THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 82/2014

REPORTABLE

In the matter between:

THE OWNERS OF THE MV SILVER STAR **Appellant**

and

HILANE LIMITED **Respondent**

Neutral citation: *MV Silver Star: Owners of MV Silver Star v Hilane Ltd* (82/2014)[2014] ZASCA 194 (28 November 2014)

Coram: PONNAN, WALLIS, PILLAY and ZONDI JJA and GORVEN AJA

Heard: 18 NOVEMBER 2014

Delivered: 28 NOVEMBER 2014

Summary: Associated ship arrest – claim on indemnities and a foreign arbitration award – whether an associated ship arrest permissible – proof of association.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Eksteen J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel, where two counsel were employed.

JUDGMENT

Wallis JA (Ponnan, Pillay and Zondi JJA and Gorven AJA concurring)

[1] The respondent, Hilane Ltd (Hilane) was the owner of the *Sheng Mu*. On 6 July 2011 it concluded a voyage charterparty on the Gencon form with Phiniqia International Shipping LLC (Phiniqia), for the carriage of a cargo of coking coal from Bandar Abbas, Iran to Vizag, India. Arising from that charterparty it has claims against Phiniqia. It has pursued those claims by way of the arrest on 12 August 2013 in Port Elizabeth of the *Silver Star* as an associated ship in relation to the *Sheng Mu*, in terms of s 3(6), read with s 3(7), of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act). An application by the registered owners of the *Silver Star*, a Hong Kong company called Action Partner Limited (Action Partner), for the release of the vessel was dismissed by Eksteen J in the Eastern Cape Local Division, Port Elizabeth. Leave to appeal was refused by the high court but granted on petition by this Court.

[2] Action Partner raises two legal issues on the basis of which it contends that an associated ship arrest is impermissible in respect of the claims advanced by Hilane. In addition it contends that Hilane has failed on the facts to establish the association on the necessary balance of probabilities.[1] This judgment deals with the two legal issues and that of my brother Ponnan JA, with which I agree, with the question of association on the facts.

[3] The charterparty concluded between Hilane and Phiniqia provided that it was to be governed by and construed in accordance with English law. It contained the conventional clause providing for the master to sign bills of lading as presented without prejudice to the terms of the charterparty and, in certain circumstances, for the owner's agents to sign bills of lading on behalf of owners. These obligations were varied to some degree by the provisions of clauses 38 and 46 of the rider clauses which provided as follows:

'CLAUSE 38

OWNERS AGREE FOR CHARTERERS TO ISSUE 2ND SET OF BILLS OF LADING IN DUBAI AGAINST CHRS SIMPLE L.O.I. & CHARTERERS UNDERTAKE TO SURRENDER THE FIRST SET OF ORIGINAL BILLS OF LADING ISSUED AT LOADPORT TO OWNERS WITHIN 21 DAYS. IF REQUIRED OWNERS AGREE TO ISSUE BS/L SHOWING LOADPORT "MIDDLE EAST PORT" OR "PERSIAN GULF PORT" OR "RAS ALKHAIMAH" INSTEAD OF ACTUAL LOADPORT "BANDAR ABBAS".

CLAUSE 46

CHARTERERS WILL ENDEAVOUR THEIR BEST TO ENSURE THAT ORIGINAL BILLS OF LADING ARE MADE AVAILABLE AT DISPORT ON OR BEFORE VESSEL'S ARRIVAL TO DISCHARGE. HOWEVER IF ORIGINAL BILLS OF LADING ARE NOT AVAILABLE THEN OWNERS/MASTER AGREE

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[1] *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581B-C.

TO DISCHARGE/DELIVER THE CARGO TO RECEIVERS AGAINST CHARTERERS SIMPLE LETTER OF INDEMNITY IN OWNERS STANDARD PANDI CLUB WORDING DULY SIGNED BY CHARTERERS ONLY.'

[4] As was perhaps to be expected, it was the operation of these clauses that gave rise to the disputes between Hilane and Phiniqia. Tradeline LLC (Tradeline), a company associated with Phiniqia, purchased the coking coal that was to be carried on the *Sheng Mu* from Golden Waves FZC (Golden Waves). On 17 July 2011 a first set of bills of lading was issued showing Golden Waves as the shipper, the loadport as 'Persian Gulf Port' and the notify parties as Tradeline and Fairway Trading Company (Pty) Ltd of Chennai, India. The following day, Tradeline, on behalf of Phiniqia, indicated that Phiniqia required a second set of bills of lading to be issued in Dubai as agreed under rider clause 38. These were to show the loadport as Ras Al Khaimah in the United Arab Emirates. In addition they were now to identify Tradeline as the shipper and the notify parties as Gupta Coal India Limited and IDBI Bank Limited, both of Nagpur, India.

[5] In terms of clause 38 the second set of bills could only be issued against a letter of indemnity (LOI) given to Hilane by Phiniqia. Accordingly Phiniqia executed an LOI in favour of Hilane indemnifying it in respect of any liability, loss, expenses or damage of whatsoever nature that Hilane might sustain by reason of having issued two sets of bills of lading in accordance with Phiniqia's request. The LOI also provided that if the *Sheng Mu* or any other property belonging to Hilane should be arrested or detained, or such an arrest or detention be threatened, by reason of issuing two sets of bills of lading, Phiniqia undertook to provide immediately on demand such bail or other security

as might be required to prevent such arrest or detention or to secure the release of the vessel or such other property and to indemnify Hilane in respect of any loss, damage or expenses, including but not limited to interest and attorneys' fees caused by such arrest or detention 'whether or not the same may be justified'.

[6] Once the second set of bills of lading had been issued and the LOI furnished to Hilane's agents, Hilane asked for the cancellation and return of the first set of bills of lading. This it was plainly entitled to do. On 21 July 2011 Tradeline, acting as Phiniqia's agents, advised that:

'We shall in due course send you original first of bs/l and the original c/p duly executed by courier to your office.'

It did not fulfil this undertaking. This was the first source of problems because Golden Waves remained in possession of the first bill.

[7] Shortly before the vessel was due to arrive at Vizag on 27 July 2011, Tradeline indicated to Hilane that the original bills of lading might not be available upon arrival. In accordance with rider clause 46 it requested the owners to provide it with the format of a further LOI for the discharge of the cargo in the absence of the bills of lading. That LOI was furnished and executed on behalf of Phiniqia on 27 July 2011. Its terms were similar to those of the earlier LOI, save that the indemnity was against any liability, loss, damage or expense of whatsoever nature sustained by reason of delivering the cargo in accordance with Phiniqia's request without delivery up of the bills of lading. It contained a provision that once the original bills of lading came into Phiniqia's possession it would deliver them to Hilane, whereafter its liability under the LOI would cease.

[8] Golden Waves remained in possession of the first bill of lading. On 25 August 2011 its agents wrote to Hilane stating that they were the shipper of the cargo and asking for confirmation that it was still being held to Golden Waves' order. According to Golden Waves it had not been paid for the coal. Hilane in turn passed this message to Phiniqia, but Golden Waves' claims were not resolved. On 8 November 2011 London solicitors acting for Golden Waves sent Hilane a letter of demand for the unpaid price of the coal in an amount slightly in excess of AED 8 million.[2] When there was no response to this demand Golden Waves caused the *Sheng Mu* to be arrested on 5 January 2012 in Napier, New Zealand. Hilane demanded that Phiniqia fulfil its obligations under the two LOIs and reinforced their demand with an order of the High Court in England, but Phiniqia did not respond. Eventually Hilane had to procure a guarantee from its own bankers to secure the release of the *Sheng Mu* from arrest.

[9] In consequence of these events Hilane contended that Phiniqia was obliged to indemnify it against the claim by Golden Waves and for the damages it said that it suffered in consequence of the arrest of the *Sheng Mu* in New Zealand. It referred a dispute in this regard to arbitration in London in accordance with the provisions of the charterparty and obtained an award in its favour. The relevant terms of that award were as follows:

'I FIND AND HOLD that Owners [Hilane] are entitled to the relief claimed namely:-

(i) An Indemnity in respect of Golden Waves' Arbitration Claim should Owners be liable for the same together with an indemnity in respect of costs incurred by

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[2] AED is an abbreviation for Arab Emirate Dirham. The amount is approximately equivalent to USD 3 million.

Owners (and for those which Owners may become liable to Golden Waves) in the Golden Waves Arbitration Claim;

(ii) The Arrest Losses;

(iii) The Further Losses;

(iv) Interest on any such losses, calculated at the rate of 5 per cent per annum compounded with three monthly rests running from the dates such losses were incurred until the date of payment by Charterers.

(v) Costs; and

(vi) Such further or other relief as may be necessary or appropriate.'

[10] Hilane now seeks to enforce its claims in an action *in rem* in South Africa brought against the *Silver Star* as an associated ship in relation to the *Sheng Mu*. In formulating its claim it assesses its liability to Golden Waves in an amount of AED 8 279 253.48; the arrest losses as USD 913 456.70; and its claims in respect of further losses and costs, in various lesser sums. In total it claimed judgment for USD 3,8 million together with interest and costs. We were informed from the bar that, although a monetary value has been placed on the Golden Waves claim, no arbitration award has yet been made in favour of Golden Waves although it is anticipated that an award will be made shortly. Leaving aside the merits of these claims, Action Partner contends that Hilane is not entitled in law to invoke the associated ship arrest provisions in order to pursue them against the *Silver Star*.

[11] In order to appreciate the legal points raised by Action Partner it is necessary to look at the statutory framework in relation to maritime claims and associated ships. Section 1 of the Act defines an admiralty action as meaning proceedings for the enforcement of a maritime claim. The material portion for present purposes of the definition of maritime claim in s 1 of the Act reads as follows:

‘“**maritime claim**” means any claim for, arising out of or relating to —

(h) the carriage of goods in a ship, or any agreement for or relating to such carriage;

(j) any charterparty or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise;

(aa) any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere;

(ff) any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned above …’

[12] The relevant provisions of s 3 of the Act governing the commencement of actions in rem and the ability to pursue a maritime claim by way of an action in rem against an associated ship are the following:

‘(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.

(6) 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.

(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.'

[13] The background to the introduction of the associated ship arrest provisions was the international trend for ship owners to register all the vessels in a particular fleet in separate companies each owning a single vessel.[3] This rendered the recovery of maritime debts more difficult. Although the Arrest Convention of 1952[4] made provision for the arrest not only of the particular ship in respect of which a maritime claim had arisen, but also the arrest of another ship owned by the same owner as the ship in respect of which the maritime claim had arisen, that was ineffective when the vessels were owned by separate 'one ship' companies. As the principal author of the Act put it to this court in the *Berg*,[5] in order to make liability for a maritime claim or the loss arising from such a claim to fall where it belonged by virtue of common ownership of ships or common control of ship-owning companies, the associated ship provisions were devised and incorporated in the Act.

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[3] The trend is traced in MJD Wallis *The Associated Ship and South African Admiralty Jurisdiction* (2010) at 41-43.

[4] International Convention Relating to the Arrest of Sea-Going Ships concluded in Brussels on 10 May 1952.

[5] *Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at 712A-B.

[14] An associated ship arrest can be sought in the following circumstances. There must be a ship in respect of which a maritime claim has arisen. This is referred to as the ship concerned. Then there must be another ship – the associated ship – that satisfies the requirements of s 3(7)*(a)* of the Act, in that it is either in the same ownership as the ship concerned, or where both ships are owned by companies, as is ordinarily the case, control of the company owning the ship concerned at the time the claim arose must be the same as control of the company that owns the associated ship at the time of its arrest.

[15] This was a perfectly satisfactory structure so long as the maritime claim against the ship concerned was a claim that gave rise to a maritime lien or was a claim that arose against the owner of that ship. However, in many maritime situations, the claims arising in respect of a ship might not fall into either category because they were claims that lay in personam against the charterer of the vessel. For example, in many charterparties, the charterer was responsible for providing bunkers to the vessel, but when bunker suppliers remained unpaid they could not arrest the vessel itself. Nor could they arrest as an associated ship a vessel owned by the charterer, or a company controlled by the charterer, because there was no commonality of ownership or control between the ship concerned and the putative associated ship.

[16] The problem was addressed by the deeming provision in s 3(7)*(c)* of the Act. Under it the charterer or sub-charterer of a vessel who is personally liable in respect of a maritime claim is deemed, for the purposes of association alone, to be the owner of the chartered vessel. It was suggested to us that this provision is extremely wide and might catch within its net any person who had at any time been the charterer of the

ship concerned. But that is incorrect. For the purposes of determining whether an association exists the question is who is the owner of the ship concerned at the time the maritime claim arose. That is clear from the language of the various sub-sections of s 3(7)*(a)*. All that the deeming provision does is to place a charterer or sub-charterer of a vessel who incurs, but does not pay, a debt arising from its having been the charterer of the vessel, in the same position as the owner of the vessel would be if the owner incurred the same debt and did not pay it.

[17] It was submitted to us that this provision must be narrowly construed in order not to fall foul of the constitutional guarantee against arbitrary deprivation of property.[6] However, no narrow reading of the section was proffered. I am conscious of the obligation of courts when construing a statute to do so in a way that promotes the spirit, purport and objects of the Bill of Rights, but in the absence of any suggested alternative reading of s 3(7)*(c)* of the Act that issue does not arise. Counsel stressed that there was no challenge to the constitutionality of the section. That being so effect must be given to the provisions of the section and they are clear in deeming the charterer against which a maritime claim arises in the course of the charter to be the owner of the vessel. They do this in order to enable an unpaid creditor to pursue recovery of the claim by way of an associated ship arrest if that is possible.

[18] The deeming provision places the unpaid creditor in the same situation *vis-à-vis* a defaulting charterer as it is in respect of a defaulting owner. It follows that any constitutional attack on associated ship arrests

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[6] Section 25 of the Constitution.

in relation to charterers under s 25 of the Constitution must also be an attack on associated ship arrests in relation to owners. In other words it must be an attack on the entire institution of the associated ship. Elsewhere, and in a different capacity, I have expressed the view that such a challenge could be raised but should not succeed.[7] As we are not confronted in this case with a constitutional challenge to the institution of the associated ship it is unnecessary for me to address the correctness of those academic views, which, after proper argument on an appropriate occasion, I may have to recant or modify.[8]

[19] Turning then to the legal issues that were raised in the heads of argument, the first was based on the proposition that the claims being advanced by Hilane against the *Silver Star* were claims that arose from the arbitration award it obtained against Phiniqia in London. As this was an English award governed by English law, it was submitted that its effect was to extinguish the underlying claims on which the award was based and to replace those claims with a claim based on the award itself. Building on that foundation Action Partner contended that the claim was no longer one that related to the *Sheng Mu* and accordingly that there was no longer a 'ship concerned' the existence of which is the foundation for an associated ship arrest, because the associated ship is arrested 'instead of the ship concerned'.

[20] I accept for present purposes, because Hilane did not challenge the proposition, that the starting point for determining whether a ship may be arrested as an associated ship must be the existence of a maritime claim

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[7] *The Associated Ship and South African Admiralty Jurisdiction* at 268-281.
[8] *MSC Gina: Mediterranean Shipping Co SA v Cape Town Iron and Steel Works* 2011 (2) SA 547 (KZD) para 19.

against or in respect of a particular ship. That appears to follow from the requirement that the associated ship is arrested instead of the ship concerned, and thereafter the action in rem is pursued against it instead of the ship concerned.[9] If the maritime claim did not give rise to a maritime lien against a particular vessel, and an in personam claim did not arise 'in respect of' a particular ship, there could be no action *in rem* against a particular ship because the requirements of s 3(5) of the Act could not be satisfied. In that event there would be no ship concerned and there could be no arrest of an associated ship.

[21] It is the next leg of the argument that is problematic. It depends upon the proposition that, because an English arbitration award extinguishes the underlying claim on which the award was based, it is not made in respect of a particular ship and therefore there can be no ship concerned for the purposes of an associated ship arrest. In the first place it is by no means clear to me that an arbitration award of the nature of the present award would in English law be regarded as extinguishing the claim or claims on which the award was based. Both the cases and the leading textbooks express the position rather more cautiously than that. In *Russell on Arbitration*,[10] it is said that:

'[T]he award itself creates new rights between the parties in most cases superseding their previous rights in relation to the matters referred.'

Similarly in giving the judgment of the Board in *F. J. Bloemen Pty Ltd v Council of the City of Gold Coast*,[11] Lord Pearson said that the award of an arbitrator cannot be viewed in isolation from the submission under which it was made and referred to the distinction between 'an award

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[9] The topic is discussed in *The Associated Ship and South African Admiralty Jurisdiction* at 153-155.
[10] D Sutton and J Gill, *Russell on Arbitration* (22 ed, 2003) para 6-190.
[11] *F. J. Bloemen Pty Ltd v Council of the City of Gold Coast* 1973 AC 115 at 126.

which merely establishes and measures a liability under a contract and so does not create a fresh cause of action and an award of damages which supersedes the liability under the contract and creates a fresh cause of action'.

[22] Those statements do not suggest that the English law governing the effect of an arbitration award inevitably has the absolute consequences for which Action Partner argued. Indeed they are, to the ears of a South African lawyer, redolent of the statements in this Court concerning these matters. Thus in the *Yu Long Shan*,[12] Marais JA described a claim based on an arbitration award as an entirely derivative cause of action. And in *Swadif (Pty) Ltd v Dyke NO*[13] this Court approved the following statement by Fannin J[14] of the status of an arbitration award:

'It does seem to me to be a somewhat artificial view of the position to regard a judgment as, in all circumstances, having the effect of a novation. In some cases, of course, it does have precisely that effect, where, for example, a plaintiff obtains a judgment for cancellation of a contract and for damages. Thus, in this case, had the judgment been one declaring the contract between the parties to have been at an end, with an order that the defendant return the vehicle to the plaintiff and pay the defendant a sum of money, it could quite realistically be said that the judgment wholly replaced and thus novated the contractual rights and liabilities of the parties *inter se*. But in a case like the present, where the only purpose of the judgment is to enable the plaintiff to enforce certain rights, by means of execution if need be, without in any way affecting other rights arising out of the contract, it seems more realistic to regard the judgment not as novating the former, but as strengthening or reinforcing them. The right of action will have been replaced by a right to execute, but the enforceable right remains the same.'

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[12] *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA) at 653F-H.
[13] *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 942C-E.
[14] In *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 310A-C.

[23] Even if the submission by Action Partner were correct I do not think that it would assist it. In *F. J. Bloemen Pty Ltd v Council of the City of Gold Coast* the Privy Council was faced with a very similar submission that, because an arbitration award had been made in respect of the contractor's claims, it could not be said that the amounts due under the award were amounts payable in terms of the contract. This was for the purposes of a clause in the contract that provided for interest to be paid on all money payable to the contractor thereunder. The Board rejected this submission on the basis that the award could not be severed from the underlying submission to arbitration embodied in the contract, and hence the amounts payable under the award could fairly be said to be amounts payable under the contract. It seems to me similarly that where an arbitration award is made in terms of an arbitration clause in a charterparty relating to a particular ship, the award cannot be severed from its source and it remains one in respect of that particular ship.

[24] When regard is had to the relevant definitions of maritime claim that are applicable in this case, it merely reinforces that view. Any judgment or arbitration award 'relating to a maritime claim' is itself a maritime claim. In this case the maritime claims that underlie the award arise from a charterparty dispute and any claim for, arising out of or relating to a charterparty is a maritime claim.[15] The words 'for, arising out of or relating to' predicate a relationship between the claim and the maritime topic sufficiently intimate to impart to the claim a maritime character of a sort rendering it appropriate for the claim to be adjudicated in accordance with maritime law.[16] An arbitration award on such a claim

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[15] They may also be claims arising in respect of the carriage of goods in a ship or an agreement for such carriage.
[16] *Peros v Rose* 1990 (1) SA 420 (N) at 424F-426A.

itself has a sufficient maritime character to render it a maritime claim. Where the underlying maritime claim lies against or in respect of a ship it does not seem an undue use of language to say that the arbitration award in respect of that claim is likewise a claim in respect of the same ship.

[25] Some very considerable oddities arise if this is not the case. Take the case of a claim by a charterer for damages arising from a breach of a performance warranty under a charterparty. The claim is a maritime claim against the owner of the vessel. It clearly arises in respect of the chartered vessel. The claim is therefore one that could be pursued by way of an action *in rem* against that vessel. The effect of Action Partner's contention is that, if the charterparty contains an arbitration clause and the dispute is referred to arbitration, the award could not be enforced by an action in rem against the vessel, because it could not be said to be a claim in respect of the vessel. So the result of the charterer complying with its contractual obligations and proceeding to arbitrate would be to forfeit the right to proceed in rem against the vessel. That would be a strange result when the Act says specifically that the award itself is a maritime claim. It has that status even if it is a South African award and enforceable in terms of the Arbitration Act 42 of 1965.

[26] The consequence of this argument being upheld would be that no claim on a judgment or arbitration award could be pursued by an action in rem. That would be a very far-reaching result, as it would deprive claimants with a maritime claim arising in respect of a vessel and capable of being pursued by an action *in rem* of that advantage, after they had fortified their claim with a judgment or arbitration award. It could lead to claimants contending in terms of s 7(1) of the Act that they should not be

compelled to pursue arbitration, as they would thereby be deprived of a legitimate juridical advantage. That would be undesirable.

[27] Action Partner relied on two English cases, *The Beldis*[17] and *The "Bumbesti"*[18] in support of its contentions. Both cases dealt with arbitration awards made under charterparties. In *The Beldis* the question was whether a claim under an award was a claim 'arising out of any agreement made in relation to the use or hire of any ship' so as to give the County Court admiralty jurisdiction to deal with it. The Court of Appeal held that it was not, because the action was one upon the award itself and not the charterparty. The court pointed out that all that had to be proved by the claimant was that matters had been submitted to an arbitrator and that an award had been made.[19] The claim was one on the award not the charterparty. In arriving at this conclusion the court was influenced by the history of the extension of admiralty jurisdiction in England, commencing with the Admiralty Courts Acts of 1840 and 1861, and held that the definition of the extended claims was undertaken in 'precise, plain and carefully guarded terms'.[20]

[28] The decision in *The "Bumbesti"* took the matter no further. Once again the contention was that the court had jurisdiction to hear a claim based on an arbitration award under a charterparty because it was a 'claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship'. The contention was rejected both as a matter of construction, having regard to the history of this expression in earlier

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[17] *The Beldis* [1936] P 51.
[18] *The "Bumbesti"* [1999] 2 Lloyd's Rep 481 [Q.B. (Adm. Ct.)].
[19] C/f *MV Ivory Tirupati: MV Ivory Tirupati and Another v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA) para 32.
[20] Per Scott LJ at 82.

legislation, and because the judge held himself bound by the decision in *The Beldis*.

[29] The English cases are by no means unanimous in this regard. Sheen J, the admiralty judge, expressed a contrary view in *The St Anna*.[21] Relying on *dicta* in both the Court of Appeal and the House of Lords he held that there was no reason not to give the words in the statute their ordinary meaning or to constrain them in the light of the history of similar expressions in earlier statutes. He held that an action on an arbitration award is an action to enforce the contract contained in the contract embodying the submission to arbitration, in that case the charterparty, and therefore the claim was one arising out of an agreement for the use and hire of a ship. He added that he was pleased to reach that result because it enabled the court to do justice 'in a way which would be denied to it if creditors could not bring proceedings in rem merely because they faithfully honoured their agreement to submit to arbitration a dispute which is clearly within the Admiralty jurisdiction'.[22] That sentiment echoes my own.

[30] For two reasons it is unnecessary for me to reconcile this difference of opinion. The first is that the English statutes defining the ambit of admiralty jurisdiction under consideration in those cases, as is still the position in terms of the Senior Courts Act 1981,[23] contained no provision corresponding to the express inclusion, as maritime claims under the Act, of claims on judgments and arbitration awards relating to maritime

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[21] *The St Anna* [1983] 2 All ER 691 (QBD).
[22] At 696h.
[23] The relevant provisions appear in Appendix 2 to Nigel Meeson and John A Kimbell *Admiralty Jurisdiction and Practice* (4 ed, 2011) at 527-529.

claims. Those cases were therefore dealing with a different issue. The second is that it is plain that the inclusion of this section in the Act was done deliberately in order to overcome the decision in *The Beldis*.[24] In those circumstances the English cases that Action Partner relied on are unhelpful, even if its contentions as to their effect are correct.

[31] At the end of the day the issue is not one as to the effect in English law of an arbitral award, but one as to the proper construction of the relevant provisions of the Act. That is a question to be determined by a conventional process of statutory interpretation in terms of South African law. Foreign law will only enter into the picture if the court needs to determine the nature of a particular claim in order to decide whether it comes within the scope of one of the defined maritime claims. Nor can there be resort to the provisions of s 6 of the Act, because those provisions only apply to fix the law applicable in the adjudication of claims ('in the exercise of its admiralty jurisdiction'), after the prior question whether the court has jurisdiction has been resolved. The statutory rules governing the bringing of an action to enforce a maritime claim embody the jurisdictional aspect of the enforcement of maritime claims.[25]

[32] The first issue thus resolves itself into the question whether, on a proper interpretation of the Act, a claim in respect of an arbitration award relating to a maritime claim is a claim in respect of the ship in respect of which the original maritime claim lay. Any practical person engaged in the maritime world would answer 'of course it is' to that question. Their

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[24] D J Shaw QC *Admiralty Jurisdiction and Practice in South Africa* (1987) at 23-24.
[25] D C Jackson *Enforcement of Maritime Claims* (4 ed, 2005) at 1.

answer would not change if they were told that under the arbitral law the award extinguished the original claim. That is in my view clearly the correct position and it disposes of Action Partner's first argument. Hilane's maritime claims under the charterparty arose in respect of the *Sheng Mu* and Phiniqia, which was liable in respect of those claims, was deemed to be its owner for the purpose of an associated ship arrest. Had no arbitral award existed to fortify Hilane's claims it could have arrested an associated ship in relation to the *Sheng Mu* on the basis that the latter was 'the ship concerned'. The fact that it has pursued its claims by way of arbitration does not alter the situation. The award is one in respect of the *Sheng Mu*, which is the ship concerned for the purpose of an associated ship arrest.

[33] The second point is related to the argument about the constitutional implications of construing the deeming provision in s 3(7)*(c)* too broadly. Action Partner submitted that insofar as the deeming provision operated in respect of claims against Action Partner as charterer, those claims should be limited to 'only those claims which relate to the core of the charterparty, and should exclude ancillary agreements such as the indemnities'. This prompted an argument from Hilane that its claims were monetary claims arising not from the two LOIs but from the charterparty itself. I do not think it necessary to resolve this issue, which can more properly be canvassed at the trial, because in my view these claims, even if technically arising in terms of the LOIs, are nonetheless claims against Phiniqia as charterer and relate to the core of the charterparty.

[34] This was a voyage charterparty for the carriage of a consignment of coking coal from the port of loading to a port of discharge. It was

accordingly a contract of affreightment, that is, a contract for the carriage of goods by sea.[26] The central obligations assumed by Hilane as carrier under that contract were therefore to load the cargo, issue bills of lading, carry the cargo and deliver it to the holder of those bills of lading. The problems between Hilane and Golden Waves arose because Phiniqia exercised its right to have a second set of bills of lading issued to replace the original bills, and then did not surrender the original bills. They were compounded when it asked that the cargo be discharged without production of the original bills of lading.

[35] In each case Phiniqia was exercising a right that it had under the rider clauses of the charterparty. In return for the exercise of those rights it was obliged to furnish the LOIs. The first LOI dealt with the issue of bills of lading, a central feature of any contract of affreightment. It starts by saying that 'we, the undersigned, the Charterers' request the issue of a second set of bills of lading on altered terms and goes on to say 'we hereby guarantee as follows'. Whether or not the LOI constitutes an agreement separate from the charterparty, it was furnished by Phiniqia pursuant to its contractual obligations under the charterparty and in its capacity as charterer of the vessel.

[36] The second LOI is in the same category. It arose from the request that the cargo be discharged – the last act by the carrier on completion of the voyage – without production of the original bills of lading. Once again the charterparty required that acting on the request meant that the charterer had to furnish an LOI, and Phiniqia did so. In both instances it

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[26] Stewart C Boyd CBE QC *et al Scrutton on Charterparties and Bills of Lading* (21 ed, 2008) articles 1 and 3. The conclusion in *Montelindo Compania Naviera SA v Bank of Lisbon and SA Ltd* 1969 (2) SA 127 (W) at 137H-138A and 138E-H that a time or voyage chartertparty is a lease is incorrect.

was exercising its rights under the charterparty and in return performing its reciprocal obligations under the charterparty. Its liability as charterer cannot be separated from its liability under the LOIs. Hilane's claims relate to the core of the charterparty. Accordingly, even on the construction contended for by Action Partner, Hilane's claims lay against Phiniqia as charterer.

[37] It follows that both legal points raised by Action Partner must fail. Accordingly, and subject to proof of association, an arrest of the *Silver Star* at the instance of Hilane was permissible. For the reasons set out in the judgment of Ponnan JA, I agree that association was established on the requisite balance of probabilities. I accordingly agree with him that the appeal should be dismissed with costs, such costs to include those consequent upon the employment of two counsel where two counsel were employed.

M J D WALLIS
JUDGE OF APPEAL

Ponnan JA (Wallis, Pillay and Zondi JJA and Gorven AJA concurring)

[38] I have had the benefit of considering the judgment of my colleague Wallis JA. I share his views and the conclusions reached by him in regard to the first two issues on appeal. The issue that remains for decision in this appeal, to which I now turn, is whether on the facts the requisite association has been established.

[39] It is well settled that Hilane bears the onus of demonstrating that the arrest was justified and this includes proving the alleged association on a balance of probabilities (*Cargo Laden and Lately Laden on Board The MV Thalassini AVGI v MV Dimitris* 1989 (3) SA 820 (A) at 834F-G; *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581B-E). But, as Wallis observes (at 292):

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

In view of that difficulty the fact that the response to an allegation that there is an association between two vessels is untruthful, evasive and economical on detail will be a relevant factor in determining whether the applicant has discharged the onus of proof resting on it.

[40] 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 (*The 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) (*The 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 shipowners 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) J A Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS* SCOSA C12 (N) at C14E). In his consideration of the concept of control as employed in the Act in *The Heavy Metal* para 8, Smalberger JA writing for the majority (Nienaber JA and Melunsky AJA concurring) expressed himself thus:

'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, 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".'

According to Wallis (at 187) 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.'

[41] It was not in dispute that Phiniqia is owned or controlled by Tradeline, a limited liability company incorporated according to the laws of the United Arab Emirates. The evidence showed that Phiniqia, Tradeline and Stellar Shipping Co LLC were all under the common control of the principal shareholder being a Mr Majid Al Ghurair as part

of a group of companies, active in various fields and bearing his name. The crux of the factual dispute therefore related to the ownership or control of the *Silver Star*. In the founding affidavit dated 14 August 2013 filed in support of the application to set aside the arrest, Mr Norton, Action Partner's attorney, appears to have relied principally on information furnished to him by Captain AK Rathee, who was said to be the Chief Executive Officer of Stellar Ocean Transport LLC (Stellar Ocean), which managed all the vessels operated by Stellar Shipping as well as the *Silver Star*. He annexed to his affidavit Action Partner's certificate of incorporation dated 23 June 2009, which reflected Mr Ahamed Mubarak Habeeb as the sole registered shareholder and both him and Mr Mujeebur Rahman Habeeb as its Directors. Mr Norton stated:

'14.

I confirm that I have further been advised by Captain AK Rathee that Mr Habeeb has confirmed to him that he is not a nominee shareholder and holds the shares for his personal account and that Tradeline LLC does not own or control the applicant in any sense.'

[42] Both Captain Rathee and Mr Habeeb deposed to confirmatory affidavits on behalf of the appellant. Captain Rathee stated:

'6

Furthermore, I confirm that I am personally aware of the facts relating to the purchase of the mv "Silver Star" by Mr Habeeb as SOT [Stellar Ocean] handled that transaction for him as managers of the vessel.

7

I am, therefore, aware of the fact that Mr Habeeb was offered and accepted Action Partner Limited as a vehicle to own the mv "Silver Star" and that he personally paid the margin for the vessel out of his funds partially held by him and partially held by SOT and that SOT then arranged for him the transfer of the vessel to Action Partner Limited, the balance of the purchase price being funded by the mortgagee bank.

8

I can also confirm that I have personal knowledge of the fact that Mr Habeeb is certainly no nominee and SOT trades the "Silver Star" for the account of Action Partner Limited which I know to be controlled by Mr Habeeb and no one else.'

Mr Habeeb added:

'7

… I confirm that:

7.1 I am the sole shareholder of Action Partner Limited, being the owners of the mv "Silver Star";

7.2 I hold those shares for my own account and not as a nominee;

7.3 Tradeline LLC does not own or control Action Partner Limited. I do.

. . .

I also confirm that by agreement between the applicant and Stellar Ocean Transport LLC, the latter are the technical and commercial managers of the "Silver Star".'

In other words the only evidence tendered in response to the evidence of association was silent about the business or trading activities of the *Silver Star*, a matter of considerable importance as later emerged.

[43] Mr Cunningham, Hilane's attorney of record, who deposed to the answering affidavit on its behalf, demonstrated that this explanation was by no means a complete picture of the relationship between the different companies. He stated:

'10. I annex hereto … copies of reports compiled by Lloyd`s List Intelligence on Action Partner and the vessel [*Silver Star*] as well as copies of reports by Sea-Web … both of which are known to be reputable sources of maritime intelligence, on Stellar Shipping Co LLC ("Stellar Shipping"), Action Partner and Tradeline.

11. It is evident from these reports that: -

11.1. Stellar Shipping is the operator of the vessel;

11.2. Stellar Shipping is a subsidiary of Tradeline;

11.3. Stellar Ocean Transport LLC ("Stellar Ocean") is a subsidiary of Tradeline;

11.4. Stellar Ocean is the ship manager and beneficial owner of the vessel;

11.5. the vessel is group owned by Tradeline.

11.6. Habeeb is the vice chairman of Tradeline

12. I attach hereto … a copy of a Bill of Sale dated 7 June 2011 wherein Stellar Shipping purported to sell the vessel to Action Partner for the sum of US$49,800,000.00.

13. In terms of a mortgage agreement entered into between Action Partner, as owner of the vessel and Emirates NDB Bank, as mortgagee, on 18 October 2011 … the actual borrower in terms of the facility agreement dated 6 September 2011, entered into in accordance with the mortgage, was Stellar Shipping.

14. The amount advanced to Stellar Shipping in accordance with the facility (loan) agreement (usually used to pay the purchase price for the vessel in part or in full) was US$40,600, 00.00. The source of the balance of the purchase price of US$9,200,00.00 for the purchase of the vessel is unknown.

15. The Applicant has submitted that as at the date of the arrest, the sole shareholder (and thus beneficial owner of all of the shares) in Action Partner was Habeeb.

16. Habeeb acquired the shares on 8 June 2011 … the day after the signature of the Bill of Sale and delivery of the vessel to Action Partner.

17. If these contentions are to be accepted, Habeeb must have acquired the shareholding by payment of the value of the vessel, given that Stellar Shipping borrowed the funds to pay the majority of the purchase price (some USD50 million).

…

19. Moreover, Habeeb is the vice chairman of Tradeline. This is apparent from the SeaWeb report to which I refer hereunder.

20. Given this association, and the fact that Tradeline is a holding company of both Stellar Shipping and Stellar Ocean, and that, indeed, Habeeb is also a "partner" of Phiniqia – which it is common cause is owned and or controlled by Tradeline - and further that Tradeline, again according to SeaWeb is the "Group Owner" of the vessel, it is significant that Habeeb did not disclose his close contact and association with Tradeline and the other entities owned or controlled by the latter. This is more surprising given that the SeaWeb report to which I refer to above expressly states that the vessel is "group owned" by Tradeline.

…

25. In addition to the above, I attach hereto … a judgment in *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm) dated 18 November 2012, wherein it is recorded, *inter alia*, that:

"The shipping division of Tradeline was spun off as an independent identity and Stellar Shipping Co LLC was incorporated in 1999 to supplement the trading activities with an initial fleet of eight dry bulkers"

26. I also attach hereto . . . company profiles from the Dubai Chamber of Commerce for Tradeline and Stellar Shipping respectively. It is evident from these reports that:

26.1. Habeeb holds a 25% share in Tradeline and is described as a "Partner";

26.2. Majid Saif Ahmad Al Ghurair ("MSA Al Ghurair") holds a 51% share in Tradeline and is described as a "Managing Partner";

26.3. Habeeb holds a 19% share in Stellar Shipping and is described as a "Managing Partner";

26.4. MSA Al Ghurair holds a 51% share in Stellar Shipping and is also described as a "Managing Partner".

27. MSA Al Ghurair is the owner and/or controller of the Al Ghurair group of companies, of which, *inter alia*, Tradeline is a party.

28. In the circumstances, I submit that despite the assertions of Captain AK Rathee ("Rathee") in regard to Habeeb`s alleged claim that he is the sole share holder of Action Partner (for his own account) it is clear that the owner of the vessel, Action Partner, and, indeed, Stellar Shipping and Stellar Ocean, are owned and/or controlled by Tradeline and its majority shareholder, MSA Al Ghurair.

29. The Respondent`s claims are therefore enforceable against the mv "Silver Star" as the deemed owner of the mv "Sheng Mu" was Phiniqia which was ultimately owned or controlled by Tradeline at the time the claim arose and which also ultimately owns or controls the mv "Silver Star" as contemplated in subsections 3(6) and (7) of the Act.'

[44] Ms Pitman, Mr Norton's colleague, deposed to the replying affidavit on behalf of the appellant on 16 August 2013. Like Mr Norton, she relied primarily on information furnished to her by Captain Rathee. She stated:

'19

Also in 2008 Mr Habeeb decided to start his own Ship Management Company, being Stellar Ocean Transport LLC ("SOT"). The use of the name "Stellar" in the United

Arab Emirates is quite popular and, therefore, common and there are numerous companies with “Stellar” as part of their name.

20

In the United Arab Emirates it is necessary for any local company to be sponsored by a local citizen who must own at least 51% of the shares. Consequently, although the company was started and managed by Mr Habeeb it was necessary for a local sponsor to be found who held 51% of the shares in the company.

21

I have been advised that this shareholding is not nominal and that the local citizen must hold such shares for his own account, which is, indeed, what occurred in the case of this company. The sponsor was Mr Ahmad Salam Ahamd Darwish, who is entirely unrelated to the Al- Ghurair family. Consequently, Mr Habeeb took a shareholding of 23% in the company which he managed, which he held until he sold his interest in the company on (date).

…

25

In any event Mr Habeeb is, as a shareholder in the group, aware of the fact that Tradelines LLC (“Tradelines”), Stellar Shipping LLC (“Stellar Shipping”) and Phiniqia International Shipping LLC (“Phiniqia”) are and always have been controlled as to 51% of shareholding by Mr Majid Saif Ahmed Al-Ghurair. It is incorrect to characterise Tradelines as a holding company. It is not. Mr Al-Ghurair independently controls all three companies through his 51% shareholding in each.

…

27

In or about 2008 Tradelines, Phiniqia and Stellar Shipping were badly affected by the economic downturn.

28

Stellar Shipping then had a number of new-buildings on order from various shipyards. The “Silver Star” was one such vessel on order by Stellar Shipping, her price being around US$50m.

29

Stellar Shipping had arranged a loan of US$40,6m from Emirates NDB Bank, the remaining roughly US$9.5m being payable by it to the yard.

30

It was no longer in a financial position to pay the US$9.5m and offered the vessel to its shareholders

31

Mr Habeeb, who then owned the “Mega Star” through a special purpose vehicle, believed that purchasing a sister vessel would bring economy of management and profitability and decided to purchase the vessel personally. Both vessels were specifically suited for the Indonesian- Indian coal business with their 80,000 DWT cranes and gears.

…

41

Indeed, in this particular case, as I have indicated, with regard to paragraph 11.1, Stellar Shipping has nothing whatsoever to do with the vessel. It sold the vessel on to Action Partner Limited and the vessel is commercially managed and, thus, operated by SOT.

42

With regard to paragraph 11.2, Stellar Shipping is not a subsidiary of Tradeline although Mr Al-Ghurair is the 51% shareholder in both companies.

…

46

With regard to paragraph 11.6, it is admitted that Mr Habeeb is the Vice Chairman of Tradeline. He was conferred this honour as a minority shareholder in the company and because of his status. This, however, has nothing whatsoever to do with his personal investment in Action Partner Limited in respect of the vessel.

47

The sale referred to in paragraph 12 was not a purported sale but an actual sale, as documented by the Bill of Sale.

48

With regard to paragraph 13, it is very well known that mortgagee banks go to some lengths to ensure that if a group company is taking a loan the main companies of the group stand as guarantors for that loan. Yet the loan documentation does not mention Tradeline, Stellar Shipping or Phiniqia. This in itself is, it is submitted, a telling fact that such companies are not related to Action Partner Limited.

49

Mr Cunningham avers that the actual borrower was Stellar Shipping. That is not the case. The facility Letters were, indeed, concluded between Stellar Shipping and the Bank. However, before the loan was granted Stellar Shipping encountered financial difficulties and could not continue with the transaction. It was at that point that Mr Habeeb agreed to step in and buy the vessel from Stellar Shipping, which he did in terms of the relevant deed of sale.

50

With regard to paragraph 14, the amount was advanced not to Stellar Shipping but to Action Partner Limited. The source of the balance has already been dealt with.

…

52

With regard to paragraph 16, there was an administrative delay in the transfer of the shares the day after the sale. In fact, the shares were supposed to have been transferred before the sale. However, nothing turned on this and the shares were subsequently transferred as they were supposed to be.'

[45] On 21 August 2013 Mr Norton deposed to yet a further affidavit to respond to the obvious difficulties facing Action Partner arising from this material. He attached a draft affidavit by Captain Rathee, in which the latter stated:

'11

I went through the affidavit and advised that the facts contained therein were correct and could be deposed. The affidavit was subsequently deposed by Ms Pitman and filed.

…

15

In re-reading it, there are, indeed, a number of inaccuracies. In the circumstances it is as well that I identify and correct them and also identify which information I provided to ENS as being within my personal knowledge and which was provided to me by Mr Habeeb as only being within his personal knowledge.

…

17

The facts contained in paragraph 19 were provided by me and the paragraph is not quite correct in that I meant to refer to the use of the word “Stellar” worldwide, not just in the United Arab Emirates.

…

19

Paragraph 20 was provided to me for verification in the form that it was finally deposed and I confirmed it but it is also incorrect in that it is possible to have a citizen of the United Arab Emirates sponsor a company by holding a 51% shareholding for a fee without any active participation, financial or otherwise in respect thereof.

20

In the case of SOT I am personally aware of the fact that Mr Ahmad Salam Ahamd Darwish is such a sponsor and that the company was until 24 September 2012 controlled by Mr Habeeb.

…

23

Paragraph 34 is not quite correct in that Mr Habeeb has subsequently reminded me that the owning company of the “Majestic Star” was controlled by his brother, Mr Mujeebur Rahman Habeeb, as sole shareholder, and the vessel was beneficially owned by him, not Mr Habeeb. However, by arrangement with his brother the proceeds from the sale of that vessel were used to part pay the difference between the loan amount provided by the bank and the sale price for the purchase of the mv “Silver Star”.

…

28

Paragraph 45 is within my personal knowledge in that I am fully aware of the transaction in terms of which Mr Habeeb took the vessel through Action Partner Limited. Tradeline does, however, continue to be a corporate guarantor of the obligations of Stellar Shipping as borrower on the loan but neither are guarantors of the obligations of Action Partner Limited`s performance under the ship`s mortgage.

…

30

I am afraid that paragraphs 48 and 49 are incorrect. I understood this paragraph to be making the point that neither Tradeline nor Stellar Shipping were guarantors of

Action Partner Limited`s commitment under the ship`s mortgage agreement. Clearly a cursory read of paragraph (b) of the Preamble to the Mortgage at page 117 of the papers makes it clear that Stellar Shipping is the borrower from the bank. I believed that ENS had grasped this point and I believe that I was reading these paragraphs as if this point had been understood and was being confirmed, not the opposite, as I subsequently understand to be the case.

31

In fact, as is clear from the Facility Letter that has been provided to the respondent as a consequence of its request for it, Stellar Shipping remains the borrower and there are, indeed, corporate and personal guarantees in place from Tradelines and the Stellar Shipping shareholders. The guarantees are for the performance of Stellar Shipping, not Action Partner Limited for its commitments in terms of the mortgage agreement.

32

With regard to paragraph 50, this is correct in the sense that the monies were advanced for the purchase of the "Silver Star" by Action Partner Limited. However, it was advanced in terms of a loan to Stellar Shipping.

33

The facts in paragraphs 52, 54, 60 and 61 are within my personal knowledge and are correct.

…

36

I now understand from ENS that the fact that Stellar Shipping remains borrower in respect of the loan for the purchaser of the "Silver Star" and that Trade Line and the shareholders of Stellar Shipping have provided guarantees in respect of the loan is to be construed on the documents as a recognition that the only position of Stellar Shipping is that it remains on paper liable to pay the Bank whereas Action Partners Ltd is actually the true payor.'

[46] No doubt the dispute of fact raised by the affidavits has 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 634E-635C. However, a court will not necessarily be hamstrung in its determination of a matter such as this by a party's denial of facts on affidavit,

particularly where, as here, there appears to be a wealth of circumstantial and other evidence pointing to association. Mr Norton's affidavit had done little to refute the information presented by Mr Cunningham, much of which was in fact undisputed.

[47] The Sea-Web report annexed to Mr Cunningham's affidavit: (a) describes Stellar Ocean and Stellar Shipping as subsidiaries of Tradeline; (b) describes Tradeline as being the group owner and Stellar Ocean as being the ship manager of the following five vessels, namely the Diamond Star, Emerald Star, Mega Star, Ruby Star and Silver Star; (c) reflects the year of build of the *Silver Star* as 2011, its shipbuilder as Cosco and its operator as Stellar Shipping; and (d) lists Tradeline`s address as '[c]are of Stellar Ocean Transport LLC, Suite 4008, 4th Floor, Al Rigga Business Centre …' and its corporate office bearers as: Mr Majid Saif Al Ghurair – Chairman; Mr Ahmed Hussain Lafir – Managing Director; Mr A.M. Habeeb – Vice Chairman; and Mr Raman Madhok – Chief Executive. The Dubai Chamber Company Profile lists Tradeline's shareholders and their respective shareholding as follows: Mr Al Ghurair – 51%; Mr AM Habeeb - 25%; and Mr Lafir – 24%. It also reflects the shareholders and their respective shareholding in Stellar Shipping as follows: Mr Al Ghurair – 51%; Mr AM Habeeb – 19%; Mr Lafir – 15% and Ahmed Ahmad Iqbal – 15%. The appellant does not appear to dispute the respective shareholdings of Mr A Ghurair and AM Habeeb in Tradeline and Stellar Shipping. Nor does it dispute that Mr Al Ghurair is the controller of the Al Ghurair group of companies, of which, *inter alia*, Tradeline is a part. In effect most of this material was undisputed. It showed common control of a group of shipping companies and common operation of the fleet including the *Silver Star*.

[48] It seems that Tradeline`s shipping division was spun off as an independent entity and Stellar Shipping incorporated in 1999. By 2006 it appears that Stellar Shipping was already operating its own fleet and had in fact ordered two new vessels from Cosco (Dalian) Shipyard Co Ltd (Cosco). On 21 October 2010 Cosco wrote to Stellar Shipping with reference to the ship building contract for the construction of the *Silver Star* dated 6 December 2006. That letter, which was marked for the attention of Captain Rathee, informed Stellar Shipping that it was in default of its contractual obligations and notified it that Cosco was cancelling the contract. Ten days later Mr Lafir wrote to Mr Habeeb on a Tradeline letterhead as follows:

'We refer to our meeting yesterday in the matter of Vessel M.V. Silver Star. We are thankful to you for your decision to purchase this Vessel and helped us to deal with our problem with Cosco Shipyard.

We have discussed this matter with Emirates bank and I am pleased to confirm that in principal the bank, Trade Line LLC and Stellar Shipping Co, (LLC) are agreeable to extend the loan facility to you. However we need your confirmation to following conditions:

(1) You will pay full margin money for this Vessel USD 10 Million (Exact amount to be ascertained upon delivery of the Vessel). These funds to be arranged by you with your own independent arrangement.

(2) The bank loan facility is extended to you against your share holding in Trade Line LLC, Stellar Shipping Co. (LLC), Phiniqia International Shipping L.L.C and any other Company of Al Ghurair.

…'

[49] Captain Rathee relied on that letter, which he said recorded the terms upon which Mr Habeeb 'took over the transaction' from Stellar Shipping in respect of the *Silver Star*. However, less than a week later on 6 November 2010, Stellar Ocean instructed the National Bank of Abu Dhabi to transfer USD 5 million to Stellar Shipping. The email address

on the Stellar Ocean letterhead bearing that instruction is the same as that of Stellar Shipping. What is more, under the caption 'payment details' Stellar Ocean stated 'transfer to sister concern'. That hardly indicated that these were transactions at arm's length. A peculiar feature of the events after this letter was written was that Stellar Shipping continued to act as if Mr Habeeb had not taken over the vessel. Thus it negotiated with the bank in regard to the loan to pay the purchase price and there are no official bank documents reflecting the revised arrangement.

[49] On 7 June 2011 a Bill of Sale was purportedly signed by Mr Lafir on behalf of Stellar Shipping in respect of the sale of the *Silver Star* to Action Partner 'in consideration of the sum of US$ 49,800,000.00 paid to us'. No evidence was tendered of a payment as reflected in the Bill of Sale. It was apparently signed in the presence of Captain Rathee, who it will be recalled was described in Mr Norton's founding affidavit as the CEO of Stellar Ocean. That Bill of Sale reflects Captain Rathee's address and the address of Stellar Shipping as the same address given for Stellar Ocean in the Standard Ship Management Agreement (the Shipman) allegedly concluded on 16 May 2011 between Action Partner and Stellar Ocean in respect of the *Silver Star* for a period of five years commencing on 17 June 2011. Mr Habeeb evidently signed the Shipman on behalf of the appellant and Mr Ihsan Habeeb signed on behalf of Stellar Ocean. One would imagine that there must have been two bills of sale – one from Cosco to Stellar Shipping and a second from the latter to Action Partner. The former has never been produced, nor have we been shown anything to explain on what basis Cosco reversed its decision to cancel the shipbuilding contract. Most importantly, if Action Partner was now the purchaser, why would that not be reflected in the arrangements with

Cosco? The inference is that Stellar Shipping remained the purchaser of the vessel from Cosco.

[50] Apart from the deed of sale there was little to suggest that Action Partner had purchased the *Silver Star* as a transaction independent of Stellar Shipping and any suggestion of independence was dealt a heavy blow when the financing of the purchase came to be revealed. It showed that Stellar Shipping, and not Action Partner, borrowed the money to effect the purchase. On 18 October 2011 a First Preferred Ship Mortgage was registered over the *Silver Star* in favour of Emirates Bank. It recorded that Emirates Bank had made available to Stellar Shipping medium term loan facilities in the amount of USD 40 600 000 and that Action Partner as the owner of the *Silver Star* had agreed to secure the liability of Stellar Shipping by granting the Bank a first preferred ship mortgage over the vessel. That document recorded Action Partner's address for the purposes of notices and the like as '4008, Rigga Business Centre' and its PO Box address as '82692'. The former is indeed the address for Stellar Ocean and the latter for Stellar Shipping. Notices were to be marked for the attention of 'Mr Anil Kumar Rathee'.

[51] In terms of a facility amendment letter dated 6 September 2011 addressed to Stellar Shipping, Emirates Bank recorded that the interest on the loan advanced to the latter would be debited quarterly to the '[c]all account of M/s Action Partner Limited (0514389287701)' and '[t]he principal amount … [would] be repaid semi annually by debiting the current account of M/s Action Partner Limited'. We were not told on what basis Stellar Shipping could agree to repay its debts from Action Partner's funds. The inference is that there was a close relationship between them in which Stellar Shipping was the dominant party. The

appellant had thus undertaken to repay the loan amount (described in the document as one '[t]o part finance purchase of a marine vessel from Cosco' – which could only have been the *Silver Star*) advanced by Emirates Bank to Stellar Shipping plus the interest on that amount. Action Partner's obligation in that regard was to endure until 25 March 2020.

[52] Moreover the facility amendment letter recorded that Stellar Shipping had irrevocably and unconditionally undertaken the following:

'- To deposit all charter income of marine vessel – Silver Star in the Call Account No. 0514389287701 of M/s. Action Partner Limited, Hong Kong.

- To accelerate the repayment in case the marine vessel name "Silver Star" generates adequate revenues.

- To indemnify the Bank against any pollution or environmental liability as may arise in connection with the operation of the marine vessel.

- The Bank reserves the right to accelerate the repayment incase the marine vessel generates adequate revenues.

…

* Authorize to debit your account in case of non-availability of funds in M/s. Action Partner Limited, Hong Kong account.'

The effect of these provisions was that Action Partner could enjoy no benefit from the trading operations of the *Silver Star* until the loan was discharged, and under the mortgage it was precluded from selling the vessel. Its 'ownership' was accordingly purely nominal and not beneficial and its commercial operations were for the purpose of discharging Stellar Shipping's liability to the bank, a liability for which Mr Habeeb was personally liable. And as conditions precedent for the 'continued availability of facilities, [Stellar Shipping] agreed to sign, execute and deliver' inter alia guarantees from Action Partner, Tradeline, Mr Lafir, Mr Al Ghurair and Mr Habeeb to the satisfaction of the bank.

[53] 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 that permeates it. Captain Rathee, the common thread on the documentary evidence between Stellar Ocean, Stellar Shipping and Action Partner, simply fails to properly explain how the factual inaccuracies and inconsistencies occurred in the latter's version. To once again borrow from Marais JA (*The Heavy Metal* para 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.'

In that, the majority (at 1107J-1108G) were at one with Marais JA.

[54] If Stellar Shipping and Action Partner were truly independent entities, as Captain Rathee suggests, there would appear to be no reasonable commercial rationale for the former to agree to sell the vessel to the latter whilst at the same time retaining liability to the bank for the loan and indemnifying it in respect of any pollution or environmental liabilities arising from the operation of the vessel. Moreover, had the vessel been sold pursuant to an arm's length transaction, how, it must be asked, could Stellar Shipping undertake to deposit all charter income from the vessel into Action Partner's call account or assign the latter's rights to revenue generated from the *Silver Star* to the bank? It thus seems not just highly improbable, but plainly inconceivable, that Stellar Shipping and Action Partner would have acted as they did had the relationship been anything other than one between closely related

companies. Action Partner has striven to create the impression that Stellar Ocean Transport has nothing whatsoever to do with Stellar Shipping, which appears manifestly not to be the case. In addition when the *Silver Star* was arrested, whilst in the process of loading a cargo of manganese ore at Port Elizabeth, she was under a time charter to Oldendorff GmbH & Co KG of Luebeck. That charterparty dated 26 July 2013 describes Stellar Ocean as the owners of the vessel. It thus seems to me that the welter of other evidence adduced, which points ineluctably to commonality of control, must perforce trump Captain Rathee's denial (albeit a denial under oath).

[55] It follows that the association has been proved on a balance of probabilities. In the result the appeal must fail and it is accordingly dismissed with costs, such costs to include those consequent upon the employment of two counsel where two counsel were employed.

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V PONNAN

JUDGE OF APPEAL

Appearances

For appellant:	D A Gordon SC (with him S Pudifin-Jones) Instructed by: Edward Nathan Sonnenbergs, Durban Honey Attorneys, Bloemfontein
For respondent:	M J Fitzgerald SC (with him J D Mackenzie) Instructed by: Bowman Gilfillan, Cape Town Matsepes, Bloemfontein.