IN THE COURT OF APPEAL OF THE COOK ISLANDS **CA 1/03 and 2/03**
HELD AT AUCKLAND

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**
AND	**NATIONAL SHIPPING AND CHARTERING LIMITED** (IN LIQUIDATION) **Second Appellant**
AND	**TRIAD MARITIME (1988) LIMITED** (IN LIQUIDATION) **Third Appellant**
AND	**TRIAD PACIFIC PETROLEUM LIMITED** **Fourth Appellant**
AND	**TRIAD ENTERPRISES LIMITED** (IN LIQUIDATION) **Fifth Appellant**
AND	**COOK ISLAND SHIPPING CORPORATION** (IN LIQUIDATION) **Respondent**

Hearing: 23 September 2003

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

Appearances: J A Fardell QC and Mr C Morris for the First–Third Appellants
Mr PT Finnigan for the Fourth and Fifth Appellants
Mr KP Sullivan for Respondent

Date of judgment: 16 December 2003

JUDGMENT OF SMELLIE JA

Introduction

I have had the advantage of seeing the judgment of Justices Casey and Williams in draft. I shall use the same abbreviations.

Although at the end of the day I reach the same conclusion regarding the outcome of the appeal, I nonetheless wish to add some brief comments on the three matters discussed below.

Was the Consensus/Expectation still extant when the Sale and Purchase Agreement was signed?

In his judgment, the Chief Justice found " ... by the time the arrangements 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". With respect, I do not consider the evidence supports that conclusion. Furthermore, it is buttressed by the absence "of any ... condition or term by which the CIG might be bound". That, however, as the cases show is of marginal relevance. For obvious reasons, parties frequently avoid explicit reference to such matters.

Nor can I accept that news media comment and speculation between 16th and 26th August 2000 has any relevance. Over that period, the CIG was by its conduct still conveying its commitment to the Consensus.

No inference can be drawn that Mr Brannagin or those who had retained him were aware during or after the cabinet meeting of 29th August 2000 that the CIG had resiled from the original understanding or arrangement. Mr Brannagin's uncontradicted sworn evidence in his affidavit of 20th January 2003 (paragraphs 14 and 15 on pages 298 and 299 of the record) is to the contrary. Nor do I find the cabinet minute at page 139 of Volume 1 of the record as compelling as my Brethren. The deferral is not said to be because the CIG has changed its mind, but to facilitate further meetings " ... with interested parties" – principally EXCIL which was to be invited to join the new company.

Quite apart from those two matters however, there is an issue of principle here which was not raised during the hearing and is not referred to expressly in the lead judgment. It is this: if, as the cases show, the Consensus requires a meeting of minds, is it possible for one party to effectively withdraw so that the expectation comes to an end without explicit or implicit notice to that effect. No authority is cited on the point and I know of none. But just as the New Zealand Court of Appeal in Giltrap (CA 236/01, 40/02 and 41/02, Judgment 5/11/03) was able by analogy with the law of Contract to find consensus established by "external appearances" (known conduct), so it must be that termination of the expectation requires notice as in repudiation or cancellation: see Burrows, Finn and Todd, *The Law of Contract in New Zealand*: paragraphs 17.2.1 and 17.3.4(a) and (b). Any other approach in my judgment would be illogical and, in the circumstances of this case, unfair.

Also, unless the Prime Minister is to be taken as intentionally misleading Messrs Vaile and Brand over the letter of comfort when he saw them in his office on 29th August 2000, it appears he was not aware that the arrangement breached the ISA until he received the Solicitor-General's letter of 7th September 2000. The Sale and Purchase Agreement had been signed at least six days earlier.

In all the circumstances, I regret I am unable to agree with the conclusion reached by my Brethren in paragraphs 90, 91 and 92 of their judgment.

Severance

My conclusion in the preceding section of this judgment, however, does not dispose of the issue in the appellants' favour. I agree with Justices Casey and Williams the understanding or arrangement can be severed from the remainder of the Sale and Purchase Agreement and for the reasons they give. I would add, however, that I find the provisions of section 7(1) and (2) of the ISA compelling. They are as follows:

> "7 **Contracts, Arrangements, or Understandings 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 the 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 the Cook Islands international shipping service is enforceable." [emphasis added]

While I accept that the common law would strike down the whole transaction, the above subsections with their emphasis on the word "provision" show clearly that the legislature intended to reserve to the Courts the option to sever.

The Inter-Company Debts

Had there been any ambiguity regarding this issue, I would have considered the background facts in an endeavour to resolve it. In doing so, I would have followed the judgments of Lord Hoffmann in the House of Lords (Investment Compensation Scheme v West Bromwich Society) and Thomas J in the New Zealand Court of Appeal (Boat Park Limited v Hutchison). The subsequent decisions in Potter and Well Energy referred to by Justices Casey and Williams are of lesser authority and should not in my judgment be seen as reversing an important common law development.

In addition, however, it is perhaps worth noting that a reference to the factual matrix would not have helped. Mr Brannagin's statement that it was not intended that the company debts should pass is contradicted by Mr Ellis' admission against interest that they would – see page 629 of the record.

Date judgment delivered:

Robert Smellie

Smellie J A