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

Plaiant No. 130/96

BETWEEN SAMUEL KARAPONGA Pearl Farmer of Manihiki

Plaintiff

AND MITSUGU NAKADA Pearl Technician of Manihiki

First Defendant

AND APII PIHO Pearl Farmer of Manihiki

Second Defendant

Hearing: 25, 26, 27 August 1997
Counsel: Mrs. T.P.Browne for Plaintiff
Mr. A.M.Manarangi for Defendants
Judgment: 22 December 1997

JUDGMENT OF QUILLIAM C.J.

The First Defendant (Nakada) has commenced two actions against the Plaintiff (Karaponga). He is a pearl technician who was based on Manihiki and who has seeded oysters for Karaponga, a pearl farmer on Manihiki. The basis of their arrangement was that Nakada would receive 34% of the proceeds of sale of pearls harvested from any oysters seeded by him for Karaponga. The two actions differ only in respect of the season in which the seeding was done, and it is conceded on behalf of Karaponga that he is liable to Nakada in both actions, although the amounts appear to be subject to valuations yet to be made.

In respect of the earlier of the two actions (No. 130/96) Karaponga has filed a Counterclaim and Set-off in which, pursuant to Rule 110 of the Code of Civil Procedure, he has joined a second defendant (Piho) and has claimed relief against Nakada in respect of certain matters, and relief against Nakada and Piho jointly and severally in respect of other matters. Karaponga has declined to pay the amounts for which he is liable until it is determined whether he should succeed by way of counterclaim or set-off.

It is unnecessary to set out the details of the actions any further because I was informed by counsel at the commencement of the trial that the only matter now in issue is the counterclaim, and, more specifically, whether Nakada and Piho, or either of them, is liable for loss suffered by Karaponga whose pearls were in the end sold to one Maima Tehei who has not paid for them and has disappeared. The counterclaim is pursued in contract, tort and bailment.

There is no dispute over the fact that Karaponga entered into a contract with Nakada for the latter to seed his oysters. A number of other pearl farmers on Manihiki also engaged Nakada. The contract was in writing and provided that Nakada would harvest, polish and grade the pearls in return for receiving 34% of the value of the pearls. Although not stated in the written contract it is clear from the evidencethat there was a collateral oral agreement that if Karaponga could not sell his pearls within three months then Nakada would undertake the sale of them on Karaponga's behalf. It was for this reason that the rate of payment was increased to 34% from the more usual 25%.

In the relevant season Nakada seeded 1040 oysters for Karaponga and in due course extracted 641 pearls from those oysters. Karaponga put a reserve price of $100 each on those pearls and left them with Nakada for the purpose of sale. Several attempts were made by Nakada to sell the pearls, both in Rarotonga and in Australia, but without success. Although Karaponga went to Rarotonga with Nakada when negotiations for sale were to take place there is no doubt that Karaponga was excluded from any such negotiations and his pearls were in the custody of Nakada throughout.

Apii Piho was one of the group of pearl farmers on Manihiki and, as he put it, "I have often been nominated by the group as their spokesperson and representative on issues affecting the group." Piho and Nakada acted for the most part together in the attempts to sell Karaponga's pearls.

Eventually Piho was left by Nakada with Karaponga's pearls (and those of some others as well) for the purpose of finding a buyer. Piho was introduced by Karaponga's brother, Daniel Apii, to a Tahitian woman named Maima Tehei, who was in Rarotonga in order to purchase pearls. Maima Tehei was interested in purchasing Karaponga's pearls on consignment. The negotiations which followed were carried out by Daniel Apii on Karaponga's behalf. Karaponga had by then agreed to lower his reserve price to $90.

On 23 March 1995 Piho and Apii met Maima Tehei and as a result a sale was arranged. It was evidenced by a handwritten agreement prepared by Piho which records that it is made "between Apii Niho (Pearl Producer) and Maima Tehei (seller)", and which records further:

> "I, Apii Piho do solemnly declare that I have agreed to allow Maima Tehei to take our pearls on consignment.
> "In return Maima Tehei has agreed to insure the pearls to its full value on receiving the total parcel of pearls and has guaranteed the sale of pearls to the value agreed by the pearl producers.."

The document then records that the transaction included 641 of Karaponga's pearls at $90NZ oer piece, a total price of $57,690. The document was then signed by Piho and Maima Tehei, and their signatures were witnessed by Apii.

The pearls were duly handed to Maima Tehei who failed to insure them, and then disappeared. Karaponga's loss was $57,690, and Nakada's claim against him was 34% of that amount.

The question then is as to whose liability it was that this loss occurred.

It is necessary first to refer to the joinder of Piho in the proceedings by means of the counterclaim.

Rule 110 of the Code of Civil Procedure Provides:

> "110. Counterclaim against plaintiff and another person- A defendant may set up a counterclaim against a plaintiff and some other person. In any such case he shall serve a copy of the counterclaim on that other person...; and the court may, on the application of the plaintiff or that other person, make such orders and give all such directions as may be necessary to enable any questions at issue between all the parties to be determined at the hearing of the action."

On behalf of Nakada it was argued that this rule did no permit the joinder of Niho in the present actions because those actions related to claims in respect of the 1996 and 1997 harvests, and the counterclaim related to the 1994 harvest. In support of this submission reliance was placed on Rule 150 of the New Zealand High Court Rules which provides:

> "150. ...if the defendant has a counterclaim against the plaintiff along with any other person (whether a party to the proceeding or not) for any relief relating to or connected with the original subject-matter of the proceeding he may...file a statement of the counterclaim.." (emphasis mine).

It is apparent from the words underlined that the two provisions are significantly different. Whether R.110 could encompass a counterclaim based upon some wholly different cause of action may well be in doubt, but I am sure that it must permit the present counterclaim which is directly connected with the relationship between Nakada and Karaponga in respect of successive yearly contracts. I accept that the matters raised in the counterclaim could equally have been the subject of separate proceedings, but I consider they also fall within the terms of R.110.

The sale on consignment of the pearls to Maima Tehei was carried out by Piho. It was an express term of the

handwritten contract prepared by Piho that the pearls were to be insured. This was not done and this failure was the immediate cause of Karaponga's loss. Maima Tehei disappeared with the pearls and there seems to be no prospect of her being traced. In evidence Piho was refreshingly frank in accepting responsibility for what happened. He acknowledged that it was his responsibility to see that the requirement as to insurance was complied withbefore he handed over the pearls. He conceded that the sale on consignment which he arranged was "a big mistake".

It remains then to consider the basis on which his liability is to be assessed, and whether he alone is liable or whether Nakada is also.

The precise relationship between Piho and Nakada is not clear. It has been described as a partnership, but this is at least doubtful. What is undoubted is that initially Karaponga entrusted his pearls to Nakada for sale. From the time of the final harvest Karaponga scarcely saw his pearls. They were set out (along with the pearls of other farmers) by Nakada for inspection, and each farmer was given a grading sheet. They never left Nakada's possession, however, and it was he who took them to Rarotonga with a view to sale. At Rarotonga Karaponga was not permitted to be present at the viewing of the pearls by prospective purchasers. Of the farmers, only Piho was permitted to be present.

No sale eventuated during this visit to Rarotonga and Nakada returned to Manihiki leaving the pearls in Piho's custody. Piho then proposed a sale to Maima Tehei but Nakada refused to agree. Later,Nakada and Piho went to Rarotonga again and from there Nakada took Karaponga's pearls to Australia and Piho went to New Zealand. Nakada was unable was unable to obtain a sale in Australia and then sent the pearls to Piho who was by then in Rarotonga. There followed the negotiations by Pihofor a sale to Maima Tehei. In March 1995 Nakada was told of a possible sale to Maima Tehei at Karaponga's reserve price of $90 per piece. He consented to that sale on consignment on the condition that the pearls were insured. Nakada acknowledged that he did not speak to Karaponga before giving that consent.

Although there were occasional communications between Karaponga and Piho, I can see no basis upon which it could be said that Karaponga ever authorised Piho to act as his agent for the purposes of sale. It is undoubted that it was Nakada to whom Karaponga had entrusted his pearls for sale, and this was in accordance with the contract between them. It was Nakada's decision to hand the pearls over to Piho but this did not relieve him of his responsibility to Karaponga.

At no stage did Karaponga give his consent to a sale

by Piho. Although his brother, Daniel Apii,was present at the sale there is no evidence that he had authority from Karaponga to agree to the sale or to the terms of a sale.

There is, I think, no doubt that Piho acted either as Nakada's agent for the purpose of selling Karaponga's pearls in accordance with the contract between Nakada and Karaponga, or as a gratuitous bailee.

If it was the former, then Piho departed from Nakada's express instruction not to sell on consignment unless insurance was arranged. In that case Piho is personally liable upon a warranty of authority for Karaponga's loss. If it was the latter, then he failed in his duty of care to Karaponga as a gratuitous bailee and again is liable directly to Karaponga.

Nakada's position is, however, different. He had a contractual obligation to Karaponga to arrange a sale at not less than Karaponga's amended reserve price of $90 per piece. He gave his consent to Piho to sell at that price, but upon the condition that insurance was arranged. I can see no basis upon which he can be held liable to Karaponga. He had discharged his obligation and had acted with due care in his instructions to Piho. He cannot be held responsible for the fact that Piho departed from his express instructions.

In the result I consider that Karaponga is entitled to succeed against Piho but not against Nakada. The amount claimed against Piho is $57,690, but there is also a claim for interest in respect of which there is no evidence.

There will be judgment on the Counterclaim for Karaponga against Piho, and for Nakada against Karaponga. I am not aware whether it is necessary to enter judgment for Nakada on his two actions against Karaponga. In the circumstances leave is reserved to all parties to apply further as to the precise form of the judgment which should now be entered if they are unable to agree on this.

Similarly, leave is reserved to apply for costs.