IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN
(EXERCISING ITS ADMIRALTY JURISDICTION)

CASE NO: A29/2024

NAME OF SHIP: MV "HARALAMBOS"

In the matter between:

HENGDELI DEYESION INTERNATIONAL SHIPPING LIMITED (formerly known as DEYESION INTERNATIONAL SHIPPING LIMITED)	**APPLICANT**
and	
MV "HARALAMBOS"	**FIRST RESPONDENT**
NERO OIL INCORPORATED	**SECOND RESPONDENT**
IRON PASHA INCORPORATED	**THIRD RESPONDENT**

In the reconsideration of the urgent *ex parte* order for the arrest of the MV "Haralambos" in terms of Uniform rule 6(12)*(c)*.

ORDER

The following order shall issue:

1. The application for reconsideration of this court's order dated 6 June 2024 succeeds and the order is set aside.
2. The applicant is to pay the costs of the first and second respondents in the application for reconsideration on scale C.

JUDGMENT

P WALLIS AJ

[1] The applicant obtained an *ex parte* arrest order for the first respondent pursuant to s 5(3) of the Admiralty Jurisdiction Regulation Act[1] ("AJRA") on 6 June 2024. The manner in which the application was moved, and the order, were of the form that is customary in admiralty arrests. A letter of undertaking was delivered to secure the release of the first respondent, and she remains under a deemed arrest as contemplated in s 3(10)*(a)*(i) of the AJRA. The first and second respondents now seek a reconsideration as contemplated in Uniform rule 6(12)*(c)*. The reconsideration is directed solely at the question of association. The third respondent plays no role in the hearing.

[2] The Supreme Court of Appeal ("the SCA") in *The Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulkers A/S (In Liquidation) and Others*[2] had cause to consider the proper approach to reconsideration in such arrests. In *Afgri,* the court was concerned with whether a case had been made out in the founding affidavit in respect of a genuine and reasonable need for security. While this matter concerns association, the procedural principles are the same.

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[1] Admiralty Jurisdiction Regulation Act 105 of 1983.
[2] *The Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulkers A/S (In Liquidation) and Others* 2024 (1) SA 373 (SCA).

[3] In short, the Supreme Court of Appeal identified that there was no prescribed procedure for reconsideration but there were, broadly, two distinct approaches. The first approach is to file an answering affidavit seeking reconsideration in which case the original applicant is entitled to reply but, as in this case the second is where::[3]

'...A party wishing to have the order set aside on the grounds that the papers did not make a case for that relief, may deliver a notice to this effect and set the matter down, for argument and reconsideration, on those papers...The matter is then argued on the original papers. It is not open to the original applicant, save possibly in the most exceptional circumstances, or where the need to do this has been foreshadowed in the original founding affidavit, to bolster its original application by filing a supplementary founding affidavit.' (Footnote omitted.)

[4] No exceptional circumstances are alleged and nor was it foreshadowed in the founding affidavit that a further affidavit might be filed in the case of reconsideration. On that basis, the matter proceeds before me on papers in exactly the same form as those that came before the original Judge hearing the matter. The sole difference is that, unlike the Judge originally seized with the matter, I have had the benefit of time for reflection and the comprehensive heads of argument filed on behalf of the parties.

The parties

[5] The applicant is a limited company registered in Hong Kong which alleges that it was the time charterer of a vessel known as the MV "*Argentina*". The MV "*Argentina*" is in turn said to have been owned by the third respondent which is identified as being registered in the Marshall Islands. For the purposes of this reconsideration, it is accepted that a claim arose in favour of the applicant for which the MV "*Argentina*" could have been arrested.

[3] *Afgri* para 12.

[6] The first respondent is the vessel which was arrested, and which is owned by the second respondent. The second respondent is, as with the third respondent, a company registered in the Marshall Islands.

[7] Central to these proceedings is the allegation, by the applicant, that the MV "*Argentina*" and the first respondent are associated vessels within the meaning of that phrase in ss 3(6) and 3(7) of the AJRA.

Association

[8] Section 3(6) read with s 5(3) of the AJRA empowers a court to grant a security arrest order for an associated ship.

[9] An associated ship is defined in s 3(7) of the AJRA as meaning:

'*(a)* ...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.'

[10] An indication of the approach that is to be taken to s (3)(7)*(a)* is to be found in s 3(7)*(b)* which provides:

'*(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) the 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.'

[11] The SCA in "*Silver Star*"[4] explained that the purpose of the AJRA and the approach to association is as follows:

'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* supra at 712A). And, as Marais JA pointed out (albeit in a minority judgment) in *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) (*Heavy Metal*) para 4:

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

Those sections require that in relation to both the ship concerned and the associated ship a "person" must be identified who "controls" (or controlled) the companies in question. The level of control required is that the person must control the overall destiny of the company (*The Kadirga 5 (No 1) 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 *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

[4] *MV Silver Star: Owners of the MV Silver Star v Hilane Ltd* 2015 (2) SA 331 (SCA) para 40.

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."'

[12] The seminal analysis of s 3(7) was conducted by the SCA in the "*Heavy Metal*".[5] This decision has been explained by the SCA in the "*New Endeavour*"[6] as follows:

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

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[5] *MV Heavy Metal; Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

[6] *MV "New Endeavour" and Others v Indian Oil Corporation Ltd* [2024] ZASCA 67 para 14.

[13] In the principal text on the topic,[7] which was cited with approval in the "*New Endeavour*",[8] the process of establishing control was intended to be a simple one. In short:

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

[14] In this matter, that simple process requires, as a precursor, a determination of two legal points. Firstly, in view of the argument advanced by the applicant based on the "*New Endeavour*" judgment: what is the burden of proof that must be met by the applicant at the stage of reconsideration. Secondly, what weight should be attached to the evidence of, in particular, a maritime 'tracing agency' upon which the applicant relies.

Burden of proof

[15] Faced with the reconsideration application, the applicant delivered a summary of argument that included the following:

'The Supreme Court of Appeal has now confirmed in the "New Endeavour" that although no adverse inference can be drawn by the failure of the respondents to file an answering affidavit, such failure does, however, have consequences.

If, therefore, the founding papers establish a *prima facie* case for the association asserted, then the failure by the respondents to place credible evidence before the Court will be 'sufficient to top (sic) the balance' in favour of the applicant.'

[16] An amplified, and somewhat more nuanced, version of this argument is set out in the heads of argument filed for the applicant. The culmination of that argument is to be found in paragraph 19 where it is submitted:

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[7] MJD Wallis *The Associated Ship and South African Admiralty Jurisdiction* at 187.

[8] The *"New Endeavour"* para 16.

'...that in the absence of any countervailing evidence adduced by the respondents, the above principles must be applied to ascertain whether the applicant has, in its founding affidavit for the arrest of the vessel, established a *prima facie* case of association.'

[17] In contrast, the first and second respondents submit that the burden remains one on the balance of probabilities throughout - at the *ex parte* hearing, at the reconsideration hearing, and (if the reconsideration is not upheld) at a further hearing to set aside.

[18] The applicant's submissions rely (primarily but not exclusively) on the concluding remarks of the SCA in the "*New Endeavour*". In that judgment, it was held:[9]

'... It was up to the appellants to controvert the evidence by placing credible evidence before the court. They failed to do so. This was sufficient to tip the balance in favour of Indian Oil. As *The Associated Ship* explains:

> "There is always some evidence available to a claimant and as long as it can produce enough to constitute at least a *prima facie* case of association that will suffice to force the owners of the two vessels to produce in response some direct evidence that they are not in truth associated . . . In the absence of countervailing evidence from the owners of the shares in the ship-owning companies that will usually suffice to discharge the onus of proof on the claimant even in the face of a bare denial of the fact of association. This flows from the well-established principle that less evidence will be required to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party."' (Footnote omitted.)

[19] The SCA also endorsed the High Court approach that:[10]

'...whilst no adverse inference could be imputed to the appellants, their failure to file an answering affidavit was not without consequences...'

[9] The "*New Endeavour*" para 51.

[10] The "*New Endeavour*" para 37.

[20] In my view, the contentions of the applicant are unsustainable when those portions of the "*New Endeavour*" are read in the context of the judgment as a whole.

[21] Importantly, the SCA was clear at the commencement of its judgment that: [11]

'...it is well established that Indian Oil bore the onus of proving the alleged association on a balance of probabilities. This was endorsed by this Court in the decisions of *Cargo Laden and Lately Laden on board the MV Thalassini Avgi v MV Dimitris*, *Bocimar NV v Kotor Overseas Shipping Ltd*, and *MV Silver Star: Owners of Silver Star v Hilane Ltd (Silver Star)*.' (Footnotes omitted.)

[22] Further, even in paragraph 51 of the "*New Endeavour*" upon which much reliance is placed, the SCA introduced that paragraph with the following: 'For all the reasons mentioned above, we are satisfied that Indian Oil had discharged the onus resting on it on a balance of probabilities.'

[23] It is clear from a complete reading of the judgment in the "*New Endeavour*" that the SCA was not only cognisant that the historical standard applied to the test for association is a "balance of probabilities", but it also applied that same test.

[24] In a similar proceeding where reconsideration of an arrest order was sought with a direct challenge to association,[12] this court was faced with precisely the same argument. It dealt with it thusly:

'[18] On these authorities Mr Fitzgerald argued that if it should appear that the applicant's evidence establishes no more than a *prima facie* case, that should be regarded as having ripened into proof on a balance of probability because the owner of the respondent has not delivered an affidavit denying the existence of the association which the applicant has sought to establish. However in my view the present case is one of those mentioned in the above passage from the judgment of Stratford JA in *Jacobson and Levy*, which in its nature is one that does require

[11] The *"New Endeavour"* para 8.
[12] *Saga Welco AS v MV "Guo Shun"* 2017 JDR 1924 (KZD).

"complete proof on the issue" to be furnished by the applicant. Complete proof in this case is proof of the standard required by our law, that is on a balance of probabilities. The respondent's owner has come before the court not with an application to set aside the original order, but exercising its right to have the original order reconsidered because it constituted final relief granted without hearing the respondent. The question is whether the order ought to have been made on the applicant's papers. The owner's right to approach this court for reconsideration of the order in that fashion is not challenged by the applicant. The manner in which the respondent had engaged the court distinguishes the present case from the *Stavroula*.

[19] Orders for the arrest of vessels are ordinarily for good reason granted without notice. It is self-evident that a judge confronted with such an application, and the requirement that the requisite association must be established on a balance of probabilities, cannot authorise the arrest of a vessel on lesser evidence, throwing into the mix that it is unchallenged. The procedure adopted excludes any possibility of a challenge, and accordingly the requisite standard must be met by the applicant without the benefit of it being endorsed or supported by the absence of a challenge to its veracity by the respondent. That does not mean, however, that there is not room for the application of the principle that less evidence will suffice if the relevant facts are peculiarly within the knowledge of the alleged associated parties.'

[25] There is an additional practical consideration militating against an interpretation of the "*New Endeavour*" that reduces the standard of proof. That is this: since the court hearing the *ex parte* application must make an assessment on the balance of probabilities, and the court hearing an application to set aside on affidavit must make an assessment on a balance of probabilities, the effect of the argument that only a *prima facie* case need be made out at reconsideration stage is that the required burden of proof would change repeatedly through the course of proceedings merely by reason of the procedural stage that has been reached. Additional challenges would arise given the two distinct approaches to reconsideration identified in *Afgri.* One form of reconsideration would require only a *prima facie* case whereas the other (where affidavits were filed) would require proof on a balance of probabilities. In my view, the SCA did not contemplate a deviation from the

accepted historical standards or the introduction of that complex variability in the burden of proof arising from its judgment in the "*New Endeavour*". Had it been the intention of the SCA, to change the historic position, it seems to me that it would have done so in more clear terms.

[26] What then is to be made of that portion of the judgment that holds that the failure to place credible evidence before the court by a respondent may "tip the balance in favour of [the applicant]"?[13]

[27] I understood the argument advanced on behalf of the applicant to be that the reference to "tipping the balance" suggested some modification to the historic requirement that association be established on a balance of probabilities. In my view, there are at least two reasons why that is not the case.

[28] Firstly, the approach to admission of hearsay evidence in admiralty proceedings (about which I set out more below) provides a considerable advantage to an applicant both in moving the *ex parte* arrest and in resisting a reconsideration without an answering affidavit. In the ordinary course, the type of evidence that is tendered in s 5(3) proceedings is of a nature that will not easily be disregarded even at reconsideration stage. The approach where a reconsideration is sought without an answering affidavit therefore accords a considerable degree of deference to the factual position advanced by the applicant. In practice, this "tips the balance" in favour of an applicant in a reconsideration without an answering affidavit.

[29] Secondly, reconsideration is a matter that confers a wide discretion upon a court. An outcome of the reconsideration application:[14]

'...may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto'.

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[13] The "*New Endeavour*" para 51.
[14] *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 487A.

[30] This wide discretion is reinforced by the powers conferred upon an Admiralty Court in s 5(2)*(c)* of the AJRA to impose conditions upon an arrest. It is by no means inconceivable that a party on reconsideration could raise a case insufficient to set aside the arrest but sufficient to justify the imposition of conditions. This too is a procedural benefit that tips the scales of justice marginally in favour of the applicant.

[31] I thus see no direction from the SCA that the standard of proof is to change at reconsideration stage in respect of the question of association. Likewise, I do not regard that portion of the judgment of the SCA in the *"New Endeavour"* which refers to "tipping the balance" as suggesting that there is a need for an amendment to the traditional burden of proof.

Evidence of maritime tracing agencies

[32] In this proceeding, the applicant relies upon a "Seasearcher" report. Such a report is in the nature of a tracing agency report. I am aware that there are different forms of these reports published by different agencies with different degrees of detail. This particular report is an eight page report which includes details relating to the specifications of the vessel, its registered owner, its insurer and class, and, most importantly, for the purposes of this proceeding, various information under the heading "Ownership". Under that section, the report records a beneficial owner, a commercial operator, a registered owner, a technical manager and an ISM manager.

[33] In the case of the MV "*Haralambos*", the report identifies the beneficial owner as Vafias Group of Greece, and Brave Maritime Corporation Incorporated as the commercial operator, technical manager and ISM manager.

[34] In the founding affidavit, the report was introduced into evidence as follows:

'11. Seasearcher is the online platform for Lloyds List Intelligence which contains a comprehensive database of ships and their registered owners. Lloyds List Intelligence is also a specialist information service which forms part of the Lloyd's List Group and is a leading publisher of ship and ship ownership information, which information published in Seasearcher is made available on a subscription basis only.'

[35] This paragraph is in the classical form of an "argument from authority". While not impermissible, the form of argument may on occasion be considered a logical fallacy. Absent from both the report and the founding affidavit was any explanation as to how the information was gathered, stored, or verified.

[36] Mr *Fitzgerald SC*, who appeared for the applicant, argued that the evidence was admissible by reason of the hearsay provisions encapsulated in s 6(3) of the AJRA. Admiralty Courts ordinarily adopt a permissive approach to the admission of hearsay under s 6(3).[15] Indeed, even "double hearsay" may be admitted in appropriate circumstances.[16]

[37] The potential prejudice associated with this permissive approach is significantly ameliorated by the provisions of s 6(4) of the AJRA which provides:

'The weight to be attached to evidence contemplated in subsection (3) shall be in the discretion of the Court.'

[38] Ms *Mills*, who appeared for the first and second respondents, argued that the evidence contained in the Seasearcher report was in the nature of opinion evidence and inadmissible. I understood that argument to be premised on the proposition that before any weight can be given to an expert's opinion, facts must be established against which that opinion is advanced and a cogent

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[15] *Cargo Laden and Lately Laden on board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 842B-D.

[16] *MT Tigr: Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) SA 861 (SCA) at 868H-I.

approach to the analysis of those facts should be conducted by the expert and disclosed to the court in order to justify the expert conclusions.[17]

[39] In my view, there is some strength to the submission by Ms *Mills* that (at least) the allegation of beneficial ownership is a matter of opinion. It seems to me that the remainder of the report is more likely to be drawn from direct evidence and is therefore in the nature of hearsay.

[40] Olsen J in the *"Guo Shun"*, was faced with a similar issue in respect of the "Panama papers". In respect of that set of documents, the court said:[18]

'What the Panama papers are is not explained in the founding affidavit – it appears that the court is expected impermissibly to take judicial notice of their nature and origin. The applicant has not described the process of collation of the information, the identities or qualifications of the persons who undertook that task, or the nature of the documents from which the information was drawn (official documents ordinarily inaccessible, or correspondence, and so on). One would have thought that if the information derived from the ICIJ was to play as central a role as it does in the applicant's case, at the minimum, the particular "papers" from which the information is derived would have been put up....'

[41] Because it is incumbent upon a court in a security arrest to have regard to a totality of evidence and because I am cognisant of the difficulties an arresting creditor will have in obtaining first hand evidence, I am loath to exclude the Seasearcher report. That being said, the absence of any description in the founding affidavit (or indeed in the reports itself) as to how the "beneficial owner" is identified, or what "beneficial owner" might mean results in a necessary finding that that report carries little to no weight in that respect.

The applicant's case for association

[17] See for example the approach to expert witnesses endorsed by the SCA in *PriceWaterHouse Coopers Incorporated and Others v National Potato Co-operative Ltd and Another* [2015] 2 All SA 403 (SCA) para 99.

[18] *Saga Welco AS v MV "Guo Shun"* 2017 JDR 1924 (KZD) para 12.

[42] The applicant's case on association commences with a description of three relevant *dramatis personae:* the Vafias Group, Nikoloas Vafias and, his son, Harry Vafias. The corporate nature of that Group is not identified beyond a statement that two further entities (Brave Maritime and StealthGas) were subsidiary entities that operated in "within, and under the direction of, the Vafias Group".

[43] The absence of a specific description of the juristic structure is not necessarily an impediment to the proof of association. This is because, in the "*New Endeavour*",[19] the SCA recognised that "family control is sufficient to establish association, and this kind of control is prevalent in Greek shipping." There can be no objection to this proposition. However, in each instance, it is necessary to establish that the former family control exerted in the particular matter, is sufficient, on the facts, to justify a finding of association. It is insufficient, in my view, simply to allege that there is a family connection between different entities without also establishing as a matter of fact that the family connection is such as to constitute control within the meaning of s 3(7) of the AJRA.

[44] I hope that I do not do an injustice to the applicant's argument on association to summarise it as follows. Nikoloas Vafias established Brave Maritime, and that entity is now run by Harry Vafias. While there is no evidence as to whether shareholdings were passed from Nikoloas to Harry, the applicant alleges that it is clear that Nikoloas Vafias now has the power to direct the operations of Brave Maritime.

[45] It is not entirely clear to me, except possibly to bolster the submission that Harry Vafias is now the guiding mind of the Vafias Group, why reference is made to StealthGas or to a further entity known as C3IS Inc except possibly to indicate that those entities are also directed by Harry Vafias for the ultimate benefit of the Vafias Group. While I accept that Harry Vafias plays a significant

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[19] The "*New Endeavour*" para 48.

part in the direction of those two entities, the evidence does not in my view justify that he has a unilateral power to direct the two entities. This is because in respect of both StealthGas and C3IS, the very documents upon which the applicant relies to allege control are evidence that majority shareholdings in the two entities have been sold to third party investors. This evidence substantially undermines the case that the Vafias Group can be treated as an indivisible conglomerate where control, within the meaning of that term in s 3(7) of the AJRA, vests with a "family group".

[46] Having so described the Vafias Group and certain other entities related thereto, the applicant seeks to link both the second and third respondents into that group.

[47] The second and third respondents, being Marshall Islands registered special purpose vehicles, have undisclosed share registers which make it difficult to discern true ownership. Given the widespread use of opaque Registries in inter alia the Marshall Islands, British Virgin Islands and Liberia, it does not seem to me that I can draw any adverse inference from the mere fact of registration in the Marshall Islands.

[48] The applicant therefore, having been unable to establish ownership through share registries, relies upon two Seasearcher reports for the vessels which both reflect the Vafias Group as the beneficial owner. I have already dealt with the evidential value which I accord to those reports.

[49] Thereafter, the applicant identifies certain commonalities in the operations of the two vessels. These include:

(a) a common prefix "Brave" in the previous names of the vessels;

(b) a common contact address care of Brave Maritime Corp;

(c) a commonality in the time charter parties which were concluded in respect of the two vessels;

(d) a commonality in the higher invoices raised for the two vessels; and

(e) various references to the vessels being part of the Brave Maritime Fleet.

[50] In my view, all of this evidence confirms only that Brave Maritime is the manager (and possibly commercial operator) of the vessel. The documents relied upon are of the form that one would anticipate would be generated by a manager.

[51] There is one particular item of evidence upon which the applicant places specific reliance. This document is an email addressed by Diamond Ship Broking Ltd (it is not entirely clear how that entity becomes involved) to the applicant in which Diamond Ship Broking Ltd records a message "From Ownrs". That email records the MV "*Argentina*" as being a "sister vessel" of the MV "*Haralambos*". I was urged by Mr *Fitzgerald* to treat that as an admission that the two vessels are ultimately owned by the same party. It must of course be that the words "sister vessel" are not used in the legal sense recognised in admiralty practice. True "sister vessels" would be owned by the same party.[20] It seems to me that it is possible that that phrase has the meaning which Mr *Fitzgerald* would urge me to attribute to it. It is also however possible that the phrase means no more than that the two vessels are managed as "sister vessels". The potential range of meanings may even include that the two vessels are constructed to the same specification.[21]

[52] The difficulty for the applicant is that for the purposes for association, it is not sufficient to prove common managerial control. This is because: [22]
'The level of control required is that the person must control the overall destiny of the company and not merely control the running of the company's day to day affairs.'

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[20] See eg: Arts 3(1) and (2) International Convention Relating to the Arrest of Sea-Going Ships, 1952.
[21] See eg: S226(2) Merchant Shipping Act 57 of 1951.
[22] *The Kadirga 5 (No. 1) JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS* SCOSA, C12 (N) at C14E-G; *EE Sharp and Sons Ltd v MV Nefeli* 1984 (3) SA 32 (C) at 326I-327C.

[53] Thus, the mere fact that there is a common manager in the form of Brave Maritime is insufficient to establish common ownership or control.

[54] The position might have been different if Brave Maritime could be established to be an entity that confines itself to the management of a particular collection of vessels that are themselves the subject of a single point of control. However, the evidence in this matter does not support that. Firstly, the range of vessels alleged to be under the control of the "Vafias Group" are not all managed by Brave Maritime. Particularly, the StealthGas vessels are said in various of the annexures, to be managed by a number of different ship managers, and the same is true in respect of C3IS. Further, certain of annexures suggest that Brave Maritime manages a fleet considerably larger than that which can be established to be under the control of the Vafias family. It therefore cannot be said on the evidence that the mere fact that the vessels are subject to management controlled by Brave Maritime is sufficient to justify a conclusion of association.

[55] That being the case, the applicant is ultimately confined to relying upon an allegation arising from the Seasearcher reports with which I have already dealt.

[56] Returning to the *"Guo Shun"*, Olsen J expressed himself thus:[23]

'However, on the question of...alleged control..., and even overlooking the uncertain qualities of some of some of the evidence which is crucial to the applicant's argument, I find that the cumulative effect of the material provided by the applicant does no more than justify speculation along the lines that Mr Wang's role in the affairs of the various business entities and companies may be a controlling one in some respects. However a finding that the available evidence might justify such speculation does not justify a finding that the evidence is sufficient to prove the requisite elements of control on Mr Wang's part...'

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[23] *MV "Guo Shun"* para 31.

[57] I find myself in the same position. There is undoubtedly evidence which justifies speculation. However, in my view, it is not evidence sufficient to establish control as required in s 3(7) of the AJRA on the balance of probabilities.

Relief

[58] That leaves only the question of relief. The first order relating to the reconsideration is straightforward and follows the form specified in *Afgri.*

[59] However, the parties advanced different contentions in respect of the letter of undertaking. Mr *Fitzgerald* suggested that the letter of undertaking should be ordered returned. Ms *Mills* submitted that the order should instead declare the letter of undertaking null and void. I understand that the need for this debate may arise because of the effect that those different orders might have on appealability.

[60] In my view, it is prudent not to address the question of the letter of undertaking in the order. This is because no clear order was sought in the notice of a reconsideration and consequently, no substantial arguments were addressed to me on this point. I have been unable to find any authority for the proper order in this respect. Further, I do not have the letter of undertaking before me and am unable to consider its terms. It seems to me that that letter of undertaking may well have its own mechanism for dealing with a setting aside of the arrest. I therefore make no comment on the effect of this judgment on the letter of undertaking.

[61] The parties were agreed that the appropriate scale for costs was scale C. I concur. The nature of the matter is one that is outside the ordinary and that requires a specialist knowledge in a discreet area of law. The parties were justified in instructing specialist and senior counsel to present the matter.

Order

[62] For the reasons, I have set out, I make the following order:

1. The application for reconsideration of this court's order dated 6 June 2024 succeeds and the order is set aside.
2. The applicant is to pay the costs of the first and second respondents in the application for reconsideration on scale C.

P Wallis AJ

<u>CASE INFORMATION:</u>

Date of Hearing:	14 August 2024
Date of Judgment:	2 September 2024
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