IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

OA 4/01

IN THE MATTER of the Declaratory Judgments Act 1994

BETWEEN COOK ISLANDS SHIPPING CORPORATION (IN LIQUIDATION)
Plaintiff

AND COOK ISLANDS NATIONAL LINE AGENCY LIMITED (IN LIQUIDATION)
First Defendant

AND NATIONAL SHIPPING & CHARTERING LIMITED (IN LIQUIDATION)
Second Defendant

AND TRIAD MARITIME (1988) LTD (IN LIQUIDATION)
Third Defendant

AND TRIAD PACIFIC PETROLEUM LIMITED.
Fourth Defendant

AND TRIAD ENTERPRISES LTD (IN LIQUIDATION)
Fifth Defendant

Mr KP Sullivan for Plaintiffs
Mr R Fardell QC and Mr Morris for First, Second and Third Defendants
Mr P T Finnigan for Fourth and Fifth Defendants
Date of hearing: 30 September and 1 October 2002
Date of Decision: 17 December 2002

DECISION OF GREIG CJ

This is an application by the liquidator of the plaintiffs for declarations to identify the assets creditors and debtors of the Plaintiff. It is brought against the defendants who operated a shipping and maritime services business

under the name of the Cook Islands National Line. The Plaintiff was incorporated on 31 August 2000 and purchased from the defendants all the assets, liabilities and business associated with their shipping and maritime services business. The Plaintiff was placed in liquidation by the High Court on 7 May 2001.

There has arisen a dispute as between the liquidator of the Plaintiff and the defendants as to the validity of the agreement for sale and purchase of the shipping and maritime services business and the identification of the assets and liabilities which it is alleged were transferred in accordance with that agreement. All defendants except the fourth defendant have at various times themselves gone into liquidation. Orders were made authorising the continuation of the action against those companies in liquidation.

The matter has proceeded as and for declarations under the Declaratory Judgments Act 1994. The parties reached agreement on a number of 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 the course of this action and in the course of the liquidation. As well briefs were prepared and were submitted. No evidence was given viva voce on oath and there was no cross examination. In essence the facts are agreed and it is only a matter of argument as to legal matters which has remained in issue.

I do not intend to recite the whole of the agreed Statement of Facts but it is necessary for an understanding of the development of the dispute between the parties to recite a number of the matters which are agreed. In 1988 George Ellis and Christopher Vaile incorporated and formed Triad Maritime (1988) Ltd and operated through that company the shipping service called Cook Islands National Line (CINL). Subsequently there was incorporated a shipping agency company in Auckland called Cook Islands National Line

Agency Ltd (CINLAL). Shipping services to and from the Cook Islands and within the Cook Islands have always been fraught with difficulties of one kind or another. From time to time there have been too many ships and too many competitors, at other times there have been too few.

From 1992 until 1998 the Cook Islands National Line was given an exclusive shipping licence pursuant to a policy of the Cook Islands government. The Cook Islands government had a shareholding in the operating company known as National Shipping and Chartering Ltd. In or about July 1998 the Cook Islands government at that time decided to deregulate the shipping industry. It then granted a licence to Express Cook Islands Line (XCIL). Thereafter CINL and its owners became concerned about the practices being operated by competitors on the New Zealand/Cook Islands run. There was lobbying of the Cook Islands government and its members and opposition parties to attempt to provide further control.

As a result of this the government and the Parliament enacted the International Shipping Act 1999. The long title of that Act is

> "an Act to promote fair dealing and to safeguard competition in Cook Islands international shipping services, and to maintain national control of Cook Islands international shipping services by encouraging the ownership and operation of Cook Islands owned and operated ships."

The Act of which more will be said, set out an international shipping policy and provided against anti-competitive and unfair practices. The passing of this Act did not, it appears, ameliorate the situation of CINL. There was further lobbying of the government through 2000 for further action. In or about March 2000 Messrs Ellis and Vaile drew up what was described as a concept proposal to create a new national shipping service which would take over the current national line and in which the government would have a shareholding. It was suggested that in consideration of the grant of an

exclusive licence the government would be given free paid up shares. Figures were suggested that if there were to be two vessels so exclusively licensed then each vessel license might be valued at $300,000 for a total of $600,000 full paid up shares. The rest of the shareholding would be CINL and Taio Shipping Ltd a company which operated within the Cook Islands. The matter was proceeded through in March and April and there were continuing meetings thereafter. On 26 July 2000 the Cabinet of the Cook Islands government approved by way of minute CM (00) (219) the following proposals:

> "1. the formation of a new National Shipping Service as outlined above;
> 2. the release of[*sic*] 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 share holder 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 Transport of the licenses granted to XCIL, 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."

Meanwhile Mr Vaile in consultation with the government Minister sourced a new vessel with sufficient capacity to upgrade as an additional vessel in the

national shipping service. This vessel was sourced in Germany and was to be undertaken on a five year charter.

In or about August 2000 Mr Peter Brannigan, a chartered accountant of Auckland was instructed by Mr Ellis and CINL to undertake the detailed development of the corporate structure for the proposed national shipping service and the other documentation that would be required. Mr Brannigan visited Rarotonga during August and set up finally a proposal which provided for a shareholding of the new company as follows:

Triad Maritime	55%
Cook Islands Government	40%
Taio Shipping Ltd	5%.

It was also proposed at this time that the corporate structure would require the creation of a holding company, Cook Islands Shipping Corporation Holdings Ltd and an operating company, the Plaintiff. It was proposed that each of these companies would have different shareholding rights with differing rights as to voting and dividends. The holding company was incorporated on 23 August 2000 and the Plaintiff on 31 August 2000. In the end the government's interest in the new corporate structures was the small shareholding of $89,500 which was the amount of a Triad debt to the government which was then written off. The government's shareholding was in the holding company, the operating company, the Plaintiff, ultimately had a capital of 1,600,120 shares 120 of these were class A shares held by the Triad Maritime Trust and Taio. Those shares carried all rights conferred upon the shares in the original subscription. The class B shares, 1.6 million, held by the holding company had no voting rights and no rights to a dividend but would receive $100,000 on the winding up of the company. The directors of the holding company were Messrs Ellis, Josaia Teremoana Taio and Mr Joseph Caffrey. That was the sole interest and control right of the government. The directors of the Plaintiff were Messrs Ellis and Taio. The government

although with a small shareholding had no right, control or authority over the operating company.

The original shipping business was sold to the Plaintiff in consideration for the subscription of the 1.6 million class B shares. Thus Triad's shares were fully paid up through the sale to the Plaintiff of its shipping business and its liabilities. The Taio interests invested no cash, their shareholding was provided by what was described as a "free carry" which is, in other words, a gift. The agreement for sale and purchase is undated. It appears that at the end of August it was signed by Messrs Vaile and Ellis or both of them as directors of the vendor companies. The vendor companies are National Shipping and Chartering Ltd, Triad Maritime (1998) Ltd, Triad Petroleum Ltd and Triad Enterprises Ltd. The purchaser is the Plaintiff. The government is not a party to the agreement.

The agreement recites that the vendor agrees to sell and the purchaser agrees to purchase certain assets of the vendor which are defined as the assets comprising:-

(a) The chattels ("chattels") described Schedule 1 of this Deed;
(b) The business ("business") described Schedule 2 of this Deed.

Schedule 1 sets out under the headings of various companies National Shipping and Chartering Ltd, Triad Maritime (1988) Ltd, Triad Pacific Petroleum Ltd, Triad Enterprises Ltd various particular assets. There is also included in Schedule 1 under the heading "Cook Islands National Line Agency Ltd – Auckland" the following:

"Motor vehicles (3)
Furniture and Fittings
Office Equipment
Computer Equipment."

Schedule 2 in its entirety is as follows:

> "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."

It appears that and I so find that at the end of August or beginning of September it was already known to Mr Brannigan and Mr Arnold, solicitor acting on instructions from Mr Brannigan to incorporate the companies, that the proposed government moves and policy to create an exclusive service and cancel the licences of the existing licence holders might be unlawful under the terms of the International Shipping Act. This matter came to the fore at the end of August. The German company supplying the new vessel requested a letter of comfort from the government to confirm the government's commitment to the new national shipping service. A draft letter was referred to the Solicitor General and in her reply of 7 September 2000 she expressed the view that paragraph 5 of the Cabinet Minute CM (00219) was illegal under the Act. She advised against writing the letter in the form as drafted and proposed some amendments.

At the same time the public disclosure of the government's new policy met with disapproval from other quarters including the existing shipping lines.

In the meantime on 1 September 2000 the charter party in respect of the new German vessel was signed.

Following further discussions and consideration on 10 October 2000, the Cabinet of the Cook Islands government rescinded Clause 5 of the earlier Cabinet decision, and gave approval to the Minister of Shipping to extend the

shipping licence of XCIL for a period of 6 months. The government did not implement the policy of exclusivity and did not cancel the licences but as I have noted renewed them.

There was a delay in the delivery of the German vessel. The Plaintiff arranged a voyage charter for a substitute vessel in order to maintain its service and a programmed voyage. The government guaranteed loan facilities for this temporary arrangement. When the German ship arrived the Plaintiff was unable to make the next charter payment and a further guarantee was extracted from the Cook Islands government. By February 2001 the government was concerned about its increased liability and on 12 February 2001 it appointed Bruce McCallum to be Manager of the Plaintiff and the holding company and to report. His report noted that although the transaction had taken effect in accordance with the sale and purchase agreement of August/September 2000, nothing had changed in the managerial structure as a result of the transfer of the maritime business. Nothing was done to transfer any of the assets in any legal way, no step was taken to notify customers, agents, creditors, secured or unsecured creditors or employees of the transfer of the business. In fact the customers and others continued to be invoiced under the names of the vendor companies and CINLAL. It was Mr McCallum's recommendation that the Plaintiff was insolvent and on the point of collapse and that proceedings should be taken to liquidate both the Plaintiff and the holding company and that was done.

The claim by the Plaintiff as set out in its statement of claim is for the following declarations:

> "(a) A declaration that the sale and purchase agreement is valid and enforceable.
>
> (b) A declaration that the agreement for sale and purchase was effective in transferring ownership of all assets

listed in schedule 1, and the entire business as described in schedule 2 to the agreement,

(c) A declaration that all of the debtors and creditors of the vendor companies and the first defendant became debtors and creditors of the plaintiff, or at least be dealt with in the liquidation as if they had, as a result of the transfer of the business consistent with schedule 2 of the agreement for sale and purchase,

(d) A declaration that the inter company debt due to and by the plaintiff by and to the Triad Group at the date of settlement became and remain an asset of the plaintiff pursuant to that agreement for sale and purchase."

The validity and enforceability of the agreement is challenged on two grounds. The first is that it is tainted by illegality, either directly under the contract and its implementation is in breach of the prohibitions imposed by the International Shipping Act. Alternatively that the agreement for sale and purchase formed and integral and essential part of a joint venture agreement between the government and the Triad companies, the defendants and that an essential part of that joint venture is illegal as in breach of the provisions of the International Shipping Act. The second ground of challenge is that as between the parties there was a fundamental mistake; the mistake being the implementation or non-implementation of the government's intentions to carry out the exclusive licence arrangements.

The challenge as to illegality is based solely on the meaning and effect in the circumstances of this case of the provisions of the International Shipping Act 1999.

I have already set out the long title to the Act and have referred to the International Shipping policy which is set out in Part II of the Act. One of the objectives of that policy was:

(a) to promote preserve and safeguard fair competition in Cook Islands international shipping service to the benefit of the public of the Cook Islands, shippers and carriers

(c) to discourage and prevent wherever possible, practices by carriers that have the effect of limiting, preventing or reducing competition among carriers or which may give rise to any monopoly or cartel in the provision of Cook Islands international shipping service.

Part III of the Act set out a number of anti-competitive and unfair practices. These included covenants substantially lessening competition which were prohibited, agreements containing exclusionary provisions, provisions of agreement with respect to prices deemed to substantially lessen the competition. Section 7 so far as it is relevant reads 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 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."

Section 8 defined Unfair Practices. Part IV of the Act provides for investigation and remedy of anti-competitive and unfair practices. Part V provides for enforcement including offences of failing to carry out the directions by the Minister. It gives jurisdiction to the High Court to impose penalties for a breach of provisions of Part III. The provisions of the Illegal

Contracts Act 1987 has no application to any agreement made in contravention of the Act. Nothing in the Act limits or affects any rule of law relating to restraint of trade not inconsistent with any of the provisions of the Act. The Court is also entitled or authorised to grant injunctions restraining a person from engaging in conduct which constitute a breach of any of the matters.

The question in the case falls to be decided under the common law. It is a question of illegality by statute. Here the statute makes it clear that any contract or covenant which is in contravention of the Act is unenforceable. That does not in my understanding mean that it is void ab initio.

The illegal part of the consideration of a contract may be severed from the rest of the consideration and a legal promise is enforced. See for example *Bennett v Bennett* [1952] 1KB 249 CA at pages 252 to 254. Moreover if it is possible to proceed on a claim for recovery of property without founding the aclim on the illegal contract, that may be enforced, see *Bowmakers Ltd v Barnett Instruments Ltd* [1945] KB 65 CA and see North J in *Joe v Young* [1964] NZLR 24 at page 38.

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. There might be some doubt in any event as to whether the Plaintiff, a company formed for the purpose of taking over the assets of the other

entities, is in itself affected by any arrangement made earlier with the government.

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. The parties must be held to the terms of the contracts that they entered into. This in the end was a written contract and other written arrangements in which the government participated in the holdings company. On these terms there can be no implication of any illegality in the transaction or the contract. In my judgment the claim of illegality fails.

I turn then to the question of mistake and once again this is to be decided on the common law. What is said here is 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. The position is

explained by Denning L J in *Frederick E Rose (London) Ltd v William H Pim Jnr and Co. Ltd* [1953] 2 QB 450. This was the case of the feveroles and the horsebeans.

At page 462 his Lordship's judgment states:-

> "The goods contracted for – horsebeans – were essentially different from what they were believed to be – "feveroles." Nevertheless, the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans. Once they had done that, nothing in their minds could make the contract a nullity from the beginning though it might, to be sure, be a ground in some circumstances for setting the contract aside in equity. In *Ryder* v. *Woodley,*, where a buyer contracted to buy a commodity described as "St. Giles Marais wheat," believing that it was wheat when it was not, the contract was held to be binding on him and not a nullity. In *Harrison & Jones Ld. v Bunten & Lancaster Ld.,* where parties contracted for the supply of "Calcutta kapok 'Sree' brand," both believing it to be pure kapok containing no cotton, whereas it in fact contained 10 to 12 per cent of cotton, Pilcher J. held that their mistake, although fundamental, did not make the contract a nullity. In *McRae v Commonwealth Disposals Commission,* where sellers contracted to sell a stranded oil tanker, described as lying at a specified point off Samarai, believing that there was a tanker at such a place when there was in fact no such tanker there, nor anywhere in the locality, the High Court of Australia held that the mistake,although fundamental, did not make the contract a nullity, and that the buyers were entitled to damages. The court showed convincingly that *Couturier v Hastie* was a case of construction only. It was not a case where the contract was void for mistake. The other old cases at common law can likewise be explained. At the present date, since the fusion of law and equity, the position

> appears to be that when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning. Even a common mistake as to the subject-matter does not make it a nullity. Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground."

In *Bell v Lever Brothers Ltd* [1932] AC 161 the appellant as chairman of the board of directors in a company had carried out certain transactions which would have justified the company in terminating his agreement for service. Unaware of the breaches the company agreed to pay a substantial sum as compensation for terminating the services. When the misconduct was discovered the company sought to recover the money that it had paid. In the House of Lords the company failed in its action. Lord Atkin in a lengthy passage beginning at page 224 deals with the underlying question as to the meaning of a contract. After referring to various examples His Lordship states:

> "It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties – namely, that the contract could not be terminated till the end of the current term. The question of the existence of conditions, express or implied, is obviously one that affects not the formation of contract, but the investigation of the terms of the contract when made".. ....

At p225:

> With regard to future facts such a condition is obviously contractual. Till the event occurs the parties are bound. Thus the condition (the exact terms of which need not here be investigated) that is generally

accepted as underlying the principle of the frustration cases is contractual, an implied condition.
Sir John Simon formulated for the assistance of your Lordships a proposition which should be recorded :
"Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: i.e., it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact".....

The proposition does not amount to more that this that, if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true. But we have not advanced far on the inquiry how to ascertain whether the contract does contain such a condition.....

At p266

The implications to be made are to be no more than are "necessary" for giving business efficacy to the transaction, and it appears to me that, both as to the existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts. Thus, in *Krell v Henry*, Vaughan Williams L.J. finds that the subject of the contract was "rooms to view the procession": the postponement, therefore, made the rooms not rooms to view the procession."

That is the case of the procession for the coronation of Edward VII which was postponed because of his illness.

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. It may be that even with an executed contract the party may raise the question of a mistake but it is necessary that the question be raised in a timely way. *Leaf v International Galleries* [1950] 2KB 86 was the case about the mistaken Constable painting. The painting was bought as a Constable: some five years later the plaintiff discovered that it was not a Constable. He returned the painting to the defendants and asked them for a refund. The Court on the assumption that the equitable remedy of rescission was open in law it was not open in this case because it had not been exercised within a reasonable time. Likewise in the case of *Fredrick E Rose v William H Pim* referred to already about the horsebeans. The claim failed apart from other things because the buyers accepted the goods and treated themselves as the owners of them. 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 on 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.

I turn then to the issue raised by the liquidator which is the extent of the assets and liabilities which were transferred to the Plaintiff under the sale and purchase agreement. The agreement recites the subject matter as the chattels and the business as described in the two schedules. Schedule 1 set out under the heading of various companies involved in the business particular assets such as ships, vehicles and other equipment. Schedule 2 as I have already noted is a general clause which refers to the entire shipping and maritime services business operated by the vendor. It is to include expressly all assets and liabilities of that business with the assets being sold subject to the existing mortgages and charters. The first dispute is to whether CINLAL was included as part of the business and that all its assets and liabilities should be part of the transfer. CINLAL is not a party to the agreement but it is referred to in Schedule 1 and its assets such as motor vehicles, furniture and fittings, office equipment and computer equipment are especially mentioned. 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. It was clearly an essential arm of the shipping service as its accounting and administration machine. It was as essential and as integral to the shipping service as the company which owned and operated the vessels, the unloading machinery and all the parts of the shipping service. It would be a nonsense to suggest that amongst the assets and liabilities, receivables and creditors, should not be treated as part of the service and as part of the assets which were transferred. That this is the case is confirmed by the fact that, immediately after and until liquidation, CINLAL continued to be the administering and accounting arm of the service. It carried on as before. It was treated thereafter just as it had been before as part of the service. I hold that the whole of the assets of CINLAL passed to the plaintiff.

The next area relates to the inter-company debts due to and by the Plaintiff and by and to the defendant group at the date of settlement. It is the Plaintiff's case that they became and remained an asset of the Plaintiff under the agreement for sale and purchase. At this stage the Plaintiff does not seek to have clarified the exact amount outstanding on this head. There are claims of setoffs raised by the fourth and fifth defendants. It was agreed that the Court was not to be asked to determine the amount of those inter-company debts. That is a matter which it was thought can be settled hereafter but may be reserved for further consideration if necessary.

Unlike the CINLAL account the trial balances which were used to assess the suggested consideration of $1,6000,000 did not include the inter-company debts. The balance sheet figures did include the CINLAL accounts and that was a substantial part of the overall calculation of the consideration. It may be explained of course that the inter-company accounts were not the running balances and it may well have been thought that in good time and with the appropriate inter-company exchanges these might have been written off. The fact is that they were not written off and they appear in balance sheets that were prepared as at 30 September 2000. These were prepared after the agreement but to record the position at the settlement date.

The figures in the account show that TM88L was owed $473,455.42 from TEL and $116,506.45 from TPPL, TM88L owed CINLAL $1,300,090.20 and NS and CL $576,536.33.

The principal challenge to this claim on behalf of the four defendants is their claim by way of setoffs. As I have noted that this is a matter which is not yet to be decided, it may well fall that it may be decided under terms of the law which has been set out by Barker J in *Popular Homes Ltd v Joint Developments Ltd* (1979) 2NZLR 642. The question may be the mutuality of the debts or the common debts.

The basis of the challenge that they are not included is because of their absence from the accounts creditor system and the accounts receivable as shown on the books of CINLAL as at 31 July. These did not include the inter-company balances. Curiously however it seems that the Shell account relating to TPPL and TM88L is accepted as being included because that account is referred to in the CINLAL running balances. The defendants have accepted that one of the Shell accounts shown in similar figures is a transferred account that also being shown in the accounts of the defendants themselves as inter-company debt. That concession does not in my view strengthen the case for the defendants, it shows that in fact the shell account was one of the accounts which for some reason was handled through the books of the other companies. The fact is that the CINLAL accounts are the running or current accounts of the company as to its creditors and debtors. The inter-company accounts are balance sheet figures which are disclosed there but which would not be shown as ordinary running accounts as between the companies or as something which was controlled and operated by CINLAL as the administering accounting arm of the enterprise. The balance sheet accounts and the inter-company debts are clearly part of the assets of the shipping enterprise unless they can be identified as arising out of something other than shipping of which there is no evidence before me. They must be included in the general assets and liabilities which are claimed by the liquidator.

I make declarations as applied for and in particular declare that the sale and purchase agreement is valid and enforceable, 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 and remain assets of the Plaintiff.

The Plaintiff is entitled to costs against the defendants, if necessary I will receive submissions as to the quantum of that.

The matter as to setoff to the extent that that is still alive is reserved.

CHIEF JUSTICE