

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

CASE NO: A121/2012

In the matter between:

M/V "Asahi"

Applicant/Second Defendant

And

RAMIL MANZO & 6 OTHERS

Respondents/Plaintiffs

JUDGMENT

ROWAN AJ

1. The outcome of this application turns on whether the Plaintiffs (Respondents in this application) have succeeded in discharging the onus of proving on balance that one George Kallimasias controlled the company which owned a ship, the m/v Asahi as well as the company which owned the m/v Saetta (at the relevant time, the relevant time not being in dispute).

2. The m/v Asahi, (the Applicant herein), is the Second Defendant (hereinafter "the Defendant") in four separate actions instituted by seafarers/crew (as Plaintiffs) against the ships m/v's Saetta, Belita and Taisetsu, as First Defendant in each action.

3. The Plaintiffs are the former crew members of these vessels and instituted their actions in this Division against the vessels for unpaid wages.

4. The m/v Asahi is alleged to be an associated ship to these vessels (“associated” as stands to be determined in terms of section 3 (7) of the Admiralty Jurisdiction Regulation Act 105 of 1983 – “the Act”).

5. Two separate actions and applications have been instituted in respect of m/v Belita and one in respect of the m/v Taisetsu.

6. There are accordingly, in total, four applications before this Court. The application in respect of the m/v Saetta under case number A121/2012 (involving 7 Plaintiffs), two in respect of the m/v Belita under case number A122/2012 (involving 14 Plaintiffs) and A126/2012 (involving 1 Plaintiff) and the final one being in respect of the m/v Taisetsu under case number A127/2012 (involving 18 Plaintiffs).

7. On the premise of her being an associated ship, the m/v Asahi was arrested at the instance of these Plaintiffs in the Durban Harbour in October 2012. She put up security to procure her physical release. Actions *in rem* were instituted and these are still pending.

8. It was agreed by the parties that the first mentioned application (case number A121/2012) would proceed as a test case, the determination of which will bind the remaining three applications.

9. In opposing the applications for the release of the m/v Asahi the Plaintiffs point to George Kallimasias (“Kallimasias”) as being the pivotal controlling figure and rely essentially on:

9.1 Affidavits by various deponents essentially relating to conversations they allegedly had which implicate Kallimasias;

9.2 Circumstantial evidence arising from aforesaid affidavits and shipping magazines, the general web of circumstances created and reasonable inferences to be drawn from all of these factors;

- 9.3 The provisions of section 3(7)(a)(iii) in contending that Kallimasias controlled the company which owned the ship concerned, the m/v Saetta as well as the associated ship, the m/v Asahi, but at the same time conceding that the Plaintiffs are not contending for direct ownership or direct holding; and
- 9.4 The deeming provision in section 3(7)(b)(ii) that “*a person shall be deemed to control a company if he has power, directly or indirectly, to control the company*”; and
- 9.5 Section 3(7)(b)(iii) to the effect that “*a company includes any other juristic person in any body of persons, irrespective of whether or not any interest therein consists of shares.*”

10. In order to properly understand, and attempt to unravel the spider’s web of connections and the various ships, people and entities which interconnect in this matter, and which may or may not lead to the Court being able to identify who ultimately controls the m/v’s Asahi, Saetta, Belita, and Taetutsu, (as well as other vessels which will be mentioned as the judgment unfolds), it is as well to initially identify and provide some detail regarding certain of the main protagonists:

- 10.1 The m/v Asahi (the associated, arrested or target ship) is:
- (i) a Panamanian registered ship;
 - (ii) owned by Forest Commercial SA a Panamanian registered company;
 - (iii) the directors of whom are Panamanian lawyers purely as nominees;
 - (iv) managed by Fairport Commercial Shipping Ltd (“Fairport”) a Liberian registered company with offices in Greece;
 - (v) represented herein insofar as facts have been attested to, by Fairport’s legal advisor, Christina Likakou, based in Piraeus, Greece;
 - (vi) with the sole shareholder (bearer shares) of Forest Commercial being Anna-Christina Markou, a Greek citizen living in Piraeus.

10.2 The m/v Saetta (one of the ships concerned or the guilty ship) is:

- (i) a Panamanian registered ship;
- (ii) owned by Aktina Enterprises SA a Panamanian registered company;
- (iii) the directors of whom are Panamanian lawyers purely as nominees;
- (iv) managed by aforementioned Fairport;
- (v) with the sole shareholder (bearer shares) in Aktina Enterprises being Alexander Vamvakus a Greek citizen living in Piraeus.

10.3 The m/v Belita (one of the ships concerned or the guilty ship) is:

- (i) a Panamanian registered ship;
- (ii) owned by Triangle Faith SA a Panamanian registered company;
- (iii) the directors of whom are Panamanian lawyers purely as nominees;
- (iv) managed by Commercial SA ("Commercial"), (not to be confused with Fairport Commercial Shipping Ltd mentioned above) a Liberian registered company with offices in Greece;
- (v) with the sole shareholder (bearer shares) in Triangle Faith being Damianos Monogioudis, a Greek citizen living in Piraeus and employed by Commercial SA;

10.4 The m/v Taetutsu (one of the ships concerned or the guilty ship) is:

- (i) a Panamanian registered ship;
- (vii) owned by Alalunga Shipping SA a Panamanian registered company;
- (viii) the directors of whom are Panamanian lawyers purely as nominees;
- (ii) managed by aforementioned Fairport Commercial Shipping Ltd;
- (iii) with the sole shareholder (bearer shares) in Alalunga Shipping being Michlas Potouras a Greek citizen living in Piraeus.

- 10.5 Forrest Commercial SA, the registered owner of the m/v Asahi managed by Fairport, the sole shareholder being aforesaid Anna-Christina Markou;
- 10.6 Aktina Enterprises SA, the registered owner of the m/v Saetta managed by Fairport, the sole shareholder being aforementioned Alexander Vamvakus;
- 10.7 Alalunga Shipping SA, the registered owner (at the relevant time) of the m/v Taetutsu managed by Fairport the sole shareholder being aforementioned Michlas Potouras;
- 10.8 Triangle Faith SA, the registered owner of the m/v Belita managed by Commercial SA, the sole shareholder being aforementioned Damianos Monogioudis, who was also employed by Commercial SA;
- 10.9 Fairport Shipping SA (Fairport) a ship management company which manages both the m/v Asahi (the associated or arrested or target ship) and the m/v Saetta (one of the ships concerned or the guilty ship) as well as the m/v Taetutsu (one of the ships concerned or the guilty ship) and which at a stage shared offices with Commercial SA;
- 10.10 Commercial SA ("Commercial") a ship management company which manages the m/v (one of the ships concerned or a guilty ship) and who contracted with Stella Marris Ship management Inc to act as its local manning agents for various of the vessels it managed after severing contractual relations with its former manning agents Global Gateway Crewing Services Inc;
- 10.11 George Kallimasias, the central figure in this application, who advises in his affidavit that he is an adult male independent chartering broker, resident of Palaio Faliro, Attiki and that Fairport Shipping Ltd. and Commercial S.A. are among his clients to whom he has been offering his services for more than 20 years;

- 10.12 Alexandros Papalambrou who maintains in his affidavit in support of Kallimasias that he is an adult male, working as Crew Manager of Fairport and that since December 2012 he has also been the legal representative of Fairport's office in Greece. He maintains that Fairport acts as ships' manager/agent;
- 10.13 Christina Laikakou, legal advisor of Fairport Shipping Limited;
- 10.14 Alejandro Palanca, who contends in his affidavit that he is a Philippino, from Manila, and the General Manager of Global Gateway Crewing Services Inc (Global), a corporation registered in the Philippines, who supports the associated arrest of the m/v Asahi in respect of amounts due to the crew on board the m/v Belita, the m/v Saetta and the m/v Taisetsu. He was authorised by Stella Marris Ship management Inc. (Stella Marris) to provide an Affidavit;
- 10.15 Edward Famadico who advises that he is a Philipino from Makati City (in/near Manila) and the Operations/Fleet Manager of Stella Marris Ship management Inc a corporation duly established under the Laws of the Republic of the Philippines and duly licensed by the Philippine Overseas and Employment Administration (POEA) to operate as a manning agency;
- 10.16 Nikolaos Chandris who states in his affidavit that he is an authorised partner in Greece of Amos International (S) Pte Ltd ("Amos"), a major Asian company offering marine supplies and logistics services. Up until January 2013, he was the Vice-President of Chandris Intercontinental Shipping Inc. ("Chandris Intercontinental"), a company which was incorporated in 1995 in Liberia. He made his affidavit in support of the associated arrest of a motor vessel in Manila in respect of amounts due to the crew on board the m/v Belita, the m/v Saetta and the m/v Taisetsu. He was authorised by Stella Marris Ship management Inc. ("Stella Marris") to provide this affidavit, which was belatedly admitted.

He was making his affidavit in support of the associated arrest of the m/v Asahi in respect of amounts due to the crew on board the m/v Belita, the m/v Saetta and the m/v Taisetsu;

10.17 George Patentas, a self employed chartering broker with an office established in Greece, acquainted with Mr. Kallimasias, who occasionally co-operates with Fairport, and intervened to assist Global in settling some outstanding disputed matters with Commercial and in this respect Mr. Kallimasias also offered to intervene for Fairport;

10.18 Panagiotis-Peter Kallifidas, legal counsel at Fairport and seemingly at Commercial from June 2002 to November 2009.

11. I would mention at this point that this matter was thoroughly and most ably argued by Counsel, Ms Mills for the Plaintiffs and Mr P Wallis for the Defendants. I am indebted to them not only for their valuable arguments but also for the concise heads, from which I draw extensively in writing this judgment.

12. Duly supported by authority the Plaintiffs' Counsel has pointed out that "*a person may control a company without controlling all the shares in the company*"¹ and that "*it is generally accepted that the level of control required for an association is that the person must control the overall destiny of the company and not merely the running of its day-to-day business.*"²

13. Relying on the oft quoted *Heavy Metal*³ case in explaining the distinction between direct and indirect control, Plaintiffs' Counsel has submitted as follows:

¹ *m/v Rizcun Trader* (4) 2000 (3) SA 776 (C) at 792 H -J; *Bocimar NB v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 578 G; *Akademic Fyodorov, The Govt of the Russian Federation v Marine Expeditions Inc* 1996 (4) SA 422 (C) at 428.

² *E E Sharp & Son Ltd v m/v Nefeli* 1984 (3) 32 (C) at 3261-327 C; *The Kadirga Five* (No. 1) J A Chapman & Co Ltd v *Kadirga Denezcilikve Ticaret AS, SCOSA, C12, C14E-G; All. V. Heavy Metal; Belfry Marine Limited v Palm Base Maritime SDN BHD* 1999(3) SA 1083 (SCA); Wallis, *The Associated Ship and South African Admiralty Jurisdiction*, Juta, 2010, p192

³ *M V. Heavy Metal; Belfry Marine Limited v Palm Base Maritime SDN BHD* 1999(3) SA 1083 (SCA);

- 19.
- (a) *A company is controlled "directly" by the person who, according to the register of the company, controls the shareholding; this power is the de jure authority over the company, or "legal ownership" (at paragraphs [9] and [10] on page 1106);*
 - (b) *Where another person commands or exerts authority over the person who has de jure power over the company, such person has de facto power to control the company, and controls the company "indirectly" (at paragraph [10] on page 1106);*
 - (c) *either form of control, de jure or de facto, is sufficient to found an association (at paragraph [14] on page 1107);*
 - (d) *Where the power to manage the operations of the company and the power to determine its direction and fate happen to vest in different hands - it is the latter, i.e. power to determine the direction and fate of the company, that the legislator had in mind when referring to "power" and hence to "control" (at paragraph [8] at page 1106).*
14. Whilst the Plaintiffs' Counsel contends that there are a number of factors that are common cause, the Defendants' Counsel maintains that *"Little is common cause in this application."*
15. Plaintiff's Counsel lists the following as being common cause:
- 20.
- (a) *The company which owned the ship in respect of which the claims arose (the m/v "Saetta") is Aktina Enterprises SA, a company registered in Panama;*
 - (b) *The company which owned the second defendant (the m/v "Asahi") at the date of its arrest is Forest Commercial SA, a company also registered in Panama;*
 - (c) *These companies, and the companies which own the vessels in respect of which the claims arose under case numbers A122/2012, A126/2012 and A127/2012, are all one-ship companies/ single purpose vehicles whose sole purpose is to own their one ship (hereinafter referred to as "SPV's");*

(d) *The vessels "Saetta", "Asahi" and "Taetutsu" are all managed by Fairport Shipping Limited, a company incorporated in Liberia in 1996 and registered as a foreign entity in Greece in 1998;*

(e) *The m/v "Belita" is managed by Commercial SA ("Commercial"), a company incorporated in Liberia in April 2004 and registered as a foreign entity in Greece in May 2004.*

16. The Defendant's Counsel contends that only "the registered ownership and directorship of the company owning the Second Defendant, and, the identity of the management company that is in charge of the Second Defendant" are common cause. Plaintiffs' Counsel's lengthier list of common cause facts however cannot be faulted.

17. Plaintiffs' Counsel commenced her argument in her concise heads by declaring that:

21.

The plaintiff's case is that Fairport and Commercial are not merely ship's agents/managers but that in fact all vessels managed by them are part of the same fleet, the beneficial owner of which is George Kallimasias, who in fact controls all of the ship-owning SPV's through Fairport and Commercial.

22.

The plaintiffs' evidence demonstrates that:

(a) *Fairport and Commercial at all material times occupied the same offices and used the same staff (this is not disputed);*

(b) *Fairport and Commercial manage the vessels in each other's fleets, interchangeably, as if they were all part of one fleet (not disputed);*

(c) *Fairport and Commercial are not simply ship's managers/agents but are in fact beneficial owners of the vessels managed by them;*

(d) *the person who is ultimately in control of both Fairport and Commercial and, through these companies, of all of the SPV's, is George Kallimasias.*

18. A summary of the evidence, expounded on in argument, which the Plaintiffs relies upon in support of this declaration, was stated as follows:

SPV's not beneficially owned or controlled by their shareholders

24.

The defendants allege that the entire shareholding in each SPV is held by a single person. A short affidavit is put up by each person, which does not state how they came to acquire the shares, for what price and when, or how they funded the purchase of a company which owns such a valuable asset. It is highly unlikely that these individuals do actually own the SPV's, for the reasons stated below.

25.

Firstly, the shares in each SPV are bearer shares. As is evident from the share certificates (e.g. at page 23 of the papers) bearer share certificates do not name the holder of the shares and simply say the bearer of the certificate is entitled to the shares. This means whoever is in possession of the bearer certificate is the owner. This effectively allows for anonymous ownership of a corporation. It also allows an owner to easily transfer the shares to someone else, simply by giving them the share certificate.

26.

Furthermore, in each case the purported shareholder is of modest means. Some are employees or former employees of either Fairport or Commercial, or family members of such employees. It is highly unlikely that such individuals would have the means or desire to acquire a commercial ship.

27.

It is submitted that in these circumstances an adverse inference can be drawn against these individuals by reason of their lack of candour.

Fairport and Commercial are not mere ship managers

28.

It is clear that the SPV's are not controlled by either their purported shareholders, or by their boards of directors.

29.

The shareholders of the SPV's have not been involved in any of the many disputes with crew, manning agents and marine suppliers mentioned in the papers. They are not mentioned in any of the e-mails, nor in any of the conversations between the various vessels' representatives Mr Palanca and Mr Famadicio (for the manning agencies) and Mr Chandris (for the suppliers of marine supplies to the vessels in the Fairport-Commercial fleet), who all only mention Mr Kallimasias. Indeed, it is said that Mrs Markou has never worked and only does volunteer work for her church. Clearly she is incapable of controlling a company which owns and operates a commercial ship.

30.

Several of the SPV's have the same directors, same presidents, vice presidents, treasurers. The defendants are at pains to explain that these individuals are not actually in control of the SPV's (as this could constitute common control sufficient to found an association) but are lawyers based in Panama who are mere nominees, and who also act as directors of many other Panamanian companies (paragraph 17-18 of the founding affidavit at p9 of the papers). These lawyers are also the original subscribers of the SPV's.

31.

A strong indication that Commercial has a beneficial interest in its vessels is the undisputed fact that it bound itself as guarantor for a loan of US\$15.9 million granted to the SPV which owns the m/v "Belita" (see annexure "J" to the founding affidavit at page 182 of the papers). A mere ships manager/agent would never undertake that sort of liability for its principal, unless it was in fact the beneficial owner.

32.

The Fairplay World Shipping Encyclopaedia, a reliable and often used source of information in the industry, states that Fairport and Commercial are the "beneficial owners" of the vessels which they manage. The meaning of this phrase in the

industry is that, although the ships are registered in the name of a SPV (as most ships are nowadays) the true owner being the person/entity who controls and benefits from the profits of the ship (and funds its losses) is the "beneficial owner".

33.

Similarly, press reports have stated that Fairport and Commercial are beneficial owners of the vessels managed by them, and that Kallimasias is the person behind those companies.

Fairport and Commercial operate as one entity and their vessels are treated as one fleet.

34.

At all material times Fairport and Commercial have acted interchangeably as agents for each of the other's vessels. They have used the same staff and sent messages from the other's e-mail addresses, and used the same offices.

35.

There is a fleet mortgage over five of the vessels, two of which are managed by Fairport and three by Commercial. Each ship-owning SPV is a joint and several borrower and each vessel is mortgaged as security for the loan of USD15.9 million (see annexure "I" to the answering affidavit, at page 143-180 of the papers.) This indicates a common ownership of the vessels in question.

36.

There is also a cross mortgage of the "AINAFTIS and the DONA LIBERTA, both managed by Commercial, for a joint loan of US\$14.5 million to both of the SPV's that own these vessels (annexure "H" to the founding affidavit at page 102- to 142 of the papers). This also indicates common ownership.

37.

The vessels have been placed in the same chartering pool, as one would with a fleet. Several of the vessels, some managed by Fairport and some by Commercial, have been entered together in a P&I club under the name "Commercial".

38.

It is no coincidence that each of the vessels in the Fairport and Commercial fleets have adopted identical policies over the years regarding crewing and payment to crew and manning agents, and that they stopped paying their crew at the same time - ultimately the funds are coming from the same source, as are the policy decisions and directives.

19. Plaintiffs contend that based on aforementioned evidence and viewed cumulatively, the clear inference is that all “*the vessels to which these actions relate are associated*”.

20. Reference is then made to *Hofmeyer* and the cases therein mentioned:

40.

Where powerful circumstantial evidence of association is produced by the arresting creditor, and the owner's case is evasive or selective, with bald denials and limited evidence, it is submitted that the court may find the association to be proved on a balance of probabilities on the circumstantial evidence, notwithstanding the denials. Similarly, where the arresting creditor puts up sufficient evidence to call for an answer from the other party, the other party's failure to do so will lead to an adverse inference being drawn against it⁴.

Defendant's Argument

21. Before dealing with facts, the Defendant's Counsel, in his heads, introduces his argument by making the following points:

9.

In this instance, Plaintiff does not make the allegation that:

9.1 *the First and Second Defendants were owned at material times by the same person;*

9.2 *the Second Defendant was owned at the time when the action was commenced by the person who controlled the company which owned the First Defendant at the time when the maritime claim arose;*

9.3 *in the circumstances the association in question, as alleged, can only be one pursuant to Section 3(7)(a)(iii).*

10.

The Plaintiff also does not contend for direct ownership or direct holding of shares and accordingly is reliant upon the deeming provision encapsulated in Section 3(7)(b)(ii).

11.

It is accordingly incumbent, upon Plaintiff to establish on a balance of probabilities (taking into account the mechanism for resolution of dispute of facts under Plascon-Evans) that the same person wields direct power vis-a-vis the First Defendant and the outside world and, in the eyes of the law, controls the shareholding and thus determines the direction and fate of the Second Defendant.⁵

⁵ *MV "HEAVY METAL"* 1999 (B) SA 1083 (A) at 1106 [9]; *The GUANGZHOU SCOSA* Ci97 (KZD) at 199 A- C

12.

In seeking to establish control, Plaintiffs must establish:

12.1 a single repository of control;

12.2 that that single repository has actual control;

12.3 that the control is in respect of the direction and policy of the ship-owning company, not its day to day management;⁶

⁶ Wallis MJD, *The Associated Ship & South African Admiralty Jurisdiction*; 222

13.

*"This should be a significant burden for the arrestor to discharge. The Court should be rigorous in putting an arrestor to the proof of his allegations of association and should not lightly infer an association ... "*⁷

⁷ Hare, *Shipping Law and Admiralty Jurisdiction in South Africa*, Second Ed, 113 - 114

22. With reference to the papers, Defendant's counsel highlights in the Heads what are contended to be the critical facts:

15.

In particular:

15.1 Ownership of the Second Defendant is by a company other than the owner of the First Defendant;

15.2 Common Panamanian directorship is not indicative of common control;

15.3 Ownership of the shares in Second Defendant ultimately vests in an individual who is not alleged by Plaintiffs to exercise control over First Defendant;

15.4 Mr Kallimasias is alleged to be the person having ultimate control but:

15.4.1 This proposition is rejected by Mr Kallimasias himself;

15.4.2 The main factual witness (Chandris) failed to disclose his malicious motivation in deposing to the affidavit leading to an inability to rely thereon;

15.4.3 Collective entry in a P&I Club and Chartering Pool do not evidence common control;

15.4.4 No evidence of any financial benefit from or registered control over either Fairport or Commercial Ship Manager by Mr Kallimasias is ever even alleged - it is wrongly alleged;

15.4.5 The alleged statements of Kallimasias (which are denied) cannot be relied upon since on Defendant's version even if they weremade they constitute the statement of an unrelated third party notbinding on Defendants;

In the circumstances there is insufficient evidence for Plaintiffs to discharge the onus.

23. These contentions, as set out in the respective party's Heads were extensively elaborated on in argument before the Court, with comprehensive cross referencing to the papers. However, as the time allocated to an extended further day in hearing oral argument in this matter ran out prior to Plaintiffs having an opportunity to reply, the Plaintiffs were requested to submit their replying argument in written form. They were furthermore requested to supply a draft order on the hypothesis that the matter be referred to oral evidence.

24. The Court received extensive further written argument as well as a relatively detailed written response from the Defendant. Albeit that the Defendant was not as of right entitled to raise further argument, and the Plaintiffs have objected thereto, the Defendant has done so on the premise that, not having had prior sight of any draft order referring the matter to oral evidence, it considered it necessary to make submissions in regard thereto.

25. Defendant also sought to deal with certain new and "adjusted" submissions that it maintained had been made in the written replying argument.

26. Both sets of written argument have been well drafted and useful in assisting the Court in reaching what it considers to be a fair and equitable end result and therefore, exercising its discretion, the Court has had regard to the Defendant's further submissions. The Defendant was in any event quite clearly entitled to comment on the draft order for the referral to oral evidence.

27. The arguments for and against the application for the release of the m/v Asahi have been carefully considered and the probabilities weighed.

28. There is however, in the Court's view, a short answer to this matter. Leaving aside all the circumstantial evidence which may indicate common control of the various ships mentioned by the management companies Fairport and Commercial, the Court is faced with various affidavits, some in number, which give rise to irresoluble conflict on a fundamental issue.

29. That fundamental issue relates to the role that is played by Kallimasias vis-à-vis these two management companies. On the one hand there are Messrs Lambson and Wood, the voices effectively of Ms Christina Liakakou, legal advisor to Fairport, constituting the first of these 6 people, Papalambrou the Operations or Crew Manager of Fairport supporting Kallimasias and then Kallimasias himself, all three being in a face off against Messrs Palanca, Famadico and Chandris.

30. Each of these witnesses is emphatic. Statements are made in their respective affidavits which are diametrically in conflict with one another on the issues of ownership and control. This does not include the 4 shareholders who rather cursorily

and simplistically state, when clearly more was called for, that they are in control of the respective ship owning companies by virtue of their majority shareholding.

31. It has been argued by both parties, based on authority, and it is trite, that perjury is not easily established or inferred.

32. In this matter there is no direct evidence of perjury. It would have to be inferred. In order to safely and confidently come to the conclusion that Kallimasias is in effective control of the four ships forming the direct subjects of these applications the Court would have to declare Liakakou, Papalambrou and Kallimasias, and effectively the shareholders of the ships owners, to be liars under oath. The Defendant has pointed out that the Court would have to infer perjury and untruthfulness in respect of at least seven witnesses on behalf of the Defendant.

33. Similarly a rejection of the detailed and categorical versions given by Palanca and Chandris and the brief but unequivocal statement by Famadico to the effect that Papalambrou explained that Kallimasias was the actual owner of all the Fairport and Commercial vessels, would effectively condemn these witnesses to having committed perjury.

34. Neither standpoint can be taken lightly, more particularly without hearing and observing these persons as witnesses giving evidence and being cross examined under oath, explaining away implicative evidence, documents and allegations.

35. Whilst it would appear on an analysis of the probabilities that they may favour the Plaintiffs it is questionable as to whether such probabilities as they stand, which themselves require more thorough investigation, are sufficient to tip the scales in favour of the Plaintiffs.

36. The companies would appear, on the face of it, to have more than day to day control. In the circumstances that present in this application, the management agreements appear to be more of a façade, although the Court makes no firm finding in this regard. The agreements enable the management companies to not only control the day to day activities of the vessels, but also to make decisions that would

appear to have a much more substantial impact in respect of the direction and policy of the ship-owning company, and, have an effect on “determining their destinies”.

37. Throughout the management agreements there is constant reference to the “principal” and, for instance, in the agreement between Forest Commercial and Fairport there is reference in clause 1(x), 2(vii), (viii) and (ix): “*To make such arrangements and contracts as the Principal shall from time to time consider requisite for the maintenance, repair, victualling, supply and equipment of the vessel;*” “*Generally to do all acts and things and to execute all such deeds, agreements and instruments in relation to the Ship and her management as the Principal instructs;*” and where “*The Agents hereby undertake that they will in all matters act loyally and faithfully to the Principal and obey his order and instructions.*”

38. But there has been no evidence put up of any of the shareholders in the ship owning companies ever having anything to do with the ships or ever exercise their rights in terms of these agreements. To all intents and purposes Fairport and Commercial appear to have simply got on with making all the decisions relating to the operation of these ships, and seemingly others in a fleet of some 17 ships, managing them in every respect.

39. Does that mean that they, the management companies were indeed in control of the ships as contemplated by sub-section 3(7)(a)(iii) of the Act as read with the deeming provision in section 3(7)(b)(ii)), and thus that an association has been proved?

40. This may be. The Plaintiffs aimed their sites at Kallimasias but have more recently suggested, in an alternative argument, that an association of the m/v's Asahi, Saetta and Taisetsuhas been established on the papers through Fairport.

41. Although Defendant's counsel has argued that the Plaintiffs are constrained to advance only the case made out in their papers, namely that Kallimasias is the controlling figure, this does not appear to be a correct statement of the law and cannot be argued in the context of this application.

42. Defendant complains of prejudice arising from the lack of clarity in Plaintiffs' argument in that further evidence might have been adduced by Commercial and/or Fairport relating to their directorial control, shareholding, financial management and internal management if the case had been properly made out that the Plaintiffs are now seeking to belatedly advance.

43. But as the Court understands it and as pointed out by Plaintiffs, a broader perspective of case they have been presenting is that Kallimasias is the beneficial owner of the vessels in the Fairport and Commercial fleets, that he controls Fairport and Commercial, and that these management companies in turn control the vessel owning companies.

44. One would have reasonably expected in these circumstances and on all the other circumstantial evidence produced by the Plaintiffs that the Defendant would in any event have produced more extensive information about Fairport and Commercial and, if it is not Kallimasias, advised on who the major role players and decision makers are behind these companies.

45. There is nevertheless no evidence as to who the shareholder or shareholders or current directorship is in respect of either Fairport or Commercial. Is there a controlling person or body of persons directing the general operational activities of these management companies? Can it be safely said on the papers as they stand that Fairport and Commercial are indeed in direct or even indirect control of the four ships making up the four applications before this Court, with regard to their general direction, their policies and their destinies?

46. There are further submissions made in the Plaintiffs' written reply and the Defendant's response which fuel the fire of uncertainty.

47. The Defendant asserts that the following submissions of fact by the Plaintiffs are unfounded having regard to the allegations in the papers. This was the Defendant's riposte to Plaintiffs' contentions that: *"the sole shareholders of the vessel owning companies do not manage the affairs or assets of those companies, nor do they direct the fate or destinies of those companies in terms of the management agreements*

between Fairport and the vessel owning companies and that all power to manage the affairs of the SPV'S and the power to direct the fate of those companies, has been delegated to Fairport;" furthermore, "that while this purports to be subject to instructions from the SPV's it is clear that neither the directors nor the shareholders of the SPV's are giving such instructions;" and finally "that the decision to withhold payment from the crew of the vessels in the Fairport fleet, and to withhold agency fees from the manning agents, was made by Fairport - and this is a decision which directed the fate of those is SPV'S and has resulted in the arrest of their vessels for these claims; it constitutes more than mere day-to-day management."

48. Whilst there is a strong suggestion that the submissions made by the Plaintiffs may rest on fertile ground the Court is not convinced, without more, that such submissions are irrebuttably correct.

49. With regard to the late filing of Kallimasias' affidavit, despite the strong protest put forward in Defendant's response to Plaintiffs' written reply, such protests are thin and unconvincing. There is no doubt on a reading of the papers that the Defendant has sought to play its cards very close to the chest. There are a number of instances where the response that has been raised that the Defendant itself, the m/v Asahi and Forest Commercial and its shareholder, have "no knowledge". They may not have had direct knowledge, but answers and information through Fairport or Commercial or Kallifadas or Papalambrou or various other employees of these companies were easily obtainable and could quite easily have been given. Kallimasias, and ultimately the Defendant, must pay the price for not being frank and open and laying the relevant cards at their disposal on the table. Transparency is a strong indication of honesty.

50. The written reply and the response traverse many other issues which swing the balance to and fro. Plaintiffs point to the fact that there is no denial by Kallimasias that he informed Mr Palanca that he referred to the vessels as "his" vessels and to Mr Pappalamprou as "his" crew manager and neither is there any explanation from him of the press reports which state that he owns the MV Pelagitis and that he purchased it through Commercial; the alleged irrelevancy of Kallimasias' family background in the shipping arena and the fact that family history has been held to be a relevant feature in many reported judgments particularly as it is not easy

for an individual to acquire ownership of a ship, if not from a ship-owning family as ships cost many millions of dollars; that Fairport's first Board of Directors consisted of Dimitrios Kallimasias and Kyriaki Kallimasia, and that all rights pertaining to the company were assigned by the incorporator to the latter; the weight to be attached to Fairplay World Shipping Encyclopaedia, the effect of being part of the same Chartering Pool and P & I Insurance, the Fleet Mortgages and Cross Mortgages, the control of SPV'S by shareholders and the like.

51. The Court has taken into account that hearsay evidence is admissible in terms section 6(3) of the Act and the words of MJD Wallis in his work *The Associated Ship and South African Admiralty Jurisdiction* submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in the Faculty of Law, University of KwaZulu-Natal (2010), at pages 177- 178:

"The position of the applicant for an arrest is ameliorated to some extent by the provisions of section 6(3) of the Act that permit hearsay evidence to be admitted 'subject to such directions and conditions as the court thinks fit' and on the basis that the weight to be attached to such evidence is in the discretion of the court. An initial attempt to restrict the scope of this provision to urgent cases where the original source of the information embodied in the hearsay evidence is identified was rejected by the appeal court. It held that the proper approach to the admissibility of hearsay evidence is to be lenient, so that in general the court inclines to admitting it and a decision to exclude it should only be taken when there is some cogent reason for doing so. The court assesses the weight to be given to such evidence when considering the case in its totality. Since that decision there does not appear to be any case where the court has excluded hearsay evidence although there are decisions where it has given it very little weight because it has been shown to be unreliable. The result has been that information culled from publications such as Lloyds' List or Fairplay and reports on shipping groups by organisations that specialise in providing information, usually of a financial nature, are frequently relied on by the courts in cases where the question of association is under consideration. However this does not necessarily overcome the problems of peering behind anonymous share registers reflecting that a company's shares are all bearer shares or discovering who is the puppet-master behind a company all of whose directors and officers are nominees employed by a legal firm in Panama or Cyprus."

52. The influence of Smalberger JA writing for the majority in the **Heavy Metal** judgment, at paragraph 19, has been weighed. This portion of the judgment deals with the effect that the appellant in that matter, having deliberately concealed the identity of the true beneficial owner of the vessel, in circumstances where that was the central issue in dispute, was telling and that the failure of the appellant to offer an adequate explanation, where it ran the risk of an inference being drawn against it, justified the conclusion that the appellant had something to hide. Consequently, the Court held that the dispute raised as to the beneficial ownership of the vessel was a contrived one and therefore not a genuine dispute of fact. Therefore, even though the nominee shareholder of each vessel owning company expressly denied that there was an association between the vessels, the Court rejected this denial. This line of reasoning has come close to tipping the scales in the present matter.

53. However, with regard to Kallimasias, the question remains to be answered as to whether he indeed is the kingpin or a linkman or the “big boss” exercising either direct or indirect *de facto* control? What power does he in fact have, if any, over Commercial and Fairport, over Forest Commercial, Aktina, Alalunga, Commercial, Triangle Faith and the ships m/v's Asahi, Saetta, Taetutsu and Belita, or over Papalambrou. Papalambrou strongly denies in his affidavit that he ever told Palanca, or Famadico that Kallimasias was the owner of all the vessels and that he was the one paying etc. Kallimasias, although not directly denying that he is in control, does so by implication in his affidavit in paragraph 6 and denies ever having spoken to Chandris. On the other hand, as mentioned there are detailed affidavits already referred to from Messrs Palanca, Famadico and Chandris which directly pinpoint Kallimasias as being the owner of the Fairport and Commercial vessels and being in apparent control. The dispute of fact between deponents to these affidavits is substantial.

54. At the end of this exercise, the Court is left with matters precariously balanced, substantially because of the direct conflict in the affidavits, as already extensively referred to. The Court is constrained to revert to the trite principle, that perjury is not easily established or inferred. There is much force in the arguments presented on behalf of the Plaintiffs. Cumulatively they are persuasive. However, viewed and analysed in piecemeal fashion as each argument has been presented in

its attack on the individual points raised by the Defendant, Defendant's case, more particularly bolstered by the conflicting affidavits, cannot simply be dismissed out of hand.

55. The Court has been invited to adopt a robust approach and determine the matter on the papers alone on the premise that the denials or assertions of the Defendant are wholly implausible or untenable. In support of this contention reference has been made to *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) and *Soffianlini v Mould* 1956 (4) SA 150 (E). Ultimately it has been the diametrically opposing affidavits of the respective witnesses referred to which has turned the Court away from adopting that approach.

56. Exercising the discretion it has, the Court has come to the firm conclusion that this matter must be referred for oral evidence. There is little doubt in the mind of the Court that the finely balanced scales will be tipped one way or the other once the credibility of the conflicting witnesses can be tested in examination in chief and in cross examination, and documents to support or detract from their versions are produced.

57. In coming to this conclusion, the Court has, in preference to adopting the robust approach, been influenced by the decisions mentioned hereinafter, under facts and circumstances which are analogous, or at the least not dissimilar to the present applications and where the comments made by the respective judges on the law as it applied to those facts, are of similar application herein.

58. The authorities relied upon are quoted at length:

58.1 *THE KADIRGA 5 (NO 1) J.A. CHAPMAN & CO LTD v KADIRGA DENIZCILIK VE TICARET A.S.*, a Natal Provincial Division decision of 9 APRIL 1999 (SCOSA, C 12) in which a full bench comprising *Booyesen J (Mclaren J and Jappie J concurring)* stated:

"Because a party alleging that a ship is an associated ship is usually at a disadvantage in having to prove the association, and cannot rely on inconclusive evidence of common shareholding and directorships, it may rely on circumstantial

evidence, which if sufficient will entitle it to an order that the question be referred to oral evidence.

The overall picture emerging from the papers before us is that the ships in question were at the relevant time all engaged in similar trade: all managed by the same managing agents: all entered for insurance purposes together: all protected as a fleet entity for insurance purposes, and all represented in negotiations by Asaf Guneri. All indications are that these companies are engaged in a common enterprise controlled by Asaf Guneri. Having said that it is also quite clear that the respondent's deponents have in terms denied the alleged control.

This is not one of those cases where the court can be satisfied on the papers that those denials are to be rejected. In the result oral evidence will have to be heard to determine the issues in this matter.”

58.2 *THE ALAM TENGGIRI: ALAM TENGGIRI SON BHD v GOLDEN SEABIRD MARITIME INC* a decision of the *Durban and Coast Local Division* by *Hurt J* made on 28 January 2000 (SCOSA B25 (D) at B34) in which he stated:

*“In South African law, in opposed motion proceedings where there are disputes of fact which cannot be resolved by gauging the probabilities as they appear from the affidavits, a court can only find in favour of the party bearing the onus if that onus is discharged on the admitted facts put forward by the party bearing the onus taken together with the factual assertions made by the opposing party. (See *Plascon-Evans Paints (Pty) Ltd v Decro Paint and Hardware (Pty) Ltd* 1984 (3) SA 623 (A). As already indicated, the respondent bore the onus in this case of proving that the arrest was justified. I think it is clear from what I have said above, that the respondents have not, in my view, discharged the onus of proving that when any of the claims asserted by the respondent 'arose', the second applicant was the owner of either the m.t. Theanoor the m.t. Ludovica.*

Where a court comes to the conclusion that a party has not discharged the onus of proving the essential elements of its claim on a balance of probability on paper, the court nevertheless has a discretion to refer the disputed issues for the hearing of oral evidence. In our practice this discretion is exercised in the majority of applications in which the affidavits themselves are not decisive.”

58.3 *THE LEROS STRENGTH ROZA v MV PROGRESS: MV PROGRESS v STONE ENGINEERING LTD (SCOSA C97 (D))* by Levinsohn J in the Durban and Coast Local Division on 2 November 1998

“In determining whether or not a ship is an associated ship, a court will weigh all of the evidence before it including the direct evidence and the circumstantial evidence. If on the strength of the evidence it is unable to infer on a balance of probabilities that the ship is an associated ship, the association will not be proved.

The applicants have thus made a thorough and strenuous effort to link the respondent with the guilty ship by adducing circumstantial evidence indicating a link through the Leriotis Management Company, Kastis and various other important circumstantial features such as Leriotis executing guarantees in respect of the mortgages. To come to the conclusion that the onus has been discharged one is required to draw an inference on a balance of probability from all the proved facts that such association exists. The respondent in reply puts up the direct evidence of Alogoskoufis and Georgiou in regard to their ownership and sbarcl10lcling of the respondent. There is also, of course, their denial under oath that they are in any way connected with the guilty ship. Weighing the circumstantial evidence adduced by the applicant against the direct evidence of the respondent, I am of the opinion that the inference sought to be drawn cannot be drawn on the papers as they stand. Therefore, looking solely at the affidavits one is driven to the conclusion that the applicant has not discharged the onus of proving the association. Obviously one cannot look solely the applicant's evidence. Such piecemeal type of reasoning must be eschewed. One has to look at the evidence as a whole. If I do that, I simply cannot find in the applicant's favour. Mr Lopes during the course of his argument and at a comparatively late stage of the case, submitted that if I reached the conclusion that the onus had not been discharged I should nevertheless refer the application for the hearing of oral evidence. Mr Harpur for the respondent, argued on the other hand that I should simply dismiss the application and not follow that course. Undoubtedly, it is desirable that an application for the hearing of oral evidence be made at the outset and before argument on the merits is heard. That, of course, is not an inflexible rule and in exceptional cases a court in the exercise of its discretion can at any stage of the proceedings refer the application for the hearing of oral evidence. (See Kalil v Decotex (Pty) Ltd 1988 (1) SA 94'I (A) at 981 D-G.)

Whether the application will be referred is a matter which is in a court's discretion. A number of factors must be taken into account in the exercise of that discretion. First and foremost the applicant is at a disadvantage in that they do not have personal knowledge of the shareholding and other business interests surrounding the respondent and the guilty ship. Secondly, there is some reason to think that cross-examination of the respondent's deponents might disturb the overall all probabilities as they emerge on paper and oral evidence may well tip the scales in favour of the applicant.

In the result, I am disposed to refer the issues which arise in both applications for the hearing of oral evidence and to direct the various important deponents to present themselves for cross-examination. At this stage I refrain from making an order because I anticipate an appropriate order will differ somewhat from the standard order that is generally made in these courts. All the deponents reside overseas and it may well be convenient to incorporate in the order provisions in regard to the taking of evidence on commission. Likewise the order may require special directions in regard to discovery. In the circumstances, I propose adjourning this matter sine die. The parties are directed within seven days to place before me in Chambers an agreed draft order prayed. Failing agreement, they are directed to place written submissions before me in regard to what an appropriate order should be. As far as the costs of the application are concerned, I have come to the conclusion that all questions of costs be reserved for the decision of the court hearing the oral evidence.” (The Court’s underlining)

59. Of yet further strong influence has been the work of MJD Wallis, *The Associated Ship and South African Admiralty Jurisdiction* referred to above.

At page 417:

“The position is therefore that whether one is considering the arrest of an associated ship in the context of an action in rem to be pursued in South Africa against the associated ship or its arrest for the purpose of obtaining security under section 5(3) of the Act one is concerned with the exercise of substantive rights conferred upon litigants by the legislature. This has two consequences. Firstly, it is not appropriate to treat the rights as being purely of a procedural nature because that is an incorrect characterisation. Although they clearly have a procedural aspect they are rights of substance. Secondly, it is inappropriate for the courts to

exhibit a reluctance to afford to litigants the rights that the statute has given them. There are cases, as has been pointed out, where our courts have expressed views that suggest a reluctance to give effect to these rights because the beneficiaries are usually foreign litigants. The judicial reluctance to entertain litigation involving foreign litigants and foreign causes of action that is manifest in statements such as these is, with respect, to be deprecated. The policy embodied in the Act is clearly one that vests our courts with jurisdiction to entertain claims by foreign litigants (peregrini) against other foreign litigants on foreign causes of action. For the courts to exhibit reluctance to give effect to this policy is inconsistent with the policy of the Act and amounts to a judicial rewriting (or even repudiation) of that policy. That was always impermissible but is even more so in a constitutional democracy based upon a separation of powers. Whilst we are dealing with pre-constitutional legislation there has been no indication in the time that has passed since 1994 of any inclination on the part of the legislature to limit or restrict the jurisdiction conferred upon our courts by the associated ship arrest provisions of the Act.” (The Court’s underlining)

At pages 418 – 419:

“Before judges in South Africa express reluctance to involve South African courts in such international litigation they should perhaps reflect that the legislature may have taken account of matters such as these in adopting and sustaining the policy decision to vest our court with jurisdiction to deal with such claims and to afford foreign litigants the particular benefits attaching to the ability to arrest vessels as associated ships.”

“The fact that they are foreign or that the defendant is owned by a foreign company or that the claim arose outside South Africa should be regarded as entirely irrelevant to the question whether an application for an arrest, or more probably an application to set aside an arrest already effected, should be referred for the hearing of oral evidence on a disputed issue of association.”

At page 421:

“It is sufficient to say that in adopting a more stringent approach to references to oral evidence in the case of foreign litigants seeking to enforce statutory rights to arrest associated ships given to them in South Africa, the courts are treating one class of litigant

differently from all other litigants and in so doing they are denying them the equal protection and benefit of the law.”

At page 422:

“As the cases already discussed in Chapter 5 reveal, the refusal of applications to refer questions of association for the hearing of oral evidence has become virtually routine. The approach adopted by the courts is that such an order should only be granted in rare cases. It is submitted that not only is the foundation for that approach unsound for the reasons already canvassed in Chapter 5, but that the constitutional imperatives discussed in this section likewise indicate that such an approach is impermissible.”

“It is submitted that there is no foundation in fact or policy for the courts to treat requests for the hearing of oral evidence by foreign claimants seeking the arrest of an associated ship any differently from the way in which they would treat any other application for a reference to oral evidence in a case where there is a dispute of fact on the papers. To do so is, it is submitted, to infringe the constitutional rights enjoyed by all litigants, including foreigners.”

60. The views expressed by the learned author, now a Judge of the Supreme Court of Appeal, are respectfully and unequivocally endorsed by this Court.

61. In the Plaintiffs’ initial Heads of Argument they applied in the alternative for the matter to be referred for oral evidence. Although the Plaintiffs were not the Applicants herein, they were obliged to start in the light of the onus resting on them to prove the association. As mentioned earlier in this judgment, having heard argument from the Plaintiff and having heard the Defendant’s counter argument, the court time for hearing these matters had expired. Plaintiff was thus requested to provide written argument in reply and at the same time provide a draft Order on the hypothesis of the matter being referred for oral evidence. The issue of referring the matter for oral evidence and the practicalities and logistics of so doing as well as the relief to which the respective parties would be entitled in such an event, was unfortunately not ventilated in open court.

62. The Defendant has raised various objections and counter arguments to the Plaintiffs' suggested draft order. The Court does not propose at the present stage to deal with them in any detail. Regard has been had to all of them.

63. I would mention however that whilst conceding that *"it is permissible to seek oral evidence conditionally"* the Defendant has contended that *"it is not permissible to do so in the absence of a fully disclosed indication of the terms of the referral"*. The complaint raised is that *"In this instance the terms of the referral are disclosed only after extensive argument."*

64. The complaint has merit. The terms of the order put forward by the Plaintiffs is extensive and proposes relief that the Defendant contends this Court is not empowered to make. I refer in this regards to paragraphs 6 of the proposed order, which reads as follows:

[5] *The defendants in the actions under case numbers A121, A122, A126 and A127/2012 are directed to produce to the plaintiff for inspection, within 21 days of this order, the following documents:*

- (a) *the audited financial statements and the annual returns of the following companies:*
 - (i) *Forest Commercial SA;*
 - (ii) *Fairport Shipping Limited;*
 - (iii) *Triangle Faith SA;*
 - (iv) *Alalunga Shipping SA.;*
 - (v) *Aktina Enterprises SA;*
 - (vi) *Commercial SA;*
- (b) *any agreements that may exist between the shareholders of the companies named in paragraph 6(a) of this order and any third party pertaining to their shareholding in those companies;*
- (c) *the income tax returns of the individuals mentioned in paragraph 4 (a) to (e) of this order, for the last two tax years;*

- (d) *all documentation evidencing the purchase of the share in the companies referred to in paragraph 6 (a)(ii)-(v) above by the individuals referred to in paragraph 4 (b) to (d) above, including all sale agreements, share' transfer documents and financing agreements.*

65. The Defendant contends that an *order directing the production of documents is not competent in respect of any documents arising from Fairport Shipping Limited or Commercial SA or in respect of the individuals in question since those individuals are not parties to the litigation.*

66. The individuals mentioned in paragraphs “4 (a) to (e) of this order” are Georgious Kallamasias, Anna-Christina Markou, Michaelis Polioukas, Damianos Monogioudis and Mr Alexandros Vamvakas. The Defendant argues that *the documents demanded in paragraph 6(a)(ii), 6(a)(vi), 6(b), 6(c) and 6(d) are not compellable”* and that such an order would not be competent.

67. Furthermore, in paragraph 7, the Plaintiffs have sought an order that:

[6] *The plaintiffs are granted leave to apply to this Court for an appropriate order:*

- (a) *to compel the production of further documents by any person;*
- (b) *to compel the giving of evidence by any person referred to in the papers; or*
- (c) *to take evidence on commission to achieve the ends set forth in 1 and 2 above.*

68. The Defendant’s reaction to this paragraph is that *“The order contemplated in paragraph 7(a) is a remarkable one to the extent that it confers a power outside those powers already conferred by the Uniform Rules. It has, as far as Defendant is aware, no precedent.”*

69. It would certainly be desirable if it were possible to ensure that documents envisaged in the above proposed orders were made available to the oral evidence hearing. They would no doubt all assist in unravelling the spiders web and revealing the true state of affairs. But subject to argument, which is catered for hereinafter, the Court does not believe that orders of this nature would be competent.

70. However, if documentation of this nature is not voluntarily made available, and no good reason at the oral evidence hearing is proffered as to why, the Court hearing oral evidence may well be in a position to draw adverse inferences.

71. In response to sub paragraph 7(c) the Defendant avers that it is incomplete. The Defendant points out that *“An order to take evidence on commission ordinarily provides for the identity of a commissioner, the rules to be followed, the place of commission, the terms of commission, the points to be taken on commission, the allocation and apportionment of costs on commission and suchlike. The order is simply incomplete and should not on that basis be granted as an unfettered order in favour of the Plaintiffs.*

72. Defendant goes on to argue that *“....at no stage has Plaintiff made application for the establishment of a commission. Such an application is self-standing under the Admiralty Act and requires at the minimum an application to be instituted in the ordinary course.*

73. Subject to argument to the contrary, which as stated, is catered for hereinafter, the Court agrees with these contentions.

74. The Defendant has also argued that *“The referral is also extraordinarily impractical in that it amounts to a referral to oral evidence of the most extensive point in the trial without a proper application for separation. In other words, the remaining issues will be largely trivial.*

75. The action between the Plaintiffs and the Defendants is not a complicated matter. It seems likely that most of the issues that would arise, if any arise once the issue of association is resolved, (being amounts allegedly due to crew for wages), would be proved by way of a paper trail, documentary evidence that would speak for itself, issues that should properly be dealt with around the table. The Court's view is that a resolution of this issue of association at the level of oral evidence has every prospect of leading to a settlement of the entire dispute.

76. The Defendant further disparages the effect of evidence on commission. Whilst what is stated about imperfections arising because of a number of contested issues possibly not being heard before the judge dealing with the matter, perhaps has substance, this is part of a recognised procedure that may have to be

incorporated into these proceedings. It does not amount to a sound enough reason either standing alone or taken together with the facts mentioned in the ensuing paragraph for not referring the matter for oral evidence.

77. Issues relating to security for costs, the number of witnesses who may have to be called from afar, the need for an interpreter and the duration of the trial do not constitute valid reasons in the context of this matter, for not referring it to oral evidence.

78. For the sake of the record and for purposes of counsel giving further consideration to the question of the time period when the association must be proven to exist, I repeat issues which the Plaintiffs, (at an earlier stage in the argument, and prior to submitting a proposed Draft Order Prayed), should be referred for oral evidence:

(a) who had de facto power to control the SPV which owned the mv Asahi, as at the date of the arrest, being 8 October 2012;

(b) who had de facto power to control the SPV which owned the mv Saetta, during the period March 2010 to May 2012;

(c) who had de facto power to control the SPV which owned the mv Belita, during the period 1 May 2010 to 12 July 2012;

(d) who had de facto power to control the SPV which owned the mv Taisetsu, during the period 27 July 2009 to 7 October 2012.

79. Plaintiffs furthermore made the following submissions with which the Court, with particular regard to the earlier mentioned extracts from the work by, MJD Wallis in his work *The Associated Ship and South African Admiralty Jurisdiction*, is in agreement:

“The question was raised as to how this Court could compel the witnesses to testify if the matter were referred for oral evidence. It is submitted that this is an issue faced in any matter where witnesses from abroad are required to testify. As in any such case, each of the parties

would secure the attendance of the requisite witnesses who deposed to affidavits on their behalf, and subpoenas could be served in Greece requiring such witnesses to testify.”

“The defendants' counsel contended that a fact militating against a referral for oral evidence is that this is a foreign case with foreign litigants and that this Court has jurisdiction only by virtue of the arrest. This is precisely the situation that the legislature intended in the Admiralty Act, and it is not for us to question it. It is clear that an arrest of the vessel here gives this Honourable Court jurisdiction over the action.”

“This is an action for seamen's wages. It is submitted that the courts should be sympathetic to the plight of seamen who have not been paid their wages. The defendants' counsel argued that there are many plaintiffs' and therefore the trial would take many days. Firstly, this is not something that the Court should take into account in deciding whether to set aside the arrest. Secondly, not all of the plaintiffs' would be required to testify ultimately at the trial, as they were represented by manning agents, who can testify on their behalf.”

80. The Plaintiffs have submitted that in the event of the Court referring this matter for the hearing of oral evidence, the issues expressed in the following terms would be appropriate:

1. *In terms of Rule 6(5)(g) of the uniform of rules of Court, the application is adjourned to a date to be arranged for the hearing of oral evidence on the question of whether the mv Asahi, mv Saetta, mv Taisetsu and mv Belita are associated ships in terms of the provisions of sub-sections 3(6) and (7) of the Admiralty Jurisdiction Regulation Act, No. 105 of 1983.*

81. They have also restricted the list of the persons who should be available for examination and cross-examination, to the following:

- (a) Georgious Kallamasias;*
- (b) Anna-Christina Markou;*
- (c) Michaelis Polioukas;*
- (d) Damianos Monogioudis;*
- (c) Mr Alexandros Vamvakas;*
- (i) Mr Papalamprou;*
- (g) Mr Palanca.*

82. The Court has taken cognisance of the respective arguments presented and chosen to adapt the Order granted by Booysen J in the Kardiga case (above) to suit the circumstances of the present application. In doing so the Court records that the order made below will constitute a Provisional Order. The reason for doing so is to give parties an opportunity to either agree or argue the terms of a final Order at the election of either Plaintiffs or the Defendant or both. The parties may well want to incorporate a provision regarding the taking of evidence on commission to avoid a separate application having to be made in this regard. They may want clearer directions with regard to discovery. The parties may wish to clearly state the relevant time at which the associations must be proved.

83. The parties are accordingly given the opportunity to either agree the terms of a final Order or make further submissions, in writing, on or before 25 September 2014 as to the form such Order should take. The Court accordingly directs that in the event of one or both of the parties not providing the Registrar by 25 September 2014 with an agreed Order or submissions with supporting argument relating to the proposed content of what they contend to be an appropriate Order, the Provisional Order will become final.

84. Although it is the Court's wish not to escalate the costs in this matter, the ramifications of the final Order made may have far reaching consequences. Should the parties therefore so desire, the Court is willing to have the matter set down for further argument as to the terms of a final Order.

Provisional Order

- (a) In terms of Rule 6(5)(g) of the Uniform Rules of this Court, the application is adjourned to a date to be arranged for the hearing of oral evidence on the question of whether, in terms of the provisions of sub-sections 3(6) and (7) of the Admiralty Jurisdiction Regulation, 1983 as amended, the mv *Asahi*, was an associated ship with the mv *Saetta* and/or the mv *Taetutsu* and/or the mv *Belita* at the relevant time.

- (b) Leave is granted to the appellant and the respondent to subpoena any person to appear at the hearing when oral evidence is led who is able to give evidence upon the issues referenced to in paragraph (a) above.
- (c) The Plaintiffs are granted leave to apply to the Durban and Coast Local Division of this Court for appropriate relief:
 - (i) to compel the production of documents by any person; or -
 - (ii) to compel the giving of evidence by any person referred to in the application records, or otherwise;
 - (iii) to take evidence on commission to achieve the ends set forth in (i) and (ii) above.
- (d) The following persons shall in any event be available for examination and cross-examination:
 - (i) Georgios Kallimasias;
 - (ii) Alexandros Papalambrou;
 - (iv) Christina Liakakou;
 - (v) Anna-Christina Markou;
 - (vi) Alexander Vamvakus;
 - (vii) Damianos Monogioudis;
 - (viii) Michlas Potouras;
 - (ix) Alejandro Palanca;
 - (x) Edward Famadico;
 - (xi) Nikolaos Chandris.
- (e) In the event of either party wishing to lead the evidence of any person who has not deposed to an affidavit in this application, that party shall, not less than twenty one days prior to the hearing of the oral evidence, deliver to the other party a summary of the evidence of the witness so sought to be led.
- (f) The provisions of Rules 35, 36 and 37 of this court shall apply to the oral evidence hearing.

- (g) Costs of the application are reserved for the decision of the court hearing the oral evidence.

**ROWAN AJ
ACTING JUDGE OF THE HIGH COURT
DURBAN AND COAST LOCAL DIVISION**

Date of hearing: 13 & 20 November 2013 (with Further Written
Argument 29 November & 10 December 2013)

Date of Judgment: 12 September 2014

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