statement that the respondent's allegation about his apparent power to control the vessels was contradicted by later passages in the founding affidavit, in which it was stated to be

probable that the companies owning the vessels in question were ultimately controlled by the same person who was probably Vafias, is correct. Indeed the only passage in the founding affidavit in which the deponent speaks of "power directly or indirectly to control" is the paragraph quoted above in which it was said that "Lemonaris apparently has the power directly or indirectly to control the *vessels*" (my emphasis).

[62] The deeming section speaks of "power ... to control the company" so that the passage quoted reveals some degree of confusion of thought. The respondent's approach appears to have been the following as far as its first basis for alleging that the ships were associated ships was concerned: Lemonaris had the controlling interest in the companies which owned the two ships , therefore he apparently had power, directly or indirectly, to control the ships.

[63] As far as indirect control is concerned in my view it must be accepted that Lemonaris's statement on oath that Tsavliris was "the ultimate beneficial owner" of the Sea Sonnet at the time of its sale and delivery to the respondent cannot be rejected as being so

far-fetched or clearly untenable that the Court would be justified in rejecting it merely on the papers. As far as the Heavy Metal is concerned it is noteworthy that Lemonaris never directly denied that Vafias was her probable ultimate beneficial owner. What he said was that Tsavliris had no interest, as owner or otherwise, in the Heavy Metal while Vafias did not own or control the Sea Sonnet at any material time.

[64] In my view on the application of the *Plascon-Evans* principles it has to be accepted that at the relevant times Tsavliris was the ultimate beneficial owner of the Sea Sonnet and that Vafias may well have been the ultimate beneficial owner of the Heavy Metal. In other words it is not possible to base an association between the vessels on the fact that the same person had the power indirectly to control the companies which owned them. I do not understand Thring J to have held otherwise. His judgment, as appears from the extract quoted above, was based on the fact that the same person, Lemonaris, had the power directly to control the companies which owned the vessels.

[65] Certainly, if it were not for the complication that it appears that power indirectly to control the companies which owned the two vessels was in different hands at the relevant time, I think that no fault could be found with Thring J's finding regarding what one may, for the sake of brevity, call direct control. In South African legal terminology the person who controls the shareholding in the company has the power to determine the company's direction and fate. Foreign law is a question of fact. In the absence of evidence to the effect that the law of the Republic of Cyprus differs materially from our own there is no reason to suspect that the applicable law differs materially from the South African model (cf *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) at 954 B - E).

[66] The complication to which I referred earlier gives rise to the following problem: can there simultaneously be two repositories of power to control for the purposes of the section?

[67] The meaning of the expression "control of the company" was considered by the House of Lords in *Barclays Bank Ltd v Inland*

Revenue Commissioners [1961] AC 509 (HL). All the Lords who participated in the appeal were agreed that a person could be said to have control of a company if he or she could by his or her votes control the company in general meeting. There was, however, a difference of opinion between them as to whether it made a difference if the shareholder who had apparent control might himself be amenable to some external control. Viscount Simonds, Lord Cohen and Lord Keith of Avonholm held that it was not relevant. Lord Reid, with whom Lord Denning agreed on this point (although he sided with the majority on another point which is not relevant for present purposes), held that control means real control and that the shareholder who the majority held had control of the company did not have real control of the majority of votes because he was not entitled to cast votes which gave him his majority (which he held as one of four trustees but in respect of which he could vote because his name appeared as the first of the four trustees' names in the company register) without the consent of his co-trustees.

[68] The case concerned the valuation for estate duty purposes

of shares held by a deceased person in a company. In terms of section 55 of the Finance Act, 1940, the deceased's shares were to be valued by reference to the value of the assets of the company "if the deceased had the control of the company at any time during the five years ending with his death". If on the other hand the deceased did not have the control of the company during the period referred to his shares were to be valued by reference to their market value under section 7 (5) of the Finance Act, 1894.

[69] For almost twenty years before his death the deceased was the registered holder of 1100 shares in a company whose share capital was 8350 shares. A further 3650 shares had been settled by the deceased nineteen years before his death upon trusts for the benefit of his wife and children. He and three other persons were the trustees who were registered as the holders of the 3650 shares. As the deceased's name appeared in the company's register of members as the first holder he was entitled under the company's articles of association to vote in respect of the shares, which meant that he was entitled to vote in respect altogether of shares amounting to more than

half the issued share capital of the company.

As Lord Reid explained in his speech (at 526):

> "The deceased had not an unrestricted power to vote in respect of these 3,650 shares. It was his duty to obtain the concurrence of the other three trustees, and, if they objected to the way in which he proposed to vote, it [was] admitted that they could obtain from the court a direction as to how the votes should be cast and, if necessary, an injunction to prevent the deceased from voting as he proposed."

[70] In concluding that the fact that the deceased was amenable to external control was irrelevant, the majority followed an earlier decision of the House of Lords, *Inland Revenue Commissioners v J Bibby & Sons Ltd* [1945] 1 All ER 667 (HL), a case concerning excess profits tax in which it was held that the register alone could be looked at and that the fact that a registered shareholder might be subject to outside control was irrelevant in deciding whether he had "a controlling interest" in the company within the meaning of a section of the Finance (No 2) Act, 1939.

[71] Lord Reid held that what he called "the rule in *Bibby*'s case" did not apply. He said (at 531 - 2):

> "... I do not see how that can be applied to this case unless, indeed, it were held that this rule is of such general application

> that even under the Act of 1940 only the register can be looked at. Neither party has argued that, and there are numerous provisions in the Act of 1940 which, in my opinion, clearly entitle the Crown to go behind the register and prove that the deceased had control although he was not the holder of a majority of the shares. If it were not so there would be such an easy and obvious method of evasion that an amending Act would immediately be necessary. And if under this Act the Crown can go behind the register, what ground is there for applying the rule in *Bibby*'s case to prevent the shareholder from doing the same?"

[72] He was of the view that what was required was "real control" and not "apparent control" and that the deceased did not have real control of the majority of the votes because he was not entitled to cast the trust votes without the consent of his co-trustees. He rejected an argument advanced by the Crown that control had a double meaning and covered both real and apparent control, saying (at 532):

> "... if we cannot apply [the rule in *Bibby*'s case] to prevent the Crown from going behind the register, I see no reason to apply it to prevent the taxpayer from doing the same"

[73] As I have said, Lord Denning agreed with Lord Reid on this part of the case. He dealt with the point as follows (at 544):

> "... I agree with my noble and learned friend, Lord Reid, in thinking that
> 'control' in this Act means real control and not apparent control. I am not prepared to subscribe to the view that a man

who is a nominee or a bare trustee has control of a company."

[74] In the present case it is clear from the use in section 3 (7) (b) (ii) of the expression "power, directly or indirectly, to control the company" that Parliament did not intend the court to look only at the register: the rule in *Bibby*'s case is clearly not applicable.

[75] In this regard it is important to point out that the definition of "control" which Thring J quoted from section 440 A of the Companies Act 61 of 1973, as amended, as it was worded before it was substituted by section 14 (b) of Act 35 of 1998, only applied to Chapter XVA of the Companies Act which deals, as the chapter heading indicates, with the regulation of securities. It was not of general application in our company law and in so far as the learned judge was influenced by it in coming to the conclusion to which he did he was wrong.

[76] Real, not apparent, control is what is required and a nominee shareholder who can be directed by a mandamus from a court as to how he is to vote at a general meeting cannot be said to be

in control of the company. The reference to "power directly ... to control" in my view is to real control exercised by the person in whose name the relevant shares are registered and who is not subject to external control, while the reference to "power ... indirectly to control" is once again to real control this time exercised indirectly through the registered shareholder who is entitled to exercise the majority of votes at the general meeting. There is nothing in the section which indicates that apparent as opposed to real, control is sufficient. When one has regard to the mischief at which the section is directed, *viz* the device of hiding the fact that two vessels are associated in that a single person "owned" them at the relevant times, it becomes obvious that an association based on apparent but not real control was not what Parliament had in mind when it enacted the section. Furthermore if apparent control were to be held to be sufficient this would lead to the bizarre result to which Mr *Gauntlett* referred.

[77] In my view what Parliament had in mind when it enacted the subsection was that there was only one criterion, namely power to control and that, whether it is directly or indirectly exercised,

there can be only one person who has it for the purposes of the subsection. There are not two repositories of power to control for purposes of the subsection - only one. If someone has indirect power to control it must follow that the ostensible holder of direct power does not have it within the meaning of the subsection. The consequence of that is that an arrestor who seeks to make out a direct control case is impliedly saying that there is no-one who exercises indirect control. On the other hand an arrestor who seeks to make out an indirect control case is impliedly saying that the person ostensibly exercising direct control is not the true repository of power to control within the meaning of the subsection.

[78] In the present case the respondent alleged that Lemonaris had direct power but contradicted itself by saying that he was a "postbox", who was ultimately controlled by someone else who had indirect power over the companies. That seems to be correct except that ultimate control over the two companies may well not be in the hands of one person but two different persons. The respondent has accordingly failed to establish that the vessels owned by the two

companies at the material times were associated vessels within the contemplation of section 3 (6) and (7).

[79] It follows that I am of the opinion that on the third issue the court *a quo* should have found in favour of the appellant and that the appeal should be allowed on that basis.

[80] This conclusion renders it unnecessary for me to consider the fourth issue referred to above.

[81] In my opinion the appeal should succeed with costs, including those occasioned by the employment of two counsel.

I G FARLAM
ACTING JUDGE OF APPEAL

/MARAIS JA:. . .

MARAIS JA:

[1] I have had the benefit of reading the judgments of Smalberger JA and Farlam AJA. I agree with Smalberger JA that the appeal should be dismissed but I reach that conclusion for substantially different reasons. However, I agree with Farlam AJA's judgment in all respects other than his assessment of the facts (to

which I shall return) and his ultimate conclusion as to the fate of the appeal. I commence by adding some observations of my own. It will appear from them where I am in respectful disagreement with Smalberger JA.

[2] As regards the question of whether there was a breach by the seller of the Sea Sonnet of its obligation under clause 11 of the memorandum of agreement before ownership of the vessel passed to the buyer, I emphasise that the moment of delivery marked the expiration of the period of time which was available to appellant to fulfil the obligation. Notification *simul ac semel* with delivery was not what the contract required. Notification **prior** to delivery was required. If that did not take place prior to delivery then *ex hypothesi* the failure to fulfil the obligation occurred prior to delivery and before ownership of the vessel had passed to the respondent.

[3] On the question of whether or not the owner of a guilty ship has still to own it before an associated ship can be arrested, I think a comparison with sec 3 (7)(a)(ii) is instructive. The plain language of the provision shows that what is envisaged is a person who had the power to control at the time when the maritime claim arose (but does not necessarily still have the power to control) a company which owned the guilty ship, and that he owns another ship

at the time action is commenced. It follows that notwithstanding the fact that he no longer controls the company which owned the guilty ship, his own ship may be arrested irrespective of when he acquired it. It seems quite plain that the words "who controlled the company which owned the [guilty] ship . . . when the maritime claim arose" cannot be interpreted as meaning "who controlled **and still controls** the company which owned the [guilty] ship . . . when the maritime claim arose". What warrant is there then for interpreting sec 3 (7)(a)(i) as meaning "who was **and still is** the owner of the [guilty] ship . . . at the time when the maritime claim arose"? Surely none. In both instances there is no longer any existing bond between the two ships. If that does not matter in a claim based on sec 3 (7)(a)(ii) I see no justification for saying that it matters in a claim based on sec 3 (7)(a)(i). I might add that a close study of the provisions of subsections (7)(a)(i), (7)(a)(ii) and (7)(a)(iii) will show that they would make little sense if the owner of the guilty ship had still to own it before an associated ship could be arrested.

[4] As to the interpretation of sec 3(7)(b)(ii), I supplement Farlam AJA's discussion of the problem with the following comments.

When the legislature decided to provide the alternative remedy of an

action *in rem* against an associated ship with ownership as a criterion for association, it realised that account would have to be taken of well-known mechanisms whereby the benefits of ownership are retained but ownership itself is not. That is why ownership is not the only criterion for association and power to control is also included as a determinant of association. The way in which this was done was, first, by describing in sec 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 sec 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.

[5] Subparagraph (i) of sec 3 (7)(a) required the ship sought to be arrested to be owned at the time of commencement of action by a person who owned the guilty ship when the maritime claim arose. Subparagraph (ii) required the ship sought to be arrested to be owned at the time of commencement of action by a person who controlled the company which owned the guilty ship when the maritime claim arose. Subparagraph (iii) required the ship sought to be arrested to be owned

at the time of commencement of action by a person who owned the guilty ship, or who controlled a company which owned the guilty ship when the maritime claim arose.

[6] The deeming provisions in sec 3 (7)(b)(i) enable a claimant to equate the position of a person who holds, or persons who together hold, the majority of the shares in a ship, or the majority of voting rights attaching to the shares in a ship, or the greater part in value of the shares in a ship with that of a sole owner of a ship. For example, if x was the sole owner of ship A (the guilty ship) and there is another ship, B, in which there are sixty-four shares of which x owns thirty, y twenty, and z ten, ship B in its entirety is deemed to be owned by x even although it is not in fact so owned. It seems clear that dominance of ownership in a situation of divided ownership, or dominance of control in such a situation, or dominance in the relative values of respective shareholdings, is considered to be the justification for equating the situations.

[7] The deeming provision in sec 3 (7)(b)(ii) is obviously intended to operate in tandem with sec 3 (7)(a)(ii) and (iii) and, for that matter, with sec 3 (7)(b)(iii) which provides that a company includes any other juristic person and any body of persons irrespective of whether or not any interest therein consists of shares. Sec 3

(7)(b)(ii) provides that "a person shall be deemed to control a company if he has power, directly or indirectly, to control the company". Here again the legislature seems to me to be more concerned with where the power to control a company actually resides than with where it may appear to reside. In my opinion, the manifest purpose of the provision is to enable claimants to penetrate protective facades such as nominee shareholdings and demonstrate that real power to control the company lies in other hands where such is in fact the case. And if the real *situs* of power to control is the criterion, as I consider it to be, I see no justification for saying that it is only open to a claimant to demonstrate where it lies and that it is not open to the targeted ship's owner to do so.

[8] I think that the untenability of interpreting the provision as if it was not concerned with the real *situs* of power to control and was intended to permit a claimant to arrest even a third party's ship which was not consciously connected in any way with the guilty ship appears when the following example is considered. Assume it to be common cause between the parties to an application for arrest that the sole shareholder and director of a company which owns an allegedly associated ship is a mere nominee and that there is a beneficial shareholder on whose instructions he acts. Which of them has power

to control the company within the meaning and for the purposes of sec 3 (7)(b)(ii)? The answer cannot be both. If it can only be one of them, I fail to see why it must or should or could be taken to be the nominee and not the beneficial owner. The provision accords no arbitrary priority to the nominee in such a case. As I see it, the provision does not give the claimant a choice as to which of the two it best suits him to have regarded as having the power to control the company. The purpose of the provision is not to create a fiction which could place innocent third parties in jeopardy of having their ships arrested to secure payment of claims brought against persons or ships of whose existence they were quite oblivious. That would be tantamount to naked confiscation without compensation - a purpose which one shies away from attributing to the legislature unless that is unmistakably what it intended. Its purpose 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.

[9] There is another consideration. If it is so, as I consider to be the case, that the provision postulates that the direct and indirect power to control a company of which it speaks cannot co-exist simultaneously, and if it were so, as Thring J held, that as soon as it is

shown that there is a person who holds the majority of the shares in a company that person is deemed, for the purposes of the associated ship provisions, to control the company directly irrespective of whether or not he is a mere nominee, it would mean that the question of indirect control could never arise for it would be irrelevant. It would mean too that a claimant who wished to prove that in fact power to control the company lay with someone else, would be forestalled at the outset. That would defeat the very purpose of the provision.

[10] It is of course so that the subsection distinguishes between direct and indirect power to control a company. But that tells one very little. It begs the question which remains: was the legislature merely distinguishing between two manifestations of **real** power to control, either of which would suffice to trigger the operation of the deeming provision, or was it saying that direct power to control includes both real power to control and apparent (but illusory) power to control, and that the existence of either will suffice to trigger its operation, but that in the case of indirect power to control, only the existence of real power to control will trigger its operation? If the latter, the inconsistency of its approach is immediately apparent.

[11] I am unable to appreciate why it is thought that the

distinction between direct and indirect power to control drawn by the legislature would be set at naught and fulfil no purpose if the beneficial owner of the shares in a ship-owning company threatened with the arrest of its vessel as an allegedly associated ship were permitted to show that the registered owner of the shares was merely his nominee. On the contrary; it would be an invocation of the distinction to show that what might appear to be direct power to control is not in fact real power to control because there is someone else in whom power to control actually resides, namely, the beneficial shareholder who exercises it indirectly.

[12] I am equally unable to agree that it would have been open to the beneficial owner of the shares in such a situation to show that the registered shareholder is a mere nominee if the legislature had spoken simply of the "power to control" in the section, but that it is not open to him to do so because the legislature speaks of "power, directly or indirectly, to control". Had the words "power to control" been used, it might well have been contended on the strength of the majority decision in *Barclays Bank Ltd v Inland Revenue Commissioners* [1961] AC 509 (HL) that the existence of a power behind the throne was irrelevant. In my view, the inclusion of the words "directly or indirectly" was intended to emphasise that the true

situs of power to control, whether it be direct or indirect power, is what matters for the purposes of the provision. However, I agree with Smalberger JA that it is not power to manage the operations of the company but the power to determine its direction and fate which is what counts.

[13] I cannot subscribe to the proposition that, if the interpretation of the provision favoured by Smalberger JA should result in a third party who has no connection whatsoever with the guilty ship other than that he happened unwittingly to use as his nominee to hold shares in his ship-owning company a person who also holds as a nominee all the shares in the company which owns the guilty ship, losing his company's ship, that is his fault for "choosing to operate behind a cloak of secrecy." There is nothing inherently immoral, unethical, or reprehensible in nominee shareholdings. The reasons why they may be resorted to in good faith are legion and the interpretation to be given to the provision cannot be grounded upon an assumption that there must always be some or other disreputable purpose lurking behind their use.

[14] I do not think that anything can be learnt from what is thought to be a contrast in the provision between the exercise of power *de jure* and its exercise *de facto*. To illustrate: to say that power

exists only *de facto* carries with it the implication that it does not exist *de jure*. If it is a fact that a board of trustees is so spellbound by the personality of the founder of a trust that they always do his bidding even though they are not obliged to do so in law, then the founder has power *de facto*, but not *de jure*, to control the trust. If, on the other hand, a company's shares are all held by a nominee who has agreed with the beneficial owner to always do his bidding, the beneficial owner's power to indirectly control the company does not exist merely *de facto*; it exists *de jure*. In other words, it is an enforceable power which he has in law and not merely in fact. Power *de jure* to control a company can thus exist directly or indirectly and should not be confused with the entirely separate and distinct rules of law which govern the relationship between a company and its registered shareholders and delineate the powers of its shareholders. As between the company and the person who is registered as the holder of the majority of its shares, the person so registered has power *de jure* to control the company even although he is a mere nominee. But *non constat* that the beneficial shareholder's power to control directly his nominee and thereby indirectly the company is merely power *de facto*. In short, it is fallacious, in my opinion, to always equate indirect control with control *de facto*. I think the truth of the matter is that,

depending on the facts of each particular case, indirect control may be exercised sometimes *de facto* and sometimes *de jure*. Whether the deeming provision must be read as extending to indirect power which exists only *de facto*, but not *de jure*, it is not necessary to decide. What seems to me to be plain is that it must extend at least to indirect power which exists *de jure*.

[15] It is in the assessment of whether there is adequate proof of the facts which must exist before the existence of indirect control can trigger the provisions which would result in the Sea Sonnet and the Heavy Metal being taken to be associated ships that I differ from Farlam AJA. In the context of this case (in which it ultimately became virtually common cause that Lemonaris was a mere nominee) what respondent had to prove on a balance of probability was that appellant company ("Belfry Marine") was controlled indirectly when action was commenced by the same person or persons who controlled indirectly the company (Dahlia Maritime Limited) ("Dahlia") which owned the Sea Sonnet when the maritime claim arose. It is not necessary to be able to name that person; it would be sufficient to prove that, whoever he or she or it or they may be, it is one and the same person. In the present case respondent did attempt to provide a name albeit in a highly speculative manner. And it is so, of course,

that inability to prove who the person is may diminish the prospect of ultimately succeeding in proving that the same person has power to indirectly control both companies. But, in a given case, it may yet be possible to prove it. All will depend on the particular facts.

[16] In considering the evidence contained in the affidavits one is of course bound to apply the principles set forth in the case of *Plascon Evans Paints Ltd* to which Farlam AJA has referred. However, as the extract from the judgment quoted by him shows, a court will not necessarily be hamstrung by a respondent's denials of facts in motion proceedings. In my view a highly unusual situation arises in this case. There is a welter of circumstantial evidence pointing very strongly indeed to Lemonaris, whether he knows it or not, being subject in his capacity as majority shareholder and sole director of both companies to the ultimate control and direction of the same person or persons. I say "whether he knows it or not", because Lemonaris himself says the instructions of beneficial owners to nominees "are often given through intermediaries". There is the fact that both companies have the same nominee and sole director; that their addresses are the same; that both ships were managed (if not operated) by Brave Maritime Corporation Inc ("Brave Maritime"); that the Greek Shipping Directory shows the operating address for

both vessels to be the address of Brave Maritime; that the managing director of Brave Maritime was said in a published list of Piraeus Shipping Offices to be Mr Nikolaos Vafias; that he is the registered holder of 10% of the shares in Belfry Marine; that there is a fleet of vessels managed by Brave Maritime, many of which have musically related names such as the names of popular rock music bands. Heavy Metal is such a name. There are also two vessels in the fleet named Sea Muse and Sea Concert. The "guilty" ship is named Sea Sonnet.

[17] When one of the vessels in that fleet was arrested in another jurisdiction in respect of a claim relating to another ship in the fleet on the ground that it was an associated ship, security was established by Brave Maritime. When one examines the response to this powerful array of evidence pointing in the direction of commonality of control one is struck by the evasiveness which permeates it. The pattern consists of some specific and, to my mind, selective and limited denials in instances where the facts enabled denials to be made but, for the rest, of either diversionary strategies or argumentation as to what the value was of evidential material placed before the court by respondent. Thus, the allegation that security had been provided by Brave Maritime when an arrest of a ship in the fleet was made on the strength of it being an associated ship of another ship

in the fleet, was not denied; instead it was met with a bald contention that it was inadmissible evidence of similar facts. The allegations concerning commonality of control contained in certain well-known publications which circulate in the shipping industry were dismissed as hearsay; some peripheral allegations were singled out as not being in accordance with the true facts but, for the rest, no attempt was made to counter the allegations by setting out fully the true state of affairs.

[18] In appellant's first answering affidavit Lemonaris declined to name the beneficial owner of either Dahlia or Belfry Marine but failed to explain why his principals should have any objection to disclosure. When respondent took him to task for doing so, he filed a further affidavit in which he claimed that he had been authorised since to disclose the name of the principal (Mr Nikolaos Tsavliris) in Dahlia but persisted both in refusing to disclose the identity of his principal in Belfry Marine and in providing no reason whatsoever for the insistence upon non-disclosure. All that he was prepared to say was that it was not Tsavliris, the person he had disclosed as being his principal in Dahlia. This despite the fact that it was Belfry Marine's ship and not the Sea Sonnet which had been arrested and was in danger of being lost.

[19] No affidavit from Tsavliris was filed and no explanation

for the failure to file such an affidavit was given. No explanation was given of who holds the shares in Whichita Maritime and Trading Inc which is said to own 48% of the shares in Dahlia. As to the remaining 52% of the shares in Dahlia, they were said to have been held at the time of the sale of the Sea Sonnet by Lemonaris as nominee for Carnation Finance Inc which was owned by Nikolaos Tsavliris. It was said that Tsavliris had since (the date is not disclosed) sold his entire shareholding in Carnation Finance Inc to an individual known to Lemonaris but whose identity he claimed to be unable to disclose. He asserted that Tsavliris had "no interest" in the Heavy Metal "as owner or otherwise". However, he failed to disclose who held the shares in Heritage Sea Carriers Ltd of Monrovia which in turn held 30% of the shares in Belfry Marine. Despite his admission that Brave Maritime had managed the Sea Sonnet and his denial that it operated it, he failed to disclose who did operate it.

[20] Finally, notwithstanding the foreshadowing in correspondence which passed between the attorneys for the parties while affidavits were being prepared, of the production of documents which would disprove the alleged association, virtually nothing in the way of any such documentation was produced.

[21] I do not think that a litigant in motion proceedings who

resorts to this kind of response in the face of a powerful circumstantial showing that, on the probabilities, whoever ultimately had the power to control the company which owned the guilty ship also has the power to control the company which owns the ship sought to be arrested as an associated ship, can shelter behind the principles laid down in the case of *Plascon-Evans Paints Ltd* . In a few words, such an approach should not be regarded as giving rise to a genuine dispute of fact.

[22] Accordingly, I concur with the majority of the Court that the appeal should be dismissed with costs, including the costs of two counsel.

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R M MARAIS