IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

SHIH BIN-FANG, ASIA PACIFIC INTERNATIONAL INVESTMENT INC.,
and MARIA TANAKA, aka BELBULT TANAKA
Appellants,
v.
SIDNEY EICHI MOBEL, INDIVIDUALLY AND ON BEHALF OF HIS SIBLINGS,
Appellee.

Cite as: 2020 Palau 7
Civil Appeal No. 19-006
Appeal from Civil Action No. 15-124

Argued: February 10, 2020
Decided: March 23, 2020

Counsel for Appellant	Johnson Toribiong
Counsel for Appellant	Salvador Remoket
Counsel for Appellee	Yukiwo P. Dengokl

BEFORE: JOHN K. RECHUCHER, Acting Chief Justice
GREGORY DOLIN, Associate Justice
KATHERINE A. MARAMAN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

DOLIN, Associate Justice:

[¶ 1] Shih Bin-Fang, Asia Pacific International Investment Inc., and Maria Tanaka appeal from the judgment of the Trial Division which held that Appellants are jointly and severally liable for trespass on the property belonging to Sidney Eichi Mobel, and which ordered the prompt removal of

the allegedly trespassing structures as well as the payment of damages. For the reasons set forth below, we **AFFIRM IN PART, REVERSE IN PART, VACATE IN PART, AND REMAND.**

FACTS

[¶ 2] This is a dispute over boundaries and ownership of the property formerly known as *Ochelochel* located in Ngetkib, Airai State and listed in the Bureau of Lands and Surveys (BLS) as Cadastral Lot 037 N 07. This is not the first time that we are required to resolve a dispute over this property. *See*, *e.g.*, *Riumd v. Mobel*, 2017 Palau 4. The history of this litigation is convoluted and we focus only on the most salient aspects.

A.

[¶ 3] At one point, *Ochelochel* was part of a larger plot by the same name. Sometime around 1998, as a result of the construction of the Compact Road, the larger plot was split into two portions. The portion on the seaward side of the road became Cadastral Lot Number 037 N 08, while the portion on the landward side of the road became Cadastral Lot Number 037 N 07. *See Riumd*, at ¶ 17. The present litigation is over the latter lot which we will refer to by its original name—*Ochelochel*.

[¶ 4] In 2008, the Land Court issued Certificates of Title for both Lot 037 N 07 certifying "that Eichi Delemel, Benged Riumd, Patrick Delemel, and Maria Tanaka is/are the owner(s) of an estate in fee simple in land . . . particularly described as . . . Cadastral Lot No. 037 N 07." *Id.* at ¶ 19 (alterations in original). In 2012, Alfonso Riumd (Benged's oldest male child) filed a petition to partition *Ochelochel*. *See* Civil Action No. 12-166. The petition named the children of Eichi Delemel, Patrick Delemel, and Maria Tanaka as respondents. Ultimately, the parties agreed to partition the property into four roughly equal lots.

[¶ 5] Prior to the settlement agreement being signed, BLS was asked to survey *Ochelochel* and create a tentative map of the boundaries that each partitioned lot was expected to have. BLS completed this rough estimate map on March 7, 2013, by drawing three essentially straight lines running from North to South, thus separating *Ochelochel* into four lots tentatively numbered (from

West to East) 037 N 07A, 037 N 07B, 037 N 07C, and 037 N 07D. Based on this map, on January 21, 2014, the parties to Civil Action 12-166 filed a joint stipulation settling the dispute. On January 23, 2014, the Trial Division entered final judgment which incorporated the settlement agreement. Pursuant to that judgment, Lot 037 N 07A was allocated to Defendant-Appellant Maria Tanaka and Lot 037 N 07B was allocated to the heirs of Eichi Delemel, who were represented by Plaintiff-Appellee Sidney Eichi Mobel.[1]

[¶ 6] Two aspects of the judgment in Civil Action 12-166 are of particular importance to the present litigation. First, Maria Tanaka's mother—the late Masae Tanaka—already had a house on the *Ochelochel* property. The house was located to the East of the line tentatively separating Lots A and B. Put another way, the house belonging to Maria Tanaka's mother ended up on the portion of the property allocated, not to Maria Tanaka, but to Sidney Mobel. Because this was unsatisfactory to the parties, the settlement agreement called for Tanaka and Mobel to "configure the partition, with the assistance of the surveyors from . . . BLS . . . so that the family house of Masae [Tanaka] and the personal house of Maria Tanaka will be contained in one lot which is owned by Maria Tanaka." This reconfiguration was supposed to be done in such a way that lots A and B would still remain of equal size. In other words, the parties agreed, and the Trial Division ordered, that Lots A and B be separated, not by a straight North-South dividing line, but rather by a border that would zig-zag in such a way as to include Tanaka family houses on Maria Tanaka's lot, but without diminishing the size of the lot assigned to Sydney Mobel.

[¶ 7] Second, the settlement called for, and the Trial Division ordered, BLS to "resurvey Cadastral Lot No. 037 N 07 to reflect the partition described in th[e] Judgment and Order." BLS was further ordered to "provide at least three (3) days notice to the parties and their counsel of the date and time of the re-survey so that all parties may attend if they choose to do so." Presumably, since the final boundary (at least between Lots A and B) was not going to be a straight line, this provision was negotiated so as to permit the parties to have some input over the final shape of their lots.

[1] Lot 037 N 07C was allocated to the heirs of Patrick Delemel and Lot 037 N 07D was allocated to the heirs of Benged Riumd. These two lots are not at issue in the present litigation.

[¶ 8] Unfortunately, BLS ignored this last part of the Trial Division's order. Instead, at some point in 2014—without notice to the parties—BLS created computer models and then conducted a survey of Lot 037 N 07 based on those models. The survey produced a final map of the partitioned lots. BLS then renumbered the reconfigured Lot A as 037 N 69 and the reconfigured Lot B as 037 N 70. Based on these maps, on October 15, 2014, the Land Court issued a Certificate of Title to Maria Tanaka for Lot 037 N 69 and on January 16, 2015, a Certificate of Title to Lot 037 N 70 to the heirs of Eichi Demerel, of whom the Plaintiff-Appellant is one.[2]

B.

[¶ 9] After the Trial Division entered its judgment in Civil Action 12-166, but before receiving her Certificate of Title, Maria Tanaka signed a contract agreeing to, in exchange for an initial lump sum payment and subsequent monthly payments, lease part of her land to Shih Bin-Fang and Asia Pacific International Investment, Inc.[3] The lease agreement was signed on April 14, 2014, and amendments were executed on September 15, 2015, and December 12, 2016. Even after the Land Court issued a Certificate of Title to Maria Tanaka which identified her plot as 037 N 69, the lease agreement between Tanaka and API referred to the plot as 037 N 07A.

[¶ 10] The purpose of the lease agreement between Tanaka and API was to permit API to build a small resort on the Tanaka property. API applied for and obtained the necessary permits to carry out this activity. In its application for the Foreign Investment Approval Certificate, API again specified that it planned to build on Lot 037 N 07A. Once all of the requisite permits had been secured, API began building. During this process, the house belonging to Masae Tanaka was torn down and the physical space previously occupied by that structure is now occupied by the resort's staff quarters.

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[2] Although the lot is owned by all heirs of Eichi Demerel, for convenience, and in keeping with the case caption, from this point forward we will refer only to Sydney Mobel as the owner of this lot. However, this is done for convenience purposes only, and nothing in this opinion should be read to in any way affect the ownership rights of the other heirs of Eichi Demerel.

[3] For the sake of clarity, we will refer to Appellants Shin Bin-Fang and Asia Pacific International Investment Inc. collectively as "API."

[¶ 11] At some point in 2015, but no later than December 7th of that year, Mobel noticed API's activities and, believing that at least some of these structures are being erected on the portion of the land allocated to him under the terms of the judgment in Civil Action 12-166, demanded that such construction cease. On December 8, 2015, Mobel's attorney sent a letter to Maria Tanaka reiterating these demands. It appears that Tanaka rejected Mobel's claims on the basis of the Certificate of Title that was issued to her about fifteen months prior.

[¶ 12] Having failed to convince Tanaka and API to stop building, Mobel filed suit alleging that some of the resort structures were actually on the land allocated to Mobel, and therefore API and Tanaka were trespassing. Mobel sought actual and punitive damages, as well as injunctive relief ordering API to tear down encroaching structures.

PROCEDURAL HISTORY

[¶ 13] At trial, Mobel argued that BLS's failure to comply with the Trial Division's order in Civil Action 12-166 and give proper notice to the parties prior to resurveying and partitioning *Ochelochel* meant that survey was unlawful and that any Certificates of Title issued as a result are void *ab initio*. There being no valid Certificates of Title, the argument continued, the boundary between Mobel's and Tanaka's land remained (and remains) the relatively straight North-South line that appears on the BLS survey that was used as the basis of the stipulation and judgment in Civil Action 12-166.

[¶ 14] Defendants-Appellants understandably took a different view. Relying on *Nakamura v. Isechal*, 10 ROP 134 (2003), Appellants argued that the Certificates of Title are conclusive and cannot be collaterally attacked unless the person seeking to invalidate them can prove, by clear and convincing evidence, that statutory or constitutional procedural requirements failed of compliance. Because in Appellants' view no statutory or constitutional requirements were violated, the Certificates of Title are binding on Mobel. At the same time, although API admitted that some structures are encroaching on 037 N 70 (which is indisputably Mobel's property), it contended that the approximately four feet of encroachment called for the application of the *de*

minimis non curat lex principle. Defendants also advanced several equitable defenses, including laches.

[¶ 15] The Trial Division issued its opinion and judgment on March 25, 2019. The Trial Division found that BLS failed to comply with the earlier judgment in Civil Action 12-166, which gave both Mobel and Tanaka the right to notice and an opportunity to be heard before BLS partitioned the property.[4] Because BLS failed to allow for such an opportunity (despite the clear order of the court), the Trial Division held that the final maps were improperly created and that any Certificates of Title based on those maps were void.

[¶ 16] The Trial Division next adopted Mobel's reasoning that, if the Certificate of Titles were void, then the true (if only provisional) boundary between Mobel's and Tanaka's property was the North-South line that appears on the March 7, 2013 BLS survey. Using this line as a boundary, the Trial Division calculated that API's structures occupied 1,191 square meters of Mobel's land. Adopting a formula proposed by the Appellee, the Trial Division calculated that the damages amounted to $12,496.06 for past trespasses and an additional $13.50 per day for each day of ongoing trespass, for which it held Appellants jointly and severally liable.[5] The Trial Division also ordered Appellants to remove all of the encroaching property within thirty days of judgment.

[¶ 17] This timely appeal followed.

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[4] The extent to which the property could have been partitioned in different ways is not entirely clear. The Trial Division summarized the testimony of the BLS surveyor as saying: "there were several ways to reconfigure the bigger lot to comply with the Judgment . . . [but] the final reconfiguration the surveyors completed was the closest, most practical reconfiguration of the lot in the manner set forth in the Judgment to keep the lots of approximately equal sizes and shape." First, the Judgement required the lots to be the same size, not the same shape; the latter requirement appears to have been invented by BLS. Second, what might seem "practical" to BLS may not suit the owners, which is precisely why the Trial Division required notice in the first place.

[5] Appellants did not object to the formula, though they dispute the total amount of damages because they take exception to the Trial Division's conclusion as to the scope of the trespass (if any).

STANDARD OF REVIEW

[¶ 18] We review matters of law *de novo*, findings of fact for clear error, and exercises of discretion for abuse of that discretion. *See Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 4.

DISCUSSION

[¶ 19] We begin by reviewing the status of *Ochelochel* prior to the partition action and the issuance of new Certificates of Title. As we already mentioned, the litigation history over this land is quite complex and spans a number of lawsuits over several decades. Our prior decisions are clear, however, that this land was held in a form of communal family ownership under Palauan customary law. Under that form of ownership, each owner had an undivided right to the whole property, so no trespass by the parties was possible unless and until the land was formally partitioned. We agree with the Trial Division that the Certificates of Title issued after BLS's attempt to partition the property without notice to the parties were void. But we conclude that, because there was no effective partition, no trespass could have taken place.

A.

[¶ 20] Many years ago, *Ochelochel* was given to Tmetbab, whose children were Mobel Delmel, Benged Riumd, and Patrick Delmel. Mobel's children included Eichi Delmel and Masae Tanaka. *Mobel*, 2017 Palau 4 ¶ 3. In 1989, we held that *Ochelochel* was "family-owned land" and that Mobel held it as a trustee for his siblings. Reversing the Trial Division's finding that the land was held as a joint tenancy, *Riumd v. Tanaka*, 1 ROP Intrm. 597, 604, 605-06 (1989), we held that: "[t]he family ownership of the land and its administration is and shall be pursuant to Palauan custom." *Id.* at 606.

[¶ 21] Following the *Tanaka* judgment, the Land Court issued a Certificate of Title to "Eichi Delemel, Benged Riumd, Patrick Delemel, & Masae Tanaka [as] the owner(s) of an estate in fee simple in land . . . particularly described as . . . Cadastral Lot No. 037 N 07." LC 677-08 (Aug. 22, 2008). The nature of the communal ownership between these individuals was not specified in the Certificate of Title, but was resolved by this Court in *Riumd v. Mobel,* 2017

Palau 4. There we held that the nature of *Ochelochel's* ownership turns on the content of the custom under which the land was owned. We noted that:

> [t]he content of that custom was [] determined in the Trial Division in Civil Action [89-475]. The Trial Division . . . found the four siblings were "co-holders of Ochelochel and as such, pursuant to Palauan Customary Law, each has an undivided interest and title in Ochelochel which may not be divested absent the knowledge and consent of all the others."

Mobel, at ¶ 29 (quoting Judgment, Civil Action 89-475, at 6 (June 12, 1990)). We went on to affirm the Trial Division's finding that, pursuant to Palauan custom, upon the death of the original owners their respective shares in the land would pass to their respective heirs. *Id.* at ¶ 33.

[¶ 22] The Trial Division's determination as to the content of the custom under which the land in question was held applied to the original *Ochelochel* before it was split into Cadastral Lots 037 N 07 and 037 N 08. However, the *Mobel* Court held that those findings applied with equal force to the two individual parcels that came into being once the original *Ochelochel* was bisected by the Compact Road. *See Mobel,* at ¶¶ 28-32.

[¶ 23] The Certificate of Title to Lot 037 N 08, at issue in *Mobel*, is in all respects identical to the Certificate of Title to Lot 037 N 07 at issue in this case. (Of course, this is not surprising because both lots are just two halves of *Ochelochel* and became separate entities only as a result of the construction of the Compact Road). Thus, while the *Mobel* decision did not address the property at issue in the instant case, but rather a neighboring lot also owned by the same individuals, the judgment in that case guides our resolution of the present dispute because both lots are portions of the original *Ochelochel*. In resolving the nature of the communal ownership of Lot 037 N 07 prior to its partition, we follow the judgments in *Mobel* and *Tanaka*. Accordingly, we hold that prior to partition Lot 037 N 07 was held by all of the parties (or their heirs) listed on the Certificate of Title, "each h[olding] an undivided interest . . . which may not be divested absent the knowledge and consent of all the others." 2017 Palau 4 ¶ 29.

[¶ 24] This type of Palauan customary law interest is not known at English common law, but approximates a mixture of tenancy in common and tenancy by the entirety. Like tenancy in common, the interest of any decedent in *Ochelochel* passes down to his heirs (rather than automatically being inherited by the co-owners). *See United States v. Craft*, 535 U.S. 274, 280, 122 S. Ct. 1414, 1421 (2002) (explaining the workings of the different forms of communal ownership under U.S. common law). However, unlike tenancy in common (but like tenancy by the entirety), no co-owner can alienate his interest without the consent the others co-owners.[6] 4 Thompson, Real Property § 33.08 (D. Thomas ed. 1994) (hereinafter "Thompson"). Whatever the closest analogy to common law ownership may be, the important point is that, because all of the owners of *Ochelochel* had "an undivided interest" in the property, they each "had an equal right to possess the *whole* property." *See* Black's Law Dictionary, "tenancy in common" 1769 (11th ed. 2019) (emphasis added); 2 William Blackstone, Commentaries on the Laws of England 190 (J.B. Lippincott Co., 1893) (noting that tenants in common maintain a unity "of possession . . . because no man can certainly tell which part is his own.").[7] Thus, prior to the attempted partition all of the parties (or their heirs) listed on the Certificate of Title as owners of Lot 037 N 07 had a right to the possession of the *entirety* of *Ochelochel*, and no one party could demand that another party cease the use or enjoyment of any part of the land.

B.

[¶ 25] We now turn to the validity of the Certificates of Title issued to Tanaka and Mobel in October 2014 and January 2015, respectively.

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[6] Of course, at common law tenancy by the entirety was only available to spouses and not to other family relations. 4 Thompson § 33.02. We should not be understood as holding that Palauan law recognizes a common law tenancy by the entirety between non-spouses. Rather, we are using tenancy by the entirety as a useful analogy to help explain the nature of ownership in *Ochelochel* under Palauan customary law as previously determined in *Mobel*.

[7] Though Blackstone is obviously commenting on the common law of *England* rather than United States, and only the latter has been adopted in Palau, *see* 1 PNC § 303, American common law, especially when it comes to matters of property, is based on English common law. In American courts, citations to Blackstone on the matters of property number in the thousands, and we therefore feel confident that we do not deviate from the mandate of § 303 by relying on this legal authority.

[¶ 26] Section 1317 of Title 35 of the Palau National Code governs changes in land ownership. As relevant here, the statute requires that when "a part of the [owned] land is transferred, the [transferor] may be required, at his own expense, to have the area to be transferred surveyed and a map thereof submitted, in form satisfactory to the Senior Judge, and a new certificate of title shall then be issued for each part of the land covered by the former certificate." 35 PNC § 1317(a). The statute further requires that "[b]efore the Bureau [of Lands and Surveys] commences a monumentation with respect to any claim, notice containing a description of the claim and the date, time, and place of the monumentation shall be given by the Bureau at least forty five (45) days in advance of the monumentation . . . ." 35 PNC § 1309(b).

[¶ 27] In Civil Action 12-166 the owners of *Ochelochel*, as a unit, agreed to transfer smaller parcels of *Ochelochel* to themselves as individual claimants. To put the matter another way, the transferors in that case were the parties (or their heirs) listed on the Certificate of Title for Cadastral Lot 037 N 07 acting as a single indivisible unit, while the transferees for Lots 037 N 07A, 037 N 07B, 037 N 07C, and 037 N 07D were Maria Tanaka, heirs of Eichi Delemel, heirs of Patrick Delemel, and heirs of Benged Riumd, respectively. Because the transferors transferred only "a part" of the land that they owned to each individual transferee, they had to have had "the area to be transferred surveyed and a map thereof submitted" to the Land Court. 35 PNC § 1317(a). And in order to conduct a proper survey, BLS had to give proper notice to the land owners.[8]

[¶ 28] It is well established that notice to affected parties is an essential element of adjudicating land disputes and setting parcel boundaries. *See* 35 PNC § 1314 (a "certificate of title [is] conclusive upon all persons so long as *notice was given* as provided in section 1309.") (emphasis added); *Nakamura v. Isechal*, 10 ROP 134, 136 (2003). We have previously set aside certificates of title when such were "issued . . . without a hearing and without a determination of ownership that could have been appealed." *See*, *e.g.*, *Emaudiong v. Arbedul*, 5 ROP Intrm. 31, 35 (1994).

[8] Although the statute requires a 45-day notice, parties of course are free to waive rights conferred on them. *See Skilang v. ROP*, 11 ROP 187, 189 (2004). By agreeing to a three day notice as part of the stipulation and settlement, the parties waived the longer notice requirement.

[¶ 29] In the present case, it is undisputed that the line between the parcel allocated to Maria Tanaka and the parcel allocated to Syndey Mobel could have been drawn in a variety of ways while still complying with the directive that Masae Tanaka's house be included in Maria Tanaka's lot. Both Maria Tanaka and Sydney Mobel had (and likely continue to have) an interest in how that boundary is drawn. It is in order to protect those interests the parties agreed that, prior to re-surveying the land, proper notice must be given. Because BLS failed to give notice, it follows that the Certificates of Title issued pursuant to that survey can be collaterally attacked. *See Nakamura*, 10 ROP at 136.

[¶ 30] Lack of notice must be proven by clear and convincing evidence. *See Becheserrak v. Eritem Lineage*, 14 ROP 80, 83 (2007). Although it is undisputed that no actual notice was given, Appellants argue Mobel was on constructive notice and therefore, since he failed to timely object, has no cause to complain. Whether or not notice was given is a question of fact, *see Lewiil Clan v. Edaruchei Clan*, 13 ROP 62, 63-65 (2006), which we review for clear error. *Rengulbai v. Baules*, 2017 Palau 25, ¶ 13. Neither API nor Maria Tanaka marshaled any evidence to convince us that the Trial Division's conclusion on this matter was erroneous, much less clearly so.

[¶ 31] Consequently, the Trial Division was correct to set aside the Certificate of Title, and it is affirmed in that respect.

C.

[¶ 32] The question then is what is the status of *Ochelochel* if the partition has not (yet) been properly accomplished and if the Certificates of Title issued as a result of that purported partition are invalid. The Trial Division held that, because BLS failed to properly notify the parties to the partition, the status of the land is governed by the map attached to the stipulation in Civil Action 12-166. In other words, in the Trial Division's view, the boundaries between the parcels will remain the relatively straight North-South lines that divide *Ochelochel* into four equal parcels. We cannot agree.

[¶ 33] Prior to 2014, when the Trial Division entered its orders adopting the settlement agreement in Civil Action 12-166, both Tanaka and Mobel had an "undivided interest" in *Ochelochel*. The Trial Division ordered a partition of *Ochelochel*; the question is whether that partition has come into effect. On one

view, the partition came into effect as soon as the Trial Division entered its Judgment, with each party being assigned their respective lot subject only to border revisions once BLS conducted a proper survey. On another view, the partition would become effective only once BLS conducted a proper survey (consistent with the Trial Division's order) and new Certificates of Title were issued (which of course, as we explained, *ante*, has yet to occur). We are of opinion that the latter view is more consistent with the statutory scheme, and therefore the better one.

[¶ 34] The stipulation in Civil Action 12-166 contemplated that the final boundaries would be set after a properly conducted BLS survey. This is consistent with § 1317, which also envisages the resurveying of land when less than the full lot is transferred. *See* 35 PNC § 1317(a). We thus conclude that the legal partition of the land was subject to the condition precedent of a proper BLS survey, which would have included the required notice. Because such notice was not given, the condition precedent was not met, and the land has not been legally partitioned.[9] That being so, the Land Court's decision to issue Certificates of Title to Tanaka and Mobel was improper and a legal nullity. Consequently, the status of *Ochelochel* continues to be governed by the Certificate of Title issued to "Eichi Delemel, Benged Riumd, Patrick Delemel, & Masae Tanaka [as] the owner(s) of an estate in fee simple in land . . . particularly described as . . . Cadastral Lot No. 037 N 07." LC 677-08 (Aug. 22, 2008). And it necessarily follows that Maria Tanaka could not, as a legal matter, trespass on any part o*f Ochelochel* because, by virtue of her undivided interest in Cadastral Lot 037 N 07, she had "an equal right to possess the whole property . . . ." Black's Law Dictionary 1769; 2 William Blackstone, Commentaries on the Laws of England 190. We reverse the Trial Division's erroneous holding to the contrary.

D.

1.

[9] Although heirs of Patrick Delemel and Benged Riumd are not party to the present litigation, we note that their Certificates of Title may well suffer from the same problem. At the same time, even if such problems do exist, individuals can waive their right to notice. *See Skilang*, 11 ROP at 189. In any event, we make no findings on this matter, but highlight it for the Trial Division, so that on remand it may consider such actions as are appropriate.

[¶ 35] Having reversed the Trial Division's finding of trespass, we are obliged to vacate its order on damages as well as its injunction against continuing trespasses. However, it does not follow that on remand the Trial Division may not craft an appropriate remedy potentially including injunctive relief and/or damages.

[¶ 36] Although we have held that Maria Tanaka remains the legal owner of an undivided interest in the entirety of *Ochelochel*, we are not blind to the fact that she, along with Appellee and the heirs of Patrick Delemel and Benged Riumd, have all entered into a binding contract to partition the property and take specified individual lots as respective owners in fee simple. The stipulation the parties entered into in Civil Action 12-166 is, for all practical purposes, a contract for the sale of land. Each party acquired (or "purchased") a parcel of land to be in his exclusive possession, and paid for this privilege by surrendering his right to an undivided interest in the larger parcel. True enough, money did not change hands, but consideration need not be monetary to be valid. 17 C.J.S. Contracts § 112; *see also Rogers v. United States*, 109 Fed. Cl. 280, 285-86 (2013) ("[A]greements such as property settlement agreements in a divorce have been found to be tantamount to a contract of purchase and sale.").

[¶ 37] "A contract for transfer of real property though not enough to vest a legal title to the land in the transferee, does vest an equitable title in him. Equitable title transfers upon the execution of the contract." *Maddox v. Hardy*, 187 P.3d 486, 493 (Alaska 2008) (citing 14 Richard R. Powell, Powell on Real Property § 81.03[1], at 81-83). "[A] person is an 'owner' of property although he or she holds only the equitable title." 63C Am. Jur. 2d *Property* § 26. "The foundation for the doctrine of equitable conversion is [the] presumed intention of the owner, equity regarding as done that which ought to be done." *United States v. O'Dell*, 247 F.3d 655, 684 (6th Cir. 2001) (quoting *Lynch v. Burger*, 168 S.W.2d 487, 488 (Tenn. App. 1942)); *see also* 27A Am. Jur. *Equitable Conversion* § 1. At the same time, "the doctrine of equitable conversion does not apply when the seller's duty to convey title is subject to a condition precedent." *Southport Congregational Church–United Church of Christ v. Hadley*, 128 A.3d 478, 485 (Conn. 2016); *see also* 27A Am. Jur. *Equitable Conversion* § 5. That is so because "there must, in fact, be a clear duty on the part of the seller to convey the property, a duty enforceable by an action for

specific performance," *Noor v. Centreville Bank*, 996 A.2d 928, 933 (2010), whereas the presence of a condition precedent means the "seller's duty to convey title is conditional." *Hadley*, 128 A.3d at 485.

[¶ 38] Yet, this is not a usual case. In a traditional contract for the sale of land subject to a condition precedent a particular event must occur before the obligation to perform arises *at all*. *See id.* Here, however, the obligation to partition the property is unconditional. Furthermore, with respect to the vast majority of the property in question, it is clear who will be the owner irrespective of the precise boundary lines that will result from a properly conducted BLS survey. For example, it is clear from the record in Civil Action 12-166 that all parties intended for Maria Tanaka to hold the western portion of *Ochelochel* which abuts the main road. Similarly, it is clear that the parties intended each of the partitioned lots to be of equal size. Thus, it is only the precise boundary between these lots that is in question. Ultimately, the doctrine of equitable conversion "is not a fixed rule of law, but proceeds on equitable principles that take into account the result to be accomplished." 27A Am. Jur. 2d *Equitable Conversion* § 4. The doctrine is a legal fiction "devised to achieve justice between the parties to a real estate transaction." *Id.* § 1. Accordingly, we hold that on this set of facts, the doctrine of equitable conversion applies. As a result, on January 23, 2014, when the Trial Division approved the parties' settlement agreement for the partition of Cadastral Lot 037 N 07, each party acquired an equitable title to their respective individual lot, though the parties as a unit continued to maintain legal title to the larger lot.

[¶ 39] Under the doctrine of equitable conversion, the seller continues to hold the land, but does so "in trust for the buyer." *Id.* at § 13; *see also Rogers*, 109 Fed. Cl. at 285 (quoting *Veigle v. United States*, 888 F. Supp. 1134, 1141 (M.D. Fla. 1995)). "The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. . . . It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries." *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (quoting 2A A. Scott & W. Fratcher, Trusts § 170, p. 311 (4th ed. 1987)). Because the owners of *Ochelochel*, acting as a unit, owed a duty of loyalty to the individual members of that unit, equity cannot tolerate actions that would have a tendency to prejudice the rights of equitable titleholders. Given the mutuality of obligations, neither Mobel nor

the heirs of Patrick Delemel and Benged Riumd could legitimately object to Tanaka's lease to API insofar as it permitted API to construct on that part of the land that would remain with her under any conceivable boundary drawing.[10] But by the same token, Tanaka (despite remaining, pending a proper partition, a co-owner of the entirety of *Ochelochel*) could not authorize API or anyone else to build on the land that has a reasonable probability of ultimately remaining with Mobel. Doing so would be a violation of her duties to Mobel as a vendee of Lot B.

2.

[¶ 40] The part of the Trial Division order that required API (and Tanaka) to remove all of the structures that have been built on the East side of the tentative boundary between Lots A and B is a form of injunctive relief. *See* 42 Am. Jur. 2d *Injunctions* § 1 ("An injunction is an equitable remedy, designed to protect property or other rights from irreparable injury by prohibiting or commanding certain acts."). "Injunctions are governed by Rule 65 of the ROP Rules of Civil Procedure . . . [[and] 'a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief.'" *Whipps v. Idesmang*, 2017 Palau 24 ¶ 10 (quoting *eBay Inc. v. MercExchange*, LLC, 547 U.S. 388, 391 (2006)). Specifically, the plaintiff must demonstrate that: absent an injunction he will suffer irreparable harm; remedies available at law, such as monetary damages, are inadequate to compensate for that injury; the balance of hardships between the plaintiff and the defendant tips in his favor; and the public interest is not disserved by an injunction. *Id.* at ¶ 11. The Trial Division did not engage in the required analysis and balancing of these factors prior to granting the injunction. Perhaps its failure to do so is understandable in light of its conclusion that part of API's hotel is located on Mobel's property and that its continued location there would constitute an ongoing trespass. The problem, of course, is that as we have explained in the preceding section, there was no trespass as a matter of law and therefore the venerable and long-standing "rule that equity will, by injunction, repress a continuing trespass," *Key v. Stringer*, 52 S.E.2d 305, 306 (Ga. 1949), is simply inapplicable to the

[10] In view of the fact that Tanaka is also an equitable owner of Lot A, the other co-owners of *Ochelochel* have no right to accounting for the money that Tanaka received from API as lease payments for the land that will in all events come into her sole possession.

present case. Because the Trial Division misapprehended the law, its grant of an injunction was an abuse of discretion. *Whipps*, 2017 Palau 24 ¶ 8 ("[A]pplication of the wrong legal standard constitutes a *per se* abuse of discretion and warrants reversal.").

[¶ 41] At the same time, on remand and after applying the four-factor test the Trial Division may, for example, enjoin the parties to maintain status quo until a proper survey is done and *Ochelochel* is legally partitioned. Such an injunction, if properly circumscribed, may protect the rights of all parties and minimize waste.[11] We of course neither endorse nor reject such a course of action. The grant or denial of injunctive relief is within the sound discretion of the trial court and we leave it to that court to apply that discretion taking all of the relevant factors into account.[12] *Id*.

E.

[¶ 42] We also vacate the Trial Division's award of damages. "Compensatory damages, otherwise known as 'actual damages,' 'are recoverable at law from a wrongdoer as compensation *for the actual loss* or injuries sustained by reason of the tortfeasor's wrongdoing.'" *Nebre v. Uludong*, 15 ROP 15, 31 (2008) (quoting 22 Am. Jur. 2d Damages § 25 (2003)) (emphasis added). Because the exact amount of encroachment cannot be calculated until a proper survey is performed by BLS, the scope of the *actual loss* and therefore the amount of damages remain unknowable.

[¶ 43] Furthermore, in order to award punitive damages, the trier of fact "must determine 'whether the defendant was motivated by malice, whether the defendant's conduct was sufficiently willful or wanton to justify the imposition

[11] Since we do not know how the boundary between Tanaka's and Mobel's lot will ultimately be drawn, we have no way of knowing whether at the end of the day API's hotel will or will not encroach on Mobel's property. Requiring removal of the hotel only to permit its reconstruction should the boundary line be drawn in such a way as to assign the disputed territory to Tanaka would be the very definition of waste.

[12] At oral argument, Appellants admitted that this part of the order has not been complied with. The record does not indicate that either Appellant sought a stay of the injunction from this Court or from the Trial Division. In other words, it appears that for the last year Appellants have been willfully violating the Trial Division's order. Because we vacate the injunction, we do not address the question of whether any sanctions should be imposed for such behavior. However, it is entirely within the power of the Trial Division to address this issue on remand.

of punitive damages, or whether there was such a reckless disregard of the rights of others as to warrant an award.'" *Id.* (quoting 22 Am. Jur. 2d Damages § 780 (2003)). The Trial Division made no such findings, merely stating that "[b]ased on the evidence presented, Plaintiff is awarded his costs and fees as punitive damages and shall submit a statement of such costs and fees prior to entry of any final judgment." Although the issue of punitive damages is committed to the discretion of the trier of fact, *Nebre*, 15 ROP at 31, a trial court abuses its discretion when it fails to consider relevant factors. *See Ngeremlengui State Pub. Lands Auth. v. Telungalk ra Melilt*, 18 ROP 80, 83 (2011). The failure to consider and articulate the basis for the decision requires a vacatur. *See Smanderang v. Elias*, 9 ROP 123, 124 (2002).

F.

[¶ 44] We briefly address Appellant API's argument that whatever failures Appellant Tanaka may have had in her dealings with Mobel, he acted as a good faith purchaser, relied on official government documents, and should not be made to suffer simply because BLS and Tanaka may have erred. While we are not unsympathetic to API's plea, ultimately it falls flat.

[¶ 45] As an initial matter, it is not clear that API actually relied on official government documents because the lease between API and Tanaka (and all of the modifications thereto), as well as the application for a Foreign Investment Approval Certificate refer to Lot 037 N 07A, rather than Cadastral Lot 037 N 69. This, we think, is significant because the former number was a placeholder designation used in the stipulation and order that settled Civil Action 12-166, while the latter number was the official BLS lot designation. This suggests that API never saw the final BLS map or the Certificate of Title which was issued pursuant to that map.

[¶ 46] Second, it is undisputed that API was on notice that there was some disagreement as to the proper boundary line.[13] Not only was Shih Bin-Feng specifically told that he was building on Mobel's land, he admits that even

[13] We reject Appellants' suggestion that judgment should be entered against Plaintiff-Appellee due to laches. Plaintiff brought suit within six months of learning of what he perceived to be a violation of his rights. We do not perceive six months to be an "unreasonable delay," Black's Law Dictionary 1046 (11th ed. 2019), to the point where we would conclude that Plaintiff slept on his rights to the prejudice of the Defendants-Appellants.

under the most favorable view of things he has crossed the placeholder "boundary" by four feet. Next, API's argument is ultimately a plea that Appellants should not be made to carry the costs of committing a mistake of law (the mistake being the legal status of the land, and various government documents). That is simply unavailing. It is a well settled principle of contract law that mistake of law is not a defense to a legal claim. *See Airai State Pub. Lands Auth. v. Baules II*, 2020 Palau 6 ¶ 20 n.8.

[¶ 47] Finally, we note that API is not without remedy. First, it may be able to seek damages from Tanaka for failure to deliver legal and physical possession of the leased property to it. *See* J. A. Connelly, Annotation, *Measure of Damages for Lessor's Breach of Contract to Lease or to Put Lessee into Possession*, 88 A.L.R.2d 1024 (1963) (noting that damages are generally the fair market value of the property, but lost profits may also be recoverable). Second, API's complaints may well be mooted should, after BLS conducts a proper survey, it turn out that all hotel structures are located within the boundaries of Tanaka's property.

G.

[¶ 48] The only thing left to consider is what should occur on remand. We are usually loath to dictate to the Trial Division how it should conduct its proceedings, and we will not deviate from this course here. Nonetheless, we will make some observations which we hope may be helpful to the Trial Division and the litigants.

[¶ 49] The dispute between Mobel and Tanaka centers on whether the boundary drawn by BLS could have been drawn in any other way that would be more beneficial to one or both parties. It may behoove the Trial Division, prior to having BLS conduct a new survey, to hold a hearing where each party would come up with its preferred map and present arguments as to why that map should be adopted. The Trial Division may then decide which party has a better argument and order BLS to survey the land accordingly. In so doing the Trial Division may (or may not) wish to take into account the fact that Masae Tanaka's house, which was the initial cause of the requirement to adjust the boundary line between Lots A and B, appears to have been torn down. To the extent that either of the parties is not content with the Trial Division's map selection, the Trial Division could then consider, prior to BLS conducting a

survey, certifying the matter for an interlocutory appeal. Again, we do not require the Trial Division to adopt this particular approach, but merely identify it as one that might help to bring this litigation to a speedier conclusion. We do caution the Trial Division that, whatever route it chooses to take on remand, its remedy must hew to the parties' original stipulation and settlement in Civil Action 12-166.

[¶ 50] Finally, and in order to avoid a repetition of this saga, we will require the Trial Division to ensure that whenever BLS does conduct a proper survey, *all* parties to Civil Action 12-166, whether or not they are parties to the present case, be given proper notice and an opportunity to object. Although there is, at present, no indication that the heirs of Patrick Delemel and the heirs of Benged Riumd are in any way dissatisfied with how BLS drew the boundaries between their lots, lack of notice makes their Certificates of Title liable to a collateral attack down the line—an eventuality that we fervently wish to avoid.

[¶ 51] The Trial Division is also instructed to ensure that this opinion is docketed with the Land Court, and that the Land Court be made aware that no Certificates of Title varying the status of Cadastral Lot 037 N 07 are to issue unless and until the Trial Division is satisfied that the property was partitioned in a lawful manner.

CONCLUSION

[¶ 52] The judgment appealed from is **AFFIRMED IN PART, REVERSED IN PART,** and **VACATED IN PART.** The matter is **REMANDED WITH INSTRUCTIONS** for further proceedings consistent with this opinion.