

**IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND**

CA 1/03 & 2/03

IN THE MATTER of Article 60(3) of the Constitution and Rule 17 of the Court of
Appeal Rules

BETWEEN COOK ISLANDS NATIONAL LINE AGENCY LIMITED (in
liquidation)

First Appellant

A N D NATIONAL SHIPPING & CHARTERING LIMITED (in
liquidation)

Second Appellant

A N D TRIAD MARITIME (1988) LIMITED (in liquidation)

Third Appellant

A N D TRIAD PACIFIC PETROLEUM LIMITED

Fourth Appellant

A N D TRIAD ENTERPRISES LIMITED (in liquidation)

Fifth Appellant

A N D COOK ISLANDS SHIPPING CORPORATION LIMITED (in
liquidation)

Respondent

Hearing: 23 September 2003

Coram: Casey JA (Presiding)
Smellie JA
David Williams JA

Appearances: J R Fardell QC and Mr C Morris for First-Third Appellant
Mr P T Finnigan for Fourth and Fifth Appellants
Mr K P Sullivan for Respondent

Date of Judgment:

16 December 2003

JUDGMENT OF CASEY JA AND DAVID WILLIAMS JA

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JUDGMENT OF CASEY JA AND DAVID WILLIAMS JA

Introduction – Issues Arising

- [1] This appeal arises from a judgment of the Chief Justice on 17 December 2002 in proceedings brought by the liquidator (“the liquidator”) of the Respondent (“CISCL”) seeking declarations designed to clarify the precise assets, creditors and debtors of CISCL. The Respondent was incorporated on 31 August 2000 and purchased from the Appellants sometime in early September 2000 all the assets, liabilities and business associated with their shipping and maritime services business. This was done pursuant to an undated “Agreement for Sale and Purchase of Assets” (“the Agreement”) in which the second to fifth Appellants were the vendors and CISCL the purchaser. The Respondent was placed into liquidation by the High Court on 17 May 2001. The liquidator sought declarations against the Appellants who operated a shipping and maritime services business under the name of Cook Islands National Line.
- [2] The central issues between the liquidator of CISCL and the Appellants are the validity of the Agreement and, assuming validity, the identification of the assets and liabilities which were transferred in accordance with that Agreement. The Appellants contended that no assets passed because the Agreement was illegal. These issues turn on the correct interpretation and application of the prohibitions on anti-competitive conduct contained in the International Shipping Act 1999 (“the ISA”), which provide the basis for the assertion of illegality, and the common law as to mistake. If the Agreement is upheld, the issue concerning the precise assets, including inter-company balances, which passed under the Agreement depends upon the true construction of the Agreement.

Procedural Background

- [3] The liquidator sought declarations under Declaratory Judgments Act 1994. The parties reached agreement on a number of factual matters and these are set out in an Agreed Statement of Facts of 67 paragraphs dated 18 September 2002. Affidavits were filed in various interim proceedings. In addition briefs of evidence were prepared and submitted for the substantive hearing. The factual narrative is largely undisputed and the primary matters for determination are the

correct inferences to be drawn from the evidence and particularly from the conduct of the parties and the application to them of established legal principles.

- [4] The liquidator's Statement of Claim of 30 July 2001 was uncomplicated. It pleaded and relied upon the Agreement and its settlement in September 2000 and referred to the "dispute between the liquidator of the first, second and third Defendants and representatives for the fourth and fifth Defendants and Mr McCallum on behalf of the Plaintiff as to which of the assets and liabilities of the Defendant were transferred to the Plaintiff pursuant to the Agreement for Sale and Purchase." It recorded that the Plaintiff liquidators position was that "all of the assets and liabilities of the first, second and third Defendants those assets of the fourth and fifth Defendants specified in Schedule 1 and 2 of the Agreement, were transferred to the Plaintiff pursuant to the Agreement for Sale and Purchase. Until this issue is resolved the provisional liquidator of the Plaintiff is frustrated in his attempts to appropriately attend to his statutory obligations."
- [5] The liquidator sought declarations as to the validity and enforceability of the Agreement and that the Agreement "was effective in transferring ownership of all assets listed in schedule 1, and the entire business as described in Schedule 2 of the agreement ...".
- [6] Defences were duly filed by all Appellants in October 2001. Nothing was raised in these defences as to the applicability of the ISA. The first to third Appellants pleaded that "the consideration for the Agreement for Sale and Purchase was an anticipated exclusive shipping licence to the ongoing benefit of the vendor and purchaser. Such exclusive shipping licence to the ongoing benefit of the vendor and purchaser has not been granted". The use of the word anticipated is to be noted. The fourth and fifth Appellants pleaded that:

"6. ...between late August and September 2000 the Government of the Cook Islands entered into a Joint Venture Agreement with Taio Shipping Limited ("Taio") and Triad Maritime Trust ("TMT") whereby, in consideration of the sale to the Plaintiff of the assets and liabilities of Triad referred to in the Agreement for Sale and Purchase as pleaded in paragraph 9 of the statement of claim, TMT, Taio and the Government of the Cook Islands through its commercial entity, Cook Islands Investment Corporation subscribed for a defined number of shares and the Government of the Cook Islands covenanted to TMT and Taio to provide

to the Plaintiff an exclusive shipping licence to establish and operate the new shipping service in the name of the Plaintiff ("JV Agreement").

11. They ... plead further that ... without disclosing [it] to TMT, Taio and the vendors under the CINL Agreement the Cook Islands Government was acting in a manner inconsistent with its obligations and repudiated the JV Agreement by failing and/or refusing to provide to the Plaintiff an exclusive shipping licence and extending existing licences to other shippers." (Underlining Added)

[7] The pleading did not specify the form of the joint venture agreement and the absence of a reference to the Agreement conveyed that the joint venture agreement was something different to the Agreement. In the amended defence of the first to third Appellants dated 23 May 2002 the following contentions were added. As to mistake, it was pleaded that:

19. At all material times the parties to the Sale and Purchase Agreement shared the same mistaken view that the policy of the Cook Islands Government would remain such that the Plaintiff would receive an exclusive shipping licence.
20. In the circumstances such a mistake amounts to a fundamental mistake in the specific performance of the Sale and Purchase Agreement as sought by the Plaintiffs is contrary to equity. ...

[8] As to illegality it was now asserted that there had been an illegal "contractual covenant":

22. Pursuant to s4 of the International Shipping Act 1999 ("the Act"), it is illegal to give effect to a contractual covenant that has the purpose, effect or likely effect of substantially lessening competition in the Cook Island's international shipping service. The first, second and third Defendants rely on sections 4 and 7 of the Act in full.
23. The establishment of the National Shipping Service and for this purpose, the proposed structure of the corporate vehicle to effect this national shipping service, comprising the Plaintiff and other associated companies were illegal and in breach of the Act and ss4 and 7 in particular.
24. All steps taken to give effect to this National Shipping Service, including the completion of the Sale and Purchase Agreement are also illegal, as being in breach of the Act and ss4 and 7 in particular.
25. As a result, the ensuing litigation of the Plaintiff and all steps undertaken by the liquidator in the context of that liquidation are invalid and of no effect."

[9] The fourth and fifth Appellants filed an amended pleading to the same general effect in September 2002.

- [10] The proceeding came on for hearing before the Chief Justice on 30 September and 1 October 2002. No evidence was given *yiva voce* and there was no cross-examination. In the written submissions for the first to third Appellants in this Court it was said that “the factual aspects of the dispute were contained within an agreed Statement of Facts and certain briefs of evidence on both sides which were addressed without challenge”.

Agreed Statement of Facts - Background

- [11] The Agreed Statement of Facts, helpfully provided the narrative of events but on some critical issues, such as the date upon which the Agreement was executed, is rather imprecise (“at the end of August”). Subject to that qualification and the consequential need in some areas for supplementation from the pleadings, the affidavits and the briefs for amplification the Agreed Statement of Facts recorded the following circumstances. In 1988, Messrs G F Ellis and C Vaile formed TM88L and operated a licensed shipping service called Cook Islands National Line (CINL) in competition with other operators. Subsequently in 1989, Messrs Ellis and Vaile incorporated a shipping agency company in Auckland, called CINLAL. During the period 1988 to 1992, the shipping service to the Cook Islands was over-tonnaged and over-competitive.
- [12] From July 1998 the Cook Islands Government of the time decided to deregulate the shipping industry, and open up the industry for other competitors to apply for licences. A licence was granted to Express Cook Islands Line (“EXCIL”) (a joint venture between Reef Shipping and four major local importers). Soon afterwards, it became evident to Vaile and Ellis that CINL would have difficulties in surviving in the long term. Vaile and Ellis lobbied members of the Cook Islands Government and also opposition parties throughout 1999 that certain shipping interests in the region were forming a cartel to control shipping within the South-West Pacific which would drive out CINL.
- [13] In November 1999 a new coalition Government was formed in the Cook Islands. In December 1999, the Cook Islands Government enacted the International Shipping Act 1999. The national interest objectives of the shipping policy were to “promote, preserve and safeguard fair competition in the Cook Islands

International Shipping Service to the benefit of the public of the Cook Islands, shippers and carriers”.

- [14] Notwithstanding the passing into law of the International Shipping Act, CINL was unable to compete against EXCIL, whose market share continued to increase. Vaile and Ellis lobbied the new coalition Government throughout 2000 along the lines that the ISA was ineffective in preventing a new shipping monopoly being created, and proposed a joint venture with Government for the establishment of a National Shipping Service.

- [15] After meetings with the then Minister of Shipping, Dr Robert Woonton, and the Secretary of Shipping, Mr Aukino Tairea the concept proposal, dated 29 March 2000 was drawn up by Ellis and Vaile. On 13 April 2000, an information paper prepared by Ellis was presented by Dr Woonton to the Cabinet of the Cook Islands Government. This information paper set out the proposed corporate framework for the new National Shipping Service, with the shareholders being the Cook Islands Government, CINL and Taio Shipping. Taio operated an inter-island shipping service.

- [16] In respect of licensing, it was proposed that the international licenses would be reduced to two (2), and granted to the company and the inter-island licence granted to Taio Shipping. The Government would take immediate steps to terminate the licences of EXCIL and Nautilus, either by notice of termination for justified cause in accordance with the terms of the respective licences, or by due notice that the respective licences would not be renewed at the end of their current licence period. In respect of the Government input for licensing, it was proposed that the Government grant an exclusive shipping licence (international) to the company to service the Cook Islands.

Agreed Statement of Facts – July-October 2000

- [17] The critical part of the narrative of events was the time between 26 July and 10 October. The salient parts of the Agreed Statement of Facts for this period were as follows. On 26 July 2000 Dr Woonton presented a briefing paper to the

Cabinet. The paper proposed that the Cabinet approve 6 proposals. By way of Cabinet minute CM(00)219 Cabinet approved the proposals as follows:

1. the formation of a new national shipping service as outlined above;
2. the release of the Minister of Transport of a public statement outlining the new shipping policy;
3. the formation and registration of Cook Islands Shipping Corporation as the corporate entity to establish the new service;
4. the participation of Government as a shareholder through the Cook Islands Investment Corporation and the appointment onto the Board of the shipping company;
5. the review and termination by the Minister of Transfer of the licences granted to Excil Shipping and Nautilus Shipping as and when these come up for renewal, and with prior notification to the licence holders of the non-renewal of their respective licences;
6. after termination of the "inter-islands" licence of Nautilus Shipping on the expiry of its current licence:
 - (a) the exemption of VAT on inter-islands freight; and
 - (b) the exemption of import levy on bunker fuel used by licensed inter-island vessels;
7. the confirmation of the new "one freight system" for freight from New Zealand to the outer islands under this policy.

Noted Government will review this policy after two (2) years."

Following the Cabinet decision a media statement was published in the newspapers.

- [18] Meanwhile in July 2000, Mr Vaile, in consultation with Dr Woonton, sourced a new vessel with sufficient capacity to operate with the Ngamaru III as the national shipping service. The vessel was sourced from Dr Brand of Baum, Germany, who had previously dealings with the Cook Islands shipping industry.
- [19] Following the Cabinet decision of 26 July 2000 Mr Ellis met with Dr Woonton and Mr Joe Caffery of the Cook Islands Investment Corporation. Dr Woonton requested Messrs Ellis and Vaile to produce the details of the corporate structure for the proposed National Shipping Service. Mr Ellis and CINL instructed Mr Peter Brannigan, a Chartered Accountant from Auckland for that purpose. During August Mr Brannigan visited Rarotonga and held numerous meetings with interested parties including the Prime Minister, Deputy Prime Minister, Dr

Woonton, Head of PM's department (Mr Eddie Drollet), Messrs Ellis, Tapi Taio, Caffery, Vaile, Mr Tim Arnold, and representatives of EXCIL.

- [20] After ascertaining these parties' views, a memorandum for Cabinet dated 29 August 2000 was prepared by Mr Brannigan which proposed the structure of the corporate vehicle to establish the national shipping service. For the first time to this audience, it was proposed that the corporate structure involve a shareholding company, called Cook Island Shipping Corporation Holdings Limited ("CISCHL") and an operating company called Cook Islands Shipping Corporation Limited ("CISCL"). It was also proposed that each of these companies would have A and B shares, carrying different voting rights and different rights to dividends. These companies were incorporated in August 2000. The memorandum of 29 August 2000 was submitted to Cabinet on the same date by the Prime Minister.

- [21] On 1 September 2000 by a special resolution, CISCL resolved to execute an agreement for sale and purchase of certain assets and business interests of the Triad Group as consideration for the subscription price of \$1,600,000 Class B shares. Thus, Triad's shares were fully paid up through the sale to CISCL of its shipping business, assets and liabilities. This was based on a net assets position set out in the particulars of a contract relating to shares filed with the Registrar of Companies. Taio invested no cash. That shareholding was provided by way of "free carry", ie, a gift.

- [22] These shares were then sold by Triad/Taio to CISCHL at or about the same time for \$1,689,500. On 29 September 2000 the directors of CISCHL resolved to accept the transfer of 1,600,000 fully paid shares in CISCL, and in consideration acknowledged that the 1,600,000 shares held by Triad and Taio were now fully paid.

- [23] On 1 September 2000 a resolution was passed by CISCL to approve a charter party between Dr Baum and the company. On the same day, the charter party was initialled by Mr Caffery on behalf of CISCL. The charter was for 5 years 30 days commencing on 1 September 2000 at a cost of 7,000 Deutschmarks per day. The vessel chartered was called the Rarotongan Rover II.

- [24] At the end of August, an undated sale and purchase agreement was signed by Messrs Vaile and/or Ellis as directors of the vendor companies NS & CL, TM88L, TPPL, and TEL and on behalf of the purchaser company CISCL. Pursuant to the agreement the vendor agreed to sell and the purchaser agreed to purchase certain assets and liabilities of the vendor companies comprising chattels described in Schedule 1 and the business described in Schedule 2. Schedule 1 sets out particular assets of the 4 vendor companies as well as specific assets of CINLAL. Schedule 2 stated:

“The entire shipping and maritime services business operated by the vendors as a going concern including all assets and liabilities of that business, with the assets being sold subject to existing mortgages and charges.”

CINLAL was not named as a vendor, but it was included in the Schedules.

- [25] On 28 or 29 August 2000 Mr Vaile and Dr Brand met with the Prime Minister. They requested of the Prime Minister a letter of comfort addressed to Brand to confirm the Government’s commitment to the national shipping service. Ms Janet Maki, Solicitor-General, advised the Prime Minister’s Office in respect of the contents of a letter of comfort on 7 September 2000. Although not spelled out in the Agreed Statement of Facts, Ms Maki advised the Prime Minister’s Office that to agree to offer exclusivity would breach the provisions of the International Shipping Act. Her letter is of such importance in the narrative of events as to warrant reproduction in part in this judgment:

“7 September 2000

Arthur Taripo
Acting Chief of Staff
Office of the Prime Minister
Avarua
RARATONGA

re: DRAFT LETTER FOR PRIME MINISTER TO BRAND

I attach for your perusal and discussion with the Prime Minister an amended draft letter as requested, for the Prime Minister’s consideration. You will note that it is similar to your own draft with the following variations:

Omission of any reference to –

- (a) *CM(00) 219;*
- (b) *Termination of other shipping licences; and*
- (c) *Amending or repealing the International Shipping Act to enable the new policy to be brought into effect.*

It is my understanding that through discussions with representatives of XCIL Shipping Ltd and others, Government has been made aware of the fact that its decision to terminate the licences of XCIL and Nautilus is illegal under the International Shipping Act 1999 ("the Act"). The Act prevents anti-competitive and unfair practices in the international shipping industry. Pursuant to section 4(b) of the Act, it is an offence for any person to "give a consent that has the purpose, or has or is likely to have, the effect of substantially lessening competition in Cook Islands International shipping service."

Given the circumstances, I am of the view that paragraph (5) of CM (00) 219 in particular, is illegal under the Act and for this reason, I advise against informing Dr. Brand of an illegal Cabinet decision.

...

I advise against any statement made by the Prime Minister in his letter regarding the amendment of legislation to 'validate' the decision as this in itself could be legally construed as a breach of section 4 of the Act.

...

It is of course, your prerogative to seek a second legal opinion on the issues I have raised.

Janet G. Maki
SOLICITOR GENERAL"

[26] Following that advice the Prime Minister sent a letter to Dr Brand on 11 September 2000. The letter stated as follows:

"Dear Dr Brand

Re: GOVERNMENT SHIPPING POLICY

I refer to my meeting with you, Messrs Chris Vaile and Arthur Taripo in my office on 29 August 2000, regarding the above.

The purpose of this letter is to advise you that Government's shipping policy includes the following:

- (a) the formation of a new shipping service;
- (b) the formation and registration of Cook Islands Shipping Corporation Limited as the corporate entity to establish a new service;
- (c) the participation of the Cook Islands Government as a shareholder in the new shipping company through its agency Cook Islands Investment Corporation;
- (d) the review of shipping licences of companies currently providing an international service to the Cook Islands, as and when these expire and come up for renewal.

As part of its shipping policy, Government intends to review the International Shipping Act 1999 in the near future.

Yours sincerely

Hon. Dr Terepai Maoate
Prime Minister"

[27] As a result the letter to Dr Brand dated 11 September 2000 fell short of the explicit confirmation of the existing policy that had been requested. The explicit

policy of termination of existing licences was now “watered down” to a policy to review current shipping licences.

- [28] On 10 October 2000 the Cabinet rescinded clause 5 of the CM(00)219, being the policy for review and termination of the licences granted to Excil and Nautilus Shipping. Cabinet also gave approval to the Minister of Shipping extending the shipping licence of Excil for a period of 6 months from the end of the present licence period issued. On 18 October 2000 Dr Woonton issued a 6 months extension of Excil’s licence. Messrs Ellis, Vaile and Caffery were not informed of this at that time.

- [29] On 12 February 2001 Mr Bruce McCallum was appointed Manager of CISCL and CISCHL. The appointment was by the shareholders of CISCL and CISCHL and by the CIG as guarantor of the bank financing facility. The conditions of the appointment were prepared in consultation with Mr Kevin Carr and signed as accepted by Triad and Taio.

- [30] After Mr McCallum concluded that CISCL was “hopelessly insolvent and on the point of collapse” proceedings were brought to liquidate both CISCL and CISCHL. On 7 May 2001 both companies were placed into liquidation and Mr McCallum was appointed provisional liquidator.

- [31] On 25 April 2001 Mr McCullagh was appointed liquidator by resolution of the first Defendant, and on 4 May 2001 was likewise appointed liquidator of the second and third Defendant. A disagreement developed between Messrs McCallum, McCullagh and the directors of Triad as to which of the assets and liabilities of the Defendant companies were transferred to the Plaintiff pursuant to the Agreement.

The High Court Judgment

Illegality

- [32] The Chief Justice began by noting that the Act provided that the Illegal Contracts Act 1987 had no application but also that nothing in the Act limited or affected any rule of law relating to restraint of trade not inconsistent with any of

the provisions of the Act. He concluded that the question fell to be decided under the common law and it was a question of illegality by statute. He held that the statute made it clear that in any 'contract or covenant which was in contravention of the Act was unenforceable but that did not mean it was void *ab initio*. It was also noted that the illegal part of the consideration of the contract could be severed from the rest of the consideration and a legal promise enforced.

[33] As to illegality it was held:

"In this case the Plaintiff as liquidator is seeking to exercise his right in the liquidation in recovering the property of the company. To prove what is the property of the company, he is relying on the agreement for sale and purchase. That agreement for sale and purchase is on its face legal. The Government is not a party to it. There is nothing in the agreement which refers either directly or indirectly to any Government policy about shipping or anything else. It is a simple and straightforward sale and purchase agreement in which a number of companies transfer their assets to a new company. The claim that is brought by the liquidator is unaffected by any possible illegality that may have arisen between the Government and the vendors."

[34] Dealing with the alleged joint venture, the Chief Justice made the crucial finding that any arrangement for exclusivity was no longer operative at the time of the agreement:

"It is alleged that there is a joint venture - a joint venture which involves a policy or an intention on the part of the Government to take steps which would have been unlawful in that they would have created a monopoly or unfair competition or practice contrary to the policies and provisions of the International Shipping Act. The policy was not carried out and indeed the Government took early steps to withdraw from such an arrangement. In any event at the very beginning of this arrangement the exclusive license was to form part of a consideration for the Government's participation in the transactions. But in fact the Government's participation was reduced to a very small amount in comparative terms by writing off a Triad debt and in circumstances in which the Government took no advantage or consideration in the control or voting or dividends apart from the return of a lump sum. Whatever may have been the original intention of the parties, by the time the arrangement and discussions reached the point of the formation of the company and the entry into the agreement for sale and purchase, the illegal purpose or intention was no longer a moving part in the transaction. That is confirmed by the absence of any form of condition or term by which the Government might have been bound or purported to be bound in the matter. ... In my judgment the claim of illegality fails." (underlining added)

Mistake

[35] The Chief Justice next turned to the question of mistake and the assertion that "the parties were equally mistaken as to a fundamental element of the contract, that is to say that there would come into being an exclusive licence. In all cases

of mistake the underlying question is what is the contract between the parties.” After dealing with the leading authorities of *Rose v Pim* [1953] 2QB 450 and *Bell v Lever Brothers* [1932] AC 161 the Chief Justice concluded:

“This is not a case where the subject matter of the contract has disappeared or is non-existent. It is a case where it is alleged a state of affairs was to come into effect and that was the understanding of the parties. Again as I have said under the heading of illegality, the Cook Islands Government is not a party to the contract. There is nothing in the contract agreement for sale and purchase which refers directly or indirectly to this question and I have noted already the change in the negotiations and discussions and the terms of the contract which have been agreed to. It is a case in my view where there is no room for an implication that in the absence of any express terms that the parties, that is to say the Plaintiff and the Defendants, were pursuing their arrangement and coming to terms on a fundamental basis that there was to be exclusivity of licensing.

There is another reason that prevents the Defendants from succeeding and that is because they have raised their claim too late. ... In this case the Defendant certainly knew in or about October 2000 that the Government was not going to proceed with the policy which they thought had been accepted. The Government as I have noted rescinded the relevant part of the earlier cabinet decision and made it clear that it was not going to grant any exclusive license. The Defendants through the Plaintiff continued to operate undertook voyages, obtained guarantees of payment of the various requirements of the charter party, and carried on trade. It is now too late for them to rely on this alleged mistake having accepted the state of affairs as it turned out.”

Transfer of Assets

- [36] Finally, the Chief Justice dealt with the issue as to the extent of the assets and liabilities which were transferred to the Plaintiff under the Agreement. He concluded that all the assets and liabilities of CINLAL including its debtors and creditors became debtors and creditors of the Plaintiff and that the inter-company debts due to and by the Plaintiff and by and to the Triad Group at the date of settlement also became assets of the Plaintiff.

The International Shipping Act

- [37] The object of the ISA is to “promote fair dealing and to safeguard competition in Cook Islands international shipping services, and to maintain normal control of Cook Islands international shipping services by encouraging the ownership and operation of Cook Islands owned and operated ships.”
- [38] The Act includes many features similar to the Commerce Act 1986 (NZ) and it is apparent that it has been modelled in part on that Act. In relation to anti-

competitive practices it defines “agreement” expansively as including “any contract, arrangement, or understanding whether formal or informal and whether express or implied ... and an agreement or such other contract arrangement or understanding that is not enforceable by legal proceedings, whether or not it was intended by any party to it, to be so enforceable;...”. The opening words are redolent of the language of sections 27(1) and 30(3) of the Commerce Act.

[39] Part III deals with anti-competitive and unfair practices. For present purposes sections 4 and 7 are pertinent:

“4. Covenants, substantially lessening competition prohibited:

1. No person, either on his own or on behalf of an associated person, shall in the Cook Islands or elsewhere:

(a) require the giving of a covenant; or

(b) give a consent,

that has the purpose, or has or is likely to have, the effect of substantially lessening competition in Cook Islands international shipping service. ...

7. Contracts, arrangements or understanding substantially lessening competition prohibited:

1. No person shall, in the Cook Islands or elsewhere:

(a) enter into any agreement containing a provision; or

(b) give effect to a provision of an agreement,

that has the purpose, or has or is likely to have the effect, of substantially lessening competition in Cook Islands international shipping service.

2. No provision of an agreement, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in Cook Islands international shipping service is enforceable.

[40] Section 16 provides that nothing in the Act limits or affects any rule of law relating to restraint of trade not inconsistent with any of the provisions of this Act, and that the provisions of the Illegal Contracts Act 1987 shall have no application to any agreement made in contravention of this Act.

[41] Section 17 deals with the jurisdiction of the High Court to impose pecuniary penalties for breach and section 18 provides that injunctions and/or damages may be granted by the Court for contravention of Part III.

Submissions for the Appellants

[42] For the first and third Appellants Mr Fardell QC and Mr Morris submitted that the appeal raised three essential issues:

- “whether the Agreement for Sale and Purchase, (the Agreement) between various companies in the Triad Group and CISCL that purportedly vested in CISCL the shipping and maritime services businesses (including liabilities) then operated by the various Triad businesses was void ab initio, as in breach of ss 4, 7 or 8 of the International Shipping Act 1999 (ISA);
- whether in the circumstances, there was an operative common mistake between the parties, which rendered the Agreement void from its inception;
- the status of certain inter-company balances. ...”

[43] In broad terms, it was submitted that His Honour’s determination that the Agreement survived the prohibitions imposed by the ISA, as it was legal on its face, was wrong. The further finding that any illegality arose in relation to the separate dealings between the Cook Islands Government and the vendors was irrelevant to the validity and enforceability of the Agreement.

[44] In relation to the findings regarding the applicability of the ISA, it was submitted that His Honour had failed to apply correctly and give due consideration to the proper scope and operation of sections 4 and 7. Those provisions proscribed either the giving of a covenant (section 4) or the completion of an Agreement (section 7) that had the purpose, or has or is likely to have the effect, of substantially lessening competition in the Cook Islands International Shipping Service. The Agreement was the means by which the parties gave effect to the exclusive licence or monopoly that the Government had indicated it would grant and which was the whole premise upon which CISCL was established. These submissions did not assert that there was an illegal covenant or agreement in the Agreement itself but appeared to proceed on the basis that the Agreement was part of some wider compact under which the Government would in due course provide a position of exclusivity for CISCL in terms of supply licences. It was irrelevant that the Government was not a party to the Agreement or that the Agreement had independent operation. The very fact that the Agreement was the means by which the shipping and maritime services business was transferred to CISCL for the purposes of implementing the

monopoly meant that the Agreement ran foul of sections 4 and 7 of the ISA and was void from the outset.

[45] Mr Fardell QC's detailed written submissions on illegality included the following:

- “ the Agreement was illegal, as in breach of ss 4, 7 & 8 of the ISA;
- the Agreement was therefore unenforceable and no-one could give effect to it: s 7 (b) and (2) of the ISA;
- it is not possible to grant any relief under the Illegal Contracts Act 1987, as that Act has no application in the circumstances: s 16 (4) of the ISA;
- there is no scope for severance. The whole of the Agreement is illegal and is unenforceable in its entirety;
- as the whole of the Agreement is illegal and has no effect, no interest in any property, which is the subject-matter of, or the consideration for, the Agreement passes. The liquidator of the Appellants can reclaim the assets, which were transferred to CISCL for the purposes of establishing the new shipping business/service, which was illegal from the outset;
- to the extent that it is now not possible to retransfer the assets back to the liquidator of the Appellants, compensation issues arise under s 18 (2) of the ISA.”

[46] It is to be noted from the underlined passages in these submissions, that Mr Fardell QC referred repeatedly to the whole of the agreement being illegal. As will be discussed in greater detail below this misreads an important aspect of the statute which focuses only on anti-competitive provisions of contracts, arrangements or understandings.

[47] Mr Fardell traversed the factual narrative and emphasised that there could be no doubt that an agreement, arrangement or understanding between the Government and Taio and the Triad representatives was concluded on 26 July 2000 when the Cabinet established the new Government Shipping Policy. The Court agrees with this submission. This was indeed the conclusion of the Chief Justice. As discussed below, the question is rather the nature of the agreement arrangement or understanding and whether it endured.

[48] In relation to the common mistake claim strong reliance was placed on the decision of the English Court of Appeal in *Great Peace Shipping Limited v*

Tsavliris Salvage (International) Limited [2002] 4 All ER 689 which it was acknowledged had not been cited before the Chief Justice.

- [49] As to the inter-company balances heavy emphasis was placed on “the direct and unchallenged evidence concerning the relevant factual matrix from Mr Brannigan’s brief of evidence ...” to the effect that inter-company balances were not to be transferred to the Respondent. Mr McCallum’s reply evidence was said to be largely inadmissible. It was little more than a submission and involved him opining on the effect of certain documents and the subjective intention of the parties.

- [50] The Chief Justice had erred in not analysing the relevant factual matrix evidence bearing on the issue of whether the inter-company balances were to transfer as part of the shipping and maritime services business under the Agreement. Mr Brannigan’s evidence confirmed that the relevant parties had reached a common assumption that these balances would not so transfer.

- [51] Mr Finnigan for the fourth and fifth Appellants endorsed and supported the submissions for the first-third Appellant and emphasised that from Triad’s perspective, the “illegal purpose or intention” namely the issue of the exclusive licence to the National Shipping Service was, and remained, a primary moving part of the transaction until after the date upon which the Agreement was entered into.

- [52] As to whether the illegal purpose was still operative when the contract was signed it was submitted that save for the filing of particulars of a contract relating to shares which was filed towards the end of September CISCL and CISCHL were incorporated and ready to commence business by 1 September 2000. By that stage the Cook Islands Government had done nothing and had conveyed nothing to Triad and had not resiled from its Cabinet decision to provide exclusivity of licence.

- [53] Mr Finnigan submitted that the Solicitor-General’s cautionary advice, which ultimately lead to the Cook Islands Government “backing off”, was not copied to Triad and it was only in early October 2000 that the Triad principals’ learnt

that the Minister might be having second thoughts in proceeding with the Cabinet decision. This was the reason why the solicitor for the Triad principals, Mr Arnold, had written to the Minister in strong terms on 6 October. On the legal issues relating to illegality it was emphasised that there was no provisions in the Act which afforded the Court any statutory jurisdiction to enforce, vary or modify any such illegal agreement.

- [54] Under common law principles the illegal agreement could not be saved under severance principles. It was strongly submitted that it could not be permitted because the offending provisions were inextricably interwoven with the other promises. On mistake the submissions of the first to third Appellants were adopted and on inter-company debts similar submissions were made.

Submissions for Respondent

- [55] For the Respondent Mr Sullivan supported the Chief Justice's finding that the illegal intention was no longer a moving part of the transaction. He submitted that, although the facts showed that the granting of exclusive licence was at one point to form part of the contractual arrangements, the Government never agreed to be bound in this respect. The Government policy granting an exclusive licence was not an integral part of the agreement reached. Any claim in respect of the change of policy and/or the alleged representations should be brought against the Cook Islands Government direct. The Agreement was a stand alone agreement. The Act did not provide a remedy for the Appellants because any legal purpose was not carried out. The Government revoked its policy, and it was entitled to do so. The directors of the Appellant companies chose to enter into the Agreement and took a commercial risk that the Government might not follow through with its policy. There were a number of other reasons why the transaction was continued, including the benefit of the Government's credibility by association, tax advantages of restructuring, the severe financial crises of the Cook Islands National Line, and operating efficiencies. It was noted that the entering into of the agreement lead to Government input into the companies by the way of guarantees or loans.

- [56] It was submitted that there was no consideration given for the granting of an exclusive licence. Even if the entire agreement was unenforceable that did not mean it was void *ab initio*. Common law principles allowed the passing of title to be valid even if it was based on an illegal agreement.
- [57] As to mistake, any alleged mistake was a mistake as to future intention but even if it were the mistake as to present fact it was not fundamental to the Agreement since both parties received that for which they bargained. The performance of the agreement was also not impossible as the Cook Islands Government could have passed legislation to revoke the Act but did not do so.
- [58] In any event delay prevented the invocation of the principles of mistake. After the Agreement had been completed a number of voyages occurred, bank accounts were opened, and trading continued for 6 months. The Appellants had numerous opportunities to seek to avoid the contract once it knew that the Government was not going to grant an exclusive licence. They chose not to do so.
- [59] As to the inter-company balances it was noted that the findings of the Chief Justice were not challenged in the Notice of Appeal. In any event, the findings were entirely correct and all assets and liabilities of the trading and the shipping of maritime businesses were to transfer.

What was the Nature of the Original Agreement, Arrangement or Understanding and was it Still in Existence at the Time the Agreement was Signed?

- [60] The crucial issues therefore are the precise nature of the agreement, arrangement or understanding and whether the Chief Justice was right to find that by the time the contract was entered into it was no longer extant. As to the precise position between the parties concerning the anticipated exclusivity the Chief Justice seems to have regarded this as an “arrangement”. This may be seen by reference to his statement that “at the very beginning of this arrangement the exclusive licence was to form part of a consideration for the Government’s participation in the transactions”, and at the later reference to “a written contract and other written arrangements”.

[61] In addressing this issue and reviewing the facts it is appropriate to refer briefly to the authorities as to the legal nature of arrangements and understandings and the extent to which it is possible unilaterally to withdraw from such informal relationships.

[62] A useful summary on agreements, arrangements or understandings is found in *Hayden Trade Practices Law (2001)* at 4-6651 which deals with a similar language in sections 45-45(c) of the Trade Practices Act 1974 Australia. The learned author says that the provisions:

“... extend beyond formal contracts and covenants to informal understandings. Even without trade practices laws, firms prefer to conceal restrictive arrangements between themselves because of a fear of customer or public antagonism. The desire to conceal may lead the parties to conclude an arrangement which is not legally binding. Certainly where collusion is illegal they may seek to reach understandings in what are conceived to be non-detectable forms which again will usually produce relationships without legal force.”

[63] There have been various detailed formulations as to the elements of the consensus or meeting of the minds necessary to constitute an arrangement or understanding. As *Hayden* says, the authority most frequently cited in Australia for the meaning of the word “arrangement” is the Privy Council’s advice in *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 7:

“Arrangement is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons – a plan arranged between them which may not be enforceable at law.”

The concluding phrase is apposite in the present case since the implementation of a new National Shipping Service to which exclusivity would be granted necessarily involved a change in legislation and the refusal to renew existing licences. The Government was not in a position to contractually agree to such a plan, nor would it necessarily wish to make an irrevocable commitment to implement it. There were too many uncertainties along the way including the possible refusal of Parliament to assent to the passage of the necessary legislation.

[64] The observations of Diplock LJ in the *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* (1963) 1 WLR 727 case are also often quoted. The notion of arrangement:

“... involves a meeting of minds because ... it has to be an arrangement between two or more persons and since it must be an arrangement under which restrictions are accepted by two or more parties it involves mutuality and that each party, assuming he is a reasonable conscientious man would regard himself as being of some degree under a duty whether moral or legal to conduct himself in a particular way or not to conduct himself in a particular way as the case may be, at any rate so long as the other party or parties conducting themselves in a way contemplated by the arrangement.”

- [65] Even though under the UK legislation there was a need to prove a restriction accepted by two or more parties, the statement remains useful. It was cited by Salmon J in *Commerce Commission v Caltex New Zealand Limited* 9 TCLR 305 at 314-315 where reference was also made to other New Zealand authorities. Salmon J said:

“Arrangement or understanding

In *NZ Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257; (1991) 3 NZBLC 101,946 (PC) the Privy Council said (at p261; p101,949):

“‘Arrangement’ is a perfectly ordinary English word and in the context of s 27 involves not more than a meeting of the minds between two or more persons, not amounting to a formal contract, but leading to an agreed course of action.”

And in *NZ Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731; (1990) 3 NZBLC 101,501 Tipping J said (at p765; p101,530):

“To bring s 27 into play there must I would have thought be some meeting of minds between the parties to the alleged contract, or arrangement or understanding.”

I accept Mr Turner’s submission that mutuality or a meeting of the minds is therefore an essential ingredient of an arrangement or understanding.”

- [66] The most authoritative pronouncement on this topic is the very recent judgment of the New Zealand Court of Appeal in *Giltrap City Limited v Commerce Commission and MacKenzie* CA236/01 CA 40/02, CA 41/02, 5 November 2003. There the Court of Appeal (Gault P, Tipping and McGrath JJ), upheld the High Court conclusion that Giltrap and its chief executive Mr MacKenzie had entered into a price fixing arrangement in breach of section 27 through the participation of Mr MacKenzie in a regular monthly meeting of eight Toyota dealers.
- [67] In the joint judgment of Gault P and Tipping J the following statements were made as to the nature of “arrangements” under section 27:

“The Judge’s approach to the law

[10] In her judgment Glazebrook J examined the legal nature of an arrangement for section 27 purposes. First she identified a need for “mutuality”. That term has been used in the past in the sense of a meeting of minds. Relying on the judgment of Diplock LJ in *British Basic Slag Limited v Registrar of Restrictive Trading Agreement* [1963] 1 WLR 727 at 746-7 the Judge held that it was sufficient to satisfy the requirements for mutuality that an arrangement be “morally binding only”. This was in contrast to legally binding. She observed that this appeared to be an objective standard rather than an inquiry “into the subjective intentions of the parties”.

...

[12] Glazebrook J went on to observe that this suggested the question was not whether Mr MacKenzie considered himself under a moral obligation to the other dealers but whether a reasonable and conscientious man would have so regarded himself.

[13] ... the Judge next observed that there was some authority which suggested that mutuality was not in any event an absolute requirement. She cited the judgment of Fisher J in *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No. 2)* (1979) 40 FLR 83, 89. She also cited the decision of the Full Court of the Federal Court which dismissed an appeal from Fisher J's decision, the case being reported as *Morphett Arms Hotel Pty Ltd v Trade Practices Commission* (1980) 30 ALR 80. Finally the Judge mentioned the decision of this Court in *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450.

Arrangement - discussion

[14] Having considered the submissions on both sides of the issue, we have come to the view that, although the Judge's approach to the existence and proof of an arrangement for section 27 purposes was properly based on previous articulations of the appropriate test, it can usefully be put rather more simply, at least for the purposes of this case. It is therefore necessary to develop the topic a little further before examining the facts of the present case.

[15] We do not consider it appropriate to be tied in any determinative way to the concepts of mutuality, obligation and duty. While the concept of moral obligation is helpful in that it will often reflect the effect of an arrangement or understanding under section 27, the flexible purpose of the section is such that it is best to focus the ultimate inquiry on the concepts of consensus and expectation. A finding that there was a consensus giving rise to an expectation that the parties would act in a certain way necessarily involves communication among the parties of the assumption of a moral obligation.

...

[17] Before there can be an arrangement under section 27 (or for that matter an understanding) there must be a consensus between those said to have entered into the arrangement. Their minds must have met – they must have agreed – on the subject matter. The consensus must engender an expectation that at least one person will act or refrain from acting in the manner the consensus envisages. In other words, there must be an expectation that the consensus will be implemented in accordance with its terms. If no specific action or inaction is envisaged on anyone's part, it would be difficult to find an arrangement under section 27, if only for want of the existence of the necessary purpose or effect of substantially lessening competition.

[18] We therefore consider that the question whether a particular person entered into an arrangement or arrived at an understanding under section 27 should be answered by asking whether that person was part of a consensus giving rise to an expectation that some proscribed action or inaction take place. If they were, they will have entered into an arrangement....

Proof of an arrangement

[19] It is desirable to say something at this point about how the necessary consensus is established. In this case there is no doubt that there was a

consensus between the others present at the crucial meeting on 3 June 1993. The essential question is whether Mr MacKenzie was part of that consensus. There is an analogy between proving the existence of a contract for contract law purposes, and proving the existence of a consensus for section 27 purposes.

[20] Most contract law textbooks speak, and for many years have spoken of "the phenomena of agreement": see for example Burrows Finn & Todd, *The Law of Contract in New Zealand* (2nd ed, 2002), chapter 3 of which is so entitled. At page 35 of their work the learned authors aptly point out that the concepts of assent and agreement, which underpin the law of contract, do not involve an examination of the actual state of mind of the parties but rather whether the necessary assent or agreement can be inferred from their conduct. The parties are to be judged not by what was in their minds but by what their conduct leads reasonable people to believe was in their minds. If a reasonable person would believe from your conduct that you are assenting, the law of contract will regard you as having assented. External appearances govern the inquiry, not undisclosed thoughts.

...

[23] Section 27 is concerned with and designed to cover contracts in the strict sense, as well as arrangements and understandings. It is therefore appropriate and in accordance with the policy and purpose of the section to adopt the same approach to proof of arrangements and understandings as that taken with contracts and analogous issues. The existence of the necessary consensus is therefore to be judged by reference to what reasonable people would infer from the conduct of the person whose participation in the consensus is in issue...." (Underlining added.)

Again, the idea of a meeting of minds not amounting to a formal contract but leading to an agreed course of action fits well into the circumstances of this case.

- [68] The Court considers that the element of future exclusivity is most aptly described as an arrangement or understanding. Even before the advice was received from the Solicitor-General that the Government's intention to create exclusivity was illegal there were good reasons why the matter should proceed by way of an informal arrangement or understanding. First of all, as in fact happened, there was a strong possibility of adverse public and political reaction if the Government's intentions were publicised. This may explain the rather nebulous press release of the Minister of Transport and Shipping Dr Woonton on 27 July 2000 which carefully avoided mention of any explicit intention to create a monopoly for the new National Line. Secondly the question on the exclusivity was connected to the formation and implementation of the new Government's shipping policy which had been announced by the Minister but which was plainly in its early stages. The relevant part of the Cabinet minute of 27 July 2000 was never reduced into contractual form with the Appellants no doubt because it represented a policy which was not immutable, which was yet to be implemented, and which might at any stage have to be changed. All of

these considerations pointed to the appropriateness of an informal arrangement or understanding.

[69] The same considerations lead this Court to conclude that there was never any binding contractual promise by the Government to provide exclusivity. The parties proceeded throughout on the basis of an informal arrangement or understanding that the Government would provide exclusivity. The Appellants, as they pleaded, “anticipated” the provision of an exclusive shipping licence but they never sought to convert the expectation into a binding contractual promise, doubtless because they were sufficiently versed in the art of politics to know that there was little or no chance that the Government would tie its hands for the future in that way. The Chief Justice was therefore right to emphasise, in the passage from his judgment cited above, “the absence of any form of conditions or term by which the Government might have been bound or purported to be bound in the matter”.

[70] As to the plea that the Government had “covenanted” to provide an exclusive shipping licence, there is simply no evidence to establish this contention. Unlike the New Zealand Commerce Act the ISA contains no definition of covenant. In section 2 of the Commerce Act 1986 covenant is defined as meaning “a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land)”. The word thus conveys a promise annexed to or running with an estate or interest in land. It is impossible to discern in the agreed statement of facts or the other evidence anything remotely resembling a “covenant” of this character.

[71] We now turn to the critical question as to whether the arrangement or understanding was extant at the time the Agreement was executed. In relation to all elements of this question the onus of proof lies on the Appellants. While the standard of proof is the civil standard, since a finding in favour of the Appellants necessitates the conclusion that a contravention occurred because the Governmental participants did not withdraw from the arrangement, the proof must be adequate. In *ARA v Mutual Rental Cars* [1987] 2 NZLR 647 at 660, Barker J said:

“Onus of Proof:

I agree with the submissions of Mr Johnston that proof of the contravention of any of the sections of the Act relied upon by Budget can have serious consequences for Avis in view of the substantial penalties and damages envisaged. Consequently, when applying the civil standard of proof, regard must be had to the gravity of the issues involved and a high degree of probability is required. *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 266 and (in the Australian Trade Practices context) *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* (1982) 4 ATPR para 40-327.” (Underlining added)

- [72] In approaching this question the first matter requiring proof by the Appellants is the date upon which the Agreement was entered into. The pleadings and evidence were vague on the point, doubtless because the Agreement itself was undated.

- [73] The Statement of Claim, para 9 asserted the Agreement was entered into “in or about September 2000”. The first to third Defendants admitted this allegation. The fourth and fifth Defendants also admitted the para 9 allegation but in their alternative defences asserted that the Agreement “was signed on or about 30 August 2000”.

- [74] The Agreed Statement of Facts recited that “at the end of August, an undated agreement was signed by Vaile and/or Ellis ...” Mr Ellis deposed that he and Mr Josia Taio signed for CISC. No evidence from Mr Taio was adduced. Mr Ellis asserted in his affidavit that the Agreement was signed “toward the end of August 2000”. August 31 was a Thursday. The fairest approach is to take September 1 as the critical date.

- [75] Before examining the evidence as to the position on September 1 it is necessary to examine the authorities as to what is required for a valid withdrawal from an arrangement or understanding.

- [76] Parties are free to withdraw from any arrangement or understanding or to act inconsistently with it notwithstanding their adoption of it. Thus in *Federal Commissioner of Taxation v Lutovi Investments Pty Limited* (1978) 140 CLR 434 at 444 in the context of an “arrangement” under the Australian Income Tax legislation Gibbs and Mason JJ said:

“But in our view it is not essential that the parties are committed to it or bound to support it. Any arrangement may be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it notwithstanding their adoption of.”

[77] As a matter of principle therefore it is possible for there to be unilateral withdrawal from such informal agreements, arrangements or understandings. The joint judgment of Gault P and Tipping JJ in the Giltrap case is also pertinent. Although the Court did not have to consider the issue of withdrawal from the arrangement, its statements of principle in paragraph 20 cited and underlined above, stressing that assent to an arrangement is to be judged by what reasonable people would infer from the conduct of the person whose participation in the arrangement is an issue, must apply equally to the conduct of a person or persons whose withdrawal from the arrangement is an issue. The parties are to be judged not by what was in their minds but by what their conduct leads reasonable people to believe was in their minds. External appearances govern the enquiry, not undisclosed thoughts.

[78] Mr Fardell accepted that the question as to whether the agreement, arrangement or understanding was still extant at the material time was to be decided essentially on the basis of the contemporaneous documents rather than the subsequent statements of the parties. We add that it also depends on the conduct of the parties. Supporting his thesis that the arrangement continued until October 2000 he relied strongly on the fact that the Government did not change course until Tuesday 10 October when it rescinded clause 5 of the July 2000 Cabinet approval to CM(00)219. He referred to the fact that, almost a month before, the Prime Minister had sent a “letter of comfort” to Mr Brand which had reassured the Defendants that the Government was committed to proceeding. It was therefore impossible to suggest that the arrangement or understanding was not in force when the Agreement was signed.

[79] We have carefully considered this submission. Turning to the critical question as to whether the expectation endured, we find on the evidence the Appellants have not proved that the arrangement or understanding was extant at the time that the agreement was executed. We consider that the proper inference to be drawn is that taken by the Chief Justice, namely that by the time the agreement

had been signed the Government had backed off the policy and resiled from the arrangement.

- [80] The analysis should start with the background circumstances in mid-August 2000 relating to the Government's new shipping policy. The evidence shows that as early as Wednesday 16 August 2000 the Cook Islands News carried a front page article headed "Shipping and Politics Part II" which stated inter alia:

"Government yesterday tied up local and international shipping for its political supporters after announcing a new policy on the industry.

The policy is the latest of several flip-flops over shipping since the present coalition took office in November last year ...

... Express Cook Islands Line (EXCIL) has been heartened to receive assurances from the prime minister and the shipping minister that the company will retain its international shipping licence.

That's according to EXCIL Director Brett Porter last night in a statement to Cook Islands News."

- [81] On Saturday August 19 the Cook Island News carried another front page article headed "Shipping Policy Illegal said Bishop – CIP Plan Court Case if Monopoly Goes Ahead". It began with a statement that:

"Opposition transport spokesman MP Teina Bishop is waiting for the coalition to form the shipping monopoly it has promised to under a new policy. Then he says he is taking the Government to Court. 'First thing is that their policy is illegal and Government is liable if they are part of this scam that's trying to kill competition and international shipping, Bishop told Cook Island News. The International Shipping Act allows the Courts to fine companies or similar corporate bodies up to \$500,000 for actions that lessen competition.' This shipping policy is illegal under the Act which this Government passed in November last year. It was their first piece of legislation which at the time appeared to protect Triad Maritime but is now going to protect EXCIL."

- [82] A further article on Wednesday 23 August 2000 under the heading "Government to Avoid Regional Shipping Monopoly" quoted Dr Woonton as "defending a coalition decision to cancel licences for two of the countries four shipping companies and go into business with the remaining two". The same front page article also stated that "a foreign secretariat trade official has advised Government that its new shipping policy is contrary to what other Pacific states are already implementing."
- [83] An article on Saturday 26 August provided "a recap of recent events in the shipping industry" and stated in part that "legal opinion is that Government may

have already breached its own International Shipping Act by conspiring with rival companies to adversely affect the operations of Nautilus Shipping and EXCIL". In the context of this small Cook Islands community the articles reveal that the new shipping policy established by the Government on 26 July and the issue of its legality were being vigorously debated and that legal opinions had already been taken. Mr Ellis in his affidavit evidence before the High Court confirmed this in stating that:

"After the public announcement of the new shipping policy and the proposed shipping corporation, there was tremendous lobbying and publicity by the EXCIL group and their supporters."

- [84] In reviewing these developments it is important not to lose sight of the fact that what counts is the conduct of the Government, speaking and acting through Cabinet, and not the views or actions of individual ministers. As noted above, a paper on the proposed functions of CISCL came before the Cabinet on 29 August 2000. It had been prepared by Mr Brannigan and was submitted by the Prime Minister. Mr Brannigan had been retained by Messrs Vaile and Ellis directors of the Triad group on 13 August to act for the Triad group and "attend to the corporate architecture" required to implement the new policy. The evidence of Mr Ellis and Mr Brannigan confirms that on the 29th of August Mr Brannigan appeared before the Prime Minister, Cabinet, Caucus and officials of the Cook Islands Government and described the corporate structure to Cabinet and Caucus. The paper noted a proposed corporate structure that had been developed by Mr Brannigan and recorded that CISCL, the operating company, would "enter into purchase agreements with various Triad companies to purchase the various assets, liabilities and businesses and operating networks as a going concern". This supports the view that as at 29 August 2000 the Agreement had not been signed. The paper also stated that "the entire restructuring has been predicated upon Cabinet policy of restricting international and domestic shipping consents to this company and Taio Shipping respectively". One member of the Caucus was an aunt of two of the principals of EXCIL. She had been briefed in some detail, presumably by her nephews who were in opposition to the new shipping policy, as it would result in their licence not being renewed. Mr Brannigan's evidence was that the very issue of renewal was debated vigorously at the Cabinet meeting.

[85] Although not mentioned in the Agreed Statement of Facts the evidence shows that the Cabinet paper concluded with the five “Recommendations as to Future Actions/Decisions Required to Implement New Shipping Policy” as follows:

- “1. Cabinet to approve the corporate structure above and to authorise CISCL to proceed with transactions necessary to complete the arrangements.
2. Cabinet to approve the directors of the company discussing potential investment with some individual Cook Islands importers associated with EXCIL.
3. Cabinet to approve of the Minister of Shipping granting approval to an EXCIL vessel to trade between New Zealand and the Cook Islands up to the 30 November 2000 but no longer.
4. Cabinet to agree in principal to either repeal in full or amend as advised the International Shipping Act 1999 and/or the Shipping License Ordinance 1963 in order that the new shipping policy can be implemented.
5. Cabinet to reaffirm that at the expiry of the current domestic and international approvals given to Nautilus Shipping there will be no renewal or extension of such approval.”

The fourth recommendation assumed correctly that the arrangement for exclusivity could not be carried into effect unless the legislation was amended or repealed. Recommendation 5 referred only to Nautilus. This no doubt was tied to Recommendation 3 which envisaged that EXCIL might be brought “into the fold”. Thus the reaffirmation called for under 5 referred only to the elimination of Nautilus Shipping. The qualified reaffirmation being called for was, of course, the explicit statement in point 5 of the Cabinet approval 26 July 2000 that the licence that the licences of EXCIL shipping and Nautilus would be terminated when they came up for renewal. The promised exclusivity was wholly dependent upon such action.

[86] The decision of the Cabinet was to “defer the paper by Cabinet until further meetings have been conducted with interested parties”. In other words, reaffirmation did not occur. Among the issues noted by Cabinet were:

- “3. EXCIL will be invited to join the shipping company and if they do and invest a ship into the company, the above structure of shares could be altered.”

This conveys that rather than terminating EXCIL’s licence its ship might become a part of the proposed CISCL operation. It also shows that the EXCIL lobbying

against the Government's new policy was already having an effect. The Government had moved away from the original concept of exclusivity.

- [87] At about the same time Mr Vaile or Mr Ellis¹ and Mr Brannigan had a separate meeting with the Prime Minister. They said that a matter had arisen in short notice which concerned Dr Brand the supplier of the proposed new CISC vessel. Dr Brand had become uncertain as to whether his vessel was going to be used for the new shipping line because he had seen that EXCIL had been given a three month licence and he knew that EXCIL, through a nominee, had been trying to charter his ship. It should be recorded that the Cabinet paper of 29 August had referred to the fact that Mr Vaile had chartered a vessel and had stated that "one of the principals of the firm which owns this vessel is in Rarotonga to meet with Government on both shipping and other matters". The fact that Dr Brand had learned that EXCIL was to be granted approval to trade between New Zealand and the Cook Islands up to 30 November 2000 signifies that both Dr Brand and Messrs Ellis and Brannigan were "up with the play" as to the developments at and following the Cabinet meeting on Tuesday 29 August. The note by Messrs Ellis and Brannigan records that Dr Brand was "not sure of Government policy anymore" and "what will satisfy Dr Brand is a reaffirmation of what Government policy is ... so he is looking for some comfort that Government policy remains the same." He needed "a short letter from Government addressed to Dr Brand confirming – "something along the lines of here's a copy of the Cabinet Minute, I confirm this remains Cabinet's policy." The language of reaffirmation is significant in view of the similar wording in the Cabinet paper on 29th of August which was prepared by Mr Brannigan. The sequence of events described above suggests that the request for the comfort letter may have followed the Cabinet meeting on 29 August. If that is so it lends support to the thesis that Government had resiled from its exclusivity policy on August 29.

- [88] To return to the requested letter of comfort it was some time in coming. It was eventually written on 11 September. It was preceded by a letter from the Solicitor-General of 7 September set out in paragraph [25] above, which made it

¹ The agreed Statement of Facts says it was Mr Vaile and Dr Brand as does the affidavit of Mr Ellis: the notes of the meeting say it was Mr Ellis and Mr Brannigan.

very clear that any grant of exclusivity by the Government would be in breach of the Act. As a result the comfort letter of 11 September made no mention of the termination of the licence as originally provided for in clause 5 of the July 26 Cabinet Minute. It simply said that there would be a “review of shipping licences of companies currently providing an international service to the Cook Islands, as and when these expire and come up for renewal”. The letter also noted that as part of that shipping policy Government intended to review the Act in the near future.

- [89] On 10 October Cabinet rescinded clause 5 of Cabinet’s July 26 approval and extended the shipping licence of EXCIL for a period of six months. The Solicitor-General was directed “to write to the two National Shipping Line managements, EXCIL and Nautilus Shipping explaining the steps the Government is taking”.
- [90] On the basis of the evidence we have summarised in paragraphs [79] – [89] above we affirm the conclusion of the Chief Justice. The submissions of Mr Fardell and the agreed statement of facts did not give sufficient weight to the Minute of 29 August which refused to reaffirm the policy of exclusivity. Considered objectively the conduct of the Cabinet as reflected in that Minute, viewed in the circumstances prevailing at the time, indicated that the Government had retreated and abandoned its policy so far as exclusivity was concerned. If it be the case that the Appellants did not fully appreciate the changed situation until advised of the Cabinet Minute of October the 10th that is legally irrelevant. What counts is the behaviour of the Government.
- [91] We have noted that in affidavits sworn by Mr Brannigan and Mr Ellis in support of the application by the first and second Appellants for leave to appeal both asserted that it was never indicated at the Cabinet meeting on 29 August that the Government shipping policy of 26 July involving exclusivity of shipping licenses for the proposed joint venture had been changed. Several comments need to be made about these affidavits. First, Mr Brannigan’s affidavit focuses on the contents of the Cabinet paper but makes no mention at all of the Cabinet decision on that paper. Secondly, the view of Messrs Brannigan and Ellis that they did not consider the Government was in any way resiling from its

undertaking was said to be based on attitudes conveyed by the Prime Minister and Minister Woonton. As noted above, the real question is what was the position of the Cabinet acting collectively. Finally, the assertion by Mr Ellis that the earliest point of time of any indication from the Cook Islands Government that it might be resiling from its undertaking was not disclosed until some days after 10 October again does not take into account the actual results of the Cabinet meeting on 29 July. In short these untested opinions, articulated in support of applications for leave to appeal, are at variance with the objective evidence and are entitled to little or no weight in our consideration of the main issue.

- [92] We accordingly conclude that the Appellants have not satisfied the burden of proof which lay upon them to establish that the arrangement or understanding was extant at the time the agreement was executed. On the contrary, we find that the appropriate inference to be drawn from the relevant documents and conduct of the Government is that the original agreement or understanding was no longer in existence at the time that the Agreement was signed on 1 September 2000. On this basis it is not strictly necessary for us to decide the severance and mistake issues. However since extensive argument was addressed by all parties on those topics we will give our views on a hypothetical basis.

Mistake

- [93] In considering this matter it is first necessary to examine the principles expounded in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* 2000 24 All ER 689. In *Great Peace Shipping*, Tsavliris had been retained to salvage the vessel 'Cape Providence', which had suffered serious damage in the South Indian Ocean. The tug dispatched by the Defendants would take five or six days to reach the casualty. The Defendants therefore urgently needed a vessel to stand by to save the crew in the event of the 'Cape Providence' sinking prior to the tug's arrival. The Defendants were told by a weather forecasting service that the nearest vessel was the 'Great Peace', belonging to the claimants. The parties entered into a contract for the 'Great Peace' to provide the required escort/stand-by services. The cancellation fee was \$US82,500.

- [94] At the time of contracting, the Defendants and claimants both believed that the vessels were about 35 miles and a few hours sailing apart. In fact, they were 410 miles and 39 hours sailing apart. Upon learning this, the Defendants did not immediately cancel the contract. Instead, they searched for a closer vessel. Only after finding and contracting with a nearer vessel did the Defendants cancel the 'Great Peace'.
- [95] The claimants claimed the cancellation fee. The Defendants refused to pay, arguing that the contract was void in law or voidable in equity owing to a fundamental mistake of fact. Toulson J found for the claimants ([2001] All ER (D) 152 (Nov)) and the Defendants appealed. The Court of Appeal, after conducting an exhaustive review of the law relating to common mistake, rejected the Defendants' arguments and awarded the cancellation fee. The Court found that it "was unquestionably a common assumption of both parties when the contract was concluded that the two vessels were in sufficiently close proximity to enable the 'Great Peace' to carry out the service that she was engaged to perform". However, it held that the "fact that the vessels were further apart than both parties had appreciated did not mean that it was impossible to perform the contractual adventure". The Court found that the Defendants' unwillingness to cancel the contract until a nearer vessel had been found showed that they themselves had not believed that the services that the 'Great Peace' could provide were "essentially different" from those envisaged by the parties. The Court therefore held that the mistake did not render the contract void under the principle in *Bell v Lever Brothers*.
- [96] The Court of Appeal also explained that the doctrine of common mistake is based on a rule of law, and not an implied term in the contract. It requires a careful analysis of the contract to determine the "contractual adventure" that is alleged to be impossible, and applies only if unforeseen circumstances make performance of the contract impossible. Performance will be "impossible" if the performance that is possible is "something essentially different" from that agreed by the parties. The doctrine will not apply if, on a proper construction of the contract, one of the parties has warranted the existence of the assumed state of affairs or otherwise undertaken the risk that performance of the contract may

be impossible. Nor will it apply if the non-existence of the assumed state of affairs is attributable to the fault of either party.

[97] Mr Fardell submitted the first three elements were established on the present facts and the last two did not arise. There was clearly a case of common mistake, as clarified in the *Great Peace* decision since the parties proceeded on a false and fundamental assumption in that they proceeded to consummate the agreement in the mistaken belief that the necessary legislation would be passed to authorise the new shipping monopoly, the establishment of which comprised in part the agreement.

[98] We do not accept these submissions. We refer to our earlier holding that the parties contracted on the basis of an expectation that the new shipping policy, including exclusivity policy would be implemented. Recommendations 4 and 5 in the Cabinet paper of July 29 2000 prepared by Mr Brannigan acknowledged that legislative amendments would be required to enable exclusivity to be granted and that Cabinet would also have to refrain from granting any renewals to EXCIL or Nautilus. The Appellants proceeded to conclude the Agreement, taking the position that these events would come to pass. On this basis, and applying the *Great Peace* principles, it cannot be said that the contractual adventure or contractual proposal was impossible to perform or that the nature of the arrangement had changed unalterably. At the time of contracting there was still the possibility that the policy of exclusivity would be revived and indeed vigorous efforts were made thereafter, as witness the letter of Mr Arnold, to persuade the Government to carry out its original policy.

Severance

[99] If it is assumed, contrary to our findings, that (i) the original arrangement or understanding involved more than an expectation of exclusivity and (ii) that such arrangement or understanding fell with section 7(1) of the ISA and (iii) that it was still in existence at the time of the agreement, the question is whether the offending provision can be severed. In this respect it is first to be emphasized that the statute renders anti-competitive provisions unenforceable not the contracts, arrangements or understandings of which they form part. *Gault on*

Commercial Law page 3-79 states as follows, in relation to section 27 of the Commerce Act:

“The focus of section 27 on provisions rather than on the contracts, arrangements, or understandings themselves, suggest that the offending provisions can be struck down separately leaving the rest of the agreement intact. Section 89(6) addresses this question in terms of the enforceability of the provisions of the contract which are not in contravention. This subsection provides that the enforceability of such provisions are not to be effected by the existence of the contravening provisions.”

- [100] In our view the absence of the equivalent section 89(6) of the New Zealand Commerce Act from the Act does not detract from the fundamental point that section 7, and indeed all relevant parts of the Act, focus on provisions not on the agreements, arrangements or understandings themselves.
- [101] There are sound policy reasons for such a limited approach in the statute. Under all competition statutes the fundamental policy of freedom of contract is subject to extensive restrictions in respect of anti-competitive practices but there is no justification for striking down whole contracts, especially when the Court may not know what may be the wider ramifications of such an action. This point is highlighted in the present case by the fact that the Cook Islands Government was not a party to the Agreement, and also by the fact that even after the Government changed its exclusivity policy the parties implemented the contract and obtained benefits from it.
- [102] In this case the assumed illegal provision for exclusivity in the informal part of an overarching arrangement which also includes the Agreement can and should be severed from the Agreement. The element of exclusivity was certainly an important factor. However, as submitted for the Respondent, there were other elements of consideration which passed between the parties including the benefit of the Government's credibility “by association”, tax advantages, the alleviation of the severe financial position of the Cook Islands National Line and likely operating efficiencies.

Inter-Company Debts

- [103] The remaining issue is whether or not the inter-company debts were to be transferred over. As has been pointed out, this matter was not raised in the

points on appeal. However no prejudice was asserted by the Respondent and the Court allowed the matter to be argued.

[104] The arguments on appeal raised in acute form, the question of principle as to the materials to be considered by the Court in deciding such matters. Mr Fardell for the first to third Appellants sought to rely on the “direct and unchallenged evidence concerning the relevant factual matrix ... from Mr Brannigan’s brief of evidence to the effect that inter-company balances were not to be transferred to the Respondent.” The evidence in question was the following:

- “43. I understood that all the trading assets and liabilities were effectively owned by a combination of Triad Maritime (1988) Limited, CINLA in Auckland, National Shipping and Chartering Limited and that other individual fixed assets used in the Maritime business were owned by other Triad companies being Triad Pacific Petroleum Limited and Triad Enterprises Limited. I was presented with a list of specific fixed assets, plant and equipment including directors’ valuations thereof and with regard to the vessels an apparently independent third party valuation copies of which I attach.
- 44. This list was eventually reproduced without specific values as part of a sale and purchase agreement whereby Taio Shipping Corporation purchased the assets from the Triad Group. As well as the specific assets listed on that schedule, it was intended to transfer the Triad debtors, that is, the amount owed by third parties for shipping on the Cook Island National Line and also to transfer the shipping-orientated creditors. It was not proposed that any of the inter-company balance be transferred.
- 45. In any event, there would be very little that had anything to do with shipping inside a number of such balances. In order to arrive at the trading creditors and debtors figures, I requested the information directly from Mr Ellis. He consulted his accounting staff and provided me with values for both debtors and creditors which I included on the projected balance sheet which I presented to various parties during the course of my discussions and which formed the basis of the transfer price and the issue of shares. My files contain no underlying documents to support these numbers but I understand that such documents do exist and are available to Mr Ellis.”

[105] It may be seen that the material in paragraph 44 is a statement of subjective intention of the parties represented by Mr Brannigan. Nevertheless it was said by Mr Fardell that this evidence “confirmed that the relevant parties have reached a common assumption that these balances were not to transfer”.

[106] For the Respondent, reliance was placed on the evidence of the liquidator Mr McCallum. His evidence was criticised by Mr Fardell as “little more than a submission and again involves him opining on the effect of certain documents

and the subjective intention of the parties". Mr McCallum's reply evidence was to the effect that he had maintained consistently, and still did, that the inter-company advances by the various companies which sold their business and assets to CISC and other Triad companies fell within the definition contained in Schedule 2 of the Agreement. He stated that it would be a miscarriage of justice if all the relevant shipping and maritime liabilities were transferred to the new corporation but not all of the assets. This would be a clear disenfranchisement of the creditors. It was not correct to say, as the witnesses for the first to third Appellants had said, that the inter-company advances by the companies which comprised the maritime services business were not assets which derived from that business. A cash advance to the non-maritime services businesses was derived from, and can only have been derived from, the maritime services business. He concluded his reply evidence by referring to a file memorandum of a meeting at 10.00am on 24 May 2001 between himself and Mr George Ellis and his accountant. He said that the document clearly recorded that Mr Ellis and his accountant had confirmed that all assets and liabilities as scheduled in the trial balances provided by them, which included inter-company accounts were transferred to CISC. By means of this post-contractual conduct it was argued that the inter-company balances had been included under Schedule 2.

- [107] There was some discussion before the Court as to the appropriate principles of contractual interpretation. Reference was made to *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 and subsequent New Zealand authorities including *Boat Park Limited v Hutchison* [1999] 2 NZLR 74. In that case the Court of Appeal (Henry, Thomas and Tipping JJ) in a judgment of Thomas J appeared to enthusiastically endorse the judgment of Lord Hoffmann in *Investors Protection*. A submission based on the plain language of the contract was said to be "an argument based on an outdated approach to contractual interpretation". Thomas J felt that it was "worth reiterating in full what Lord Hoffmann felt it necessary to spell out when delivering the judgment of the majority in the recent decision of the House of Lords in *Investors Compensation*". Not all Judges have been so enthusiastic about *Investors Protection*. Sir Christopher Staughton in his article "How do the Court's interpret Commercial Contracts" [1999] *Cambridge Law Journal* 303 said at 306:

“It is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation. In the first of the Mirror Group Newspapers cases I said that, [...] proliferation of inadmissible material with the label “matrix” was a huge waste of money and of time as well. Evidently Lord Hoffman does not agree. Others have since questioned that passage in *Investor Compensation Scheme*: see the judgments of Saville and Judge LJ in *National Bank of Shajah v Delborg* and of the Lord President and Lord Kirkwood in the *Bank of Scotland v Dunedin Property Investment Co Limited*. I myself returned to the topic in *Scottish Power v Brit Oil Exploration Limited*.”

- [108] A recent judgment in the Court of Appeal in *Potter v Potter* [2003] 3 NZLR 145 sought to correct misplaced enthusiasm for a modernist approach based on Lord Hoffmann’s speech and emphasising a very broad approach to the factual matrix. It said in a passage which is worth quoting in its entirety:

“Extrinsic evidence as to negotiations and intentions

- [31] For the interpretation of the contract Mr Carruthers relied upon a passage from the judgment of this Court in *Mount Joy Farms Limited v Kiwi South Island Co-operative Dairies Ltd* (CA 297/00, 6 December 2001, paras [38] and [39]:

“The day has long since passed in our Courts where words are to be given a purely literal meaning. The words used are to be given their natural and ordinary meaning, and having regard to what those words as used in a document would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

It is unnecessary to traverse the authorities for these now well established propositions. They include *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98; *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74; *Yoshimoto v Canterbury Golf International Limited* [2001] 1 NZLR 523; *WEL Energy Group Limited v ECNZ* [2001] 2 NZLR 1.”

- [32] It seems necessary to observe that in *Mount Joy Farms* this Court was not setting out to provide any comprehensive survey of interpretation principles. In particular the phrase “all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract” could be misconstrued if divorced from the context in which Lord Hoffman first used it in *ICS Limited v West Bromwich* [1998] 1 WLR 896, 913A (HL). Lord Hoffman’s comprehensive survey of principle (912F-913E) included, for example, the acknowledgement that “[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent” (ibid 913). The extent to which Lord Hoffman’s own gloss upon Lord Wilberforce’s speeches in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 will endure is not yet finally resolved. Arguably such decisions as *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391, 395 (PC) represent a more conservative tendency although in the end the difference may be only one of emphasis.

- [33] Wherever the emphasis is placed, the way in which commercial litigation is currently conducted in New Zealand suggests widespread misunderstanding of the limits of extrinsic evidence. It must not be overlooked that the “background knowledge” referred to by Lord Hoffman can be relevant only where stringent requirements are satisfied. Four are of particular importance in the present case.
- [34] The first is that although a contract is to be interpreted in its factual setting, there is no justification for invoking rules which exist solely to resolve ambiguities in order to create an ambiguity which, according to the ordinary meaning of the words used in the document, is not there: *Melanesia Mission* supra at 395. The second is that extrinsic facts can be relevant only if within the *mutual* contemplation of the parties. Even an objective view of meaning is irrelevant if based on facts within the contemplation of one party alone. The third is that with the exception of known unilateral mistake, non est factum, and rectification, the subjective intentions of the parties are irrelevant. The fourth is that pre-contract negotiations are irrelevant except when used for the very limited purpose of ascertaining what objectively observable facts, as distinct from intentions, must have been within the contemplation of both parties: *Eastmond v Bowis* [1962] NZLR 954 (CA) at 959, 960.
- [35] It is true that in one of the decisions relied upon in *Mount Joy Farms*, supra, Thomas J suggested that the parties’ negotiations and draft agreements should be admissible if reliable extrinsic evidence were available to confirm their actual intentions (*Yoshimoto v Canterbury Golf International Limited*, supra, paras 59-95 pp 538-549). But it is important to note that when the decision in *Yoshimoto* was reversed in the Privy Council (*Canterbury Golf International v Yoshimoto* (PC 99/01, 15 July 2002) Lord Hoffman took the opportunity to say this: -

“In a separate section of his judgment, Thomas J expressed the view that his construction was supported by two provisions in earlier drafts of the contract. He said that the normal rule which excludes evidence of pre-contractual negotiations, authoritatively stated by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, should be relaxed or departed from. Their Lordships do not think that this is a suitable occasion for re-examining the law because they consider that in this case the evidence is, as Lord Wilberforce predicted, unhelpful. ... Their Lordships do not think that it is helpful to try to construe the earlier version of clause 6.3 because it was dropped and the present clause 6.3 substituted. It seems to them pointless to try to speculate upon why the change was made. No doubt each party had their reasons for proposing it on the one hand and accepting it on the other. *All a court can do is to decide what the final contract means.* (emphasis added).”

- [36] Accordingly *Yoshimoto* did not affect any change to established limits to the permissible use of extrinsic evidence for interpretation purposes. Considerable misdirected litigation time might be saved if more effect were given to those limits. In an area of judge-made law no-one could say that the limits are necessarily immutable. But that could scarcely be justification for adducing inadmissible evidence in the meantime. We do not admit inadmissible evidence against the possibility that one day a law change might make it admissible. As McGechan J tartly observed in *Well Energy Group Limited v ECNZ*, supra, (general approach approved by this Court [2001] 2 NZLR 1 at 18 para 31) at p 9:

“It may seem old-fashioned, but the first step in interpreting words in a document is to read the words concerned. They are the central focus, and the point of departure. *Boat Park* principles do not require anything different. The question is the meaning of the words used, in light of surrounding circumstances. Reference to surrounding circumstances is particularly appropriate where words used give rise to ambiguity or literal meaning gives rise to unreasonable outcomes. One does not start from surrounding circumstances and on that basis invent wording which might have made more sense but which does not exist. The task is interpretation, not reconstruction.”

[37] Once careful regard is paid to those principles, it becomes clear that in the present case none of the extrinsic evidence as to the intentions of the parties is admissible. Accordingly we do not propose to traverse the conflicting evidence on that topic.”

[109] We are content to adopt for present purposes the observations of McGechan J in *Well Energy* cited at the end of paragraph [36]. We consider that the factual matrix is sufficiently captured in the passages in the judgment dealing with this issue to which we refer to below in paragraphs [110] – [112]. In those circumstances and in line with the long established principles referred to in *Potter v Potter* the matter must be decided on the wording of the relevant contracts. As Lord Diplock said in *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] AC 724:

“The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them.”

The reasons for focusing on the language of the contract were persuasively articulated by Kirby P in *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* [1990] 20 NSWLR 310, 313-314:

“Resolution of ambiguity in commercial agreements:

Between two such substantial businesses, there are sound reasons of principle and policy for determining their respective rights and duties, if at all possible, by reference to the written terms by which they expressed those rights and duties. No other approach is as likely to command general acceptance in the commercial community. No other approach is as efficient in the containment of litigation. None is so effective in conserving the economic and entrepreneurial decisions which lie behind contract law to business people rather than lawyers...

Whoever may be the parties to the agreement, it is the fundamental rule, that a court should give the words of a written agreement the natural meaning that they bear.”

[110] It will be recalled that the agreement is headed “Agreement for Sale and Purchase of assets” and the recitals state:

“WHEREBY the vendor agrees to sell and the purchaser agrees to purchase certain assets of the vendor (the assets) comprising:

- (a) The chattels (“chattels”) described in schedule 1 of this deed.
- (b) The business (“business”) described in schedule 2 of this deed.

Upon and subject to the following terms and conditions...”

[111] Schedule 1 sets out under the headings of various companies (National Shipping and Chartering Limited, Triad Maritime (1988) Limited, Triad Pacific Petroleum Limited, Triad Enterprises Limited and Cook Islands National Line Agency – Auckland) various particular assets. Included in the schedule 1 under the heading “Cook Islands National Line Agency Limited” Auckland were the following:

“Motor vehicles 3
Furniture and fittings
Office equipment
Computer equipment”

[112] Schedule 2 refers to “The entire shipping and maritime services business operated by the vendor as a going concern including all assets and liabilities of that business, with the assets being sold subject to existing mortgages and charges”. As noted above, the Chief Justice emphasised the word “entire”.

[113] The Chief Justice dealt with this matter by reference to the contractual documents only. In our view this was the correct approach because the words in Schedule 2 were unambiguous. He first found in favour of the liquidator that CINLAL was included as part of the business being transferred and that all its assets and liabilities should be part of the transfer. In making this finding he noted that CINLAL was not a party to the agreement but was referred to in schedule 1 and its assets such as motor vehicles, furniture and fittings, office equipment and computer equipment were especially mentioned. He pointed out that CINLAL was the administrative agency which administered the day to day operations of the shipping service issuing invoices, controlling and obtaining the receivables and dealing with the creditors. He held that it was clearly an essential arm of the shipping service and its accounting and administration

machine. He therefore held that the whole of the assets of CINLAL passed to the Plaintiff.

[114] As to the second question, namely the inter-company debts due to and by the Plaintiff and by and to the Defendant group at the date of settlement, he noted that the basis of the challenge to the inclusion of the inter-company debts was because of their absence from the accounts creditor system and the accounts receivable as shown on the books as CINLAL as at 31 July. He considered, however, that the inter-company accounts were balance sheet figures which were disclosed there but which would not be shown as ordinary running accounts as between the companies. He concluded that the balance sheet accounts and the inter-company debts were clearly part of the assets of the shipping enterprise unless they could be identified as arising out of something other than shipping of which there was no evidence presented to him. They must therefore be included in the general assets and liabilities which were claimed by the liquidator.

[115] The unquestioned fact is that the balance sheets prepared as at 30 September 2000 by the directors of the Appellants do include inter-company balances. The inter-company figures and the accounts prepared show that TM88L were owed \$473,455.42 from TEL and \$116,506.40 from TPPL. However TM88L owed CIMLAL \$1,200,090.20 and NS and CL \$576,536.33. On this basis we uphold the reasoning of the Chief Justice and find that the inter-company balances in question come within the Second schedule, giving the words of the second schedule their ordinary and natural meaning. In short the assets and liabilities of the business of CINLAL include inter-company debts due to and by the various companies. As the Chief Justice put it at page 19:

“The balance sheet accounts and the inter-company debts are clearly part of the assets of the shipping enterprise ... They must be included in the general assets and liabilities which it claimed by the liquidator.”

Result - Costs

Accordingly all of the arguments of the Appellants fail and the judgment is affirmed. The Respondent liquidator is entitled to costs which we fix at \$5,000.00 along with all reasonable disbursements to be agreed by the parties or failing agreement fixed by the

Registrar. Leave granted to the parties to apply to the High Court if they are unable to agree on a taking of accounts in relation to the various intercompany disputes.

Date judgment delivered:

16 December 2003

M. Casey

Casey JA

David Williams JA.

David Williams JA