

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

PLAINT NO. 132/91

BETWEEN COOK ISLANDS PEARLS  
LIMITED a duly incor-  
porated company having its  
registered office at  
Rarotonga

Appellant

A N D KAMUTA KAITARA of  
Manihiki

First Claimant

A N D CHARLIE MAIRI of  
Manihiki

Second Claimant

Mr Tylor for the Applicant  
Mr Moore and Mr Gibson for the First Claimant  
Mr Howard for the Second Claimant

Date of Judgment : 5<sup>th</sup> MARCH 1993

JUDGMENT OF DILLON J.

The Applicant company operates in the island of Manihiki and in association with the Island Council of Manihiki contributes to the promotion and development of the very successful pearl harvesting operations in the Manihiki Lagoon. Part of those operations comprise the seeding of the oyster shells by the company; and when matured sharing with the pearl farmers in the proceeds from the harvesting of the oyster shells. As the Company's return for the technical expertise required and provided in the seeding operations, the Company obtains by agreement 40% of the next proceeds on the sale of the pearls; while the pearl farmers receive the remaining 60% of the nett proceeds.

A dispute has now arisen between the First and Second Claimants as to the entitlement of the share of 60% of the proceeds of pearls sold by the Applicant, who simply asks this Court to "... determine the rights and claims of both Kamuta Kaitara and Charlie Mairi to the said 60% share." The applicant is simply a "stakeholder" pending this Court's final determination.

### THE PARTIES

The First Claimant is the son-in-law of the Second Claimant. It is alleged that the Second Claimant was opposed to the First Claimant's association with his daughter Tina Charlie. However he accepted the couple into his house; he entered into an oyster and pearl farming partnership with the First Claimant; and he shared the resultant proceeds from the first harvest on an approximate 50/50 basis. There is no disagreement as to that first arrangement. The First Claimant and his wife subsequently left the home of the Second Claimant; and later still they returned to live with the Second Claimant who by this time had been appointed the Chief Administration Officer for the Island of Manihiki and consequently was occupying the Government house that went with that position. They all lived together in that house.

It was during this period that the First Claimant says he entered into a second oyster and pearl farming operation not with the Second Claimant but with one Luka Tobia. He further says that his share of that partnership arrangement with Luka entitled him to 383 shells which were subsequently seeded and later still harvested by him. It is the 60% proceeds from the sale of those pearls by the Applicant to which the First Claimant says he is entitled.

The Second Claimant says this second harvest, like the first harvest, is to be shared equally.

### THE MANAGEMENT AND CONTROL OF THE MANIHIKI LAGOON

The Lagoon at Manihiki is controlled by the Island Council. Permits are issued

to farm oysters and areas are allocated where these farming operations may be developed. There is no objection by the Council for a permit holder to go into a partnership or other such agreement with a non permit holder. However it is only the permit holder with whom the Council or the Applicant will deal with. That is the Applicant will only complete the preliminary seeding operation with a licensed permit holder.

The areas where the growing and harvesting of pearls are developed is controlled and allocated by the Council. However there is nothing to stop a person or family who has been allocated a certain area from allowing a permit holder the use of their area or part of it for such time as all agree upon.

The seeding and harvesting of what has been described as the first shells by the two claimants in partnership and for which there is no dispute is a good example of these procedures. The Second Claimant held the appropriate permit; he and the First Claimant had an agreement as to the sharing of the proceeds of those first shells - the First Claimant to receive a new boat and motor, and some cash and free board and lodging at the Second Claimant's house; that arrangement was adhered to when the Second Claimant as the permit holder received 60% of the proceeds of the auctioned pearls from the Applicant when the first shells were harvested.

There is no dispute between the claimants as to the first shells either as to the sharing of the proceeds; or that the seeding and harvesting was carried out pursuant to the permit issued to the Second Claimant. This dispute arises from what has been described as the second shells. The Second Claimant says the same arrangement as applied to the first shells was applicable to the second shells. He says this for several reasons :

1. It was he who made an agreement with Trainee Samson to use his area to farm the second shells;
2. It was only he who had the permit to farm the second shells;
3. That the First Claimant did not have a permit to farm the second shells as his

own as he now claims;

4. That the First Claimant at no time told the Second Claimant that the agreement between them in respect of the first shells was not to continue in respect of the second shells.

While there is no dispute about the farming, harvesting and distribution of the proceeds of the first shells and that it was only the Second Claimant who had the necessary permit, the dispute about the second shells developed because :

1. the First Claimant and his wife no longer continued to live with the Second Claimant for a while during that period; and
2. a permit was issued by the Council in the First Claimant's name in circumstances where there is serious conflict of evidence which I shall consider shortly. It will assist if I now refer to a chronological table of dates which all parties agree with.

Chronological Table

DATE	THE FIRST SHELLS	THE SECOND SHELLS
July 1988	First and Second Claimants agree to farm pearls - the first shells.	
October 1988	The first shells are seeded.	
August 1989		First Claimant alleges that he and Luka Tobia enter into agreement - the second shells.
October 1989		The second shells are seeded.
October 1990	The first shells are harvested.	
May 1991		The second shells are harvested.

The overlapping of the dates of the first and second shells - their seeding and harvesting - has to some extent created part of a most confusing picture of the surrounding events relied on by the claimants but particularly the First Claimant. This confusion has been accentuated to some extent by conflicting evidence as to where the First Claimant was living and when. The First Claimant says :

- (a) in August 1989 he and his wife left the Second Claimant's residence and returned to the family house in Tauhuna;
- (b) in January 1991 he left the residence of the Second Claimant.

(Page 2 of Counsel's submissions)

However Counsel for the Second Claimant says the First Claimant's living arrangements during the relevant period were as follows :

- (a) August 1989 - Kamuta Kaitara leaves Charlie Mairi's house at Tukao and moves to his family house at Tauhuna;
- (b) August 1989 - Charlie Mairi returns from Rarotonga and Kamuta Kaitara and Tina Charlie move in with him in the Chief Administration Officer's residence;
- (c) January 1991 - Kamuta Kaitara and Tina Charlie moved out of Chief Administration Officer's residence at Tauhuna.

(Page 2 of Counsel's submissions)

There is conflict as to where the First Claimant was living between August 1989 and January 1991. It was during this period that the first shells were harvested and the proceeds shared. It was also during this period that the second shells were established - the First Claimant claiming by he and Luka Tobia; the Second Claimant claiming by he and the First Claimant.

## WITNESSES CALLED BY THE FIRST CLAIMANT

### 1. Luka Tobia

The First Claimant's case is based on a partnership agreement with Luka. However it is clear from Luka's evidence that any partnership; agreement; or arrangement is limited only to the diving for shells using Luka's boat. That arrangement is quite clear - they dived for shells; shared equally the most suitable; sold the unsuitable to Cook Islands Pearls; and shared equally the money received. That was the extent of the partnership arrangement between Luka and the First Claimant. Luka's 50% share of the suitable shells he then drilled and hung them on the line allocated to him in his family's permitted zone.

Luka states that the First Claimant's remaining 50% share of the suitable shells he hung on a prepared platform separate from Luka's.

Luka claims he seeded his own 50% share; he says that the First Claimant seeded his 50% share. That is everything was separate between them once the suitable shells had been divided up equally.

On the evidence of Luka therefore the First Claimant's claim rests not on a partnership agreement with Luka but on a claim of ownership of the 383 shells that were the subject of the seeding agreement. In cross-examination Luka agreed they were not farming together.

### 2. Martin Ellis

Mr Ellis helped the First Claimant on some of his pearl shells. He did not know whose shells they were or the exact number - only that the First Claimant had told them they were his. In cross examination however Mr Ellis, when asked whose farm it was, stated "yes it was a partnership" and when asked whose partnership stated "Kamuta and you" - the you being the

Second Claimant.

Then Mr Ellis in reply to another question stated :

"... I know for a fact that the shells were Kamuta and Luka before you and Kamuta were partners."

This of course would fix his evidence on those shells as prior to 1988.

WITNESSES CALLED BY THE SECOND CLAIMANT : SOLOMON WILLIAMS

Mr Williams is the Community Development Officer in Manihiki and also the Islands Mayor. He recalled issuing a permit to the First Claimant before the 1991 harvest. In reply to a question as to whether the First Claimant could farm pearls in Manihiki by himself if he had no permit. Mr William's reply was :

"... No. The Council's policy is you must have a farming permit before you can farm in the lagoon. That is the policy of the Council and that is how we work."

As a result of cross-examination by Mr Gibson, Mr Williams provided his explanation of another very confusing aspect of this case and which has been the subject of conflicting and diverging statements. The depositions state as follows :

"Q : Mr Kaitara has given in his evidence that you visited him at his place about this dispute over the pearls and told him that he had better resolve it and if he could not resolve it the Manihiki Island Council would keep the proceeds of those pearls.

A : This is correct. But I only visited him because he wanted me to see his documents. And when I went there his documents showed the agreement. It was then that I saw the Agreement that was signed between him and Cook Islands Pearls and it was under his name only.

And I told him that if that is the case and those pearl shells were his then he had farmed illegally in the Manihiki lagoon and that Council would confiscate those pearls.

Q : Were you aware that Mr Kaitara was working with Mr Luka Tobia?

A : No.

Q : If I now tell you that Mr Kaitara was working with Mr Tobia on Mr Tobia's family area in the lagoon, that's alright then isn't it? If Mr Tobia had given his consent for Mr Kaitara to do that?

A : It is alright as long as the shells are not his. As far as the Council is concerned he doesn't own any shells in the lagoon because he hasn't got a permit.

Q : But if Mr Kaitara works with Mr Tobia in the same way as Mr Kaitara had previously worked with Mr Mairi, then that's alright isn't it?

A : No it's not alright. Because previously before that Charlie Mairi had agreed that Kamuta Kaitara would work with him. There was no indication from Tobia that they will allow Kamuta to work with them in their area.

Q : And just one other question. Mr Gibson asked you were you aware that Kamuta was working with Luka Tobia and you said no. And that there was no indication from Luka Tobia that Kamuta was working with him. But being a small community were you not aware of this?

A : On our application for permits you have to indicate on it who is going to work with you on your farm and there was no indication from Tobia that Kamuta was going to work with them on their farm. Other than that I don't go to the lagoon myself, although I own a farm I don't go to



the lagoon. I am not an Inspector. I did not know that Kamuta was working with Tobia. All I know is that some of these farmers get together and they go out diving. When they get their shells they get them and put them in an area. Maybe that is what happened in this case. Kamuta and Tobia went to get shells and put them in that area.

Q : But you are not sure of that are you?

A : No I am not sure about that."

### TAWATORA PINIATA

Mr Piniata is the Supervisor of the Applicant company. He referred to the occasion of the 1991 harvest which was in May of that year. He confirmed there had been one of the necessary forms signed by both Claimants. He also referred to another form executed by the First Claimant only. He stated that both forms were presented to him on the same day. His explanation under cross-examination was :

"when Charlie found out that Kamuta had crossed his name out he tried to fill out another application witnessed by the Mayor."

### TRAINEE SAMSON

Mr Samson is a licensed pearl farmer in Manihiki. His evidence on the second shells is in direct conflict to that already referred to and given by Luka; by the First Claimant and his wife which supports Luka's version; and to some extent supported by Mr Ellis. Mr Samson's evidence supports that given by the Second Claimant. There is a direct conflict to the extent that one wonders if they are in fact talking about the same shells. Mr Samson describes the situation as follows :

"Q : Now, can you tell the Court what you know about shells belonging to Charlie Mairi and Kamuta Kaitara under your area for farming.

A: Yes Charlie Mairi requested me if I would consent to an area within my permit to farm their shells. I agreed and they brought their shells to be in that boundary.

Q: Can you tell the Court who brought the shells there, Charlie or Kamuta or both of them?

A: Both of them.

Q: An do you know who the shells belonged to?

A: According to Charlie what he told me the shells belonged to him.

Q: Did Kamuta say anything about the shells who they belonged to.

A: Yes, according to him it is for both of them.

Q: Is he aware of how many shells were brought there?

A: When I swam to see the shells there were about 500 big shells plus some little ones and there was also a line for spat collector.

Q: Can he tell the Court when these shells were taken to his permit area?

A: I think about January 1989.

Q: And once the shells were in your permit area, did Charlie or Kamuta come and check them, either alone or together?

A: Sometimes both of them came and other times Kamuta and so with Charlie.

Q: Can you tell the Court how long those shells were left in your permit

area?

A : As I recall the shells were brought in January and were left in that area until September when the shells were taken to Yves area the time for seeding."

### THE EXHIBITS

Exhibit 4 is the grading report for Lot 21 in the name of Charlie Mairi, the Second Claimant. I don't believe anything significant hinges on that document.

Exhibit A to Mr Tylor's affidavit is the seeding agreement dated 7 October 1989 signed by "K. Ioane" (which is the First Claimant's other name); witnessed by "T. Piniata"; referring to 383 oysters seeded; and in the name of "Kamuta Kaitara". There is considerable conflicting evidence as to when this agreement was signed, it being alleged there were no forms available at the time of seeding in 1989 and it wasn't signed until some time later. There was further conflicting evidence as to why it was in the name of the First Claimant - he says because the second shells were his - the Second Claimant saying he was prepared to allow the agreement to be in the First Claimant's name when approached about it by the claimants officials and because he knew the second shells were shared and because he trusted the First Claimant.

The only fact that has been established and is accepted by the First Claimant's Counsel is that at the time the seeding agreement was signed by the First Claimant, he was not a licensed pearl farmer. As such he could not take advantage of the 1989 seeding by the Applicant. It is suggested or implied by both the Applicant's officials and the Second Claimant that the seeding agreement signed by the First Claimant could only be acceptable on the basis of the first shells arrangement - that is a partnership between both claimants since the Second Claimant was the only farmer who was licensed. It is relevant to observe that under this seeding agreement executed by the First Claimant he covenanted to :

"(f) ... farm the seeded oysters in accordance with the terms of the Culture Pearl Farming Permit held by him."

He of course did not have a permit at the time he entered into this agreement which provides further :

"(g) No farmer shall be entitled to have any oyster seeded under this agreement unless he is the holder of a Culture Pearl Farming Permit."

It is because of these provisions and the disagreement between the Claimants that the Applicant has withheld distribution of the funds which are now in dispute.

Again referring to Mr Tylor's affidavit he has exhibited a harvesting or marketing agreement dated 16 May 1991 between the Applicant and the Second Claimant and signed by the latter. This provided for the 192 harvested pearls to be auctioned. The auction was held on 8 June 1991 and the 60% payable to the Second Claimant under that agreement is now the dispute the applicant has asked the Court to resolve.

#### CONCLUSIONS

I have considered all the evidence presented in this dispute. There is no disagreement as to the first oyster shells that were seeded and harvested jointly by the Claimants who are son-in-law and father-in-law respectively - these were seeded and harvested pursuant to a permit issued to the Second Claimant only by the Manahiki Island Council; the First Claimant did not have a permit; the proceeds were distributed approximately equally. With the first operation there is no dispute.

The second oyster shells, 383 being seeded, are the subject of this claim - by the First Claimant - he claims sole ownership; and by the Second Claimant - he claims an equal sharing arrangement similar to the equal sharing the applied to the first oyster shells.

There is direct conflict in the evidence of the two claimants - as to the number of shells; as to where they were placed in the lagoon; as to what happened at seeding; and as to what happened at harvesting. The First Claimant is supported in the main by his wife Tine Charlie, the daughter of the Second Claimant. Normally a Court, in circumstances where there is such conflict, has the benefit of hearing how the evidence is given by the parties; the manner in which it is given; the demeanour; the hesitation; the frankness; and all the other aspects necessary to assess what evidence will be accepted and what evidence will be rejected. This case is very unusual in that respect since all the evidence has been given on commission and no witnesses have appeared before me. Consequently I have had no opportunity to assess the weight to be given to the evidence submitted; yet I am required to determine what evidence I should accept and what evidence I should reject. As far as the principle parties to these proceedings, namely the First Claimant and his wife challenging the Second Claimant; and the fact of this so close relationship; makes the determination of who to believe and what evidence to rely upon or reject in such circumstances a most difficult task. For that reason I have delayed preparing this Judgment in order to re-read all the evidence several times and at separate intervals in order to better absorb all the evidence while at the same time to ensure that subsequent reviews will mean that no part of the evidence has been overlooked or misinterpreted. In this respect the very detailed and comprehensive submissions from both Counsel has materially helped the Court to appreciate the evidence of the respective party and supporting witnesses. Those submissions have also highlighted very graphically the serious differences in the evidence of the two claimants - the frequently repeated allegations of lying by both Counsel in their interpretations of evidence against the opposing claimant or witnesses.

For those reasons I have been forced to concentrate on the witnesses called by both claimants in an effort to determine what arrangements were made by the claimants for the growing, seeding and harvesting of the second oyster shells. For I am required to determine from all the evidence recorded whether the proceeds held by the Applicant belong to the First Claimant; or are to be shared by the First and Second Claimants equally.

I have already considered in detail the evidence of the various witnesses called by each claimant. Allied with that evidence I must also consider the documentation so necessary to be able to seed and harvest oyster shells at Manahiki. There is no dispute that the First Claimant did not have a farming permit so necessary to seed and harvest oyster shells. I accept the evidence that without that permit a farmer cannot seed and harvest oysters. The standard pearl seeding agreement provides :

"(g) No farmer shall be entitled to have any oyster seeded under this agreement unless he is the holder of a Culture Pearl Farming Permit."

It is accepted by Counsel for the First Claimant that Mr Kaitara did not have such a permit. He acknowledged that in his submissions as follows :

"The problem the First Claimant must overcome however is that he had farmed these pearls without a farming permit. Mr Samson Piniata was of the opinion that the First Claimant when he brought the shells in did so on behalf of the Second Claimant and that is why he allowed the harvesting agreement to be executed about a year later. Mr Samson Piniata states that he was sure the First Claimant was working on behalf of the Second Claimant and there was no need to question the First Claimant signing the harvesting agreement by himself. If this is true then :

- \* why did Samson Piniata go to the residence of the Second Claimant to tell him to sign the agreement.
- \* why did the company representative only enter the name of the First Claimant when he bought the shells in for seeding in October 1989?
- \* why was the Second Claimant not present in such an important event as bringing the shells in for seeding?
- \* why did the Second Claimant fill in a separate harvesting agreement to claim the second harvest.
- \* why had a year elapsed before the Second Claimant decides the second harvest are part of his?

And further in the evidence the First Claimant states that at no time did he say to anyone that the shells belong to him and the Second Claimant. The First Claimant further gave evidence that at the time he gave the shells for seeding he had told Mr Piniata that these shells were his and as a result his name only was entered into the record book for these shells. Therefore the shells of this second harvest belong to the First Claimant (and Luka Tobia)."

The questions posed by Counsel in those submissions were answered by Mr Piniata. I have already considered his evidence. Counsel submits, however, that because the First Claimant is farming without a permit this is not an impediment to his claim. He puts it this way :

"The farming without a permit should not prevent the First Claimant from the proceeds of the second harvest because the council were of the opinion that he was fit to have a permit because they were issued a permit to him subsequently in 1990. It is submitted that the proceeds of the second harvest be given to the First Claimant solely to distribute it pursuant to the partnership agreement with Luka Tobia."

I cannot accept that submission. It is contrary to the policy of the Island Council which has not been challenged viz that seeding and harvesting can only be undertaken by the holder of a Culture Pearl Farming Permit. The fact that the Council subsequently granted the First Claimant a permit can only apply to seeding and harvesting arrangements concluded after the issue of the permit. Explanations have been given as to how the seeding agreement was in the name of the First Claimant and signed by him. The harvesting agreement produced was in the name of the Second Claimant.

The totality of the evidence presented; the necessity for a permit to operate; and the documentation associated with this second seeding and harvesting clearly establishes an arrangement similar to that which applied between the parties for the first seeding and harvesting - an equal sharing of the proceeds.

Counsel for the Second Claimant suggests his client should be allowed \$685.00 for a line of spat and 117 shells. The latter relates to the Second Claimant alleging a total of 500 shells laid when only 393 were harvested. This claim relates really to the entitlement of the proceeds of 393 shells that were seeded and harvested. That number of shells has been established and the proceeds are identified and held by the Applicant. The claim for \$685.00 is disallowed.

The Court awards the proceeds of the 192 pearls harvested and at present held by the Applicant to be distributed equally to the First and Second Claimants. Likewise the interest which would have accumulated on those funds is to be distributed equally to both claimants. Each party will pay its own costs.

*D. J. J.*

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