LIJABLUR, Plaintiff

v.

WILFRED KENDALL and FRANCIS REIMERS, Defendants

Civil Action No. 414

Trial Division of the High Court

Marshall Islands District

April 23, 1973

Dispute over distribution of money paid for loss of business *alab* had on land leased to the Government. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that holder of *dri jerbal* interests in leased *wato* was entitled to share in the rental payment, but was not entitled to share in the damages paid the *alab* for the loss of business he had on the land.

1. **Marshalls Land Law—Questions of First Impression—Determination**

   In the absence of any custom or traditional law applicable to question of first impression whether *dri jerbal* was entitled to share in money paid *alab* for loss of *alab's* business located on land leased by Government, court would look to any analagous traditional practices or, in the alternative, apply American common law under authority of statute. (1 T.T.C. § 103)

2. **Real Property—Generally**

   Interests in land and an investment interest in a business on the land are not the same.

3. **Marshalls Land Law—Generally**

   Under the feudal system of land tenure prevailing in the Marshall Islands there are always three and usually four rights or ownership interests in land, all of which benefit from the produce from the land, even though the product is generally obtained by the sole efforts of the *dri jerbal*, who shares a portion of the income from the sale of copra with the *alab*, whose principal duty is management of the land, and with the *iroij erik* or *iroij lablab* and with both in the eastern chain.

4. **Marshalls Land Law—Leases—Distribution of Income**

   When land is leased to another to use for business purposes, the rental income is shared by the land interest holders, but the income from the business on the land is not shared.

5. **Marshalls Land Law—Generally**

   Rental or other income from land is "contract" or custom income, whereas payment for loss of a business on the land and the goodwill and future earnings of the business represents damages for a tort or a taking by eminent domain.

6. **Marshalls Land Law—Interests Taken by Government—Distribution of Compensation**

   Holders of interests in land taken by the Government are entitled to share, in accordance with their interests, in any compensation paid for the taking.

7. **Marshalls Land Law—Business on Land—Distribution of Payment for Loss**

   When a person operates a business on land and none of the other persons holding an interest in the land have a claim to or interest in the business, the other interest holders should not be entitled to share in damages paid for loss of the business.

8. **Marshalls Land Law—"Alab"—Obligations**

   An *alab* is not expected to share income with the *dri jerbal* when the *alab* sells copra or other produce from the land, but the *alab* has some degree of responsibility for the welfare of the *dri jerbal.*

9. **Marshalls Land Law—"Alab"—Obligations**

   Alab's obligation to protect the welfare of the *dri jerbal* does not require him to make a gift to the *dri jerbal* of a share of the *alab's* sole and separate business.

10. **Marshalls Land Law—Generally**

    Holder of *dri jerbal* interests in leased *wato* was entitled to share in the rental payment, but was not entitled to share in the damages paid the *alab* for the loss of business he had on the land.

Assessor:	KABUA KABUA, *Presiding Judge, Marshalls District Court*
Interpreter:	OKTAN DAMON
Reporter:	Tape Recording
Counsel for Plaintiff:	JESSE L. LAJUAN
Counsel for Defendants:	ANIBAR TIMOTHY

TURNER, *Associate Justice*

After much preliminary skirmishing between counsel, with numerous motions, including one by defendants for a jury trial, and memoranda of alleged fact and custom, the trial developed only a single issue of law. Because it was apparent the dispute pertained to Marshallese customary law and there were no substantial issues of fact involved, the motion for a jury trial was denied.

The Trust Territory Government leased Jeik *wato*, Majuro Atoll, together with other parcels of land for a new airstrip and water catchment system. The Government paid $27,216 for the land rental and also paid to the defendants $35,000 "as full and complete compensation and settlement for loss of business, loss of profits and future earnings and goodwill connected in any manner with the 'Ni-Palm-Inn' business operation situated on the premises . . . ."

The land rental payment was made to the *iroij erik* and the two defendants who were designated *alab* and *dri jerbal*. This designation was partially in error because in the two judgments entered in Civil Action No. 109, not reported, it was held:

1. In the judgment dated November 17, 1959, that ". . . Lijablur . . . the adopted daughter of Jemba's father's sister Lijronean through whom the *alab* and *dri jerbal* rights came, also has *dri jerbal* rights in the land under Jemba as *alab*." Jemba also was held to have *dri jerbal* rights with Lijablur.

2. The supplemental judgment in that case entered June 20, 1969, held that "Wilbur (Wilfred) Kendall has purchased rights in the property . . . from Jomba (Jemba) and . . . is now the lawful owner of the said *alab* rights, and that said sale has not affected the rights of the plaintiff Lijablur as *dri jerbal* in said land under Wilbur (Wilfred) Kendall, as *alab* . . . ."

In the present case no issue was raised as to whether there was a valid and effective transfer of interest from Jemba, now deceased, to Kendall and his partner Reimers and the Court proceeded on the basis of the holdings in Civil Action No. 109. In accordance with that judgment the *dri jerbal* shares of the $27,216 rental payment was agreed to be divided equally between plaintiff and defendants, who each hold one-half of one share. The two *dri*

jerbal shares are one-third of the total, with one-third received by the *iroij erik* and one-third received by the defendants as *alab* interest holders. The one-third share is $9,072 and this amount is to be divided between plaintiff and defendants, less the amount, however, paid by defendants to plaintiff of $1,300 from the entire *dri jerbal* share of $9,072 erroneously paid by the Government to the defendants. Plaintiff, therefore, is entitled to receive $3,236.

Plaintiff also claimed $11,666 as her *dri jerbal* share of the $35,000 paid by the Government for the removal of the hotel and consequent loss of business. Plaintiff did not disclose the calculations upon which she based the claim, but the principle involved was an insistence that under Marshallese custom the *dri jerbal* is entitled to share in the proceeds from the land and that a payment for a business on the land is in effect an income from the land.

The plaintiff agreed that she had not invested in the hotel and her only claim was because of her *dri jerbal* interest in the land on which it was situated. Thus the question was raised as to whether or not the holder of the *alab* interest in land is obligated under Marshallese customary land law to share income from the business, or as in the present case, share the payment made for the loss of the business as result of transfer of the land on which it is situated.

[1] The question is one of first impression in the Courts and from the evidence it appeared that it has not arisen in the Marshallese society. Because it is an entirely new concept there has not been any custom or traditional law developed which would be applicable. In the absence of applicable custom the Court must look to analogous traditional practices if there are any, or in the alternative, apply the American common law under the authority of 1 T.T.C. 103.

A study as to whether or not custom was available to solve a first impression case was made by this Court in

Ichitaro v. Lotius, 3 T.T.R. 3. From a lengthy definition of the term "custom" taken from the textbooks, the Court concluded at 3 T.T.R. 13:

> "In other words, an alleged custom must be at least generally accepted and followed by those upon whom it places a burden as well as by those who hope to profit from it, before it can fairly be considered to have become a part of the customary law. Since the Court can find no such common consent and fairly uniform practice . . . it feels it must hold that any liability there may be . . . does not depend on Trukese custom, but on other parts of the law."

In the present case the parties and their counsel agree there is no uniform practice for this precise situation for the very good reason the question, to the best of their knowledge, has not arisen before. The question presented is whether the *alab* is obligated to share any portion of the payment for destruction and removal of the business only because others had an interest in the land on which it was situated.

[2] It is necessary to distinguish between interests in the land and an investment interest in a business on the land. They are not the same.

[3] Under the feudal system of land tenure prevailing in the Marshall Islands, there are always three and usually four rights or ownership interests in a parcel of land. All interests benefit from the produce from the land, even though generally the product is obtained by the sole efforts of the *dri jerbal*, the worker. When copra is made and sold the *dri jerbal* shares a portion of the income with the *alab*, whose principal duty is supervision and management of the land. The *dri jerbal* also shares his income with the *iroij erik* or *iroij lablab*, and in the eastern chain, with both.

In addition to sharing the income derived from the product of the land, the *dri jerbal* makes ceremonial gifts of food to the *alab*, and both *dri jerbal* and *alab* make

ceremonial gifts of both food and other commodities to the *iroij*. The ceremonial giving as well as the income sharing is fully in accord with long established and well recognized custom.

The income that is shared by the *dri jerbal* with the *alab* and *iroij* is a small percentage of the total. This practice has changed, however, in comparatively recent times by the exchange of land for money, either by lease or transfer. The practice of substituting money for land does not result in a minimal division of the money exchanged except, however, one case decided by this court, which calculated minimal share for the *iroij*. *Bulele v. Loeak*, 4 T.T.R. 5; *Muller v. Makroro*, 5 T.T.R. 570.

[4] Also similar to sharing produce income or food from the land, but distinguishable from a business income, is the practice of sharing rental income from the land when it is transferred by lease or otherwise to a transferree who has no traditional interest in the land and has paid only for the right to use and occupy it. In the present case the interest holders, the *iroij erik*, *alab* and *dri jerbal*, shared the $27,216 lease payment. When land is leased to another to use for business purposes, the resultant income is shared by the land interest holders, but not the income derived from the business on the land.

The distinction between the land itself, its intrinsic value and the value of its product, and a business enterprise located on land is a familiar one in the United States. The very recent Supreme Court Cases involving taxation of tribal Indian income from businesses operated on lands which were themselves exempt from taxation are illustrative. See: *Mescalero Apache Tribe v. Commissioner of the State of New Mexico*, U.S. Supreme Court Case No. 71-738, decided March 27, 1973, and *McClanahan v. State Tax Commission of Arizona*, U.S. Supreme Court Case No. 71-834, decided March 27, 1973.

Although both these cases were decided upon construction of treaties with the Indians and interpretation of congressional statutes, rather than the common law itself, they are significant examples of the distinction between land and income derived from its product and a business and the income from it.

[5] Another determinative distinction between rental or other income from the land and from a business on the land which has been destroyed is that the first is "contract" or custom income and the payment for loss of a business, its goodwill and future earnings represents damages for a tort. 25 C.J.S., Damages, Sec. 44; 27 Am.Jur.2d., Eminent Domain, 285–287.

The law in eminent domain or tort cases (and this case has aspects of both) for loss of business, future earnings, goodwill, going concern value, and similar measures of loss are all compensated for in damages. Compensation for use of the land is not the same.

[6, 7] Interest holders whose land is taken and to whom compensation is paid by the Government as the taker are entitled to share in this compensation in accordance with their interests in the land. When one of these operates a business on the land in which none of the other interest holders have a claim to or interest in, then they should not be entitled to share in the damages paid for the loss of the business. This common law rule is applicable in the absence of any effective or governing Marshallese custom.

There was testimony by the Assessor, who was called to discuss for the record, his understanding of applicable Marshallese custom, if any, which indicates custom might well govern the operation of a business by a *dri jerbal.* In this situation he might be expected to share with his *alab* and *iroij* some of the profits from the business upon the same theory that the *dri jerbal* is expected to share a small portion of the income from copra sales from the land.

[8] By the same analogy to copra sales an *alab* is not expected to share income with the *dri jerbal* when the *alab* cuts and sells copra or other products from the land. The *alab* has some degree of responsibility, however, for the welfare of the *dri jerbal.*

The Appellate Division held in *Jatios v. Levi,* 1 T.T.R. 578, that the interest holders in land each hold obligations to each other. The Court said at 1 T.T.R. 587:

"All the different levels of owners have rights which the Courts will recognize, but they have obligations to each other which severely limit their control over the land. There is a duty of loyalty all the way up the line *dri jerbal,* to *alab,* to *Iroij erik,* to *Iroij lablab,* a corresponding duty to protection of the welfare of subordinates running down the line, and a strong obligation of cooperation running both ways."

[9] The obligation of an *alab* to protect the welfare of the *dri jerbal* does not require the *alab* to make a gift to the *dri jerbal* of a share of the *alab's* sole and separate business.

Another "business" payment situation may further clarify, by way of example, this situation. Assume the *alab,* with his own funds purchased an automobile to be operated as a taxi. In the course of events the taxi is destroyed in a traffic accident. When the *alab* collects either insurance or damages from the other vehicle operator causing the loss, it would be difficult to accept an argument that a *dri jerbal* had a right to claim a share in the payment, even though that payment, as in the present case, may have exceeded the *alab's* "investment" in the taxi business.

[10] In accordance with common law principles of fairness and justice, plaintiff, as a holder of *dri jerbal* interests in Jeik *wato,* is entitled to one-half of the *dri jerbal* share of the rental payment for the land. She is not entitled to share in the damages collected by the defendant *Alab* Kendall, for the loss of his and his partner's business. Accordingly, it is,

Ordered, adjudged and decreed: that plaintiff is awarded judgment against the defendants, jointly and severally, in the sum of $3,236 together with interest on said sum at the rate of 6% per annum from date of entry hereof until paid. No costs are awarded.