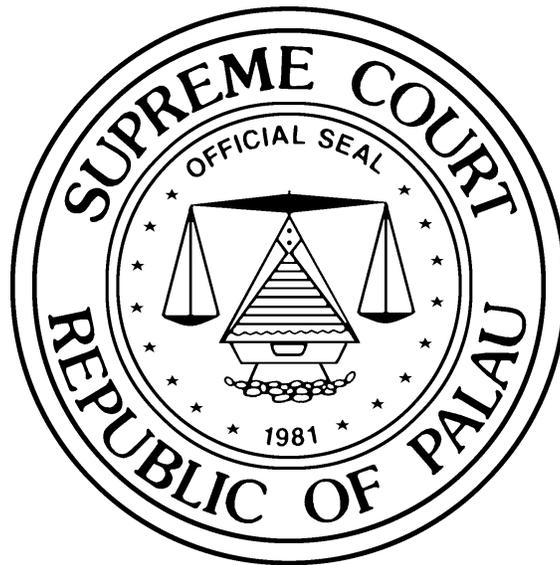


Republic of Palau Reports

Volume Seventeen



Consisting of Cases Determined by the

THE SUPREME COURT OF THE REPUBLIC OF PALAU

APPELLATE DIVISION

**with Selected Trial Decisions, Land Court Decisions, and
Decisions of the Disciplinary Tribunal of the Bar of the Republic of Palau**

Published by the Republic of Palau Supreme Court

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Serving During the Period Covered by this Volume

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Lourdes F. Materne
Alexandra F. Foster

PART-TIME ASSOCIATE JUSTICES

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Richard H. Benson

ASSOCIATE JUSTICES PRO TEM

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Senior Judge, Land Court

Rose Mary Skebong
Associate Judge, Land Court

Honora E. Remengesau Rudimch
Senior Judge, Court of Common Pleas

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DONALD HARUO,
Appellant/Appellee,

v.

KEIBO RIDEP and BARRET RIDEP,
Appellees¹/Appellants.

CIVIL APPEAL NO. 08-036
Civil Action No. 00-023

Supreme Court, Appellate Division
Republic of Palau

Decided: September 30, 2009

[1] **Equity:** Estoppel

A person asserting estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also lacked any reasonably available means of acquiring the knowledge.

[2] **Equity:** Restitution

A party's entitlement to restitution for services depends on the terms under which the work was done.

[3] **Equity:** Restitution

If there was an agreement that a party would improve the land as compensation or gratuitously, then that party is clearly not entitled to any restitution. However, if he

improved the land under the mistaken belief that the land was his and the other party knew about the improvements, then party performing the work is entitled to restitution.

[4] **Contracts:** Terminable

The issue of whether a party's breach is material and excuses future performance by the other party is a question of fact.

[5] **Contracts:** Damages

If some of Appellees' building expenses are not recoverable because of the delay caused by Appellant's breach, then they are entitled to recoup that loss.

[6] **Civil Procedure:** Attorney's Fees

Palau follows the American rule in which each party typically bears their own attorney fees.

Counsel for Appellant: John K. Rechucher.

Counsel for Appellees: Raynold B. Oilouch.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This case concerns a land use agreement in which two parties agreed to

¹ Each party appealed the Trial Court Decision. For clarity, Donald Haruo will be identified as Appellant and Keibo and Barret Ridep will be referred to as Appellees.

divide one party's leasehold into two areas. Appellees/Appellants Keibo Ridep ("Keibo") and Barrett Ridep² (collectively, "Appellees") have a commercial lease in Malakal; Appellant/Appellee Donald Haruo ("Donald" or "Appellant") wanted to move his dive shop, which had been located in Meyuns, to land which Keibo had leased from KSPLA. The parties signed a "Use-Right Agreement," drafted by Donald's attorney, on August 29, 1992.

The Use-Right Agreement states that Keibo, as lessor of Lot. No. 40659, grants a use right to Donald "to use a portion of his lease to relocate to and establish his business operation. Such portion to be used and occupied by [Donald] will be surveyed immediately after execution of this agreement and the copy of this survey map will be attached to this agreement." In reality, the land was not surveyed for five (5) years after the Agreement was signed, when confusion arose about the boundaries of the parties' separate portions.

The parties disagree about where on the lease Donald was entitled to build. It is undisputed, however, that Donald cleared and developed the entirety of Keibo's leasehold, a 480 square meter section of Lot. No. 40659. Donald explains that Keibo represented to him that the lease comprised all of Lot No. 40659 and that the uncleared 480 square meter

portion was Donald's to develop. Donald asserts that Keibo made no objection to Donald's expensive and time-consuming clearing of the land and construction of a seawall, floating dock, swimming pool and three-story building, until after he had spent over \$500,000 improving the lot.

In contrast, Keibo claims that he correctly described the boundaries of the lot to Donald at all times and made timely objections to Donald's development in 1997, when Donald began to encroach upon Keibo's reserved area.

TRIAL DIVISION OPINION

In a decision dated May 30, 2008, the Trial Division determined that both parties' testimony was self-serving and not credible. Basing its determination on "only the testimonies of witnesses that are backed up or corroborated by credible documentary evidence," the trial court found that the Use-Right Agreement required the parties to share the 480 square meters which was the entirety of Keibo's lease from KSPLA. Civ. Act. No. 00-023, Decision at 8 (Tr. Div. May 30, 2008). The court found that Donald began building upon the area reserved for Keibo in 1997. *Id.* at 4. At that point, Keibo had the land surveyed to delineate the boundary between the two areas inside the leasehold and told Donald to stop working in the contested area. *Id.* The court found that Keibo asserted his claim to Donald as soon as Donald began building in Keibo's reserved area, but Donald refused to stop building. *Id.*

The Trial Division concluded that "Donald's occupation of the entire lot is a clear contravention of the 1992 Agreement

² Keibo Ridep was originally the holder of the lease. In the course of litigation, Keibo transferred his interest in the lease to his son, Barret. Accordingly, Keibo and Barret are joint Appellees but most of the relevant events only involved Keibo.

and, as such, he should be relegated back to his portion.” *Id.* at 5. Additionally, the court noted Donald’s concession that he agreed to make all lease payments to KSPLA and ruled that he was responsible for all future payments, and the arrears dating back to 1998. *Id.* at 5-6. The Trial Division denied the other damages sought by Appellees: expenses incurred in planning to develop their part of the lot, lost profits, punitive damages, and attorney’s fees. *Id.* at 6-9. In making these rulings, the court found that the blueprint costs and other expenses outlaid in preparation for building are “the natural consequences of building a commercial structure that would have been born by [Keibo] even if [Donald] had not breached the 1992 agreement.” *Id.* at 6. Accordingly, the award of those expenses would enrich Appellees, rather than making them whole. *Id.* at 6-7. The other types of damages sought were denied as improper in this case. *Id.* at 7-9.

STANDARD OF REVIEW

We review the Trial Division’s findings of fact for clear error. *Aitaro v. Mengekur*, 14 ROP 71, 72 (2006). “Under this standard, the factual determinations of the lower court will be set aside only if they lack evidentiary support in the record, such that no reasonable trier of fact could have reached the same conclusion.” *Id.* Challenges to the Trial Division’s legal conclusions are reviewed *de novo*. *Estate of Asanuma v. Blailes*, 13 ROP 84, 86 (2006).

DISCUSSION

Each party has appealed the Trial Division’s decision, although on different grounds. Appellant asserts that the Trial

Division erred by failing to find that Appellees’ claims were properly barred by the statute of limitations, estoppel, or laches. Also, Appellant alleges that he is entitled to restitution for the costs of clearing land which was ultimately awarded to Appellees.

Appellees argue that the Trial Division erred because (1) it did not find that the Use-Right Agreement had been terminated by Appellant’s breach; (2) it limited Appellant’s liability for lease payments to the period after 1998; and (3) it refused to award Appellees expenses, lost profits and attorney’s fees.

I. Appellant’s Claims

A. Statute of Limitations

Appellant argues that the six-year statute of limitations governing Appellees’ claim began to run in 1993, when he first began to develop Keibo’s land, and that the cause of action, filed in 2000, was untimely. The Trial Division found that the statute of limitations began to run in 1997, when Appellant began building upon the area reserved for Keibo, and had not expired when the case was filed.

Appellees argue that Donald’s work clearing and developing the land, prior to 1997, was done with Keibo’s consent and for the benefit of both parties. Accordingly, the Use-Right Agreement was not breached in 1993, when Donald began clearing the land and building his sea wall. The Trial Court agreed with this theory, finding that Donald’s work clearing the land and fixing the sea wall and dock was not in breach of the Use-Right Agreement.

The Trial Court's conclusion that Donald's work prior to 1997 was in accordance with the Use-Right Agreement is a factual finding and will be upheld unless clearly erroneous. The record contains evidentiary support for this finding: Keibo testified that the original agreement between Donald and himself required Donald to fix the dock and sea wall as compensation for use of the land. (Tr. at vol. I, p. 160-161, 177, 215-216.) Testimony also shows that, at the time of the survey in 1997, the only imposition onto Keibo's portion of the land was a corner of the swimming pool. (*Id.* at p. 186-189, 270-272.) Donald had not yet built the fence or any buildings on Keibo's portion of the plot. (*Id.*)

This evidentiary support is sufficient to allow a reasonable trier of fact to conclude that Donald's clearing and repairing work was in accordance with the Use-Right Agreement and that the first breach of the Use-Right Agreement took place in 1997. Accordingly, the Trial Division's conclusion that the six-year statute of limitations for breach of contract had not expired by 2000, when this suit was filed, is not clearly erroneous.

B. Estoppel

Appellant asserts that Appellees should be estopped from claiming half of the land Donald developed under two theories: equitable estoppel, because Keibo had falsely told Donald that the entire 480 square meter plot was Donald's section of the leasehold, and estoppel by inaction, because Keibo had allowed Donald to develop the entire leasehold under the misunderstanding that it was all his land.

The Trial Division explicitly rejected Appellant's theory of estoppel by inaction, finding that "there is simply no credible evidence to show that Keibo delayed assertion of his claim to the detriment of Donald, at least to the reserved portion." Civ. Act. No. 00-023, Decision at 5 (Tr. Div. May 30, 2008). The Trial Division determined that upon receiving the survey, which confirmed that Donald was impinging on his portion of the lot, Keibo promptly told Donald to cease work in the reserved portion. *Id.* at 4.

For the reason discussed above, this Court will not revisit the Trial Division's finding that the first breach of the Use-Right Agreement took place in 1997. The Trial Division also found that Keibo had asked Donald to stop all construction on Keibo's portion of land promptly after discovering the breach. *Id.* at 2, 4. The record supports the Trial Division's finding. Appellees' exhibits before the trial court include correspondence between Donald and the Koror State Planning Commission, which establishes that, by March 1998, Donald was aware that Keibo had obtained a building permit to develop a portion of the lease which overlapped with Donald's fenced-in parking area. (Pls.' Exs. 22-25.) In addition, there is testimony that, when Keibo discovered that Donald was building on his portion of the lease, Keibo sent messages from Peleliu complaining to Donald about the intrusion. (Tr. at vol I, p. 214, 264-265.) Because there is sufficient evidentiary support for the Trial Division's conclusion that Keibo promptly told Donald to

stop using his land, that conclusion is not clearly erroneous and will be upheld.³

[1] Appellant’s theory of equitable estoppel also must fail. The Trial Division did not conclude that Keibo misrepresented the area of the lease to Donald; even if the court had reached that conclusion, Donald’s failure to investigate the terms of Keibo’s lease is fatal to his equitable estoppel claim. “A person asserting estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also lacked any reasonably available means of acquiring the knowledge.” 28 Am. Jur. 2d *Estoppel and Waiver* § 86. Donald could have easily checked the terms of the lease between KSPLA and Keibo and seen that Keibo’s entire lease was the 480 square meter plot. For this reason, the trial court’s determination not to estop Appellees’ suit will be upheld.

C. Restitution

Finally, Appellant seeks restitution, on the theory that he is entitled to compensation for his work clearing and developing Keibo’s portion of the lot. Appellees argue that Donald’s work clearing the land and building the sea wall was part of the original agreement between Donald and Keibo: Donald would do

that work as compensation to Keibo. In contrast, Donald asserts that he believed the entire lot was his to develop and build on and did the work for his own benefit.

Resolution of this dispute depends on whether Donald knew that part of the land he was developing was Keibo’s portion of the sublease and if so, if he and Keibo agreed that the work would be compensation for the sublease. While the Trial Division concluded that Donald’s work on the land prior to 1997 did not constitute breach, it did not make a determination about the terms under which Donald improved the land.

[2, 3] If there was an agreement that Donald would do the work as compensation or gratuitously, then Donald is clearly not entitled to any restitution. However, if he improved the land under the mistaken belief that the land was his and Keibo knew about the improvements, then Donald is entitled to restitution. *Giraked v. Estate of Rechucher*, 12 ROP 133, 139-140 (2005). Because resolution of this issue depends on a factual determination that must be made by the Trial Division, the case is remanded for the trial court to determine if Donald made improvements under the mistaken belief that the land was his or as part of an agreement with Keibo.

II. Appellees’ Claims

A. Termination of Use-Right Agreement by Breach

Appellees claim that the court should have allowed the Use-Right Agreement to be terminated, since Donald breached the

³ Appellant also asserted laches as a bar to Appellees’ suit, on the ground that Keibo unconscionably delayed asserting his claim, to Donald’s detriment. Because this assertion is substantially similar to Appellant’s unsuccessful assertion of estoppel by inaction, Appellant’s arguments concerning laches is equally unavailing.

Agreement. The Trial Division refused to allow Appellees to terminate the Use-Right Agreement because of the huge expense that Donald, relying on the Agreement, has put into developing his part of the leasehold. The Trial Division concluded that “to terminate the 1992 Agreement would give [Appellees] a huge windfall and [Appellant] a big loss.” Civ. Act. No. 00-023, Decision at 4 (Tr. Div. May 30, 2008).

[4] The Trial Division did conclude that Donald breached the Use-Right Agreement in using the entirety of the lot, instead of a subsection. *Id.* at 2. However, not all breaches justify termination of a contract. The issue of whether a party’s breach is material and excuses future performance by the other party is a question of fact. *See Roberts v. Ha*, 13 ROP 67, 72 (2006). Accordingly, the decision that Appellees are not entitled to terminate the Agreement is reviewed for clear error. *Id.* The Restatement of Contracts lists several circumstances which are significant in determining whether a failure in performance is material:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he was deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1979).

In light of these circumstances, it is clear that the Trial Division did not err in refusing to allow termination of the Agreement. Donald’s breach, using the entirety of the lot, instead of a portion, deprived Appellees of the use of, and the opportunity to develop, their portion of the lease since 1997. Appellees were deprived of that benefit, which they reasonably expected. However, Appellees have not shown that they cannot be adequately compensated for that deprivation with damages. Additionally, as the Trial Division noted, allowing termination of the contract would cause Donald, the breaching party, to suffer forfeiture of a portion of the \$500,000 he has spent in reliance on the contract. Finally, there is no indication that Donald will not vacate Appellees’ portion of the land, now that the parties’ rights are determined, or that Donald’s breach was a willful violation of standards of good faith, to the degree which would justify termination.

The Trial Division’s conclusion that termination is not justified in this case is not clearly erroneous and is, accordingly, upheld.

B. Limitation of Lease Payments

Appellees argue that the Trial Division erred in limiting Donald's liability for lease payments. Although the Use-Right Agreement makes no mention of lease payments, Donald conceded that he assumed liability for the lease payments as part of the Agreement. Donald's obligation to pay this rent arose in 1992. The Trial Division found that Donald was responsible for the lease payments, but the six year statute of limitations limited his liability to 1998 and afterwards.

This limitation is erroneous. Keibo filed his claim for breach of contract in 2000. The six-year statute of limitations should count backwards six years from that date, to 1994. However, statute of limitations is an affirmative defense; if it is not pled, it is waived. ROP R. Civ. P. 8(c) "requires a party to set forth affirmatively the defense of the statute of limitations. Failure to do so constitutes waiver of this affirmative defense." *Kumangai v. Isechal*, 1 ROP Intrm. 587, 589 (1989). Donald never pled a statute of limitations defense to the rent payments, so it was improper for the Trial Division to *sua sponte* use the statute of limitations to limit his liability.

Because Donald did not plead the affirmative defense of a statute of limitations, his liability for lease payments under the Use-Right Agreement is not limited to those payments due after 1998. The Trial Division's decision is reversed on this point. Appellant owes KSPLA lease payments back to August 1992.

C. Award of Expenses, Lost Profits and Attorney Fees

Finally, Appellees argue that the Trial Division erred by refusing to award them damages for lost expenses. Appellees sought compensation for materials, labor, blueprints and landscaping that Keibo purchased in anticipation of using their portion of the lot. Appellees argue that, because of Donald's breach, they never received the benefit of that expense and should be compensated. The Trial Division denied Appellees' request, because "the expenses seem to be the natural consequences of building a commercial structure" and have no correlation to Donald's breach. Civ. Act. No. 00-023, Decision at 6 (Tr. Div. May 30, 2008).

[5] Appellees disagree with the Trial Division, asserting that some of the expenses were lost due to Donald's breach, in that materials became worn out or labor which was paid for was not utilized. Although Appellees incurred the building expenses for their own benefit, if Donald's breach prevented completion of the construction and made some of Appellees' expenses unsalvageable, Appellees are entitled to compensatory damages. The determination of which expenses have the same value now as they did when purchased, and which are lost, is factual and, thus, a task for the Trial Division. The Trial Division concluded that "these incurred expenses are no longer actual losses because the plaintiffs are getting back the reserved portion." *Id.* at 7. The Trial Division did not evaluate if any of Appellees' expenses are actual losses, despite their recovering the land, because of the passage of time. If some of Appellees' building expenses are not

recoverable, because of the delay caused by Donald's breach, then they are entitled to recoup that loss. Restatement (Second) of Contracts § 347. On remand, the Trial Division is directed to evaluate if Appellees have proven with a reasonable degree of certainty if any of their outlay is not salvageable due to the passage of time and Donald's breach. *See Hanpa Indus. Dev. Corp. v. Asanuma*, 10 ROP 4, 10 (2002) ("damages are recoverable only to the extent that they can be proven with a reasonable degree of certainty"); Restatement (Second) of Contracts § 352.

Appellees also seek compensation for profits lost as a result of Donald's breach. The Trial Division rejected their claim on the grounds that they did not establish the lost profits with the requisite degree of certainty. A lower court's determination that a plaintiff failed to prove its damages to a reasonable degree of certainty will not be set aside unless clearly erroneous. *PMIC v. Seid*, 11 ROP 79, 81 (2004). Appellees alleged lost profits in the amount of \$730,000 for a convenience store, gas station, apartment building and commercial rental property. The Trial Division denied Appellees' request, because it did not include an accounting of costs and expenses to differentiate net from gross profits. Appellees direct the Court's attention to Plaintiff's Exhibit 17, a six-line tally of lost income. This evidence does not substantiate the \$730,000 figure. There is no basis provided for the rental amount or amount of business income; the numbers assume full occupancy at all times, and no expenses or costs are deducted. Accordingly, we conclude that the Trial Division's finding that Appellees failed to prove lost profits with a reasonable degree of certainty was not clearly erroneous.

[6] Finally, Appellees argue that the trial court erred in refusing to award attorney's fees. Appellees provide no authority to support the assertion that the Trial Division's refusal to award attorney's fees is an abuse of discretion. Palau follows the American rule in which each party typically bears their own attorney fees. *See* ROP R. Civ. P. 54(d). Appellees cite *Foster v. Bucket Dredger S/S "Digger One,"* 7 ROP Intrm. 234 (Tr. Div. 1997) as support for the trial court's authority to award attorney fees. That case does not compel the award of fees, nor is it factually similar to the present case. In that case, a finding of fraud justified the award of attorney's fees.

Because Appellees have not shown that the trial court's refusal to award fees was an abuse of discretion, the trial court's decision is affirmed.

CONCLUSION

For the foregoing reasons, the Trial Division Decision of May 30, 2008, is AFFIRMED in part and REVERSED in part. The Trial Division Decision is REVERSED to the extent it limited Appellant's liability for lease payments to September 1998 and afterwards. The case is REMANDED for resolution of the issues of restitution and damages.

**SURANGEL WHIPPS d/b/a SURANGEL
& SONS CO.,
Appellant,**

v.

**JERRY NABEYAMA,
Appellee.**

CIVIL APPEAL NO. 08-030
Civil Action No. 07-280

Supreme Court, Appellate Division
Republic of Palau

Decided: October 21, 2009

[1] **Civil Procedure:** Attorney’s Fees

Deciding whether post-judgment attorney fees are warranted is one of the essential discretionary functions of the Trial Division.

[2] **Judgments:** Stipulations

Courts have broad discretion in determining whether to hold a party to a stipulation, and may set aside a stipulation where enforcement would not be conducive to justice. A stipulation may be binding on the parties, but it is not binding on the court.

[3] **Appeal and Error:** Pro Se Litigants

There is a long standing, and oftentimes unspoken, tradition in the United States and here in Palau of courts employing a heightened duty to its pro se litigants. We find that this tradition serves the interest of justice in helping to ensure meaningful access

to the courts of Palau to all Palauan citizens, regardless of their socio-economic status.

Counsel for Appellant: David Shadel

Counsel for Appellee: Pro se

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

Appellant, Surangel & Sons (“Appellant”), by and through its attorney David Shadel, appeals a judgment entered by the Trial Division in an action to recover credit card debt. Although judgment was entered in favor of Appellant, Appellant now challenges the Trial Division’s deviation from the parties’ stipulation. Specifically, Appellant challenges the Trial Division’s deletion of certain language regarding post-judgment attorney fees. For the reasons that follow, we AFFIRM the Judgment of the Trial Division.

BACKGROUND

Appellant filed its complaint against Appellee to enforce payment of Appellee’s debt under his October 2002 Customer Credit Card Application and Credit Agreement. The agreement stated in relevant part,

Applicant will pay . . .
reasonable attorney’s fees

(including without limitation, at trial and on appeal) that may be incurred in any manner of collection of any account past due.

The complaint was filed on September 26, 2007, for the principal amount of \$6,007.55, interest of \$4,368.37, plus attorneys fees and court costs. Then, on October 18, 2007, Appellant and Appellee entered into and filed a stipulation with the Trial Division, which stated,

Judgment is now entered in favor of plaintiff and against defendant for \$10,913.82 (\$6,007.55 of principal, \$4,415.77 of prejudgment interest, \$440.00 of attorney fees, and court costs of \$50.50) as of October 12, 2007, **and further daily interest of \$2.96, costs, and attorney fees thereafter.** Such judgement's unpaid balance of \$6,007.55 shall continue to earn 18% annual interest, and the rest shall earn annual interest at the maximum rate allowed by law (currently 9%). **Defendant is liable for and will pay plaintiff's further reasonable attorney fees herein at the rate of at least \$137.50 per hour.**

The Trial Division entered judgment based on that stipulation but did not award all of the

attorney fees contained in the stipulation. Instead, the Trial Division simply removed the bolded language above pertaining to post-judgment attorney fees, but otherwise substantially included the rest of the language stipulated by the parties. This appeal followed.

STANDARD OF REVIEW

We review the amount of attorney fees awarded by the trial court under the abuse of discretion standard. *W. Caroline Trading Co. v. Philip*, 13 ROP 28 (2005). Appellant attempts to characterize the issue on appeal alternately as (1) a review of a trial court's interpretation of a contract, or (2) a review of a denial of due process. In either proposed situation, this Court would be bound to exercise a *de novo* standard. *See NECO v. Rdialul*, 2 ROP Intrm. 211, 217 (1991) (holding "we review a lower court's interpretation of a contract *de novo*."); *Elbelau v. Semdiu*, 5 ROP Intrm. 19, 21 (1994) (holding "where factual issues are not in dispute, the denial of due process is a pure question of law that this court reviews *de novo*.") We reject both of Appellant's characterizations.

In his first argument, Appellant asserts that the parties freely entered into a stipulation, which is akin to a contract, and which provided that "Defendant is liable for and will pay plaintiff's further reasonable attorney fees herein at the rate of at least \$137.50 per hour." When the Trial Division removed the language of the Stipulation from its own Judgment, the Appellant asserts that the removal was tantamount to an interpretation of the contract.

In his second argument, Appellant states that “[d]ue process . . . requires a court . . . to provide notice to be heard before sanctions are imposed . . .” *Martin v. Brown*, 63 F.3d 1252, 1262 (3rd. Cir. 1995). Thus, Appellant argues that the Trial Division’s *sua sponte* deletion of language in the stipulation, without providing the parties an opportunity to brief the issue, was a sanction of sorts. Thus, the Trial Division’s failure to allow a hearing on the matter amounted to a denial of Appellant’s procedural due process.

We disagree on both counts. The Trial Division made no findings of law or fact regarding the Stipulation. Rather, it gave effect to the stipulation in large part, issuing a Judgment which even included \$440.00 of attorney fees. Even though the stipulation can conceivably be analogized to a contract, to suggest that the Trial Division’s issuance of Judgment, which was a purely discretionary function, subsequently became an exercise in contract interpretation asks too much. Likewise, Plaintiff’s reliance on a due process argument is simply inapposite. We see no conceivable way to construe a Judgment awarding Appellant the principal debt, interest, costs and attorney fees as a sanction—and Appellant has provided no convincing argument otherwise.

[1] Rather, in deciding whether post-judgment attorney fees were warranted in the case, the Trial Division simply exercised one of its essential discretionary functions. *See W. Caroline Trading Co. v. Kloulechad*, 15 ROP 127 (2008) (the award of attorneys fees is a matter of discretion (citing *Philip*, 13 ROP at 28)). Thus, we reject Appellant’s suggestion that the proper standard of review is *de novo*

and reemphasize that we review the amount of attorney fees awarded by the trial court under the abuse of discretion standard. *Philip*, 13 ROP at 28.

DISCUSSION

The gist of Appellant’s argument on appeal is that the Trial Division was not entitled to depart from the language of the parties’ Stipulation when it issued its Judgment. Appellant states that, pursuant to the Credit Card Agreement, it had a right to seek an award of its expenses, including post-judgment attorney fees. Indeed, the language in the Credit Card Agreement provides as much. Thus, Appellant argues, it was “reasonable” to include those post-judgment fees in the Stipulation, i.e., the Court should not substitute its judgment regarding the “reasonableness” of attorney fees for the judgment of the parties themselves.¹ If Appellee stipulated to the award of post-judgment attorney fees, Appellant argues, then the Trial Division is bound to enter that stipulation because it was “reasonable.”

[2, 3] This argument is unconvincing. The fact that Appellee stipulated to Appellant’s entitlement to post-judgment attorney fees makes no real difference. In a nearly identical case in which the identical attorney, Mr. David Shadel, alleged that he was owed

¹ Indeed, Appellant took the opportunity to lecture this Court on the perils of the Palau judiciary acting as an advocate for the debtor, stating that it is a “slippery step towards the abyss of arbitrary interference with contract,” that will “lead to chaos” in Palau’s participation in the commercial and business world.

attorney fees based on a stipulation, the Supreme Court has already stated that “[c]ourts have broad discretion in determining whether to hold a party to a stipulation, and may set aside a stipulation where enforcement would not be conducive to justice.” *Kloulechad*, 15 ROP 127 (quoting 73 Am. Jur. 2d *Stipulations* § 12 (2001)). “A stipulation may be binding on the parties, but it is not binding on the court.” *Id.* Additionally, we previously noted that courts have discretion in awarding attorney fees. Thus, both acts complained of—the modification of the stipulation and the refusal to award of post-judgment attorney fees—are clearly within the Trial Division’s discretion. Given the fact that this is a case in which the Defendant was proceeding pro se and the attorney fees were fairly sizeable compared to the principal at issue, the Trial Division was clearly entitled to modify the stipulation on attorney fees in the interest of justice.² Accordingly, we cannot

² Although neither the Supreme Court of Palau nor the Supreme Court of the United States have directly addressed the question of whether courts owe pro se civil litigants a duty to assist them during the *entire* trial process, in *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the Supreme Court of the United States held that judges should liberally construe pro se litigants’ pleadings. In *Bounds v. Smith*, 430 U.S. 817, 823 (1977), the Supreme Court also required that states provide pro se litigants with services to protect their adequate, effective, and meaningful access to the courts. Moreover, several lower courts of appeals have recognized pro se civil litigants are entitled to particularized instruction concerning the consequences of failing to respond to motions for summary judgment. See e.g., *Moore v. State of Florida*, 703 F.2d 516 (11th Cir. 1983); *Madison v. Sielaff*, 393 F. Supp 788 (N.D. Ill. 1975) (holding that, in the case of pro se plaintiffs,

say that the Trial Division abused its discretion when it removed the award of post-judgment attorney fees.

As a final note, Appellant argues as if the Trial Court summarily rejected any and all future claims on his behalf for attorney fees. However, nothing in the Trial Division’s judgment precludes counsel from seeking post-judgment attorney fees in the future, provided it appends an affidavit which sets out in some detail the actual work that was performed. As we noted before, this is not the first time this issue has been presented by this attorney. Thus, we reemphasize here that, in the exercise of its discretion, the Trial Division—not the attorney—gets to make the reasonableness determination about whether and to what extent to award attorney fees.

CONCLUSION

For the reasons set forth above, the judgment of the Trial Division is AFFIRMED.

courts should employ a heightened standard in construing well-pleaded allegations of fact in a complaint). There is a long standing, and oftentimes unspoken, tradition in the United States and here in Palau of courts employing a heightened duty to its pro se litigants. We find that this tradition serves the interest of justice in helping to ensure meaningful access to the courts of Palau to all Palauan citizens, regardless of their socio-economic status.

**YUKIO M. SHMULL,
Appellant,**

v.

**CHIUNG-FENG CHEN,
Appellee.**

CIVIL APPEAL NO. 08-006
Civil Action No. 01-330

Supreme Court, Appellate Division
Republic of Palau

Decided: October 28, 2009

[1] **Creditor-Debtor; Property:**
Mortgage

The underlying purpose of an exemption statute is to protect the basic necessities of the debtor against unforeseeable indebtedness and the underlying purpose of secured transactions is to promote financial certainty by allowing creditors to rely on legal rules governing collateral. Thus, the phrase “unless otherwise specified by contract” in 14 PNC § 2110(a) modifies the entire exemption provision. To decide otherwise would create a perverse incentive for debtors to mortgage property they never really intended to use as security for their debt.

[2] **Creditor-Debtor; Property:**
Mortgage

Although exemption rights are liberally interpreted in favor of the debtor, they are not intended to give the debtor what in common honesty does not belong to him, by

exonerating the debtor from the payment of just debts.

[3] **Creditor-Debtor; Property:**
Mortgage

Exemption laws are not designed to prevent persons from giving liens on whatever property they may see fit. Where such lien is given, it creates security for the debt in the property to which it attaches, from which the debtor cannot be relieved. The lien is not discharged until the debt is paid. Unless there is some provision in the statutes to the contrary, it may be enforced against the property to which it attaches even though the property is exempt under law.

Counsel for Appellant: Pro se¹

Counsel for Appellee: David Shadel

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

¹ President Johnson Toribiong was Appellant’s last counsel of record. Upon his election as President of the Republic, Toribiong withdrew as Counsel on January 13, 2009. Appellant was required to inform the Court of his new counsel by February 12, 2009. Because Appellant failed to do so, we accept it as Appellant’s intention to proceed pro se.

Appellant, Yukio M. Shmull (“Appellant”), appeals the Order Denying his Motion to Set Aside Notice of a Judicial Sale of his family dwelling house. The Order was issued by the Trial Division on January 28, 2008.² Specifically, Appellant moved to exempt his family dwelling house (also known as Lot No. 40025) from the reach of judgment creditors on the grounds that it should now be considered exempt under RPPL No. 7-11 (hereinafter referred to as 14 PNC § 2110(a)). The Trial Division denied the motion. For the reasons that follow, we AFFIRM the Trial Division’s Order.

BACKGROUND

On March 19, 2000, Appellant and Appellee executed an Agreement whereby Appellant agreed to pay his debt to Appellee. In doing so, Appellant gave Appellee a mortgage on his interest in property located at Lot No. 40025, which consists of six apartments. Appellant leases five of the apartments to other tenants and resides in the sixth. The mortgage on this property was duly recorded on May 19, 2000. When Appellant failed to pay under the Agreement, Appellee sued to collect on the amount owed and to foreclose on the mortgage. On March 4, 2002, the Trial Division issued an Entry of Default and Judgment in the sum of \$174,136.45 and in foreclosure of the mortgage

on all of defendant’s rights and interests in and to certain lands

described as Lot. No 40025 and all improvements thereat, to any lease which defendant had or may have in or at such Lot. No. 40025 Such judgment shall be paid within three months hereof, failing which defendant’s interests in the above properties may be sold

Over the past six years, Appellee sought to collect on the judgment. During this time, the Trial Division, as well as the Appellee, devised various methods of repayment, including having the tenants of the property pay their rent directly to Appellee. However, Appellant was still unable to pay his debt to Appellee. Then, on October 19, 2007, Appellee filed, published, and served his Notice of Sale of Appellant’s interests in the foreclosed property at Lot No. 40025. Appellant and Appellee set the date of the judicial sale for December 12, 2007. However, Appellant then requested one last chance to postpone the date of the sale because he was allegedly seeking \$70,000.00 with which to settle the case. Therefore, Appellant and Appellee stipulated to reset the date of the sale for February 6, 2008. Then, on January 9, 2008, Appellant filed a Motion to Set Aside the Notice of the Judicial Sale, moving that the Trial Division should instead declare that the foreclosed property at Lot No. 40025 was exempt from the judicial sale under 14 PNC § 2110(a).

This argument required some clever maneuvering because 14 PNC § 2110(a) had actually been amended to include this “family dwelling” exemption on August 31, 2005,

² This Order shall be considered a final judgment for purposes of this appeal. *See* this Court’s October 10, 2008, Order (finding that no danger of multiple appeals exists).

which was three years *after* the issuance of the default judgment in this case. Prior to the amendment, no “family dwelling” exemption existed. Now, with the portions added by the amendment highlighted in **bold**, 14 PNC § 2110(a) reads,

The following described property shall be exempt from attachment and execution:

(a) Personal and household goods—all necessary household furniture, cooking and eating utensils, and all necessary wearing apparel, bedding, **and the principal family dwelling house and one motor vehicle, fair market value of said property not to exceed \$150,000, unless otherwise specified by contract.**

In his motion to the Trial Division, Appellant argued that this late-arriving amendment should exempt his “principal family dwelling house” at Lot No. 40025 because, even though the original judgment was issued prior to its enactment, the actual judicial sale was sought after its enactment. Appellant argued in the alternative that the new provision in 14 PNC § 2110(a) should be applied retroactively to his property because the statute was “remedial” in nature. The Trial Division was unconvinced and denied Appellant’s Motion to Set Aside Notice of the Judicial Sale. This appeal followed.

STANDARD OF REVIEW

In its Order, the Trial Division gave no reason for its denial, save for the statement, “no good cause being shown.” This raises the question whether the decision was based upon a legal conclusion, such as 14 PNC § 2110(a)’s potential retroactivity, or a factual one, such as whether Appellant’s property fits the definition of a “principal family dwelling house” under 14 PNC § 2110(a). It is perhaps because of this uncertainty that neither party correctly cited the standard of review in their respective briefs.³ Because we AFFIRM the Trial Division’s Order based upon a legal interpretation of Palauan statutory law, discussed *infra*, we shall review the Trial Division’s decision accordingly and apply the *de novo* standard. *Bandarii v. Ngerusebek Lineage*, 11 ROP 83 (2004) (“Issues of statutory interpretation are reviewed *de novo*.”).

DISCUSSION

Appellant asks this Court to decide whether 14 PNC § 2110(a), which exempts a

³ The Appellant recited no applicable standard of review and the Appellee recited a standard without any citation to authority. Despite the absence of direction provided by Trial Division’s Order, we reemphasize that ROP R. App. P. 28(a)(7) requires all briefs to set forth any matters “necessary to inform the Appellate Division concerning the questions and contentions raised in the appeal.” What is more, this Court has plainly stated that the “standard under which the Appellate Division is to review the issues before it is a matter necessary to the questions raised on appeal.” *Scott v. Republic of Palau*, 10 ROP 92, 95 (2003). With this in mind, even on hard questions such as this one, we require at the very least that the parties take their best shot.

debtor's "principal family dwelling house" from judicial attachment or execution, is a remedial statute that should be applied retroactively to his judgment. The gist of Appellant's argument is this: Even though the default judgment in this case occurred prior to the enactment of 14 PNC § 2110(a), the law should nevertheless be applied retroactively to exempt Appellant's house from being subject to the judicial sale, because the law is actually a "remedial statute." (Appellant's Br. at 6 (citing *Robin L. Miller Constr. Co. v. Coltran*, 43 P.3d 67, 70-71 (2002) (holding "statutory amendment is retroactive in application if (1) the Legislature clearly intended it to be so in the language of the statute, (2) it is curative, or (3) it is remedial")). Appellant's brief then explains why the "family dwelling" exemption in 14 PNC § 2110(a) should be considered remedial, i.e., because it does not affect a substantial or vested right, because homestead exemptions are traditionally considered remedial, because retroactive application of exemption statutes does not violate the Contracts Clause in the U.S. Constitution.

Unfortunately, Appellant has focused his efforts on an issue that is immaterial to our ultimate determination in this case. Thus, we decline to opine about the remedial nature *vel non* of Palauan statutory law when the genuine issue on appeal is whether any property, which has previously been mortgaged in satisfaction of a debt, is later capable of being claimed as exempt under 14 PNC § 2110(a). For the reasons discussed below, we find that it is not. As we noted earlier, 14 PNC § 2110(a) states,

The following described property shall be exempt from attachment and execution:

(a) Personal and household goods—all necessary household furniture, cooking and eating utensils, and all necessary wearing apparel, bedding, and the principal family dwelling house and one motor vehicle, fair market value of said property not to exceed \$150,000, **unless otherwise specified by contract.**

The bolded words in the provision above open and shut this appeal. As Appellee rightly points out, Appellant mortgaged Lot No. 40025 as security for a debt. When he did so, the words "unless otherwise specified by contract," were triggered, and thus the exemption must fail.

[1-3] The rebuttal argument to this interpretation is that the phrase "unless otherwise specified by contract" does not modify the entire provision, but only the immediately preceding phrase, which states, "fair market value of said property not to exceed \$150,000." This reading makes little sense to us. A word or phrase "gathers meaning from the words around it." *Jarecki v. G.D. Searle & Co.*, 81 S. Ct. 1579, 1582 (1961). "[T]he meaning of doubtful words may be determined by reference to their relationship with other associated words or phrases." 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:16 at 265 (6th ed. 2000). Examining the underlying purpose of an exemption statute, i.e., to protect the basic necessities of the debtor against unforeseeable

indebtedness,⁴ and examining the underlying purpose of secured transactions, i.e., to promote financial certainty by allowing creditors to rely on legal rules governing collateral,⁵ we find that the phrase “unless otherwise specified by contract” modifies the entire exemption provision. To decide otherwise would create a perverse incentive for debtors to mortgage property they never really intended to use as security for their debt.

Although exemption rights are liberally interpreted in favor of the debtor, they are not intended to give the debtor what in common honesty does not belong to him, by exonerating the debtor from the payment of just debts.

31 Am. Jur. 2d *Exemptions* § 3 (1989). Moreover,

[e]xemption laws . . . are not designed to prevent persons from giving liens on whatever property they may see fit. Where such lien is given, it creates security for the debt in the property to which it

attaches, from which the debtor cannot be relieved. The lien is not discharged until the debt is paid. Unless there is some provision in the statutes to the contrary, it may be enforced against the property to which it attaches even though the property is exempt under law.

31 Am. Jur. 2d *Exemptions* § 276 (1989); see also *D’Avignon v. Graham*, 823 P.2d 929, 935 (N.M. 1991) (“A security interest, when considering exemption defenses, transfers the interest immediately and operates to waive any exemption which might later be asserted.”); *In Re Rade*, 205 F. Supp. 336, 339 (D. Colo. 1962) (“Where a mortgage is executed on exempt property, the prevailing view seems to consider the exemption waived by implication.”).

Even assuming *arguendo* that 14 PNC § 2110(a) could be applied retroactively to exempt Appellant’s dwelling from Appellee’s judgment, the fact that Appellant specifically offered that same property as security for his debt triggers the words “unless otherwise specified by contract,” in 14 PNC § 2110(a). Thus, Appellant’s claimed exemption fails without this Court ever having to reach whether 14 PNC § 2110(a) is a remedial statute that could be applied retroactively to the judgment.

This Court is sensitive that its Opinion today may ultimately effect considerable hardship upon Appellant and his family. However, this Court is bound by the rule of law. Here, the rule of law requires that

⁴ “Exemption statutes preserve for debtors the prime necessities of life and furnish them with a nucleus with which to begin life anew.” 31 Am. Jur. 2d *Exemptions* § 3 (1989).

⁵ “The fundamental purpose of [secured transactions] is to create certainty and predictability by allowing creditors to rely on specific [rules] that govern collateral . . .” 68A Am. Jur. 2d *Secured Transactions* 2 (1989).

Appellant be bound by the mortgage that he signed.

CONCLUSION

For the reasons set forth above, the judgment of the Trial Division is AFFIRMED.

**KYOKO APRIL,
Appellant,**

v.

**PALAU PUBLIC UTILITIES CORP.,
Appellee.**

CIVIL APPEAL NO. 08-038
Civil Action No. 06-048

Supreme Court, Appellate Division
Republic of Palau

Decided: November 3, 2009

[1] **Constitutional Law:** Due Process

Constitutional due process is only due when a government actor acts to the detriment of a person's life, liberty, or property rights.

[2] **Constitutional Law:** Due Process

A public corporation wholly-owned by the national government and over which the government exercises significant power of control qualifies as a government actor for due process purposes.

[3] **Constitutional Law:** Due Process

Under procedural due process a government actor must properly adhere to its own procedure in depriving a person of life, liberty, or property.

[4] **Constitutional Law:** Due Process

The hallmark of procedural due process is the requirement that the government provide

notice and an opportunity to be heard before depriving a person of life, liberty, or property.

[5] **Constitutional Law:** Due Process

The level of procedure “due” to an individual under procedural due process varies depending on the circumstances.

[6] **Constitutional Law:** Due Process

Damages for a due process violation should be calculated only to compensate a plaintiff for the affront of suffering a deprivation of process. In an action for lack of adequate process preceding a termination from government employment, back pay should only be ordered if proper process would have resulted in the employee’s reinstatement; otherwise, nominal damages are appropriate.

[7] **Employment Law:** Government

Although citizens do not generally have a right to public employment, it is impermissible for a public employer to force employees to surrender fundamental rights as a condition of their employment. At the same time, however, public employers must be afforded sufficient autonomy to oversee and reprimand their employees lest every grievance be elevated to a matter of constitutional proportions.

[8] **Constitutional Law:** Freedom of Expression

The government is free to regulate the speech of its employees when public employees speak on behalf of the government. The government may, in some instances, regulate public

employees’ personal speech on matters not of public concern, especially where the speech relates to the workplace. But, absent a powerful justification, the government may not punish public employees for expressing themselves on issues of public concern.

[9] **Constitutional Law:** Freedom of Expression

Not all expression regarding a public employer is a “matter of public concern.” It is the gravity of the substance of the expression that dictates whether a matter concerns only a few individuals or rises to the level of public concern.

Counsel for Appellant: Pro se

Counsel for Appellee: Oldiais Ngiraike

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Kyoko April appeals the Trial Division’s grant of judgment in favor of Palau Public Utilities Corporation (“PPUC”) in her suit stemming from her 2004 termination from PPUC’s employ. April claims that her termination violated constitutionally-guaranteed rights to due process and freedom of expression. For the reasons set forth herein, we affirm-in-part, reverse-in-part, and

remand to the Trial Division for calculation of damages.

BACKGROUND

No material facts are in dispute. PPUC hired April as a clerk in 1996. In the years that followed April worked her way up to the position of Administrative Assistant to the General Manager. In 2002, the then-General Manager, Noriwo Ubedei, fired the Human Resources Officer. Ubedei delegated to April the task of managing the recruitment process to find a suitable replacement.

April advertised the open Human Resources Officer position and set up interviews. The interview process consisted of a written test, an initial interview with April, and then a second interview with the Comptroller. PPUC received five applications for the position. One applicant withdrew her application, another was off-island and unable to interview, two were determined to be unsuitable by April based on their test performance, and one was deemed unsuitable by the Comptroller.

With no suitable candidates remaining, Ubedei asked April if she would formally assume the Human Resources Officer position. April declined the invitation because the position came with a smaller salary than she received in her position as Administrative Assistant. Ubedei then created a new, more highly compensated, manager-level position, Human Resources Manager, and asked April to fill that position. April took on the new Human Resources Manager position and retained her post as Administrative Assistant to the General Manager as well. The PPUC Board of Directors (“Board”) received a

memorandum apprising them of April’s expanded role in the new position and approved funding for the position in the budget.

Approximately two years later, the Board took an interest in the Human Resources Manager position, specifically the process by which April attained the position. The Board questioned the propriety of April’s role in screening applicants for a position that she then effectively filled herself. The Board determined, in an Executive Meeting, that April’s hiring was not procedurally proper. The Board directed the then-Acting General Manager, Rukebai Inabo, to remove April from the Human Resources Manager position and to re-announce the vacancy. April was removed from the Human Resources Manager position on September 30, 2004, but retained her position as Administrative Assistant to the General Manager.

April, discontent with her demotion, sought a meeting with the Board, but such a meeting never occurred. April contacted then-President Tommy Remengesau, Jr. and then-Delegate Kerai Mariur to grieve her demotion. Following April’s complaints, Delegate Mariur criticized PPUC for the demotion of an unnamed employee during a televised House of Delegates session.

On October 13, 2004, April received a memo from Inabo seeking her resignation, citing April’s violation of a PPUC personnel rule “prohibit[ing] employees from making public statements or displays unfavorable on the Company or its employees.” April refused to resign, and, later that same day, she received a memo from the newly-minted General Manager, Dallas Peavey, terminating

her employment for the reason stated in the resignation request. April filed suit in the Trial Division on March 3, 2006, and following trial, the court below issued a June 12, 2008, opinion denying April's claim and granting judgment in PPUC's favor. April then filed a timely notice of appeal.

STANDARD OF REVIEW

Due process issues are reviewed *de novo* when, as here, factual issues are not in dispute. *Lewiil Clan v. Edaruchei Clan*, 13 ROP 62, 66 (2006). The same standard applies to review of other legal conclusions as well. *Id.* at 63.

DISCUSSION

I. Due Process

April complains that her termination lacked proper procedure whereby PPUC violated her right to due process as guaranteed by the Palau Constitution. The Constitution reads in pertinent part: "The government shall take no action to deprive any person of life, liberty, or property without due process of law" ROP Const. art. IV, § 6.

[1, 2] Due process is only due when a government actor acts to the detriment of a person's life, liberty, or property rights. The first inquiry therefore is whether PPUC qualifies as a government actor. PPUC is a "Public Corporation of the Republic of Palau created by the Republic of Palau." (Compl. ¶ 2; Answer ¶ 1); *see* 37 PNC § 403(a). "Public corporation," with regard to PPUC, means "an entity wholly-owned by the national government, doing business as a corporation

formed under the laws of the Republic." 37 PNC § 402(d). All members of the Board are "appointed by the President of the Republic of Palau with the advice and consent of the Senate." 37 PNC § 404(b). Because it is a public corporation wholly-owned by the national government and the government exercises significant power of control over its operations (through the appointment of Board members), PPUC qualifies as a government actor for due process purposes.

The second inquiry is whether any of April's three due process rights—life, liberty, or property—were violated. PPUC defends itself with the claim that April, as a non-contractual employee, had no property (or any other) right to continue in its employ. We need not look past the pleadings to resolve the issue.¹ PPUC admitted, in response to paragraph 10 of April's Complaint, that "[April] had a right to continued employment so long as she did her job properly." (Answer ¶ 1.) Although PPUC now claims that April had no right to continued employment, we need not inquire into the basis for this right, as it was admitted by the most formal means possible.² *Cf. Palau Marine Indus. Corp. v. Pac. Call Invs., Ltd.*, 9 ROP 67, 71 (2002) (even withdrawn pleadings can still constitute an admission of a party).

¹ The parties' pleadings in the Trial Division are open for consideration on appeal. ROP R. App. P. 10(a).

² The Court does not today consider what property rights an at-will public employee maintains in their continued employment absent an employer admission of such a right.

Because PPUC, a government actor, deprived April of her right to continued employment, she should have been afforded due process before that deprivation occurred. Although the specific nature of the alleged due process violation is unclear from April's appellate briefing, April pressed a procedural due process argument before the Trial Division. (See April's Closing Argument at 10 ("Why was I not given a verbal or written warning?" "Why wasn't I given another chance to correct what you think I did wrong?") (quoting Trial Testimony of April)). Therefore we will review the following due process contentions under the mantle of procedural due process: (1) whether April's termination violated PPUC's internal rules of procedure; and (2) whether April was terminated with sufficient notice and an opportunity to be heard.

A. Conformity with Enumerated Procedure

[3] Under procedural due process a government actor must properly adhere to its own procedure in depriving a person of life, liberty, or property. Such procedures ensure that the government acts with an even hand. April claims that by statute the General Manager of PPUC had sole authority to terminate her employment and that her termination was improper because it came by way of instruction by the Board to the General Manager.

Legislation grants the General Manager the power to "[t]o select, hire and terminate the employees of [PPUC], except as otherwise provided in this chapter . . . and to plan, organize, and control the services of

such employees in the exercise of the powers of [PPUC] under the general direction of the Board and the policies established by the Board." 37 PNC § 407(b)(5). Those powers, however, are tempered by the requirement that the General Manager act "in accordance with the oversight of and policies established by the Board." 37 PNC § 407(b). Therefore the Board maintains oversight of employee terminations through the General Manager and April's termination did not violate these procedures. April's appeal fails on this front.

B. Notice and an Opportunity to be Heard

[4, 5] The hallmark of procedural due process is the requirement that the government provide notice and an opportunity to be heard before depriving a person of life, liberty, or property. See *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999). Of course, one procedure does not fit all. A criminal defendant facing an extended prison sentence is due more process than a contractual government employee facing termination of their contract. See *Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) ("Due process is flexible and calls for such procedural protections as the particular situation demands."). Here, April was afforded neither notice of her termination nor an opportunity to be heard. She received a memo requesting her resignation. She refused and was terminated immediately. April did not receive even a minimal level of process before deprivation of her continued employment, therefore her due process was violated.

[6] Damages for a due process violation should be calculated only to compensate a

plaintiff for the affront of suffering a deprivation of process. Only if proper process would have resulted in April's reinstatement should she be allowed to recover anything resembling back pay or compensation for her termination. If notice and an opportunity to be heard would have left her in the same position employment-wise, nominal damages are likely appropriate. *See Zinermon v. Burch*, 110 S. Ct. 975, 983 n.11 (1990) (“[I]n cases where the deprivation would have occurred anyway, and the lack of due process did not itself cause any injury (such as emotional distress), the plaintiff may recover only nominal damages.”).

II. Freedom of Expression

[7] Although citizens do not generally have a right to public employment, it is impermissible for a public employer to force employees to surrender fundamental rights as a condition of their employment. Otherwise public employers would be free to require their employees to vote for a certain candidate or join a certain religion. At the same time, however, public employers must be afforded sufficient autonomy to oversee and reprimand their employees lest every grievance be elevated to a matter of constitutional proportions.

The Trial Division followed the teachings of United States case law, whereby public employers are prohibited from abridging their employees' right to express themselves as citizens on matters of public concern. Civ. Act. No. 06-048, Decision at 8-9 (Tr. Div. June 12, 2008.) The court below also followed the American view that when public employees speak as employees or speak

on matters not of public concern, public employers “enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Id.* at 9 (quoting *Connick v. Myers*, 103 S. Ct. 1684, 1690 (1983); *see also Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) (“The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.” (citations omitted))).

At the outset we must be mindful that our guarantee of free expression, located in Article IV, Section 2 of the Palau Constitution, is not a mirror image of the American guarantee to freedom of speech, located in the First Amendment to the United States Constitution. Much can depend, in constitutional construction, on the variation of language. Furthermore, the freedom of expression jurisprudence of the United States has ventured far afield from the actual language contained in their constitution. We must be wary not to follow a foreign jurisdiction's reasoning into unsteady territory that strays from our Constitution as informed by our traditional values. At the same time, we must not shun borrowed wisdom, for it comes at a lesser price than knowledge paid for by the painful injustice of error and adjustment.

[8] It would be unworkable to find that public employers are wholly powerless to regulate the expression of their employees. When public employees speak as employees, their expression is in effect not their own.

They communicate, not as private citizens, but as representatives of their government employer. *See Garcetti*, 126 S. Ct. at 1960. The government must be free to regulate its own expression. And, because the government’s expression can only be carried forth by human couriers, the government must be free to oversee its employees without judicial interference when public employees speak as government agents.

But when a public employee speaks as a private citizen the government no longer has the same level of self-interest in the employee’s expression. Despite that diminished interest, all citizen-speech by public employees cannot lie outside the bounds of employer oversight. Public employees, by virtue of the identity of their employer, do not enjoy unfettered leeway to publicly air their personal workplace grievances without repercussion. *See Connick*, 103 S. Ct. at 1690. To impose such a bar on public employers—a constitutional bar no less—would impede the fruitful operation of the Republic.³

Stifling expression on matters of public concern, however, is a much graver matter. Speech on matters of public concern is at the heart of our guarantee to freedom of expression. Free discourse regarding such matters is a bedrock of any democratic

society. Absent a powerful justification, punishing public employees for expressing themselves on issues of public concern—whether those issues relate to the public employer or not—would run afoul of our constitutional guarantee to freedom of expression. *See Garcetti*, 126 S. Ct. at 1958.

[9] The battle line going forward will be to define which areas qualify as those “of public concern” and which do not. Although, in the literal sense, because public employers are funded with public money, all facets of a public employer’s operation concern the public. But this is not what we mean today by a “matter of public concern.” Reviewing courts should inspect the gravity of the substance of the expression to delineate between matters that may concern only a few individuals and those that truly rise to the level of public concern. *See Connick*, 103 S. Ct. at 1690-91.

With these guideposts staked out, we turn to the facts at hand. April was punished for going over her supervisors’ heads and sharing a personal gripe—discontentment regarding her demotion—with President Remengesau and Delegate Mariur. Her demotion was not a matter of public concern. Therefore (within the bounds of due process and other statutory and constitutional constraints) PPUC was free to exercise its powers as employer to react to April’s expression as it felt was appropriate. It saw termination appropriate and we will not—in the name of freedom of

³ Although the Court lacks the ability to forecast all future factual scenarios it would seem extraordinary that a public employer’s interest in orderly administration would trump an employee’s right to speak as a private citizen on matters not of public concern unrelated to the workplace.

expression—substitute our judgment for that of PPUC.⁴

CONCLUSION

For the reasons stated herein, we AFFIRM the Trial Division’s denial of April’s free expression claim. We REVERSE the Trial Division’s wrongful termination decision and find that a due process violation occurred. We therefore REMAND to the Trial Division to calculate damages in the first instance.

JEFFREY RECHETUKER,
Petitioner,

v.

MINISTRY OF JUSTICE and BUREAU
OF PUBLIC SAFETY,
Respondents.

SPECIAL PROCEEDING NO. 09-002
Civil Action No. 02-255

Supreme Court, Appellate Division
Republic of Palau

Decided: November 3, 2009

[1] **Appeal and Error:** Writ of Mandamus

The proper procedural mechanism to seek a writ of mandamus in the Appellate Division is by petition captioned as a special proceeding.

[2] **Appeal and Error:** Writ of Mandamus

A petition seeking a writ of mandamus is not an appeal, even where the petition seeks a writ ordering a trial judge to reverse a decision. A petition for a writ of mandamus is a request for a separate, extraordinary remedy, available only when a petitioner lacks adequate alternative means to obtain relief.

[3] **Appeal and Error:** Jurisdiction

A court has the power and the duty to examine and determine, *sua sponte* if need be, whether it has jurisdiction over a matter presented to it.

⁴ April has mounted an as-applied freedom of expression challenge both before the Trial Division and on appeal. Therefore, while we will not assess the facial validity of the PPUC personnel rule restricting employee expression, we do caution PPUC that it would be prudent to revise the rule to conform with the law as laid out in this opinion.

[4] Appeal and Error: Jurisdiction

The Appellate Division of the Supreme Court's jurisdiction is constitutionally limited to review of lower court decisions.

Counsel for Petitioner: David W. Pugh

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice.

PER CURIAM:

Before the Court is Jeffrey Rechetuker's motion for a writ of mandamus in Civil Appeal No. 04-019. For the reasons set forth below, his motion shall be treated as a petition for a writ of mandamus in a newly-captioned Special Proceeding and dismissed for lack of jurisdiction.

BACKGROUND

On April 2, 2001, Rechetuker, an officer employed by the Bureau of Public Safety, Ministry of Justice ("MOJ"), received a Notice of Adverse Action terminating his employment in ten days' time. The charges set forth in the letter stemmed from several incidents that occurred in the early morning hours of March 30, 2001.¹ Rechetuker challenged his termination before a Grievance

¹ These incidents have been recited previously, and, as they are not pertinent to the matter at hand, the Court will not again repeat them. For a more detailed account, consult *Rechetuker v. Ministry of Justice*, 11 ROP 31, 32-33 (2003).

Panel. The Grievance Panel recommended, and then later commanded, reinstatement. The MOJ challenged the Grievance Panel's order of reinstatement in the Trial Division. In the course of its lifespan, the litigation has taken two previous trips to the Appellate Division, first in *Rechetuker v. Ministry of Justice*, 11 ROP 31 (2003) ("*Rechetuker v. MOJ I*") and then more recently in *Ministry of Justice v. Rechetuker*, 12 ROP 43 (2005) ("*MOJ v. Rechetuker II*").

MOJ v. Rechetuker II resulted in remand back down the chain to the Grievance Panel for further decision. According to Rechetuker, the Grievance Panel conducted further proceedings and concluded closing arguments on April 24, 2006, but has yet to reach a decision. He now seeks a writ of mandamus ordering the Grievance Panel to issue a decision.

DISCUSSION

Rechetuker has moved, under the caption of Civil Appeal No. 04-019,² for a writ of mandamus. Rechetuker's request suffers from a number of deficiencies—it employs the wrong procedural mechanism in the wrong action before the wrong court.

[1, 2] First, the proper procedural mechanism to seek a writ of mandamus in the Appellate Division is by petition, not motion. *See* ROP R. App. P. 21. Second, petitions for writs of mandamus in the Appellate Division are captioned as special proceedings, not appeals. *See, e.g., Wolff v. Ngiraklsong*, 9

² Civil Appeal No. 04-019 blossomed into the *MOJ v. Rechetuker II* opinion.

ROP 20 (2001) (captioned as “Special Proceeding No. 01-02”). Quite simply, petitions for writs of mandamus are not appeals. Even where the petition seeks a writ ordering a trial judge to reverse a decision, a petition for a writ of mandamus is not an appeal of the decision below, but a request for a separate, “extraordinary remedy” available only when a petitioner lacks adequate alternative means to obtain relief. *See, e.g., Ngirmeriil v. Armaluuk*, 11 ROP 122, 123 (2004). If a petitioner could seek relief by appeal, a writ of mandamus would neither be necessary nor appropriate.

Rechetuker’s motion for a writ of mandamus comes under the caption of Civil Appeal No. 04-019. That appeal, however, is closed. The Appellate Division disposed of that appeal on January 7, 2005, when it reversed the Trial Division and instructed it to remand the case back to the Grievance Panel. *MOJ v. Rechetuker II*, 12 ROP at 45, 47. This mis-captioning, however, is not per se fatal, and shall be corrected by re-captioning the matter as a Special Proceeding.

[3] This mis-captioning, however, betrays Rechetuker’s greater error—one that is not so easily remedied. Because this request for mandamus is not, as Rechetuker would have it, part-and-parcel of *MOJ v. Rechetuker II*, Rechetuker must demonstrate an independent source of jurisdiction for this Court to entertain his request for a writ of mandamus. Although his motion is silent in that regard, this Court is duty-bound to pay heed—*sua sponte* as the case may be—to this issue: “[A] court has the power and duty to examine and determine whether it has jurisdiction of a matter presented to it.” *Roman Tmetuchl Family Trust v. Ordomeel Hamlet*, 11 ROP

158, 160 (2004) (*quoting* 20 Am. Jur. 2d *Courts* § 60 (1995)).

[4] This Court has previously made plain that it has jurisdiction over actions pursuant to ROP Const. Article X, Section 6. *See Koror State Gov’t v. W. Caroline Trading Co.*, 2 ROP Intrm. 306, 307 (1991). That Section states: “The appellate division of the Supreme Court shall have jurisdiction to review all decisions of the trial division and all decisions of lower courts.” ROP Const. art. X, § 6. The remand of Civil Appeal No. 04-019 placed the ball back in the Trial Division’s court for purposes of reviewing the Grievance Panel’s action (or, as is alleged, inaction).

A read of *Koror State Gov’t* is instructive. In that case, the plaintiff in the Trial Division filed a petition for a writ of mandate in the Appellate Division seeking an order compelling the defendant to open its records to the plaintiff. *Koror State Gov’t*, 2 ROP Intrm. at 306-07. The Appellate Division granted the respondent’s motion to dismiss for lack of jurisdiction because jurisdiction was vested solely in the Trial Division at that time. *Id.* at 310. The Court set forth a well-reasoned demonstration that the provisions of the Rules of Appellate Procedure—namely ROP R. App. P. 21 governing writs of mandamus—did nothing (and could do nothing) to enlarge its constitutionally-defined limited jurisdiction. *Id.* at 308-10. Similarly here, the Constitution provides that jurisdiction is vested solely in the Trial Division. ROP Const. art. X, § 5 (“In all other cases, the National Court shall have original and concurrent jurisdiction with

the trial division of the Supreme Court.”).³ This Court resolved the appeal before it over four years ago and jurisdiction does not linger.⁴ Rechetuker’s request is better addressed to the Trial Division, where his case is currently pending.⁵

CONCLUSION

For the above-stated reasons, Rechetuker’s motion for a writ of mandamus is treated as a petition for a writ of mandamus, re-captioned as a Special Proceeding, and DISMISSED for lack of jurisdiction in the Appellate Division.

³ Because the National Court is currently inactive, the Trial Division of the Supreme Court presently maintains *de facto* exclusive jurisdiction.

⁴ To be sure, the Appellate Division is not devoid of jurisdictional authority to issue writs of mandamus under the appropriate circumstances. Consistent with the Constitution’s grant of jurisdiction, the Appellate Division may, for instance, issue writs of mandamus reviewing actions of the lower courts. *See* ROP Const. art. X, § 6.

⁵ Should Rechetuker choose to pursue his request elsewhere, it would be prudent of him to be mindful of whether, dependent on the procedural mechanism chosen, the Grievance Panel should be named as a party to the request.

ANASTACIA NAPOLEON,
Appellant,

v.

CHILDREN OF MASANG MARSIL,
Appellee.

CIVIL APPEAL NO. 08-031
LC/B 04-84

Supreme Court, Appellate Division
Republic of Palau

Decided: November 4, 2009¹

[1] **Appeal and Error:** Preserving Issues

The Appellate Division typically will not consider issues raised for the first time on appeal. If a party fails to raise an issue below, she prevents the trial court from considering it and generally forfeits the argument.

[2] **Appeal and Error:** Preserving Issues

The Appellate Division’s review on appeal is normally confined to the record, meaning it cannot consider evidence presented for the first time on appeal.

[3] **Evidence:** Judicial Notice

A court may take judicial notice of an adjudicative fact, whether requested or not, at any stage of the proceeding. A properly noticeable fact must not be subject to

¹ The panel finds this case appropriate for submission without oral argument, pursuant to ROP R. App. P. 34(a).

reasonable dispute, meaning it is either (1) generally known within the territorial jurisdiction of the court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[4] **Appeal and Error:** Preserving Issues;
Evidence: Judicial Notice

An appellate court has reasonably wide discretion to take judicial notice of a properly noticeable fact. The appellate court, however, should ensure that it is not unfair to a party to the case and does not undermine the trial court's factfinding authority. Although an appellate court typically should decline to take judicial notice of a fact that could have been presented to the lower court, it is not precluded from doing so and may exercise its discretion accordingly.

[5] **Appeal and Error:** Preserving Issues;
Evidence: Judicial Notice

Judicial notice should not be invoked frequently to supplement a record on appeal or to subvert a trial court's role as the finder of fact.

[6] **Evidence:** Judicial Notice

That a fact is judicially noticeable does not necessarily mean that a court should also take judicial notice of the inferences a party hopes will be drawn from that fact.

Counsel for Appellant: J. Uduch Sengebau Senior

Counsel for Appellee: Mark Doran

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Senior Judge, presiding.

PER CURIAM:

Appellant Anastacia Napoleon, on behalf of the Ngedlau Lineage, challenges the Land Court's April 24, 2008, decision awarding fee simple ownership of a parcel of land to the children of Masang Marsil.² Specifically, Napoleon claims that the Land Court clearly erred in finding that the disputed parcel was part of a Tochi Daicho lot owned by Masang, rather than an adjacent lot purportedly owned by the Ngedlau Lineage. To support her argument, Napoleon raises an issue not presented to the Land Court, accompanied by a Certificate of Title submitted for the first time on appeal. Despite our proven reluctance to consider issues for the first time on appeal, we will take judicial notice of the Certificate of Title, which potentially stands in direct tension with the Land Court's determination, and therefore remand this matter to the Land Court for further proceedings.

BACKGROUND

² The children of Masang consist of George, Sam Yoyo, Toribiong, Emiliana, and Florian. For simplicity, we will refer to the Appellees solely as "Masang," unless referring to a specific individual.

This dispute concerns competing claims to a parcel of land in Ngerkesoal Hamlet, Koror State. The property in question, commonly known as *Ngedlau*, is identified as Lot 182-523 on Worksheet No. 04-B-001, as prepared by the Bureau of Lands and Surveys (BLS). Napoleon claimed below that this lot corresponds with either Tochi Daicho Lot 439 or 441, which the Ngedlau Lineage received in 1994 during the distribution of properties in the Estate of Masang Marsil. Masang argued that the lot is a part of its land in Tochi Daicho Lot 440.

The Land Court heard the case on April 16, 2008. Anastacia Napoleon was not present at the hearing, but she executed a power of attorney to Maria K. Mira, who appeared in her stead. Mira was the sole witness supporting Napoleon's claim. She introduced a stipulation regarding the distribution of the Estate of Masang Marsil, which conveyed "Tochi Daicho Lot No. 441 or 439" to the Ngedlau Lineage. To establish the location of these lots, Mira testified that a BLS representative told her that BLS Lot 182-523 is part of either Tochi Daicho Lot 439 or 441. Mira did not know the boundary of the adjacent lot, Tochi Daicho Lot 440, nor was she certain whether the land she claimed was part of Tochi Daicho Lot 439, 441, or both. She also claimed that the Ngedlau Lineage had always owned the land in Lot 182-523, and that she, her mother, and her grandmother had each lived on the land at various times.

Masang presented evidence that questioned the existence of Tochi Daicho Lots 439 and 441 altogether. Masang's counsel stated that there is no listing for these two Tochi Daicho lots, and the Land Court, after reviewing its own Tochi Daicho compilation,

concluded but indicated "that it is incomplete with relevant pages missing." LC/B No. 04-84, Decision at 3 (Land Ct. Apr. 24, 2008). The Land Court subsequently determined that Lot 439 did in fact exist, relying on two Japanese maps, attached to Masang's Exhibit 10, that show Tochi Daicho Lot 439 adjacent to Lot 440. The boundaries of the relevant lots, however, remained in dispute.

Masang presented two witnesses, Lalii Markub and Sam Yoyo Masang. Markub, who owns land in the vicinity and claimed to know the history of the land, stated that BLS Lot 182-523 is part of *Ngedlau* and belongs to Masang as a portion of Tochi Daicho Lot 440. Sam Yoyo Masang also testified that BLS Lot 182-523 was a part of *Ngedlau*, which belonged to his family. Sam was born in *Ngedlau* and currently lives there, and he claimed that Urimch, Napoleon's mother, asked the Masang family for permission to build a house on the disputed land.

Masang also introduced documents suggesting that BLS Lot 182-523 is a portion of Tochi Daicho Lot 440. Among them were the two Japanese maps attached to Masang's Exhibit 10. Both maps indicate that Tochi Daicho Lot 439 is a plot of land bordered by Lot 440 on the northwest and a road on the southeast, although each map is hand-drawn and without coordinates. Tochi Daicho Lot 439 appears to correspond primarily to BLS Lot 182-524, commonly known as *Ongitekei*, which is adjacent to Lot 182-523 and also bordered by the road on the southeast. Furthermore, Masang produced a Land Acquisition Record from 1974, which included a sketch showing the land between the road and Masang's land in Tochi Daicho 440 as being claimed by Obaklubil, a member

of the Ngedlau Lineage. Based on these maps, Lot 182-523 appears to be at or near the border of Tochi Daicho Lots 439 and 440. As for Tochi Daicho Lot 441, Mira produced no evidence of its existence or location.

After considering this evidence, the Land Court concluded that, although Tochi Daicho Lots 439 and 441 existed and referred to property somewhere, they did not encompass BLS Lot 182-523. The court noted that Mira had produced no evidence to connect the lot to Tochi Daicho Lot 439, other than an alleged statement to that effect by a BLS representative. Rather, the court determined that Lot 182-523 was a portion of Tochi Daicho Lot 440. The court cited testimony from Sam Yoyo Masang, as well as the Japanese maps and the 1974 Land Acquisition Record indicating that Tochi Daicho Lot 439 referred to the land adjacent to the road (BLS Lot 182-524). The Land Court determined that Masang's Tochi Daicho Lot 440 was split at some point into two BLS Worksheet lots: Lots 182-522 and 182-523.

Consequently, on April 24, 2008, the Land Court issued a determination of ownership of BLS Lot 182-523 in favor of the children of Masang. Napoleon now appeals.

ANALYSIS

Napoleon challenges the Land Court's factual findings, which we review for clear error. *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007). We will not set aside the findings so long as they are supported by evidence such that any reasonable trier of fact could have reached the same conclusion, unless we are left with a definite and firm conviction that an error has

been made. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006). We review the Land Court's conclusions of law *de novo*. *Sechedui Lineage*, 14 ROP at 170.

Napoleon's primary contention on appeal relates to an issue not raised before the Land Court. She argues that the entire area of Tochi Daicho Lot 440 is approximately the same as the recorded area of BLS Lot 182-522, which undisputedly belongs to Masang and is adjacent to Lot 182-523. To support this argument, Napoleon attached to her opening brief a Certificate of Title for BLS Lot 182-522, issued on May 9, 2005, and registered at the Clerk of Courts on May 11, 2005. The document indicates that the "*Land known as 'Ngedlau' and located in Ngerkesoaol Hamlet (Formerly shown as Worksheet Lot No. 182-522)*" contains an area of 568 square meters, more or less. According to multiple exhibits that Masang introduced at trial, Tochi Daicho Lot 440 is recorded as having an area of 162.3 tsubo, which equates to approximately 537 square meters.³ The implication of this information, if accurate, is that Tochi Daicho Lot 440 could not possibly encompass *both* BLS Lots 182-522 and 182-523, meaning Tochi Daicho Lot 440 must correspond only to Lot 182-522. This is in direct tension with the Land Court's ruling below.

Masang correctly notes in his response brief that this issue was not raised or litigated before the Land Court. Although the court had evidence of the size of Tochi Daicho Lot 440, neither party introduced evidence

³ One tsubo equals approximately 3.305785 square meters.

pertaining to the size of BLS Lot 182-522 or 182-523. Napoleon produced this evidence for the first time in her opening appellate brief.

[1, 2] This Court typically will not consider issues raised for the first time on appeal. *Rechucher v. Lomisang*, 13 ROP 143, 149 (2006); *see also Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998) (collecting cases). If a party fails to raise an issue below, she prevents the parties and the trial court from considering it and generally forfeits the argument. *See Kotaro v. Ngirchchol*, 11 ROP 235, 237 (2004). Likewise, our review is normally confined to the record, meaning we cannot consider evidence presented for the first time on appeal. *Ucheliou Clan v. Alik*, 8 ROP Intrm. 312, 314 (2001); *see also Pedro v. Carlos*, 9 ROP 101, 103 (2002). We have also held that the Land Court does not clearly err by failing to take evidence into account that was never introduced at trial. *See Otobed v. Ongrung*, 8 ROP Intrm. 26, 27 (1999) (citing *Estate of Etpison v. Sukrad*, 7 ROP Intrm. 173, 175 (1999)).

[3] Competing with the principles regarding the scope of our appellate review, however, is a tribunal's authority to take judicial notice of certain facts. Rule 201 of the Palau Rules of Evidence states that a court may take judicial notice of an adjudicative fact,⁴ whether requested or not, at any stage of

⁴ Although courts have defined "adjudicative" facts in a number of ways, the term generally means "facts that are specific to the particular case and are typically required to be established by evidence, or facts that are relevant

the proceeding. ROP R. Evid. 201(b), (c), and (f).⁵ A properly noticeable fact must not be subject to reasonable dispute, meaning it is either (1) generally known within the territorial jurisdiction of the court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ROP R. Evid. 201(b).

Under the second category, the Certificate of Title that Napoleon presented on appeal would have been be a proper subject of judicial notice by the Land Court during the proceeding below. The Certificate of Title is matter of a public record, and its accuracy cannot reasonably be questioned, particularly having been certified by a Land Court judge, recorded by the Land Court Registrar, and registered at the Clerk of Courts. The question is whether the Certificate of Title is a proper subject for judicial notice on appeal.

[4] An appellate court has reasonably wide discretion to take judicial notice of a properly noticeable fact. *See* 29 Am. Jur. 2d *Evidence* §§ 46, 154; *see also Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Melvin v. Nickolopoulos*, 864 F.2d 301, 305 (3d Cir. 1988). In doing so, however, the appellate court should ensure that it is not unfair to a party to the case and "does not undermine the trial court's factfinding

to a determination of the claims presented in a case." 29 Am. Jur. 2d *Evidence* § 29. The size of BLS Lot 182-522 is an adjudicative fact.

⁵ Unlike the other Rules of Evidence, Rule 201(f) states that judicial notice may be taken at any time in the proceeding, meaning that Rule 201 applies to an appeal.

authority.” 29 Am. Jur. 2d *Evidence* § 46. Although an appellate court typically should decline to take judicial notice of a fact that could have been presented to the lower court, *see id.*, it is not precluded from doing so and may exercise its discretion accordingly.

Other appellate courts have taken judicial notice of matters of public record, *see, e.g., Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741 n.6 (9th Cir. 2006) (holding that it “may take judicial notice of court filings and other matters of public record”), and in cases where information not in the record was “most relevant and critical to the matter on appeal,” *Coil*, 887 F.2d at 1239 (taking judicial notice of appellees’ subsequent guilty pleas, in which they admitted to committing arson that undermined a settlement agreement in the civil proceeding). Our Court has also taken judicial notice of certain facts on appeal, although none that were determinative.⁶

⁶ *See Lin v. Republic of Palau*, 13 ROP 55, 60 (2006) (no floating fish markets in Palau); *Idid Clan v. Olngembang Lineage*, 12 ROP 111 (2005) (certain number of square feet equals certain number of acres; used to confirm a typo in land records); *Wolff v. Republic of Palau*, 9 ROP 104, 105 n.1 (2002) (filing for writ of habeas corpus in another proceeding); *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 42 n.7 (1998) (existence of, and arguments made in, a prior related case); *Republic of Palau v. Decherong*, 2 ROP Intrm. 152 (1990) (a memorandum from the Chief Justice of the Palau Supreme Court to the Palau Attorney General and Public Defender); *In re Sugiyama et al.*, 1 ROP Intrm. 282, 285 (1985) (proximity of Guam to Palau); *cf. Arbedul v. Rengelekel A. Kloulubak*, 8 ROP Intrm. 97, 99 (1999) (declining to consider a pretrial order from

With these principles in mind, we turn to Napoleon’s appeal. Masang is correct that under our general rule, Napoleon forfeited her argument regarding the relative sizes of Tochi Daicho Lot 440 and BLS Lot 182-522 by failing to raise the issue before the Land Court. However, given the unique circumstances of her case, and in the interests of truth and justice, we will exercise our discretion under Rule 201 to take judicial notice of the Certificate of Title that Napoleon attached to her opening brief. First, the document and the information therein are proper subjects of judicial notice because they are capable of ready determination by resort to a source whose accuracy cannot reasonably be questioned. Second, unlike many cases in which this issue might arise, the Certificate of Title, on its face, suggests a conclusion that is in direct tension with the Land Court’s determination. Masang offered no substantive response to this apparent conflict, only arguing that Napoleon forfeited the issue by failing to raise it below. Third, Napoleon was acting pro se and was not even present at the trial. She gave power of attorney to Maria Mira, a non-lawyer, to appear on her behalf, but Mira did not appear particularly knowledgeable about Napoleon’s claims. This does not wholly excuse the failure to produce the Certificate of Title, but we find this fact relevant to whether we should take judicial notice.

a related proceeding that appellants attached to their brief because it was not part of the trial record, but noting that even if the Court took judicial notice of it, it was not helpful); *Heirs of Drairoro v. Dalton*, 7 ROP Intrm. 204, 206 (1999) (acknowledging appellate court’s ability to take judicial notice of contents of Tochi Daicho, but refusing to do so).

[5] Finally, this Court's role is, at least in part, to facilitate the quest for truth and ultimately to reach a fair and just determination of the disputes before it. We do not intend that judicial notice will be invoked frequently to supplement a record on appeal or to subvert a trial court's role as the finder of fact.⁷ In this case, however, the Certificate of Title undeniably calls the Land Court's determination into question, and a complete adjudication of this property dispute should occur with this information before the trial judge. This is particularly so in a case such as this, where no witness or exhibit definitively laid out the proper ownership of BLS Lot 182-523, and the Land Court assigned the lot Appellees based on limited information. We do not fault the Land Court for failing to consider evidence not presented to it, and taking judicial notice on appeal in this case does not undermine the lower court's factfinding authority.

We therefore take judicial notice that a Certificate of Title, numbered LC 564-05, in the name of the Estate of Masang Marsil, was recorded at the Land Court on May 9, 2005, and registered at the Clerk of Courts on May 11, 2005. We also take judicial notice that this Certificate of Title describes the property owned by the Estate of Masang Marsil as follows: "*Land known as 'Ngedlau' and located in Ngerkesoaol Hamlet (Formerly shown as Worksheet Lot No. 182-522).*" Finally, we take judicial notice that this Certificate of Title states that the area of the

above-described property is "568 square meters, more or less."

[6] Although we take notice of the Certificate of Title, we do not find this additional information to be conclusive of the proper ownership of BLS Lot 182-523. That ultimate determination is for the Land Court as the trier of fact. "[T]hat a fact is judicially noticeable does not necessarily mean that a court should also take judicial notice of the inferences a party hopes will be drawn from that fact." 29 Am. Jur. 2d *Evidence* § 32. We have taken judicial notice of the *existence* of the Certificate of Title, not the implications of the information contained therein. Masang did not have an opportunity to consider or challenge this information, and he must be afforded that chance.

For these reasons, we will remand this matter to the Land Court for further proceedings. Although the Land Court cited evidence to support its determination, the record, supplemented by the 2005 Certificate of Title, leaves us with "a firm conviction that an error has been made." *Rechirikl*, 13 ROP at 168. On remand, the Land Court shall consider the description of the property in the Certificate of Title, in light of the evidence produced at trial. The Land Court may, but is not required to, take additional evidence regarding the proper ownership of BLS Lot 182-523. After further proceedings, the Land Court should issue any additional factual findings, as well as a new determination of ownership, which may or may not reach the same outcome as the first. Apart from these specific directives, the Land Court shall have broad discretion in handling this case on remand.

⁷ Of course, a judicially noticeable fact must not be the subject of reasonable dispute, a requirement which should automatically limit the number of appeals in which this issue might arise.

CONCLUSION

We find it appropriate, given the circumstances of this case, to take judicial notice of the 2005 Certificate of Title for *Ngedlau*, formerly BLS Lot 182-522. This public record potentially stands in direct conflict with the Land Court’s determination that BLS Lot 182-523 is a portion of Tochi Daicho Lot 440, belonging to Masang. For these reasons, we VACATE the Land Court’s April 24, 2008 Determination of Ownership, and REMAND for further proceedings consistent with this opinion.

KYOMI UTEMEI TENGADIK,
Appellant,

v.

LOWRY KING,
Appellee.

CIVIL APPEAL NO. 08-039
Civil Action No. 07-176

Supreme Court, Appellate Division
Republic of Palau

Decided: November 4, 2009

[1] **Property:** Homesteads

A “homestead” is a plot of publicly owned land, designated as such by the President, that the government may allot to an applicant for farming or developing village lots. A homesteader receives a permit to use and improve the land, and he must comply with the conditions and requirements established under the homestead law. Upon fulfilling the applicable requirements, the government issues a certificate of compliance and, subsequently, a deed of conveyance for the homestead lot, granting the homesteader any and all rights of the national government to the property.

[2] **Constitutional Law:** Citizenship;
Property: Acquisition Limited to Palauans

Article XIII, Section 8 of the Palau Constitution mandates that only citizens of Palau may acquire title to land or waters in Palau. Article III, Section 2 defines a Palauan citizen as one born of parents, one or both of whom are citizens of Palau is a citizen of

Palau by birth, and shall remain a citizen of Palau so long as the person is not or does not become a citizen of any other nation.

[3] **Constitutional Law:** Citizenship

The Second Amendment to the Palau Constitution changed Article III to provide that a Palauan-born individual need not renounce her U.S. citizenship to become a naturalized citizen of Palau. However, the Court does not apply the Second Amendment retroactively, and a renouncement made prior to the effective date of the amendment is not affected by it.

[4] **Descent and Distribution:** Determination of Heirs

The general rule is that individually owned lands vest immediately in a decedent's heirs at the time of death, even though a determination of who "immediately" inherited a decedent's property commonly comes long after the decedent's death.

[5] **Property:** Acquisition Limited to Palauans

The phrase "acquire title to land" in Article XIII, Section 8 applies equally to inheritance and the distribution of a decedent's estate as it does to other methods by which one can acquire such title.

[6] **Statutory Interpretation:** Ambiguity

The Court must interpret statutory and constitutional language according to its common usage, unless a technical word is used.

Counsel for Appellant: Moses Y. Uludong

Counsel for Appellee: Mark P. Doran

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Kyomi Utemei Tengadik appeals the Trial Division's decision denying her claim to property owned by her late father, Utemei Basechelai, and awarding the land to the appellee, Lowry King. Tengadik primarily disputes the court's ruling that she was ineligible to inherit her father's property because she was not a Palauan citizen at the relevant time periods. After considering Tengadik's arguments, we find no error below and affirm the court's disposition.

BACKGROUND

[1] This proceeding began in 2007, after Tengadik filed a petition to open the estate of her father, Utemei, who died on August 28, 1985. At the time of Utemei's death, the only property he owned was a homestead lot¹

¹ A "homestead" is a plot of publicly owned land, designated as such by the President, that the government may allot to an applicant for farming or developing village lots. 35 PNCA § 802; *see also* 67 TTC § 201. A homesteader receives a permit to use and improve the land, and

commonly known as *Ngemsiul*, located in Ngerkesou Hamlet, Ngchesar State.² He was not the registered fee simple owner of the property at the time of his death, and the land apparently remained publicly owned for the next nineteen years, until the government issued a Certificate of Title naming him the fee simple owner on May 20, 2004.³ Because Utemei was deceased, the land became an asset of his estate. Utemei was not married at the time of his death, but he left two surviving children: Tengadik and her brother, Curtis, who has since passed away.

Only two claimants sought ownership of *Ngemsiul*: Tengadik and the appellee, Lowry King. Tengadik is the biological daughter of Utemei and was born in Palau in 1938. In 1957, she moved to Guam with her father, and she became a citizen of the United States in 1965. Tengadik continued to live in

he must comply with the conditions and requirements established under the homestead law. 35 PNCA §§ 802, 806; 67 TTC §§ 202, 206. Upon fulfilling the applicable requirements, the government issues a certificate of compliance and, subsequently, a deed of conveyance for the homestead lot, granting the homesteader any and all rights of the national government to the property. 35 PNCA §§ 810-811; 67 TTC §§ 208, 212.

² The property is also identified in the Certificate of Title as Cadastral Lot No. 057 P 01 (Tochi Daicho Lot 451 part) and consists of 96,610 square meters.

³ The record is notably silent regarding the status of the land in the intervening nineteen years, as well as what prompted the national government to issue the Certificate of Title to Utemei in 2004.

Guam and visited Palau periodically, but she remained a U.S. citizen until she obtained dual Palauan and U.S. citizenship in 2005. She cared for her father until his death in 1985 and brought his remains to Palau for a funeral.

At trial, Tengadik presented evidence from family members that Utemei intended that his homestead property go to her upon his death. Two experts on Palauan custom also testified that the property of an unmarried decedent passes to his children unless disposed of during the *cheldecheduch*. There was no *cheldecheduch* for Utemei.

The other claimant, Lowry King, is the grandson of Utemei's sister, Bali. King is a Palauan citizen who has always lived in Palau. King testified that Utemei occasionally stayed at his home when in Koror to visit the hospital, and King took care of Utemei on these trips. King claimed that Utemei informed him multiple times that he wanted Curtis and him to have the land at *Ngemsiul* to take care of it for the family. Curtis passed away several years after Utemei, and King therefore claims sole ownership of the land according to Utemei's wishes.

The trial of Utemei's estate occurred on April 29, 2008. After hearing the evidence, the trial court first concluded that customary law, rather than the intestacy statute, applied to the distribution of Utemei's property.⁴

⁴ In determining who should inherit a decedent's property, we apply the statute in effect at the time of decedent's death. *Ngirasqei v. Malsol*, 12 ROP 61, 63 (2005). At the time of Utemei's death in 1985, the applicable statute was 39 PNCA § 102, which has since been recodified

According to custom, *Ngemsiul* would normally go to Tengadik as Utemei's sole remaining child; there was no cheldechcheduch, and Utemei's son, Curtis, had since deceased. The court also noted that the evidence of Utemei's desire for the property to go to King and Curtis was minimal and consisted of little more than King's own, mostly unsupported testimony.

Nevertheless, the trial court was forced to confront Article XIII, § 8 of the Palau Constitution, which prohibits non-Palauan citizens from acquiring title to land in Palau. The court found that Tengadik became a U.S. citizen in 1965—thereby renouncing her Palauan citizenship—and remained a U.S. citizen continuously until 2005. Consequently, she was not a Palauan citizen in 1985, when her father died, nor in 2004, when Utemei's estate received the Certificate of Title conveying fee simple ownership of *Ngemsiul*. The court held that Tengadik was therefore ineligible to acquire land in Palau, even though she was born to Palauan parents and subsequently became (and is currently) a Palau citizen. The court granted fee simple ownership of *Ngemsiul* to King, the only eligible claimant. Tengadik now appeals.

as 25 PNCA § 301. Section 102(c) applies to a decedent without a will who was a bona fide purchaser for value of land held in fee simple. Utemei, as a homesteader, did not purchase *Ngemsiul* for value. Section 102(d) applies to an owner of fee simple land who dies without issue and who has not left a will or if his lands were acquired by means other than as a bona fide purchaser for value. Utemei had issue at the time of his death—Tengadik and Curtis—and the trial court therefore held that § 102(d) was inapplicable.

ANALYSIS

Tengadik presents issues of both fact and law in her appeal. We review the trial court's legal conclusions *de novo* and its factual determinations for clear error. *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007). We will not set aside the court's findings of fact so long as they are supported by evidence such that any reasonable trier of fact could have reached the same conclusion, unless we are left with a definite and firm conviction that an error has been made. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006).

[2] The overarching issue is whether Tengadik's citizenship precluded her from inheriting her father's interest in *Ngemsiul*. Our starting point for answering this question is Article XIII, Section 8 of the Palau Constitution, which mandates that “[o]nly citizens of Palau . . . may acquire title to land or waters in Palau.” A Palauan citizen is defined in Article III, Section 2: “A person born of parents, one or both of whom are citizens of Palau is a citizen of Palau by birth, and shall remain a citizen of Palau so long as the person is not or does not become a citizen of any other nation.” Accordingly, Tengadik was a Palauan citizen by birth.

In 1965, however, Tengadik became a U.S. citizen and thereby relinquished her Palauan citizenship according to Article III, Section 2. According to Article III, Section 3, Tengadik could have regained her Palauan citizenship if, within three years of the

effective date of the Palau Constitution,⁵ she renounced her foreign citizenship and registered her intent to remain a citizen of Palau. *See also* 13 PNCA § 121. Tengadik failed to fulfill these requirements and therefore remained a U.S. citizen until 2005.

[3] In November 2004, the Second Amendment to the Palau Constitution changed Article III to provide that a Palauan-born individual need not renounce her U.S. citizenship to become a naturalized citizen of Palau. In 2005, Tengadik obtained dual Palauan and U.S. citizenship under this provision. The Second Amendment, however, expressly states that “Palauan citizens may renounce their Palauan citizenship. Renuncements made prior to the effective date of this amendment are not affected by this amendment.” Accordingly, we do not apply the Second Amendment retroactively.

Applying the above law to Tengadik’s case, we are compelled to agree with the trial court that she was not a Palauan citizen from 1965 until 2005, and she was therefore ineligible to inherit title to property in Palau during that time. Tengadik was a U.S. citizen at the time of Utemei’s death in 1985 and when the Certificate of Title to *Ngemsiul* was issued in 2004. That Tengadik was born to Palauan parents and currently holds a Palauan passport cannot overcome the clear text of Article XIII, Section 8, which states unequivocally that only citizens of Palau may acquire title to land in Palau.

⁵ The Palau Constitution became effective on January 1, 1981, meaning an eligible foreign citizen had until January 1, 1984, to fulfill the requirements for Palauan citizenship.

Tengadik presents a number of arguments to avoid this result, many unsupported by legal authority. She first argues that the court erred by finding that she renounced her Palauan citizenship in 1965, noting that there was no such thing as Palauan citizenship at that time. This argument is without merit, and we have rejected it before. *See Diaz v. Estate of Ngirchorachel*, 14 ROP 110 (2007). In *Diaz*, we determined that a Palauan-born citizen of the Trust Territory renounced his Trust Territory citizenship when he became a U.S. citizen in 1969. *Id.* at 110-11. We cited 8 U.S.C. § 1448(a), which requires an applicant for U.S. citizenship “to renounce and abjure absolutely and entirely all allegiance and fidelity” to a foreign state of which the applicant was previously a citizen. *Id.* *Diaz* was therefore not a Palauan citizen in 1983 and could not acquire title to land in Palau. *Id.* at 111. Tengadik’s situation is nearly identical to that in *Diaz*; she renounced her Trust Territory citizenship when she became a U.S. citizen in 1965, and she was therefore not a Palauan citizen until she reacquired that status in 2005.

[4] Tengadik next asserts that she is eligible to inherit her father’s land because she was a Palauan citizen at the time she petitioned the court to open his estate. This is directly contrary to the established general rule that individually owned lands vest immediately in a decedent’s heirs at the time of death. *Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 86 (2004). It is common for a determination of who “immediately” inherited a decedent’s property to come long after the decedent’s death. *See Bandarii*, 11 ROP at 86 (citing *Temaungil v. Ulechong*, 9 ROP 31, 34 (2000)); *Heirs of Drairoro v. Yangilmau*, 14 ROP 18, 20 (2006) (“It is not unusual for this

determination to be made many years after the decedent dies . . .”). Tengadik’s interest in *Ngemsiul* vested in either 1985 or, at the latest, 2004,⁶ and whether she became a Palauan citizen after that time is irrelevant.

Tengadik’s next challenge suffers a similar fate. She argues that the phrase “acquire title,” as used in Article XIII, Section 8, refers only to the “transfer, conveyance or grant of title to land from one party to another,” but not to inheritance. (Appellant’s Br. 12.) We see no such distinction in the clear language of the constitutional provision and decline to create one.

[5, 6] We must interpret statutory (and constitutional) language according to its common usage, unless a technical word is used. *Ministry of Justice v. Rechetuker*, 12 ROP 43, 46 (2005) (citing 1 PNC § 202). A common definition of “acquire” is “to come into possession, control, or power of disposal.” *Webster’s Int’l Dictionary* 18 (3d ed. 1981); *see also Black’s Law Dictionary* 25 (8th ed. 2004) (“To gain possession or control of; to get or obtain.”). This common usage encompasses obtaining title to property through inheritance. Furthermore, we have previously suggested that Article XIII, Section 8 applies to inheritance. *See Dalton v. Borja*, 8 ROP Intrm. 301, 303 n.2 (2001) (“[Petitioner] never made an averment that she was eligible to *inherit* real property in Palau. It is an affirmative obligation to prove citizenship whenever claiming *acquisition* of

land.” (emphases added)). Accordingly, we hold that the phrase “acquire title to land” in Article XIII, Section 8 applies equally to inheritance and the distribution of a decedent’s estate as it does to other methods by which one can acquire such title. Tengadik was therefore subject to the provision, and her claim fails.

Perhaps the most interesting of Tengadik’s arguments is that she did not “acquire” title in her father’s interest in *Ngemsiul* until the Certificate of Title conveyed fee simple ownership in 2004. As we have already noted, an heir’s interest in the decedent’s estate typically vests at the time of his death, even if the proper heirs are not determined until years later. *Bandarii*, 11 ROP at 86; *Heirs of Drairoro*, 14 ROP at 20. Under this principle, Tengadik’s interest in Utemei’s estate vested upon his death, and she became the heir to whatever property interest her father possessed at that time.

In this case, however, Utemei’s interest in *Ngemsiul* at the time of his death is unclear. We know that he possessed the property as a homesteader at some point. Accordingly, his land was publicly owned, but he had a permit to use it and “a right to acquire title upon the fulfillment of the conditions” of the homestead. 35 PNCA § 801; *see also id.* §§ 806-807; 67 TTC §§ 201, 206-207 (1980). There is no evidence in the record of whether Utemei fulfilled the conditions of the homestead or received a Certificate of Compliance from the national government. *See* 35 PNCA § 811; 67 TTC § 212. If he had already complied with the homestead requirements at the time of his

⁶ As described below, there is some dispute about when title to *Ngemsiul* vested, but we need not resolve that issue in this case.

death,⁷ then he may have had a vested right to the property in 1985. See *Tmetuchl v. Siksei*, 7 ROP Intrm. 102, 105 (1998) (citing *Sablan v. Norita*, 7 TTR 90, 92 (Tr. Div. 1974)). The government, however, did not issue the Certificate of Title granting fee simple ownership to Utemei until 2004, and Tengadik asserts that only then did the estate—and therefore she, as an heir—“acquire title” for purposes of Article XIII, Section 8 of the Palau Constitution.

Unfortunately for Tengadik, this dispute is immaterial to her case. She was still a U.S. citizen in 2004, and she remained ineligible to acquire title to *Ngemsiul*. Had she become a Palauan citizen some time between 1985 and May 20, 2004, we may have been called upon to decide this issue. But she was not a citizen of Palau at any relevant time period, and we therefore express no opinion on when her interest in *Ngemsiul* vested or precisely when she “acquired title” to the land.

CONCLUSION

In the end, Tengadik is unable to overcome that she was not a Palauan citizen at the time of her father’s death in 1985, nor when the Certificate of Title was issued in 2004. According to the express and unambiguous language of the Palau

Constitution, Tengadik was ineligible to acquire title to land in Palau. We acknowledge the oddity of denying inheritance to a claimant born to Palauan parents and who currently holds a Palauan passport, but the Constitution is clear. The Second Amendment partially addressed this concern, but that provision expressly stated that it shall not have retroactive effect. Accordingly, the trial court did not err in awarding the property to King, the sole remaining claimant, and we AFFIRM.

⁷ We presume that Utemei did, in fact, fulfill these requirements, evidenced by the national government’s conveyance of fee simple title to him in 2004. The record contains nothing, however, regarding these facts, and we are left to speculate what happened to *Ngemsiul* upon Utemei’s death.

**JAMES ORAK, MARIA ASANUMA,
and EBUKL NGIRALMAU,
Appellants,**

v.

**MINORU UEKI and ETOR
NGIRCHOMTILOU,
Appellees.**

CIVIL APPEAL NO. 07-031
Civil Action No. 04-077

Supreme Court, Appellate Division
Republic of Palau

Argued: November 27, 2009

Decided: December 3, 2009

[1] **Appeal and Error:** Standard of Review

A person's status within a clan is a matter of custom, and we review a Trial Division's findings regarding a custom's terms, existence, or nonexistence for clear error.

[2] **Custom:** Proof of Custom

Clear and convincing evidence must establish the existence and content of a claimed custom.

[3] **Custom:** Appellate Review

This Court's long history of treating custom as a factual matter limits the depth of appellate review. If the Trial Division's findings as to custom are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be disturbed on appeal unless the Court is

left with a definite and firm conviction that a mistake was committed.

Counsel for Appellants: Raynold B. Oilouch

Counsel for Appellees: William Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

PER CURIAM:

This appeal involves various groups claiming membership, strength, chief titles and the right to use disputed land of the Uchelkeyukl Clan in Ngermid, Koror State. For the reasons included below, we AFFIRM in part and REVERSE in part the Judgment of the Trial Division.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This appeal originates from a dispute over the use of land, called *Ngerunguikl* ("disputed land"), belonging to the Uchelkeyukl Clan of Ngermid, Koror. As the Trial Division stated, "[t]he genesis of this now more-than-20-year-old dispute is quite obviously and somewhat ironically Uchelkeyukl Clan's good fortune in acquiring title to *Ngerunguikl*, a large tract of land covering more than 40 acres, from the Trust Territory in 1969." Civ. Act. No. 04-077, Decision at 4 (Tr. Div. June 15, 2007). Not surprisingly, the Appellants and Appellees

disagree on many of the facts embodied in this long dispute; however, a general history can still be gleaned.

In 1996, Appellant James Orak (“Orak”) and members of his family made a written request to the then-chief Recheyungel Ngiraingas (“Ngiraingas”)¹ of the Uchelkeyukl Clan, requesting permission to build their homes on certain parts of the disputed land. (Appellant’s Br. at 6; Intervenor’s Ex. 1A.) According to Orak, this request was ignored. (Appellant’s Br. at 6.) When Ngiraingas died in 1998, some female members of Uchelkeyukl Clan signed a document appointing Orak to bear the chief title Recheyungel. (*Id.*; Def.’s Ex. A.) This appointment was approved by a number of rubaks and, in late November 1998, a feast was held for Orak to signify him bearing the chief title. (*Id.*; Tr. vol. 2, p. 233.)

Around the same time, however, Appellee Etor Ngirchomtilou (“Etor”)² sent a letter to the people of Ngermid indicating that Appellee Minoru Ueki (“Ueki”) was to have a feast in January of 1999, in which he—not Orak—would be approved as Recheyungel. (*Id.*; Tr. vol 1, p. 68.) As a result of the odd configuration of the Ngermid Hamlet and the Uchelkeyukl Clan, in which two klobaks operate independently, the problem arose in which “two parties, each selected largely by

members of his own faction, [were] competing for a single [chief] title.” Civ. Act. No. 04-077, Decision at 12-13 (Tr. Div. June 15, 2007). At the time, the issue was never resolved.

In 2004, Orak, believing to be the rightful Recheyungel, entered into a portion of the disputed land and began clearing it. (Appellant’s Br. at 6). Because Etor and Ueki believed that they—and not Orak—bore the highest chief titles of the clan, they filed the present action against Orak to stop him (1) from entering the land, (2) from calling himself Recheyungel, and (3) from threatening and defaming Ueki regarding the disputed lands and chief title. Civ. Act. No. 04-077, Decision at 1 (Tr. Div. June 15, 2007).³

³ Two reasons why Ueki felt entitled to bear the chief title were that (1) his uncle (Etor’s brother), Ngiraingas, had been undisputed clan Recheyungel during the Trust Territory time in which the disputed land was returned, and (2) he had been nominated by Etor, the uncontested Ebil-Recheyungel. As a side note, the Trial Division emphasized how crucially important Ngiraingas had been in procuring the land by pointing to the fact that many of Orak’s own witnesses said Ngiraingas “was selected to bear the title Recheyungel for the very reason that he was a savvy and well-connected trial counselor and judge who could better assist the Clan in dealing with the U.S. bureaucracy.” Civ. Act. No. 04-077, Decision at 5 (Tr. Div. June 15, 2007). Orak still maintained that Tellames, Ngiraingas’s predecessor as Recheyungel and Orak’s relative, originally filed the claim for the disputed land, although there is nothing in the Trust Territory records indicating as much. *Id.* In fact, the Trial Division noted there was actually much convincing evidence to the contrary, i.e., that Tellames had failed to file the clan’s claim for the

¹ Recheyungel is the male chief title for the Uchelkeyukl Clan. Ebil-Recheyungel is the highest female title.

² Etor Ngirchomtilou, who passed away during the pendency of the Trial Division action, was and remained the uncontested Ebil-Recheyungel of the Clan until her death.

Orak counterclaimed at trial, seeking a declaration that he is, in fact, Recheyungel. He also claimed that Ueki and Etor are not strong members of the clan, but rather drifters who usurped clan lands. *Id.* Thus, he contended, Ueki and Etor had impermissibly excluded Orak and his family from building on the land.

On the eve of the first trial, a third group, Appellants Asanuma and Ngiralmu, intervened in the case on the side of Orak. Asanuma claimed that she—not Etor—was the rightful holder of the female chief title, Ebil-Recheyungel.

Not surprisingly, the primary issue at trial became the relative status of the competing factions in the clan. The Trial Division first analyzed the status of Orak, finding that he should indeed be considered a strong member of the clan. It stated that it “could see no basis to say other than that the defendant and others matrilineally related to him qualify as strong members of the clan.” *Id.* at 7. Whether, in fact, Orak should be considered Recheyungel was less clear, and the court addressed this later in its decision.

Next, the Trial Division concluded that the Asanuma and Ngiralmu were clearly not strong members of the clan. Asanuma claimed membership in the clan as descendant of a woman named Mesmechang, while Ngiralmu claimed membership as descendant of a woman named Bakas. Mesmechang was brought into the clan by a man named Elibebai

and Bakas was brought in by a man named Ngiratrachol. *Id.* at 2, n.2. Thus, the Trial Division concluded that both Asanuma and Ngiralmu are cheltakl el ngalek⁴ and thus not strong members of the clan. It also noted that counsel for Asanuma and Ngiralmu conceded that, “at least as between them and defendant’s family, they are clearly in second place.” *Id.* at 8.

Then, the Trial Division moved to the status of Ueki and Etor, stating that “the real question in this case is the status of plaintiffs, [who] told an extremely complicated story of their flight from Peleliu to escape the man-eating monster, Meluadelchur, and a multiple-stop migration, which included, confusingly, an assertion that one of their forebears had been give the entire village of Ngerbodel as elbechiil.” *Id.* at 8. This story was in direct tension with a completely different story told by Orak about Ueki and Etor’s origins in Indonesia. In the end, the Trial Division concluded that neither story about Ueki and Etor’s origins seemed particularly reliable.

Instead, in determining Ueki and Etor’s true status in the clan, the Trial Division looked to the way both factions had treated one another in the past. It stated, “actions speak louder than words—in this case, actions showing that, notwithstanding the current enmity, plaintiffs’ family and defendant’s family have in the past and even recently acted as if they were related to each other.” *Id.* at 9. Foremost, it noted that many

disputed lands within the appropriate time and thus the duty to correct the mistake had fallen on Ngiraingas. *Id.*

⁴ Cheltakl el ngalek essentially means that they were introduced into the clan as step-children of a person who, themselves, married into the clan.

members of Orak's family had named their children after the mother of one of the lead plaintiffs. *Id.* at 10. Likewise, many members of Ueki's family had helped care for a man named Ngirabiol, "another prior Recheyungel who [Orak] claims as his mother's maternal uncle." *Id.* at 11. The Trial Division reasoned that, even if Orak and his family knew some secret truth about Ueki and Etor's origins, which would place them at an inferior status in the clan, such secrets should not be given precedence "over the pragmatic truth reflected in people's day-to-day actions of caring for each other, naming their children, etc." *Id.* at 12. It concluded by stating that "while there is some evidence that plaintiffs are later arrivals to the clan, it is more likely than not that plaintiffs and defendant are closely related and that their matrilineally-related relatives also qualify as strong members of Uchelkeyukl Clan." *Id.* at 12.

The Trial Division finally turned to the issue of the identity of the Recheyungel. With respect to Orak's claim as Recheyungel, it noted that the facts were clear that Orak had not completed both steps of the two-step process necessary to claim a chiefly title. *Id.* at 14 (citing *Eklbai Clan v. Imeong*, 13 ROP 102 (2006) (holding that mere acceptance by a klobak, alone, does not constitute a sufficient basis for determining title and membership disputes)). Ueki's status was less clear. Sure, his uncle was Ngiraingas, who arguably secured the plot of disputed land and who was himself the undisputed Recheyungel. However, it was still unclear whether Ueki was a strong member and whether he had been affirmed by all of the ourrot of the clan.

The Trial Division decided that the fight over Recheyungel was misplaced

altogether. Instead, what was really important was the fact that, despite the dubious tales of clan lineage on both sides, both Orak and Ueki and Etor were all strong members of the clan. This determination was paramount to the Recheyungel fight because "neither prior case law nor the pleadings in this case dictate that the male chief of a clan, or the male and female title bearers together, have sole and absolute authority over the use of clan lands." *Id.* at 15. Rather, "'clan land . . . belongs to all clan members, who . . . have a voice in its control and use,' *Adelbai v. Ngirchoteot*, 3TTR 619, 629 (App. Div. 1968), and the distribution of clan assets 'should be determined by consensus among the strong, senior members of the clan[.],' *Remoket v. Omrekongel Clan*, 5 ROP Intrm, 225, 230 (1996)." *Id.* at 15-16. Indeed, "'customary law throughout Palau requires that the assets of a clan . . . be distributed fairly.'" *Id.* at 16 (quoting *Ngeribongel v. Guilbert*, 8 ROP Intrm., 68, 71 (1999)).

The Trial Division concluded that Ueki and Etor, along with their predecessor, Ngiraingas, had not "fairly allocated use rights to members of defendant's family and supporters, meeting their requests with silence if not outright rejection while seemingly never turning down a request from their own family members." *Id.* at 16. Although Palauan customary law clearly entitled Orak and his family to have the assets distributed fairly, the Trial Division acknowledged that, because of the present acrimony, some form of judicial intervention was necessary to compel the warring factions to resolve the conflict.

Thus, on June 15, 2007, the Trial Division issued its Judgment and Decision, ruling that (a) Ueki and Etor, as well as Orak,

are strong members of the Uchelkeyukl Clan, (b) Asanuma and Ngiralmu are not strong members of the Uchelkeyukl Clan, (c) because the Trial Division was unable to determine definitively who bears the title Recheyungel of the Uchelkeyukl Clan, Ueki, who has the stronger claim between himself and Orak, should be considered *de facto* Recheyungel for the purpose of convening a meeting of the strong members of the clan to determine use of the disputed land, (d) because Orak is also a strong member of the clan, he has an equal right to use clan lands, and therefore (e) Orak should make his request on behalf of other strong members of the clan to Ueki as *de facto* Recheyungel, who should promptly convene a meeting of the members from both factions and who should not unreasonably withhold permission to use the disputed land.

Orak, Asanuma, and Ngiralmu now appeal the Trial Division's decision.

STANDARD OF REVIEW

[1, 2] The Appellate Division of the Supreme Court reviews Trial Division findings of fact for clear error. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). "When reviewing for clear error, if the Trial Division's findings of fact are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless the Appellate Division is left with a definite and firm conviction that a mistake has been committed." *Id.* Moreover, a person's status within a clan is a matter of custom, and we review a Trial Division's findings regarding a custom's terms, existence, or nonexistence for clear error as well. *Dokdok v. Rechelluul*, 14 ROP 116, 119

(2007). We "will not reweigh the evidence, test the credibility of the witnesses, or draw inferences from the evidence." *Id.* "If the Trial Division's findings as to custom are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be disturbed on appeal unless the Court is left with a definite and firm conviction that a mistake was committed." *Id.* at 119. Likewise, "[w]here there are two permissible views of the evidence as to proof of custom, the fact finder's choice between them cannot be clearly erroneous." *Id.* at 118 (citing *Saka v. Rubasch*, 11 ROP 137, 141 (2004)). Finally, clear and convincing evidence must establish the existence and content of a claimed custom. *Ngirutang v. Ngirutang*, 11 ROP 208, 210 (2004); *Children of Matchiau v. Klai Lineage*, 12 ROP 124, 125 (2005).

DISCUSSION

Although divided into seven subheadings, the bulk of Appellants' brief was devoted to three primary issues: First, whether the Trial Division committed clear error when it ruled that Ueki and Etor were strong members of the clan; second, whether the Trial Division committed clear error when it ruled that Asanuma and Ngiralmu were weak members of the clan; and third, whether the Trial Division committed clear error when it failed to rule that Appellant Orak bears the chief title Recheyungel. We shall address them in the order listed above.

I. Whether the Trial Division committed clear error when it ruled that Ueki and Etor were strong members of the clan

At trial, an uncontested expert customary witness, William Tabelual, stated that a member of a clan must fall within the following categories of membership: (1) ochell, (2) ulchell, (3) rrodel, (4) eltekill, (5) ultechakl, and (6) terruaol. He went on to clarify that the strength of the members in the clan follows the same order, that is, the strongest member of the clan is an ochell member, and so on down the line. (Appellants' Br. at 11; Tr. vol. 3, p. 74-75.)

Before delving into the Trial Division's decision about Ueki and Etor's status in the Clan, it is helpful first to address Orak's status. Although the Trial Division never explicitly declared that Orak is an ochell member of the Clan, there was little doubt that Orak was uniformly considered ochell by nearly everyone, including the Trial Division. We agree with the Trial Division and hold that the record below supports a finding that Orak is indeed ochell. First, we hold that the Trial Division intended to acknowledge his ochell status when it stated "the Court can see no basis to say other than that defendant and others matrilineally related to him qualify as strong members of Uchelkeyukl Clan." Civ. Act. No. 04-077, Decision at 7 (Tr. Div. June 15, 2007). The Trial Division's use of the phrase "and others matrilineally related to him" clearly indicates ochell status, as ochell is traced through the matrilineal line. Moreover, the Trial Division's reference to Orak as a "strong member" is in line with the expert testimony elicited at trial, which equated "strong" membership in the Clan with ochell status. Second, Ueki never challenged Orak's status at trial. Instead, he acknowledged not only that Orak's brother had been appointed to bear the title Uong, the second ranking title in Ngarabachesis, but also

went so far as to state, through counsel, "Let [Orak] in due course be Recheyungel."⁵ *Id.* at 7 n.10. Indeed, the gist of Ueki's story into the Clan was that his line was related to Orak's line and that Ueki's family members were seeking them out in Ngermid at the end of their long journey from Peleliu. Third, Defendant's Exhibit D represents Orak's family tree, which was essentially uncontested at trial. The family tree clearly shows that Orak can trace his lineage in the clan through a matrilineal line—from Dililong (Orak's mother), to Rekong, to Tualoi, and finally to Itewai. (Def.'s Tr. Ex. D, March 9, 2006.) Fourth and finally, Ueki's own Exhibit 35 lists the previous thirteen Recheyungels of the Uchelkeyukl Clan. Of those thirteen, this Court can clearly identify at least seven of them that are members of Orak's family. (Pl.'s Tr. Ex. 35, February 17, 2006.) Our case law clearly states that the number of ancestors who have held the chief title is itself indicia of status in the clan. *Eklbai Clan*, 13 ROP at 102. Thus, this Court independently finds that Orak is clearly an ochell member of the Uchelkeyukl Clan and AFFIRMS the Trial Division's decision on this issue.

On the other hand, we disagree with the Trial Division's decision on the issue of Ueki and Etor's status in the Clan. Indeed, at

⁵ The Trial Division noted, somewhat puzzlingly however, that none of Orak's relatives had "bore the title [of Recheyungel] in the more than half-century between the death of Ngirabiol and James' claim to be Recheyungel in 1998." Civ. Act. No. 04-077, Decision at 12 n.20 (Tr. Div. June 15, 2007). We find this ruling to be in question, as our reading of the uncontested family tree shows that Orak's great-uncle on his mother's side, Mekirong, held the chief title after Ngirabiol.

trial, there was quite a bit of doubt as to their status in the Clan, relative to Orak's. "[T]he real question in this case is the status of plaintiffs" Civ. Act. No. 04-077, Decision at 8 (Tr. Div. June 15, 2007).⁶ Ueki and Etor unsurprisingly described themselves as ochell members, telling a story that started in Peleliu, and continued on a multiple-stop migration from Meyuns to Ngerbodel, to Ngerbechedesau, and finally to Uchelkeyukl Clan in Ngermid, where they could be reunited with Orak's family, which was already living there. This story, however, was in direct tension with a completely different story told by Orak about Ueki and Etor's origins in Indonesia. In the end, the Trial Division concluded that neither story about Ueki and Etor's origins seemed particularly reliable.

After hearing the testimony of witnesses, the Trial Division nonetheless found Ueki and Etor were strong members of the clan and that the two factions were closely related and of equal rank because (1) Ueki and Etor's family members cared for members of Orak's family, and (2) Orak's family members named children after members of Ueki and Etor's family. *See id* at 9-12. The Trial Division also presumably relied on the fact that Ngiraingas, who was Ueki's uncle, was the most recent Recheyungel and had been very instrumental in acquiring the disputed

⁶ It should be noted at the outset that Etor was uniformly recognized as Ebil-Recheyungel of the Clan; however, Orak questioned whether she was in fact ochell, or rather simply Ebil-Recheyungel because of her relationship to Ngiraingas.

land.⁷ Although these considerations were clearly inspired by the Trial Division's desire to achieve a fair result, the simple question this Court must decide is whether the Trial Division was entitled to reject Ueki and Etor's story into the clan but nonetheless conclude that they are strong senior members.

The issue is clearly a matter of Palauan custom, i.e., can a clan's "actions speak louder than words" in determining the status of its members, or does clan lineage predominate? Orak argues that "Appellees have not shown by clear and convincing evidence that, under Palauan custom, people helping each other must be close relatives or members of the same clan," much less members of the same, ochell rank. (Appellant's Br. at 16.) Likewise, they have not shown "by clear and convincing evidence that people who share the same name must be close relatives or members of the same clan," much less members of the same rank. (*Id.* at 17.) We agree with Orak, as Ueki failed to point this Court to any evidence in the record indicating otherwise.

⁷ Although the number of ancestors who have held the chief title is indicia of status in the clan, Ueki's own Exhibit 35 only shows, at most, two of the last thirteen that are members of Ueki's family. *Eklbai Clan*, 13 ROP 102. It is undisputed that Ngiraingas, the last Recheyungel, was Ueki's uncle; however, the testimonial and documentary evidence indicated that Ngiraingas was chosen as chief not because of his ochell status but because "he was a savvy and well-connected trial counselor and judge who could better assist the Clan in dealing with the U.S. bureaucracy." Civ. Act. No. 04-077, Decision at 5 (Tr. Div. June 15, 2007).

The Trial Division simply concluded, without recourse to expert customary testimony, that the caring for and naming of members of each other's family constitutes an acceptable means of establishing a clan member's ochell status. This begs the question. The Trial Division noted that, "while there is some evidence to support defendant's claim that plaintiffs are later arrivals to the Clan, it is more likely than not that plaintiffs and defendant are closely related and that their matrilineally-related relatives also qualify as strong members of Uchelkeyukl Clan." (*Id.* at 12.) Because the Trial Division obviously believed that Orak was ochell, this statement, at the very least, implies that it believed that Ueki and Etor should also be considered ochell. We simply see no way that the Trial Division could have been justified in reaching this conclusion.

To be sure, testimony at trial indicated that members of both factions did in fact care for and name members of each other's family after one another.⁸ However, no one testified that caring for and naming members of each

other's family after one another constitutes proof of ochell status in the clan. When the Trial Division rejected Ueki and Etor's story of their arrival into the clan, it was bound to articulate an alternative way, under Palauan custom, for them to be considered ochell members. Allowing "actions to speak louder than words," the court created something akin to clan-member-status-by-estoppel, which appears to have no evidentiary basis in the record. Finally, at oral argument, Ueki's counsel conceded to the panel that name-sharing and mutual care-giving do not constitute indicia of one's status in the clan under current Palauan case law.

As a final note, in *Dokdok*, 14 ROP at 119, "matters of custom are resolved according to the record in each case." The Trial Division's decision is not the record—it is the very thing this Court is supposed to be reviewing. Although it is within the province of the Trial Division to listen to testimony and conclude that the actions of the clan are more convincing than the myriad, and often contradictory, versions of clan lineage, it is not within the province of the court to create Palauan custom without clear and convincing evidence to do so. Put another way, the Court's practice in resolving custom according to the record "allows for judicial recognition of the evolution of custom," but it does not allow for the court itself to speed that evolution along without the help of some form of customary testimony. Accordingly, we REVERSE the Trial Division's determination that Ueki and Etor are strong members in the Uchelkeyukl Clan. Based on the testimony elicited at trial and even accepting Ueki and Etor's story into the Clan, Ueki appears at best to be a strong terruual member of the Clan.

⁸ For example, the Trial Division noted that "Maria Asanuma and Ebukl Ngiralmu both testified that Ucharm, [Orak's] maternal uncle, named one of his daughters, Sariang, the name of the grandmother and mother of the lead plaintiffs. And, if the Court reads its notes correctly, Ebukl also said that Dililong, [Orak's] mother, had a daughter . . . named Dirremeang, which was the name of Sariang's mother." Civ. Act. No. 04-077, Decision at 10 (Tr. Div. June 15, 2007). Likewise, "Moses Yobech, a grandson of Ngiramolau called as one of defendant's witnesses, testified that Ngiramolau had said that he was related to both plaintiffs' and defendant's families." *Id.*

II. Whether the Trial Division committed clear error when it ruled that Asanuma and Ngiralmu were weak members of the clan

As we noted previously, an uncontested expert customary witness at trial stated that a member of a clan must fall within either of the following categories of membership: (1) ochell, (2) ulehell, (3) rrodel, (4) eltekill, (5) ultechakl, and (6) terruaol. The strength of members in the clan follow the same order. (Appellants Br. at 11; Tr. vol. 3, p. 74-75.) With this in mind, Asanuma and Ngiralmu make a comparative argument, asserting that it would be unfair for the Trial Division to conclude that Ueki and Etor have a higher status within the clan than Asanuma and Ngiralmu. We disagree.

Even though this Court has come to the conclusion that the Trial Division erred in its decision as to Ueki and Etor's status, we reemphasize that matters of custom are resolved according to the record in each case. It is self-evident, based on the record, that the evidence offered as to Ueki and Etor's status was entirely different than the evidence offered as to Asanuma and Ngiralmu's status. The Trial Division heard testimony about Asanuma and Ngiralmu's lineage and clan involvement, judged its credibility, and determined that they are instead cheltakl el ngalek members of the clan. The Trial Division was also entitled to consider Asanuma and Ngiralmu's counsel's statement indicating that they are at least in second place between themselves and defendant (Orak). Since Orak was clearly a strong ochell member, this admission, while not conclusive as to what their status *is*, clearly reveals what their status is *not*, i.e., ochell.

[3] Finally, this Court's long history of treating custom as a factual matter "limits the depth of appellate review. If the Trial Division's findings as to custom are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be disturbed on appeal unless the Court is left with a definite and firm conviction that a mistake was committed." *Omenged v. UDMA*, 8 ROP Intrm. 232, 233 (2000). Based on the reasons outlined above, we are not left with a definite and firm conviction that a mistake was committed. Accordingly, we AFFIRM the Trial Division's determination that Asanuma and Ngiralmu are not strong members in the Uchelkeyukl Clan.

III. Whether the Trial Division committed clear error when it failed to rule that Appellant Orak bears the chief title Recheyungel

The Trial Division agreed with the customary witness in this case that the appointment of a chief is a two-step process. Civ. Act. No. 04-077, Decision at 14 (Tr. Div. June 15, 2007); *see also* (Tr. vol. 3, p.103). One must be appointed by the klobak, as noted in *Eklbai Clan*, and one must then be accepted by all the chiefs of the clan. Indeed, the "title belongs to the Clan and not to the council." *Eklbai Clan*, 13 ROP at 107. Orak argued that he substantially completed the process, stating that, since all the members of the klobak that nominated him are chiefs in the Uchelkeyukl Clan anyway, there was no need for him to complete the second step and be accepted by all the chiefs of the Clan. However, Orak failed to produce any customary evidence in this regard, which is probably one reason why the court decided that he had "all but

conceded that unlike Minoru (Ueki), his nomination was not formally accepted by Ngarabachesis (all the chiefs of Ngermid).” The Trial Division also noted that, “[a]lthough both sides put forward documents purporting to show that the chiefs of Ngarabachesis approved their respective appointments, and indeed, although James (Orak) claims to have been appointed two months earlier than Minoru, it is a fair observation that many of the names on James’s list appear to have claimed their titles for the first time simultaneously with James (and with Maria Asanuma’s claim to be Ebil-Recheyungel).” Civ. Act. No. 04-077, Decision at 14 (Tr. Div. June 15, 2007). Put simply, after listening to the testimony and examining the evidence, the Trial Division found Orak’s claims for Recheyungel unreliable. Thus, we find Orak’s so-called admission that he was not formally accepted by all the chiefs to be sufficient to AFFIRM the Trial Division’s decision on this issue.

There is one final determination this Court must make with respect to the identity of the Recheyungel. Orak takes issue not only with the Trial Division’s failure to appoint him as Recheyungel but also with the Trial Division’s decision to treat Ueki as *de facto* Recheyungel. As Orak rightly points out, no customary evidence was admitted at trial as to the practice of treating someone as *de facto* Recheyungel. We agree, as the whole concept of a *de facto* Recheyungel seems to have appeared from the judicial ether. To be fair, in referring to Ueki as *de facto* Recheyungel, the Trial Division took pains to state that Ueki was merely to use that status in order to convene a meeting whereby *all* the strong members of the clan, including Orak, should be a part of determining the use of the

disputed land. It stayed out of making a definitive determination (for which a customary basis would have been necessary) because it would have been simply unhelpful for resolving the dispute.⁹

However, the plain fact is that the appointment of a Recheyungel, *de facto* or not, is clearly a matter of custom and matters of custom must be proved by clear and convincing evidence. Far from clear and convincing, here, there was simply nothing in the record about the customary basis for appointing someone a *de facto* Recheyungel. Moreover, for all intents and purposes, even a court’s limited treatment of someone as *de facto* Recheyungel would, in practice, result in that person being entitled to parade a judicial blessing over his own premature claim to a chief title. This represents a clear encroachment by the judiciary into traditional matters. Accordingly, we REVERSE the Trial Division’s decision to treat Ueki as *de facto* Recheyungel, even for the limited purpose of resolving the dispute.

In affirming the Trial Division as to Orak’s claim to Recheyungel and in reversing the Trial Division as to Ueki’s claim, we recognize that this Court has left the identity of the Recheyungel undecided. Although this

⁹ The Trial Division recognized that “‘clan land . . . belongs to all clan members, who . . . have a voice in its control and use,’ *Adelbai v. Ngirchoteot*, 3TTR 619, 629 (App. Div. 1968), and the distribution of clan assets ‘should be determined by consensus among the strong, senior members of the clan[.]’ *Remoket v. Omrekongel Clan*, 5 ROP Intrm, 225, 230 (1996).” See Civ. Act. No. 04-077, Decision at 15-16 (Tr. Div. June 15, 2007).

Court would like to settle this dispute once and for all, there was simply not enough evidence in the record for us to make a definitive declaration, nor do we feel it should be within the general province of courts to do so. We reemphasize, however, that one of the primary reasons for the dispute over Recheyungel was the unsettled nature of the statuses of the competing factions, which this Court has now definitively settled. Orak is clearly ochell and Ueki is clearly not ochell.

CONCLUSION

In matters involving custom, the Court is faced with a difficult and sensitive choice: “May the court in the exercise of its constitutional powers and authority, but within the context of the very influences that serve to degrade and diminish customary processes, take over and supervise the conduct of these processes in order to quiet controversy, bring peace, and settle differences among participants in traditional customary matters?” *Ichiro Blesam v. Ilab Tamakong*, 1 ROP Intrm. 578, 581 (1989). In the above case, the Court answered the question in the affirmative, as we do here. Of course, we would prefer to leave customary matters to be settled by the exercise of goodwill and fair dealing between clan members. In intractable situations like these, however, we reluctantly find it necessary to step in and make determinations that we continue to insist are best left to the clans. As a final consideration in this case, we echo the Trial Division in stating that “neither prior case law nor the pleadings in this case dictate that the male chief of a clan, or the male and female title bearers together, have sole and absolute authority over the use of clan lands.” *See* Civ. Act. No. 04-077, Decision at 15 (Tr. Div. June

15, 2007). Rather, “‘clan land . . . belongs to all clan members, who . . . have a voice in its control and use,’ *Adelbai v. Ngirchoteot*, 3TTR 619, 629 (App. Div. 1968), and the distribution of clan assets ‘should be determined by consensus among the strong, senior members of the clan[.]’ *Remoket v. Omrekongel Clan*, 5 ROP Intrm, 225, 230 (1996).” *Id.* at 15-16. Indeed, “‘customary law throughout Palau requires that the assets of a clan . . . be distributed fairly.’” *Id.* at 16 (quoting *Ngeribongel v. Gulibert*, 8 ROP Intrm. 68, 71 (1999)).

Despite this Court’s determinations as to the statuses of the competing factions, we emphasize that the members of the Uchelkeyukl Clan—especially Orak and Ueki—should work towards building a future consensus out of the present acrimony and allocate the disputed land fairly and in accordance with Palauan custom. For the reasons set forth above, the judgment of the Trial Division is AFFIRMED in part and REVERSED in part.

**FRIEND SORA TAIMA,
Appellant,**

v.

**SUN XIU CHUN,
Appellee.**

CIVIL APPEAL NO. 09-005
Small Claims No. 07-085

Supreme Court, Appellate Division
Republic of Palau

Decided: December 10, 2009

[1] **Appeal and Error:** Standard of Review; **Civil Procedure:** Motion for Relief from Judgment

When reviewing the denial of a Rule 60(b) motion for relief from judgment, the Court only reviews the trial court’s order denying the motion and not the substance of the court’s initial judgment. The Court reviews the denial of a motion for relief for an abuse of discretion.

[2] **Civil Procedure:** Motion for Relief from Judgment

An allegation of fraud under Rule 60(b)(3) typically encompasses most types of misconduct or misrepresentations by an adverse party, including perjury, the use of a fraudulent instrument, nondisclosure by a party or his attorney, false discovery responses, or other similar misconduct that operates to prevent an opposing party from presenting its case.

[3] **Civil Procedure:** Motion for Relief from Judgment

Unlike fraud of an adverse party, fraud upon the court is narrower and consists of situations where the impartial functions of the court have been directly corrupted. A fraud upon the court is limited to fraud which seriously affects the integrity of the normal process of adjudication.

[4] **Civil Procedure:** Motion for Relief from Judgment

Fraud upon the court is limited to the most serious types of misconduct and to those that are directed at the court and the judicial process, rather than an adverse party. This may include conduct such as bribing a judge, using an officer of the court to improperly influence the proceeding or judge, or any form of jury tampering.

Counsel for Appellant: Mariano W. Carlos

Counsel for Appellee: Garth Backe

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Court of Common Pleas, the Honorable HONORA E. REMENGESAU RUDIMCH, Senior Judge, presiding.

PER CURIAM:

Friend Sora Taima, the owner of the Red Dragon karaoke bar and restaurant, appeals the lower court’s denial of his motion for relief from a default judgment. Despite

waiting over one year to challenge the judgment, he now asserts that the court violated his rights and that Sun Xiu Chun, a former employee, perpetrated a fraud upon the court. We find no error below and affirm.

BACKGROUND

Sun Xiu Chun is a Chinese national who came to Palau in January 2004 to work at the Red Dragon karaoke bar and restaurant. Sun and her employer, Friend Sora Taima, agreed to a two-year contract, and Taima assisted Sun in obtaining a nonresident work permit.

It is somewhat unclear from the record what occurred in the years after Sun arrived in Palau, but on July 3, 2007, she filed a complaint in the Court of Common Pleas claiming that Taima owed her \$3,000. Sun stated that Taima never paid her salary according to her employment contract, that she had to pay her own taxes and renew her work permit, and that Taima borrowed \$225.00 from her but did not pay it back.

On July 10, 2007, Taima was served with Sun's complaint and a summons notifying him of these allegations and that a hearing was scheduled for August 13, 2007. The summons informed Taima that "[a] default judgment may be entered against you if you fail to appear." Taima signed the Proof of Service form, acknowledging that he understood the meaning of the documents.

Taima claims that he appeared at the courthouse on August 13 but that Sun Xiu Chun did not. There is no record of attendance on that day because no hearing occurred. In a subsequent order, the trial

judge noted that she rescheduled the hearing because she was out on sick leave, not because Sun was absent. The court postponed the hearing until August 21, 2007. In the Hearing Notice, which Taima received on August 16, the court noted that "Defendant is ordered to appear."

As with the prior hearing, Taima claims that he appeared at the courthouse on August 21 and that Sun was not present. Taima is uncertain whether Sun's counsel appeared on her behalf. Once again, there is nothing in the court's records indicating the attendance on that day or whether any proceeding actually occurred. It appears that Sun was served with a notice setting the hearing for August 21, but nothing indicates whether she or her counsel was present.

In any event, the next document in the record states that the court postponed the hearing again, this time until September 10, 2007. Both parties were served with the new Hearing Notice, which included a comment that "[a]ll parties must appear." On September 6, however, the court postponed the hearing a final time, setting it for September 19. Taima received notice of the hearing on September 6.

The court finally held the hearing regarding Sun's claims on September 19. Sun appeared with counsel; Taima did not appear. In Taima's absence, the court heard from Sun and her counsel, reviewed her Complaint and the evidence before it, and found good cause in favor of her claim. The court therefore entered a default judgment against Taima,

ordering him to pay Sun \$2,623.00¹ within thirty days of the date of service. Taima was served with the default judgment on September 21, two days after the hearing, and he signed the Proof of Service form.

In the words of Taima's own counsel, after the court entered the default judgment, "[n]othing happened in this case for almost a year." (Appellant's Br. at 3.) Taima neither paid Sun any money, nor did he challenge the default judgment. On August 11, 2008, Sun filed a motion for an order in aid of the judgment entered on September 19, 2007. Sun stated that she had been unable to collect any of the money Taima owed her. Taima was served with this motion on August 12, and on August 14 the court issued an order for Taima to appear for a hearing on his ability to pay the judgment.

This hearing occurred on December 1, 2008.² Taima represented himself; Sun was represented by counsel. The court heard from both Taima and Sun's counsel, but the only record from the proceeding is the court's final order, issued the same day.

At this hearing, Taima appears to have told the court a version of the same facts that he later recorded in a sworn affidavit. Taima acknowledged that he received notice of the September 19, 2007, hearing regarding Sun's complaint against him, but he claimed that it

¹ Although Sun sought \$3,000.00 in her complaint, the trial court noted in the default judgment that Sun orally amended this amount during the hearing.

² Like the earlier proceedings, this hearing was postponed several times.

was scheduled around the same time that his father had suffered a stroke. Taima, who was caring for his father, admitted that he forgot about the hearing. He also appears to have argued to the court that Sun was lying, that he did not owe her any money, and that he could obtain evidence to prove this assertion.

The trial court treated these statements as a request for relief from the prior default judgment and denied his request. The court found that Taima simply forgot about the hearing, and after Taima received the judgment two days later, he made no further inquiry or objection for one year. The court held that Taima's forgetfulness and the circumstances surrounding his father did not amount to excusable neglect, particularly in light of his disregard for the court's order to pay Sun. Next, the court construed Taima's statements about obtaining evidence to support his defense as a motion for relief based on newly discovered evidence, but it held that this evidence was not newly discovered and did not merit relief.

After the court's order denying relief from the judgment, Taima finally found a lawyer to represent him. On December 30, 2008, Taima's new counsel filed a second motion for relief from judgment, accompanied by an affidavit in which Taima explained his version of the relevant facts. Taima's motion claimed that the default judgment (1) was obtained through fraud upon the court, (2) violated ROP Small Claims Rule 12, and (3) violated Taima's equal protection rights.

In his affidavit, Taima claimed that Sun falsified her complaint. He stated that she used his assistance to enter Palau and, within three days after arriving, refused to work for

him and moved out of the Red Dragon. Taima claims to have searched for Sun over the next two years, with little success. On the few occasions when he located her, she refused to return to work. Taima claims that after Sun's work permit expired sometime in 2006, a police officer escorted Sun to the airport, removed her handcuffs, and handed her a plane ticket. Sun purportedly shredded the ticket and slapped the officer in the face, earning her a trip to the Koror jail rather than back to China. Taima did not speak with Sun after this event and is unaware of her current employment status.

Taima's motion for relief from judgment averred that Sun's false allegations in her complaint constituted fraud upon the court. Specifically, he argued that Sun fabricated her claim and thereby used the court as a "weapon" to extort money from him, (Appellant's Mot. for Relief from J., Dec. 30, 2008), and that it would be unfair to hold Taima to a judgment entered after he missed the hearing.

On January 26, 2009, the trial court denied Taima's motion. The court held that Taima's allegations, even if true, did not constitute fraud upon the court, but rather fraud or misrepresentation of an adverse party. As such, the motion should have been made under ROP Rule of Civil Procedure 60(b)(3). Motions for relief under this provision, however, must be filed within one year after the court enters the judgment, *see* ROP R. Civ. P. 60(b), a period that had expired when Taima filed both of his motions for relief. Finally, the court rejected Taima's additional arguments regarding Small Claims Rule 12 and equal protection, noting that it postponed

the hearing because the judge was unavailable, not because Sun failed to appear.

Taima now appeals the trial court's order denying his motion for relief from judgment.

ANALYSIS

[1] When reviewing the denial of a Rule 60(b) motion for relief from judgment, we review only the court's order denying the motion and not the substance of the court's initial judgment. *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85 (1997). We review the denial of a motion for relief for an abuse of discretion. *Id.*; *see also Idid Clan v. Olngembang Lineage*, 12 ROP 111, 119 (2005). We review the court's conclusions of law *de novo*. *Idid Clan*, 12 ROP at 115.

On appeal, Taima recapitulates the arguments he made below. Specifically, he asserts that (1) Sun's purportedly false allegations constituted fraud upon the court; (2) the trial court violated Small Claims Rule 12 by not dismissing the case when Sun failed to appear at an earlier hearing; and (3) the court violated his right to equal protection by treating him differently than Sun.³ We address each argument in turn.

I. Rule 60(b) – Fraud Upon the Court

³ Taima has not appealed the trial court's conclusion that his reason for missing the hearing on September 19, 2007, was not excusable neglect, nor its holding that Taima failed to establish that newly discovered evidence merited relief from the default judgment. We will not address these issues further.

Taima first claims that the trial court erred by ruling that his motion for relief from judgment alleged fraud of an adverse party rather than fraud upon the court. According to Taima, this determination improperly led the court to reject his motion as untimely. The proper characterization of Taima's motion matters because a party seeking relief for fraud of an adverse party under Rule 60(b)(3) must file such a motion no later than one year after the court entered judgment,⁴ whereas an allegation of fraud upon the court is not subject to such a limit. *See* ROP R. Civ. P. 60(b). Taima does not dispute that a motion under Rule 60(b)(3) based solely on fraud of an adverse party would have been untimely because he filed it more than a year after being served with the court's default judgment; therefore, whether his motion properly alleged fraud upon the court is determinative.

[2] A party may seek relief from a judgment under Rule 60(b) for multiple reasons, one of which is if the judgment was procured by fraud, misrepresentation, or other misconduct of an adverse party. *See* ROP R. Civ. P. 60(b)(3).⁵ Fraud under this provision

typically encompasses most types of misconduct or misrepresentations by an adverse party, including perjury, the use of a fraudulent instrument, nondisclosure by a party or his attorney, false discovery responses, or other similar misconduct that operates to prevent an opposing party from presenting its case. *See generally* 12 James Wm. Moore et al., *Moore's Federal Practice* §§ 60.21(4), 60.43(1) (3d ed. 1998).

[3] Unlike fraud of an adverse party, fraud upon the court is a narrower category of misconduct that consists of situations where “the impartial functions of the court have been directly corrupted.” *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 89 (1997) (quoting *Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1550 (10th Cir. 1987)). Stated another way, a fraud upon the court “is limited to fraud which seriously affects the integrity of the normal process of adjudication.” *Ngerketiit Lineage v. Ngirarsaol*, 9 ROP 27, 30 n.3 (2001); *see also Secharmidal*, 6 ROP at 89.

[4] Although these definitions are broad and nebulous, courts have limited the bounds of fraud upon the court to the most serious types of misconduct and to those that are directed at the court and the judicial process, rather than an adverse party. *See generally* 11 Charles Alan Wright, et al., *Federal Practice and Procedure (Civil)* § 2870 (2d ed. 1995); *see also* 12 *Moore's Federal Practice* § 60.21(4) (“Fraud on the court must involve more than injury to a single litigant . . .”). This concept includes conduct such as bribing a judge, using an officer of the court to improperly influence the proceeding or judge, or any form of jury tampering. *See* 12 *Moore's Federal Practice* § 60.21(4); *see also*

⁴ A party must bring a motion under Rule 60(b)(3) within a “reasonable time” after entry of the judgment, a period which may expire prior to—but may not exceed—one year. ROP R. Civ. P. 60(b).

⁵ As the trial court noted, the Court of Common Pleas is not bound by the Rules of Civil Procedure in a small claims action, but it may look to them for guidance, and they may apply to cases to the extent not inconsistent with the Small Claims Rules. *See Cura v. Salvador*, 11 ROP 221, 223 n.2 (2004) (citing ROP R. Civ. P. 1(a)).

Hazel Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (finding fraud upon the court where plaintiff's attorney fabricated an article praising a process for which plaintiff was seeking a patent, obtained signatures on it, published it, and then used the article to validate the patent in court). A common, although not requisite, component of fraud upon the court is the participation of an officer of the court in perpetrating the fraud, as compared to fraud by a party or a witness. 12 *Moore's Federal Practice* § 60.21(4); *see also Hazel Atlas*, 322 U.S. at 240-44. Furthermore, fraud upon the court does not have to be committed by a party—or even benefit a party—before it may justify granting relief from a judgment. 12 *Moore's Federal Practice* § 60.21(4).

With this distinction in mind, we find no error in the trial court's ruling that Taima's motion for relief did not allege a fraud upon the court. Taima attempts to characterize what occurred below as such a fraud by stating that Sun's purportedly false claims were an attempt to extort money from Taima, using the court as a weapon to do so by legitimizing her claims. He is trying to fit a round peg in a square hole. The only source of Taima's fraud claim is that Sun lied in her complaint. This is tantamount to perjury, which is a classic example of fraud between the parties. He does not allege misconduct that strikes the heart of the court's integrity, nor one perpetrated by an officer of the court. Furthermore, Taima had an opportunity to challenge the veracity of Sun's complaint—that is the purpose of civil litigation. Discovery and trial are the means by which a party contests a complaint, not a motion for relief based on fraud upon the court.

For these reasons, we agree with the trial court that Taima's motion raises fraud of an adverse party, which renders it untimely under Rule 60(b)(3).

II. Small Claims Rule 12

Taima next asserts that the court violated Small Claims Rule 12 and that this is a sufficient basis to relieve him from a default judgment.⁶ Small Claims Rule 12 reads as follows:

[I]f the plaintiff fails to appear at the hearing, the court shall enter a judgment for the defendant. If the defendant fails to appear, the court may enter judgment for plaintiff, or may require plaintiff to present evidence to prove his or her claim, and if such evidence is provided, the court shall enter judgment for the plaintiff.

Taima relies on the *shall* language in the first sentence, arguing that the court was required to enter a judgment against Sun because she did not appear at the hearings on August 13 and August 21, 2007. Taima acknowledges that the reason for rescheduling the first of these hearings was that the trial judge was on sick leave, not because Sun was

⁶ Taima does not actually explain under what authority the court's purported violation of Small Claims Rule 12 provides a basis for relieving him from the default judgment. This is a particularly notable absence given that he waited over a year after the judgment to raise the issue. We need not address this, however, because we find no violation of Small Claims Rule 12.

absent. Nothing in the record suggests the reason for postponing the August 21 hearing, but the court said nothing about Sun being absent. Taima admitted that he is uncertain whether Sun's counsel was present.

According to Taima, "[s]trict application of Rule 12 makes the Judge's absence irrelevant," (Appellant's Br. at 16), *i.e.*, so long as he can prove Sun missed a scheduled hearing, it is irrelevant whether such hearing actually took place. This argument is seriously misplaced. The purpose of requiring a plaintiff at the hearing is so that she may present evidence to prove her claim and for the judge to hear and determine the case. Without the plaintiff, the hearing cannot proceed, wasting the court's and the remaining parties' time. But without the presiding judge, no hearing can even begin, and, consequently, there is no hearing for either party to miss.

We find no violation of Small Claims Rule 12. There is no judicial record of a hearing at which the plaintiff failed to appear. Perhaps Sun was lucky that the judge was on sick-leave on August 13, 2007, but that does not alter the fact that no hearing took place, and there was no opportunity for the judge to enter a judgment for Taima. By the express language of Rule 12, when Taima did not appear for the hearing on September 19, 2007, the court had discretion to enter judgment for Sun, after taking evidence from her if it so chose. It heard from Sun, as contemplated by Rule 12, and entered judgment in her favor.

III. Equal Protection

Taima's last argument is that the court violated his right to equal protection by permitting Sun to miss a hearing but entering

judgment against him for the same transgression. *See* Palau Const. art. IV, § 5. Taima presents almost no legal support for this conclusion. Setting aside the intricacies of our constitutional jurisprudence,⁷ Taima's claim fails for the same simple reason as his previous argument: for purposes of the trial court's ruling, Sun never missed a hearing. The court postponed the hearings for its own reasons, not because Sun was absent. There was no hearing for Sun to miss on August 13 and August 21, 2007, and the parties were not treated differently. Taima's constitutional claim fails.

⁷ For example, we have made abundantly clear that the Equal Protection Clause "does not assure uniformity of judicial decisions or immunity from judicial error." *Palau Marine Indus. Corp. v. Seid*, 9 ROP 173, 176 (2002) (quoting *Beck v. Washington*, 369 U.S. 541, 554 (1962)). In *Seid*, the plaintiff asserted that the trial court's decision to permit an amendment in one case but to deny a similar amendment in another case constituted an equal protection violation. *See id.* at 175-76. Not only were there justifiable reasons for the differential treatment in the two cases, we cited thirteen cases supporting the principle that judicial error and lack of uniformity in judicial decisions do not create a constitutional issue. *Id.* at 176. In *Beck*, for example, the United States Supreme Court noted that if we permitted such claims, "every alleged misapplication of state law would constitute a federal constitutional question." 369 U.S. at 555. Returning to *Seid*, we found that the plaintiff's equal protection argument was frivolous and appeared sanctionable, and we ordered plaintiff to show cause why we should not sanction it. 9 ROP at 176. We decline to go so far here, but Taima's claims in this case do not rise to a constitutional level.

CONCLUSION

We are cognizant that Taima, as a pro se litigant, may not have fully understood how to obtain relief from a default judgment. He states in his brief that “[a] motion to set aside a default judgment is as foreign to the Appellant as what exists on the far side of the moon.” (Appellant’s Br. at 16.) We are also sympathetic to the circumstances surrounding his father’s health. But we must demand some accountability from any party called to appear before a court, otherwise our system of justice would be inoperable. Ignorance of the law is no excuse for failing to abide by it, a maxim that applies no less stringently in the context of a default judgment. At a minimum, a party served with a default judgment can enquire at the court about his available options. Even if Taima was unsure about how to challenge a default judgment, he must have been clear that the court ordered him to pay Sun almost \$3,000, and he had better options than to sit quietly for over a year.

We find that the trial court did not abuse its discretion in denying Taima’s motion for relief from the default judgment. Sun’s conduct, even if Taima’s allegations are true, did not constitute fraud upon the court, and his motion was therefore untimely. Taima’s arguments regarding Small Claims Rule 12 and his right to equal protection are meritless. For these reasons, we AFFIRM.

**SECUNDINA OITERONG AZUMA,
Appellant,**

v.

**IKED ROY NGIRCHECHOL, LYNN
MEREP, and KOROR STATE PUBLIC
LANDS AUTHORITY,
Appellees.**

CIVIL APPEAL NO. 08-026
LC/B 07-197, LC/B 07-198

Supreme Court, Appellate Division
Republic of Palau

Decided: January 8, 2010¹

[1] **Appeal and Error:** Standard of Review

The Court reviews the Land Court’s factual findings for clear error and will set aside the lower court’s factual determinations only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record.

[2] **Civil Procedure:** Res Judicata

The doctrine of issue preclusion states that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

¹ The panel finds this case appropriate for submission without oral argument, pursuant to ROP R. App. P. 34(a).

[3] **Property:** Tochi Daicho

Ownership by the landowner listed in the Tochi Daicho is presumed to be correct. To rebut this presumption and challenge such ownership, a claimant must prove by clear and convincing evidence that it is incorrect.

[4] **Appeal and Error:** Standard of Review

The question on clear error review is not whether the Court agrees with the trial court's outcome or whether it would have reached the same conclusion had it heard the evidence first-hand, and it will not reweigh the evidence or draw new inferences from it.

Counsel for Appellant: J. Uduch Sengebau Senior

Counsel for Koror State Public Lands Authority: Imelda Bai Nakamura

Counsel for Ngirchechol and Merep: Pro se

BEFORE: LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-time Associate Justice.

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

Appellant Secundina Azuma challenges the Land Court's determination granting ownership of disputed tracts of land to the various Appellees. Azuma claims that her interest in the land commonly known as

Demkerang extends beyond the boundary determined by the Land Court. Having considered the parties' arguments, we find no error below.

BACKGROUND

This dispute concerns competing claims to parcels of land in Ngerbodol, Ngerchemai Hamlet, Koror State. The property in question, commonly known as *Idong*, *Bailked*, and *Demkerang*, corresponds to Tochi Daicho Lots 261, 262, 263, and 272, and is identified as seven different parcels on Worksheet 2005 B 04, prepared by the Bureau of Lands and Surveys (BLS). Specifically, the parties dispute ownership of BLS Lots 181-084A-1, A-2, B, C, D, E, and F.

Azuma claimed below that she acquired the land in question in 1993 through a conveyance from Ngirachelbaed, the original registered owner of Tochi Daicho Lots 261 and 262. Azuma asserted that Ngirachelbaed was her father, although he was more commonly called Benjamin Ngiraingas Oiterong. Although skeptical, the Land Court found Azuma's claim that Ngirachelbaed was her father to be credible, meaning that Azuma legally received her father's interest in Tochi Daicho Lots 261 and 262. The remainder of the Land Court's decision discussed the precise boundaries of the interest that Azuma's father conveyed.

Azuma explained that her father showed her the boundaries of his land on separate occasions during the 1970s and 1980s. She averred that his land included all of the property now at issue, with the exception of BLS Lot 181-084D. Azuma's brother, Isaias, offered similar testimony,

except he did not include BLS Lot 181-084C when describing his father's land. Two witnesses testified that they knew Benjamin Oiterong and farmed the disputed land, and one witness claimed to have asked permission to build a house that encroached onto the property. On May 14, 1993, Oiterong conveyed his interest in land described as Tochi Daicho Lots 261 and 262 to Azuma, who then built a house on the land and has lived there since 1993. Regarding BLS Lot 181-084C, Azuma testified that her father gave this land to Koror State with the understanding that it would be used for a road. Because Koror State never built the road, Azuma claims that she still owns the property.

The Land Court heard competing claims for portions of the disputed land from the Koror State Public Lands Authority (KSPLA), Iked Roisisbau Ngirchechol (on behalf of the Idong Lineage), and Lynn Merep (on behalf of the children of her late father, Ngirboketereng Merep). After hearing the evidence, the Land Court determined that Azuma was the owner in fee simple of Lot 181-084A-1, but that the competing claimants had superior claims to the remaining parcels.

KSPLA claimed that it owned BLS Lots 181-084D, E, and F, as well as the above-mentioned planned road, which was platted but not built on Lot 181-084C. KSPLA based its claim to Lots D, E, and F on a purported conveyance of this land from Azuma's father to the Japanese government in 1941. The Land Court ruled in KSPLA's favor, finding that Oiterong conveyed a portion of the land described as *Demkerang*—which the court concluded was the same land described as Tochi Daicho Lots 261 and 262—to the Japanese. In 1954,

Oiterong filed a Statement of Claims (Claim No. 64) with the Trust Territory government, claiming that he unwillingly sold this portion of his land in 1941. The record from the 1954 proceedings is unclear, but what documentation exists suggests that the Trust Territory government denied his claim in 1956, meaning the land remained publicly owned. Nothing in the record indicates that Oiterong subsequently recovered the land involved in Claim No. 64, and the government has maintained control of it since 1956. Neither Oiterong nor Azuma has ever filed a claim for the return of public land, and Azuma expressly stated that this is not such a proceeding.²

The Land Court concluded that BLS Lots 181-084D, E, and F represent the portion of Oiterang's land that he conveyed in 1941 and described as *Demkerang* in Claim No. 64. KSPLA produced evidence that the land in Claim No. 64 corresponds to the state's current subdivision lots, which are public lands held by KSPLA. The Land Court also noted the similarity of the name—*Demkerang*—used in both Claim No. 64 and Azuma's current claim, as well as the similarity of the size of the disputed lots. In 1954, Oiterang stated that *Demkerang* was 1137.25 tsubos; Tochi Daicho Lots 261 and 262 are registered as a combined size of 1131.1 tsubos. The Land Court therefore

² Nor could Azuma bring such a claim at this time. A citizen who asserts a claim for the return of public land that was conveyed to a previous occupying power through force, coercion, fraud, or without just compensation or adequate consideration must have filed the claim on or before January 1, 1989. See 35 PNCA § 1304(b). Azuma has never filed such a claim.

found that Lots 181-084D, E, and F are public land belonging to KSPLA.

As for BLS Lots 181-084A-2 and B, the Land Court credited the testimony of Iked Roisisbau Ngirchechol, who appeared for Idong Lineage. Ngirchechol stated that he was intimately familiar with the Lineage's property, having received instructions about the land from former Ikeds Etpisong and Ngirboketereng Merep, as well as having accompanied Iked Etpisong during its monumentation in the 1970s. Based on this knowledge, Iked Ngirchechol claimed that Lots 181-084A-2 and B belonged to the Lineage. Ngirchechol acknowledged, however, that the Lineage conveyed Lot 181-084B to Ngirboketereng Merep's children at his eldecheduch. The Lineage also argued that BLS Lot 181-084A-2 and B are part of Tochi Daicho Lot 272—which it owns—and not Azuma's Lot 262.

The Land Court was persuaded by Iked Ngirchechol's testimony and found that the Idong Lineage owned BLS Lots 181-084A-2 and B because they were part of Tochi Daicho Lot 272. The court also determined that Iked Ngirchechol's testimony, in addition to Lynn Merep's, established that Lot 181-084B became property of the children of Ngirboketereng Merep at his eldecheduch.

Finally, the Land Court determined that BLS Lot 181-084C also belonged to the children of Ngirboketereng Merep. Ngirboketereng built his home on this lot in 1996 and farmed the surrounding land without objection, and he filed a claim for the land named *Bailked* in 1997. Iked Ngirchechol supported Lynn Merep's claim to this land, testifying that the senior females of the

Lineage gave the land occupied by Ngirboketereng to his children. The court did not credit Azuma's testimony that her father had provided permission to KSPLA to use the land for an access road, and it rejected KSPLA's argument that platting the road established an ownership interest.

Azuma now appeals the Land Court's determinations, claiming that each of its factual findings were clearly erroneous.

STANDARD OF REVIEW

[1] We review the Land Court's factual findings for clear error. *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007). We will set aside the lower court's factual determinations only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record. *Id.* We review the Land Court's conclusions of law *de novo*. *Id.*

ANALYSIS

Azuma presents various issues, each of which distills to whether the Land Court properly determined the ownership of the disputed property. We address the court's determinations in turn.

I. BLS Lots 181-084D, E, and F: KSPLA's Claims

Azuma contends that the Land Court erred by finding that BLS Lots 181-084D, E, and F became public land as a result of her father's 1941 conveyance of a portion of *Demkerang* to the Japanese. Specifically, she argues that there is no evidence from which the Land Court could have concluded that the

three BLS lots (which she claims correspond to Tochi Daicho Lots 261 and 262) were the same property at issue in Claim No. 64. Despite Azuma's contention to the contrary, there was sufficient evidence in the record to support the Land Court's determination.

First, in 1954, Benjamin Ngiraingas Oiterong labeled the land he claimed from the Trust Territory government in Claim No. 64 as a portion of "*Demkerang*," the same common name Azuma used to describe the presently disputed property. Azuma notes that neither her father nor the Trust Territory government recorded the Tochi Daicho lot numbers in Claim No. 64, leaving the identity of the property ambiguous. But the absence of the Tochi Daicho lot numbers does not resolve the question of whether *Demkerang* was the same land as Tochi Daicho Lots 261 and 262. It only means that it was not labeled as such in 1954, and the Land Court made a permissible finding that the lands were the same. Second, Oiterong recorded in Claim No. 64 that *Demkerang* was 1137.25 tsubos, a number nearly identical to the combined registered area of Tochi Daicho Lots 261 and 262. This similarity supports the Land Court's finding that the land disputed in Claim No. 64 concerned a portion of Tochi Daicho Lots 261 and 262. The Land Court was somewhat unclear regarding the extent to which Tochi Daicho Lots 261 and 262 became government property,³ but its final determination made

³ Although the Land Court ultimately determined that Azuma's father conveyed only a portion of his property to the Japanese government, it stated at one point that "Lots 261 and 262 became public land in Claim No. 64, and [are] currently held by the KSPLA." This

clear that it found that Claim No. 64 related to a portion of *Demkerang* now registered as Tochi Daicho Lots 261 and 262.

Finally, KSPLA presented testimony from Roman Remoket, the individual who prepared BLS Worksheet 2005 B 04, which demarcated the boundaries of the property in dispute and the undisputed surrounding land. Remoket testified that the property at issue in Claim No. 64 included public land that is now divided into state subdivision lots. Specifically, he testified that the land in Claim No. 64 encompasses BLS Lots 181-084D, E, and F, an assertion supported by the subdivision maps produced at trial.

Most importantly, Azuma has not produced evidence that Claim No. 64 related to any other property that her father owned at the time. KSPLA has maintained control of the disputed lots for over fifty years, and neither Azuma nor her father filed a claim for the return of public land. The subdivision maps indicate that the lots are public property. This evidence is more than a sufficient basis for the Land Court's determination that BLS Lots 181-084D, E, and F became public land.

Azuma also asserts that the Land Court improperly precluded her from claiming ownership of Tochi Daicho Lots 261 and 262 based on the Trust Territory government's 1956 determination that her father legitimately sold a part of his property to the Japanese government. Azuma's argument is misplaced because the Land Court did not bestow

statement is overly broad, but the Land Court clarified this statement in the remainder of its decision.

preclusive effect on the Trust Territory's determination in Claim No. 64. Azuma properly notes that Claim No. 64 did not litigate the true location of the disputed land; the only issue determined by the Trust Territory government was whether Azuma's father willingly and legitimately sold it.⁴ But Azuma conceded that this is not a return of public lands claim, and she is not challenging Claim No. 64's underlying determination. Rather, the relevant issue before the Land Court was whether the land that Azuma's father sold in 1941 was a part of Tochi Daicho Lots 261 and 262. The Land Court accepted evidence from both parties regarding the location of the disputed land—evidence that included the records from the 1956 Trust Territory determination in Claim No. 64—and it did not preclude Azuma from litigating the issue of whether her father's claim related to part of the land described as Tochi Daicho Lots 261 and 262, or some other land.

[2] The doctrine of issue preclusion states that “[w]hen an issue of fact or law is actually

⁴ We express no opinion as to whether the 1956 Trust Territory government's determination of ownership in Claim No. 64 would be entitled to preclusive effect for any issue at all. There may be dispute about whether the 1956 parties had a full and fair opportunity to litigate the issues; whether the determination was a valid and final judgment; whether the Trust Territory government represents a proper judicial entity for preclusion purposes; or whether the parties are aligned closely enough to merit preclusion. The Land Court in this case did not apply the doctrine of issue preclusion, rather it used documentation from that proceeding to determine the location of the property in question, and that is as much as we need to find to reject Azuma's argument.

litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Trolii v. Gibbons*, 11 ROP 23, 25 (2003) (quoting Restatement (Second) of Judgments § 27 (1982)). The Land Court did not misapply the doctrine of issue preclusion, nor did it err in finding that the land Azuma's father conveyed in 1941 was a portion of Tochi Daicho Lots 261 and 262. The Land Court cited sufficient evidence to support its conclusion that the property became public and therefore is currently owned by KSPLA.

II. BLS Lot 181-084C: Lynn Merep's and Idong Lineage's Claims

Turning to Azuma's claim for BLS Lot 181-084C, we again find no clear error by the Land Court. The court heard competing evidence from Azuma and the other claimants, namely Lynn Merep and Iked Roisibau Ngirchechol. The court credited the testimony of Merep and Iked Ngirchechol that the land belonged to Idong Lineage and was granted to the children of Ngirboketereng Merep at his eldecheduch. Lynn testified that in 1997, Ngirboketereng filed a claim for the land, commonly known as *Bailked*, and he built and occupied a house on Lot 181-084C and farmed the surrounding areas.

Azuma's claim to BLS Lot 181-084C rested solely on her contention that her father gave the parcel to Koror State under a good faith understanding that it would be used for a public road. The government never built the road, so Azuma seeks return of the property. But Azuma did not present sufficient evidence demonstrating that her father gave the state

permission to build a road over the land, and even Azuma's own witnesses—her brother, Isiais, and BLS Land Registration Officer Ignacio—did not identify Lot 181-084C as a parcel belonging to Azuma's father. Without evidence of the initial understanding with the Koror State government, Azuma faced an uphill battle.

Azuma invokes the theory of common-law dedication, which states that a dedication of land to the public transfers only a servitude or easement, not fee simple ownership. *See Itolochang Lineage v. Ngardmau State Pub. Lands Auth.*, 14 ROP 136, 139 (2007). Therefore, she argues, she remains the fee simple owner of the property because KSPLA never fulfilled the purpose of the servitude or easement. The Land Court determined that Lot 181-084C was not owned by Azuma's father in the first place, however, meaning that he could not have dedicated it to Koror State. Instead, the Land Court found that the land upon which Ngirboketereng Merep built his house was Idong Lineage land that became property of Merep's children at his *eldecheduch*. There was evidence in the record to support this factual determination, and it was not clearly erroneous.

III. BLS Lots 181-084A-2 and B: Idong Lineage's and Lynn Merep's Claims

[3] The next dispute is the proper ownership of BLS Lots 181-084A-2 and B, which appear to fall within Tochi Daicho Lots 261 and 262 on BLS Worksheet 2005 B 04. Azuma notes that ownership by the landowner listed in the Tochi Daicho is presumed to be correct. *See Kerradel v. Ngaraard State Pub. Lands Auth.*, 14 ROP 12, 15 (2006). To rebut this presumption and challenge such

ownership, a claimant must prove by clear and convincing evidence that it is incorrect. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 169 (2006).

In this case, however, the Land Court did not find against Azuma's ownership of Tochi Daicho Lot 262. Instead, the Court determined that the property depicted by BLS Lots 181-084A-2 and B fell within Tochi Daicho Lot 272, rather than Lot 262. Consequently, the Land Court did not negate the presumed accuracy of Azuma's ownership of Lot 262; it merely determined what land is encompassed by that particular lot. The presumption and elevated standard of proof arising from the Tochi Daicho listing are therefore inapplicable.

We are left, then, with competing evidence regarding the proper Tochi Daicho characterization of BLS Lots 181-084A-2 and B. Azuma claimed that the property was part of Tochi Daicho Lot 262. Azuma, her brother, and various other witnesses testified that this property has always belonged to Azuma and her father; that various individuals farmed and used the property with the family's permission; and that Azuma built her house on Lot 181-084A-2 in 1993. Azuma has been living on Lot 181-084A-2 for over fifteen years, and she testified that not once has Idong Lineage objected or complained.

On the other side, Iked Ngirchechol testified that Lot 181-084A-2 and B belong to the Idong Lineage. He testified about the history of the land and that he received instructions from elders that the land should be retained for the Lineage. He purportedly accompanied Iked Etpisong on the land on various occasions, including during a

monumentation in 1972. He therefore asserted that the land was not part of Tochi Daicho Lot 262, but was instead a portion of Tochi Daicho Lot 272. Lynn Merep, whose father built his house in the lot adjacent to BLS Lot 181-084B (Lot C), continuously maintained trees and plants on Lot B.

The Land Court credited Iked Ngirchechol's testimony over the evidence produced by Azuma. The Court noted that Ngirchechol knew the lands, and his testimony was substantiated by the available record, namely Land Acquisition Records showing that Iked Etpisong participated in a monumentation in the 1970s. The Land Court also remarked on Ngirchechol's sincerity in carrying out his responsibilities and his honesty in declining to claim any of the lands within Claim No. 64 or Azuma's Lot 181-084A-1, knowing that they were not Idong Lineage property. Regarding BLS Lot 181-084B, the Land Court heard testimony from both Iked Ngirchechol and Lynn Merep that the property belonged to the Idong Lineage and was conveyed to the children of Ngirboketereng Merep at his eldecheduch.

[4] We reiterate that our task when reviewing the Land Court's factual findings is to determine whether there was clear error. See *Sechedui Lineage*, 14 ROP at 170. The question is not whether we agree with the outcome or whether we would have reached the same conclusion had we heard the evidence ourselves, and we will not reweigh the evidence or draw new inferences from it. See *Children of Rengulbai v. Elilai Clan*, 11 ROP 129, 131 (2004). Here, the Land Court heard competing evidence regarding the boundaries of Tochi Daicho Lots 262 and 272. The court concluded that the testimony of

some witnesses was more credible than that of others. We find that there was sufficient evidence before the Land Court to support its factual findings regarding the ownership of BLS Lots 181-084A-2 and B, and we therefore affirm them.

CONCLUSION

The disputes in this case were not simple and required the Land Court to make difficult factual determinations. The litigants proffered competing views of the evidence, and the Land Court properly based its decisions on evidence in the record. See *Sechedui Lineage*, 14 ROP at 171. We are not "left with a definite and firm conviction that a mistake has been made," *Tmiu Clan v. Ngerchelbuchebe Clan*, 12 ROP 152, 153 (2005), and we therefore AFFIRM the Land Court's determinations regarding ownership of the disputed property.

**SECHEDUI LINEAGE,
Appellant,**

v.

**DMIU CLAN and SANDRA S.
PIERANTOZZI,
Appellees.**

CIVIL APPEAL NO. 08-027
LC/R 06-410

Supreme Court, Appellate Division
Republic of Palau

Decided: January 8, 2010

[1] **Appeal and Error:** Standard of Review:

Where there is evidence supporting two different factual conclusions, the trial court does not clearly err by crediting one over the other.

[2] **Civil Procedure:** Res Judicata

The doctrine of *res judicata* states that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Counsel for Appellant: John K. Rechucher

Counsel for Dmiu Clan: Ernestine K. Rengiil

Counsel for Pierantozzi: Oldiais NgiraiKelau

BEFORE: LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-time Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

This appeal arises from a Land Court proceeding involving twenty-two Tochi Daicho lots and twenty-six worksheet lots, as depicted on the Bureau of Lands and Surveys (BLS) Worksheet No. 2001 R 02. Among numerous claimants, the only appealing party is the Sechedui Lineage, which challenges the Land Court's determination that it was not the rightful owner of certain of these properties. After considering the Sechedui Lineage's arguments, we find no error below.

BACKGROUND

This case involves property in Ngerkeyukl Hamlet, Peleliu State. The disputed land before the Land Court consisted of multiple Tochi Daicho and worksheet lots within the property known as Homestead Lot 160, commonly called *Ngeriwang*.¹ The Sechedui Lineage claimed ownership of some of these disputed lots, which are the only ones

¹ As we address below, the Sechedui Lineage disputes on appeal that the land called *Ngeriwang* includes all of the property included in Homestead Lot 160.

at issue in this appeal.² The Dmiu Clan claimed ownership of all of the disputed land.³

This proceeding has been ongoing for some time. The Land Court first noticed this matter for hearing in 2001, and an initial hearing occurred from January 21 to 31, 2002. The case then sat dormant for a number of years until the Land Court held a second and

final hearing over four days in late February, 2007. After reviewing the testimony presented in the 2001 hearing and presiding over the hearing in 2007, the Land Court issued its final determination on March 26, 2008.

At the hearings, the Dmiu Clan claimed that it has owned *Ngeriwang*—the land that later became Homestead Lot 160—from time immemorial until 1938, when the Japanese government pushed them from their land. The Dmiu Clan argued that it then regained possession of the property in 1959, when it became a homestead lot, and ownership of the land in 1962, when the Trust Territory issued a quitclaim deed to the property. The Clan stated that it has maintained ownership and control from that time to the present.

To support their alleged ownership, the Dmiu Clan presented evidence of its history on the land and the proceedings by which it eventually received a quitclaim deed to Homestead Lot 160. In 1938, the Japanese government took possession of *Ngeriwang* and occupied it during the war, after which the Trust Territory government inherited possession. In 1955, the Dmiu Clan's chief titleholder, Remeliik, sought to regain ownership of the land and filed Claim No. 115 with the Trust Territory government. In 1956, a Land Title Officer of the Trust Territory found that, although the Dmiu Clan owned *Ngeriwang* prior to 1938, the Japanese government took the property by eminent domain and properly compensated the Clan. The Dmiu Clan did not pursue its claim further at that time, and the property was released to the Trust Territory government.

² In its brief, the Lineage separated its claims into to three disputed lands: (1) *Delbochel*, (2) *Debed*, and (3) *Sechedui*. According to the lineage, *Delbochel* refers to Tochi Daicho Lots 1806, 1817, and 1825, which purportedly correspond to BLS Worksheet Lots 291-005, 005A, 005-part, 006, 007, 009A, 010A, 011D. *Debed* refers to Tochi Daicho Lots 1828, 1836, and 1861, which purportedly correspond to BLS Worksheet Lots 291-009, 010, 011, and 011C. Finally, *Sechedui* refers to Tochi Daicho Lot 1862, which purportedly corresponds with BLS Worksheet Lot 291-009A. On appeal, the Sechedui Lineage challenges the Land Court's determinations regarding only *Debed* and *Sechedui*.

³ Appellee Sandra Pierantozzi claimed that the Dmiu Clan conveyed to her certain lots within *Ngeriwang*, Homestead Lot 160. She supported her claim with a Warranty Deed executed in 1983. The Land Court found her testimony credible and therefore held that the Dmiu Clan conveyed the property to her with the knowledge and support of the Clan's senior members. The Dmiu Clan has not appealed this determination and it is not at issue before this Court. Pierantozzi's ownership of this property, therefore, depends on the Dmiu Clan's broader claim to ownership of *Ngeriwang*. That is, if the Dmiu Clan did not own Homestead Lot 160, it could not have conveyed part of that land to Pierantozzi, and she would not be the rightful owner. We will therefore limit our discussion to the Dmiu Clan's claim.

In 1958, however, Remeliik appealed the determination that *Ngeriwang* was government property, arguing that the Japanese took the land by threat and without just compensation. The Dmiu Clan settled the case, agreeing to take a homestead permit for *Ngeriwang*, which at that point became Homestead Lot 160. Less than four years later, in January 1962, the Trust Territory issued the Dmiu Clan a quitclaim deed for Homestead Lot 160. The deed was recorded on October 26, 1963, and the Dmiu Clan claims ownership ever since.

The Sechedui Lineage disputed the Dmiu Clan's claims to certain parts of Homestead Lot 160. At the hearings, the Lineage argued that it has owned and controlled the lands *Debed*, *Delbochel*, and *Sechedui* from time immemorial, long before the Japanese administration. The Lineage presented testimony regarding its ancestral history, when its forefathers sailed by canoe from Angaur and settled in Peleliu at *Debed* and *Delbochel*. The Lineage claimed that at no time did it convey its land to the Japanese government or any foreign power, nor did it occupy the land with permission from the Dmiu Clan. It argued that this land, unlike *Ngeriwang*, never became public property, and the Trust Territory had no right in the land to convey via the 1962 quitclaim deed.

After hearing these claims, the Land Court first determined that the land *Ngeriwang* represented the same property as that in Homestead Lot 160, meaning that *Ngeriwang* encompassed *Debed*, *Delebochel*, and *Sechedui*. The court then held that *Ngeriwang* belonged to the Dmiu Clan, relying primarily on Remeliik's 1955 Trust Territory claim and the 1962 quitclaim deed.

The court found that members of the Dmiu Clan had lived on *Ngeriwang* before the Japanese occupation, ceded their property to the Japanese, and then reclaimed it after the war. Their persistence in pursuing the property indicated prior ownership; the 1962 quitclaim deed from the Trust Territory was evidence of their subsequent ownership.

The court rejected the Sechedui Lineage's claim that it had always owned the disputed property. The court determined that the claimants on behalf of the Lineage had lived on and used the property as members of the Dmiu Clan, not as land owners. As part of this determination, the Land Court cited a 1977 Palau District Court judgment, which found in pertinent part that a man named Sisor Tuchesang and his relatives were members of the Bairrak Lineage of the Dmiu Clan, who later became members of the Sechedui Lineage of the Ucheliou Clan after performing certain work for them. *See Ucheliou Clan v. Sisor Tuchesang, et al.*, Civ. Action No. 67-77 (Palau Dist. Ct. Sept. 14, 1977). The 1977 judgment also held that Sisor Tuchesang and his relatives lived on land owned by the Dmiu Clan, not individually owned property. *Id.* Sisor Tuchesang is the uncle of Misako Kikuo, the claimant and a primary witness for the Sechedui Lineage; he is also the father of Timarong Sisor, a witness for the Lineage. The court also relied on testimony from the Dmiu Clan's primary witness, Idesong Sumang, and a statement by Kikuo's other uncle, Baulechong, who formerly held the second-highest title in the Sechedui Lineage (Adelbeluu). Baulechong signed the Dmiu Clan's 1955 claim to *Ngeriwang*, attesting that the land belonged to that clan.

The Land Court therefore issued its final determination of ownership, granting the land disputed in this appeal to the Dmiu Clan. The Sechedui Lineage claims error in the Land Court’s determinations regarding the properties *Debed* and *Sechedui*.

ANALYSIS

The bulk of the Sechedui Lineage’s appeal challenges the Land Court’s factual findings, which we review for clear error. *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007). We will not set aside the findings so long as they are supported by evidence such that any reasonable trier of fact could have reached the same conclusion, unless we are left with a definite and firm conviction that an error has been made. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006). We review the Land Court’s conclusions of law *de novo*. *Sechedui Lineage*, 14 ROP at 170.

I. Land Court’s Factual Findings

The Sechedui Lineage first attacks the Land Court’s factual finding that the Dmiu Clan has owned *Debed* and *Sechedui* since time immemorial and continues to do so today. As one component of this argument, the Lineage avers that these lands are not part of the property known as *Ngeriwang*, but rather separate lands that also comprised Homestead Lot 160.

As to the first of these findings, the Lineage simply repeats the evidence it produced at the hearings. It summarizes its witnesses’ testimony and the alleged history of its ancestors and the land. We acknowledge, as have the Appellees, that there is some

evidence in the record that the Sechedui Lineage owned a portion of the property in Homestead Lot 160. But the Land Court heard this same evidence—along with competing evidence from the Dmiu Clan—and determined that the Dmiu Clan was the rightful owner. We now sit on appeal with a cold, paper record, unable to see the witnesses’ demeanor or hear their voices. There were at least twenty-five claimants in this case, meaning some claims were false, while some were truthful. It is up to the Land Court to decide between these competing versions of the evidence, which is precisely why we review its findings for clear error. *See Sechedui Lineage*, 14 ROP at 171 (“It is not clear error for the Land Court to credit one proffer of evidence over another so long as one view of the evidence supports the factfinder’s decision.”).

We find sufficient evidence in the record to support the Land Court’s finding that the Dmiu Clan has owned *Ngeriwang* since time immemorial. The Dmiu Clan presented evidence that it owned and possessed the disputed land until the Japanese took possession in 1938, reclaimed the land in 1955, appealed the adverse determination of that claim, and eventually obtained a quitclaim deed to the property in 1962. Idesong Sumang testified that the Dmiu Clan owned the land within Homestead Lot 160 before the Japanese government took it.

The Dmiu Clan also produced documentary evidence to support their assertions, including records from its 1955 claim before the Trust Territory government. Among these records is a statement by the Dmiu Clan claimant, Remeliik, which reflects that *Ngeriwang* belongs to the Dmiu Clan.

Eleven individuals signed this statement and verified its accuracy. One signatory was claimant Kikuo's uncle, Adelbeluu Baulechong, whose signature is probative of *Ngeriwang's* ownership not only in its own right, but also because, as Adelbeluu and Kikuo's elder relative, Baulechong presumably knew the appropriate owner of the land better than his younger relative does many years later. The 1955 claim to *Ngeriwang* also included a map of the property, which corresponds closely with the contours of the property depicted as Homestead Lot 160. Finally, the Dmiu Clan produced the quitclaim deed to Homestead Lot 160, issued in 1962. We have previously held that a court may consider a quitclaim deed as evidence of ownership, *see Basiou v. Ngeskesuk*, 8 ROP Intrm. 209, 210 (2000), and this is particularly true where the deed was issued approximately thirty-five years before Misako Kikuo filed her claims to the land.⁴

⁴ The Sechedui Lineage correctly notes the axiomatic principle that one may only convey a property interest that one actually owns. *See, e.g.*, 63C Am. Jur. 2d *Property* § 35 (“As a matter of general property law, one who does not hold title to property . . . cannot pass or transfer title to that property.”). Nor could the Trust Territory properly create Homestead Lot 160 in 1959 from property it did not own. *See* 35 PNCA § 801 *et seq.* (defining homestead areas as “public lands”); *see also* 67 TTC § 201 *et seq.* (same). The Land Court, however, considered and rejected the Lineage's claim that it had owned the land since time immemorial, meaning that it found that the Trust Territory government properly owned the land when it created Homestead Lot 160 and when it subsequently issued the quitclaim deed in 1962. The deed, therefore, is relevant evidence of

As additional evidence, the Land Court cited Civil Action No. 67-77, in which the Palau District Court of the Trust Territory government found that Kikuo's uncle, Sisor Tuchesang, was a member of the Dmiu Clan and that he and his relatives occupied land owned by the Dmiu Clan. This evidence, although not determinative, provides further support for the Land Court's determination. The Land Court weighed all of this evidence against that of the Sechedui Lineage. The court then made permissible factual findings supported by that evidence.

The Lineage's second argument also fails. The Lineage asserts that the lands *Debed* and *Sechedui* are not a part of the land *Ngeriwang*, but rather are a distinct portion of Homestead Lot 160. During the proceedings below, both the Land Court and some of the parties referred to Homestead Lot 160 and the land known as *Ngeriwang* interchangeably. For example, the Land Court found that this proceeding was to determine “ownership of lands within the land known as *Ngeriwang*, Homestead Lot 160,” and specifically that *Debed* and *Delbochel* are lands within *Ngeriwang*. LC/R No. 06-410, Decision at 3-4 (Land Ct. Mar. 26, 2008).

In support of the Lineage's argument that Homestead Lot 160 encompasses more than just *Ngeriwang*, it notes that the Dmiu Clan's initial claim for *Ngeriwang* in 1955 described the land as located in the village Wosech, not in the village of Ngerkeyukl or Ngerkeiukl Hamlet where *Debed* and *Sechedui* are located. The Lineage also notes that Remeliik, the Dmiu Clan's claimant in

ownership of the property.

1955, described *Ngeriwang* as including part of an airfield, a description that apparently does not apply to *Debed* and *Sechedui*.

We are unable to find that the Land Court clearly erred in finding that *Debed* and *Sechedui* are a portion of the land described as Homestead Lot 160 and *Ngeriwang*. The Lineage relies on summary descriptions of the land in a claim made over fifty years ago. The parties do not dispute, however, that in 1955, the Dmiu Clan *only* claimed a property named “*Ngeriwang*,” and this claim eventually resulted in the Trust Territory conveying Homestead Lot 160 to the Clan. The Land Court did not commit clear error by thus concluding that the two are the same. Homestead Lot 160, by definition, could only have encompassed the land that the Dmiu Clan claimed in 1955; the creation of Homestead Lot 160 was a settlement of that very claim. The Clan also included a map of property with its 1955 claim, which corresponds to what later became Homestead Lot 160. To the extent that the Sechedui Lineage argues that the description in the 1955 claim was overly broad, we are left wondering why they waited over forty years to say so.

[1] We acknowledge that Misako Kikuo presented testimony that *Ngeriwang* did not include the disputed lands *Sechedui* and *Debed*. The Sechedui Lineage, however, admitted that the disputed land was within Homestead Lot 160. The Land Court considered all of the evidence and concluded that the land comprising Homestead Lot 160 properly belonged to the Dmiu Clan. Where there is evidence supporting two different factual conclusions, the court does not clearly err by crediting one over the other. See *Sechedui Lineage*, 14 ROP at 171; *Rechucher*

v. Lomisang, 13 ROP 143, 146 (2006). Here, the Land Court did not err by choosing to credit the Dmiu Clan’s evidence over that presented by Kikuo and the Sechedui Lineage.

II. Doctrine of *Res Judicata*

As its next claim of error, the Sechedui Lineage argues that the Land Court improperly applied the doctrine of *res judicata* to preclude it from litigating a factual issue. As evidence against the Sechedui Lineage’s claim, the Land Court cited the aforementioned 1977 Palau District Court judgment, which found in pertinent part that Sisor Tuchesang and his relatives were part of the Dmiu Clan and had lived on land owned by the Dmiu Clan. The Land Court noted that Misako Kikuo’s testimony conflicted with these findings.

[2] The Lineage now claims that by referring to this judgment, the Land Court improperly applied the doctrine of *res judicata*, which states that “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Rechucher*, 13 ROP at 147 (quoting Restatement (Second) of Judgments § 27 (1982)).

The Sechedui Lineage properly notes that the 1977 proceeding involved issues distinct from those before the Land Court in 2008. That case involved a dispute over the appointment of the highest title of the Ucheliou Clan. The Lineage is also correct that the prior proceeding involved different

parties. Indeed, the Lineage has a good argument that the 1977 judgment should not receive any preclusive effect, although we need not make that determination here.

Where the Lineage's argument goes awry, however, is that the Land Court did not give preclusive effect to the 1977 judgment. It did not bind the Lineage to the judgment, nor did it preclude the Lineage from litigating any particular fact. The Land Court referred to the decision as additional evidence in considering both (1) the ownership of the disputed properties, and (2) the credibility of the Lineage's witnesses, particularly Misako Kikuo. The Land Court noted that Kikuo's testimony that her ancestors owned the land long ago was contrary to the 1977 judgment, which found that her ancestors were part of the Dmiu Clan and had lived on the property with that Clan's permission.⁵ The court considered the inconsistency as evidence of the witness's credibility and the proper ownership of the land. The Sechedui Lineage was free to present evidence refuting the 1977 findings; indeed, most of the Lineage's evidence was offered to dispute those precise facts. The Land Court therefore did not improperly apply the doctrine of *res judicata*

and did not err by referring to the 1977 judgment as additional evidence in this matter.

CONCLUSION

The Land Court rendered its decision in this protracted and bulky proceeding based on the evidence before it. Although the Sechedui Lineage presented some evidence in its favor, so too did the Dmiu Clan, and we cannot say that the Land Court clearly erred by finding in favor of the latter. We therefore affirm.

⁵ The 1977 judgment expressly states that the Ucheliou Clan in Ngerkiukl Hamlet encompasses three original lineages, one of which is the Sechedui Lineage. *Tuchedesang*, Civ. Action. No. 67-77, at 2. The Palau District Court found that "[t]he defendants, Sisor Tuchedesang and others of his relation, are members of Bairrak lineage of Dmiu clan." The court further found that "Sisor Tuchedesang and others of his relation all occupy lands *owned by Dmiu clan*, with no land of Ucheliou clan in their possession at present time." *Id.* (emphasis added).

**IGNACIO ANASTACIO,
Appellant,**

v.

**PALAU PUBLIC UTILITIES
CORPORATION and REPUBLIC OF
PALAU,
Appellees.**

CIVIL APPEAL NO. 08-042
Civil Action No. 04-206

Supreme Court, Appellate Division
Republic of Palau

Decided: January 8, 2010

[1] **Appeal and Error:** Standard of Review

The Appellate Division reviews a lower court’s interpretation of a contract *de novo*.

[2] **Property:** Ejectment

The right to exclusive possession of real property is sufficient to provide a basis to bring an action in trespass or ejectment against an unwanted occupier.

[3] **Property:** Licences:

The right to possess real property includes the right to terminate a revocable license to occupy the land, but does not include the right to terminate an irrevocable license to occupy the land. The transfer of the right to possess real property automatically terminates limited privileges to occupy land.

Counsel for Appellant: Raynold B. Oilouch

Counsel for Palau Public Utilities Corp.:
Oldiais Ngiraikelau

Counsel for Republic of Palau: Nelson J. Werner

BEFORE: LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Ignacio Anastacio brought an action in trespass and ejectment against Palau Public Utilities Corporation (“PPUC”) and the Republic of Palau (“the Republic”) before the Trial Division. The court below entered judgment in the defendants’ favor and ordered that Anastacio take nothing. Anastacio appealed that ruling to this Court and, for the reasons stated herein, we reverse and remand to the Trial Division for further consideration.¹

BACKGROUND

Neither Anastacio nor PPUC objects to the Trial Division’s findings of fact. The Republic claims some error in the trial court’s findings, but these alleged discrepancies are not material for the purposes of this appeal.

¹ Although the Republic requested oral argument, we deemed such argument unnecessary for resolution of this matter and therefore treat this case as submitted on the briefs in accordance with ROP R. App. P. 34(a).

Therefore, we adopt, without review, the findings of fact of the Trial Division for the purposes of this appeal. *See* Civ. Act. No. 04-206, Decision at 2-4 (Tr. Div. June 12, 2008).

Dr. Yuzi Mesubed acquired ownership of a parcel of land located in Ngetkib, Airai, through a land exchange with the Airai State Public Lands Authority. The land Mesubed acquired is known as *Rengesuul*. Mesubed began exercising his authority over *Rengesuul* in 1985, but deeds were not executed to confirm the transfer until 1987.

Sometime in the mid-1980s officials representing the Republic approached Mesubed and requested permission to construct an electric power substation on a portion of *Rengesuul*. Mesubed consented to the substation provided that the parties would enter into a lease agreement and the Republic would pay rent for the use of the land. No lease agreement was executed, but the Republic nonetheless built the substation on *Rengesuul*.

The substation was completed in 1986. The Republic maintained the substation until 1994 when it conveyed its interests in the substation to PPUC. PPUC has maintained the substation since that time. The substation is contained within a portion of *Rengesuul* measuring approximately 2,000 square meters. *Rengesuul* comprises approximately 11,139 square meters in total.

In 1998 Anastacio negotiated a lease agreement with Mesubed and leased the entirety of *Rengesuul* from Mesubed for a period of fifty years. At the time of the lease Anastacio was aware of the substation as well as ten power poles on the property. Since the

execution of the lease, PPUC has erected an additional three or four more power poles and has placed some machinery on the property. On September 24, 2001, Anastacio wrote to the PPUC Chairman and Board of Directors requesting rental payment from PPUC or removal of PPUC's operations on *Rengesuul*. PPUC declined and stated that it would charge Anastacio \$800 for the removal of each power pole.

Anastacio filed a complaint in the Trial Division against PPUC for trespass and ejectment. That complaint was later amended to include the Republic as a defendant. After hearing the evidence at trial, the court below issued judgment in the defendants' favor. Anastacio filed a timely appeal.

STANDARD OF REVIEW

[1] The trial court's conclusions of law, including the interpretation of a contract, are reviewed *de novo* on appeal. *See Estate of Rechucher v. Seid*, 14 ROP 85, 88-89 (2007).

DISCUSSION

The Trial Division set forth two bases for its denial of Anastacio's claims: (1) the lease agreement between Anastacio and Mesubed did not assign the right (if any exists) to seek or receive rental payments from PPUC or the Republic; and (2) Anastacio cannot now complain about PPUC's presence on the land because he entered into the lease agreement with knowledge of that presence. *See* Civ. Act. No. 04-206, Decision at 5-6 (Tr. Div. June 12, 2008). Because these bases do not, *a fortiori*, demand the denial of Anastacio's claims, the judgment of the Trial

Division is reversed and this matter is remanded for further consideration.

The Trial Division found that Anastacio lacks the right to sue PPUC or the Republic for their presence on *Rengesuul* because his lease agreement with Mesubed did not contain a specific provision assigning Mesubed's rights against current occupiers of the land. While the Mesubed-Anastacio lease agreement does not mention the substation or PPUC's activities specifically, it does grant Anastacio the right to "exclusive use of the property." (Mesubed-Anastacio Lease Agrm't, ¶ 3, Apr. 22, 1998.)

[2] Both trespass and ejectment are actions rooted in a plaintiff's right to possess real property. *See* Restatement (Second) of Torts, Ch. 7, Topic 1, Scope Note (1965) ("[The chapters on trespass on land and privilege to enter land] deal with invasions of the interest in the exclusive possession and physical condition of land."). Anastacio, by the terms of the lease agreement, held the exclusive right to possess *Rengesuul*. That right of possession is sufficient to provide Anastacio a basis to bring an action in trespass and ejectment against unwanted occupiers during the term of the fifty year lease. *See* Restatement (Second) of Torts § 158. No separate or explicit assignment of the right to sue or the right to seek rental payments is necessary for Anastacio to bring his action. The right to sue for trespass and ejectment is inherent in the exclusive right to possess real property. *See id.*

Anastacio also appeals the Trial Division's conclusion that he cannot maintain an action because he knew that PPUC was occupying a portion of the land rent-free when

he entered into the lease agreement with Mesubed. The Trial Division failed to define PPUC's status vis-à-vis *Rengesuul*. Depending on PPUC's status relating to the land, Anastacio may or may not be within his rights to demand compensation for PPUC's use of the land.

[3] If PPUC is a common trespasser then Anastacio was free to seek removal or damages for the trespass as soon as he gained a possessory interest. *See* Restatement (Second) of Torts § 158.² Anastacio, armed with his right to current possession, would also be within his rights to terminate any sort of limited or revocable license that Mesubed may have granted (or created through implication) in favor of PPUC or the Republic. *See* Restatement (Second) of Torts § 171(c). Indeed, the transfer of Mesubed's possessory right to the land would automatically terminate a limited privilege to remain on the land. *See id.*; *see also id.* § 171(c) cmt. f ("A consent given by one in possession of land ceases to be effective as conferring a privilege to enter or remain, when

² PPUC argues that Anastacio cannot sue for trespass because he did not possess the land at the time that the Republic (and subsequently PPUC) entered the land. (PPUC Br. at 7, 9-10.) Under this rationale a purchaser of land would have no recourse against a trespasser who was present on the land before the transfer of title. Such a rule would not make for good policy, let alone good neighbors. *See* Restatement (Second) of Torts § 158(b) ("One is subject to liability to another for trespass . . . if he intentionally remains on the land."); *see also id.* § 158(b) cmt. b ("[T]he phrase 'enters land' is for convenience used . . . to include, not only coming upon land, but also remaining on it.").

the interest of the licensor in the land is terminated.”). But if PPUC or the Republic had achieved an irrevocable license then Anastacio cannot—as the name implies—terminate that license. *See id.* cmt. i (“[A] license coupled with an interest may under some circumstances amount to a property interest in the land itself, of a kind which is irrevocable, either by the licensor or by his transferee.”); *see also Ulechong v. Palau Pub. Utils. Corp.*, 13 ROP 116, 121 n.3 (2006).

This determination—whether PPUC’s status is that of trespasser, revocable licensee, irrevocable licensee, or another status altogether—is therefore key to discerning whether Anastacio has the right to recover from PPUC or the Republic in tort. Whether or not Anastacio knew of PPUC’s occupation of a portion of the land is not conclusive. The crucial question is whether PPUC has a right to maintain its operations on Rengesuul that Anastacio cannot revoke. This determination must be made by the Trial Division in the first instance. On remand the Trial Division should consider the parties’ arguments and defenses regarding this question as well as the defendants’ properly pled affirmative defenses. It should further consider whether PPUC is liable to Anastacio regarding the more recent activity since the time of the lease agreement.

CONCLUSION

For the foregoing reasons, we REVERSE the decision of the Trial Division and REMAND this matter for further consideration.

**TECHEBOET LINEAGE,
Appellant,**

v.

**BELECHL NGIRNGEBDANGEL,
IDONG LINEAGE, NGERBODEL
HAMLET, TELUNGALEK RA IKED,
and TELUNGALEK RA METIEK,
Appellees.**

CIVIL APPEAL NO. 09-011
LC/B 01-527; LC/B 01-528; LC/B 01-529;
LC/B 01-530

Supreme Court, Appellate Division
Republic of Palau

Decided: January 14, 2010

[1] **Property:** Statute of Limitations

Filing a claim with the proper authority tolls the statute of limitations clock for claims to land even in the absence of a filed lawsuit for recovery of land. Land claimants should not be penalized for pursuing their claims through the legislatively-blessed claim method rather than through the filing of an individual lawsuit.

Counsel for Appellant: Salvador Remoket

BEFORE: ARTHUR NGIRAKLSONG,
Chief Justice; ALEXANDRA F. FOSTER,
Associate Justice; HONORA E.
REMENGESAU RUDIMCH, Associate
Justice Pro Tem.

Appeal from the Land Court, the Honorable
SALVADOR INGEREKLII, Associate Judge,
presiding.

PER CURIAM:

This appeal is Techeboet Lineage's challenge to certain determinations of land ownership by the Land Court. The land at issue is located in Ngerbodol, Ngerchemai Hamlet, Koror State. Although five parties are named as appellees, the substance of the appeal only relates to parcels awarded to Belech Ngirngbedangel.¹ Therefore the other four appellees—Idong Lineage, Ngerbodol Hamlet, Telungalek raked, and Telungalek ra Metiek—are dismissed from the appeal. For the reasons set forth below, the challenged determinations of ownership are affirmed.

BACKGROUND

In the proceeding below, the Land Court awarded Ngirngbedangel the following fifteen lots on Bureau of Lands and Surveys Worksheet No. C3 B 00: Lot Nos. 181-191, 181-191A, 181-191B, 181-191C, 181-191E, 181-191G, 181-191K, 181-191P, 181-191P-1, 181-191Q, 181-191T, 181-034A, 181-034B, 181-034D, 181-034H. *See* Land Ct. Case Nos. LC/B 01-527, LC/B 01-528, LC/B 01-529, LC/B 01-530, Decision at 18 (Land Ct. Oct. 31, 2008). Techeboet Lineage claimed thirteen lots before the Land Court: Lot Nos. 181-191,² 181-191A, 181-191B, 181-191C,

181-191D, 181-191E, 181-191G, 181-191H, 181-191J, 181-191K, 181-191M, 181-191P, and 181-034H.³ (*See* Appellant's Br. at 1.) By comparing the lists,⁴ it appears that the nine overlapping lots at issue (those claimed by Techeboet Lineage but awarded to Ngirngbedangel) are: Lot Nos. 181-191, 181-191A, 181-191B, 181-191C, 181-191E, 181-191G, 181-191K, 181-191P, and 181-034H.⁵

mistake, as the Land Court stated that Techeboet Lineage claimed Lot No. 181-191 and no Lot No. 181-191I was awarded. *See* Land Ct. Decision at 4, 12.

³ Techeboet Lineage was awarded four lots: Lot Nos. 181-191H, 181-191J, 181-191M, and 181-191N-1. *See* Land Ct. Decision at 17. We note that the Land Court awarded Lot No. 181-191N-1 to Techeboet Lineage without discussion and, possibly, without Techeboet Lineage even claiming it (it is not listed either in Techeboet Lineage's appellate brief or in the Land Court opinion as a claimed property of Techeboet Lineage). But that is not before us.

⁴ The task of defining the lots at issue should have fallen on the appellant, rather than on the Court.

⁵ We note that four of the lots awarded to Ngirngbedangel (Lot Nos. 181-191E, 181-191G, 181-191P-1, and 181-191T) were not specifically addressed in the section of the Land Court's opinion discussing its awards to Ngirngbedangel. *See* Land Ct. Decision at 10. Two of those four undiscussed lots (Lot Nos. 181-191E and 181-191G) are part of the appealed lots before us. Upon close reading of the Land Court's opinion, the award of those lots to Ngirngbedangel (at least compared to the claim of Techeboet Lineage) is sufficiently explained in the section of the opinion addressing the claims of Techeboet Lineage. *See id.* at 12-13. The Land Court should be mindful,

¹ Although Techeboet Lineage named "Belech Ngirngbedangel" as an appellee, we use the spelling on the Land Court's determination of ownership, "Belech Ngirngbedangel."

² Techeboet Lineage's brief states that it claimed Lot No. 181-191I but does not mention its claim to Lot No. 181-191. (*See* Techeboet Lineage Br. at 1.) This statement is an apparent

The Land Court grounded its awards to Ngirngabdangel in his statute of limitations defense. The Land Court found that Ngirngabdangel purchased property from Iked Etpison in 1976 and additional property from Yukiwo Etpison in 1983.⁶ The Land Court further found that Ngirngabdangel occupied those parcels continuously—and without objection—since the respective purchases. However, in 1988 Techeboet Lineage’s representatives, Bilung G. Salii and Ibedul Y. Gibbons, filed a “Claims for Public Lands” form with the Land Claims Hearing Office (“LCHO”). Techeboet Lineage appeals the Land Court’s determinations of ownership, largely based on the argument that the 1988 public lands claim tolled the statute of limitations. No responsive briefs were filed.

STANDARD OF REVIEW

Although we review the Land Court’s findings of fact for clear error (*see Ngerungel Clan v. Eriich*, 15 ROP 96, 98 (2008)), this appeal presents a question of law. We therefore review it *de novo*. *See Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007).

DISCUSSION

Techeboet Lineage does not argue that Ngirngabdangel’s possession of the land failed

however, that the specific basis for the award of each lot should be clearly set forth in its opinions, lest we find ourselves incapable of reviewing its awards.

⁶ Techeboet Lineage does not dispute this finding and instead cites to it as fact. (Appellant’s Br. at 2.)

any aspect of the test for the running of the statute of limitations for claims concerning land (e.g., that his possession was actual, open, visible, notorious, continuous, hostile or adverse, and under claim of right or title). We therefore do not review those aspect of the Land Court’s decision. We will narrowly confine our review to the appealed issue: whether the 1988 public lands claim of Gibbons and Salii tolled the statute of limitations clock as to Ngirngabdangel.

[1] We have previously stated that filing a claim with the LCHO tolls the statute of limitations clock for claims to land even in the absence of a filed lawsuit for recovery of land. *See Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 17, 21 & n.5 (1998). Land claimants should not be penalized by pursuing their claims through the (then-)legislatively-blessed LCHO method rather than through filing individual suits in court. *See id.* To determine whether the 1988 LCHO claim effectively interrupted Ngirngabdangel’s possession of the appealed lots, we must inspect the language of the claim.

The form, entitled “Claims for Public Land (Pursuant to 35 PNC § 1104),” was filed by Gibbons and Salii with the LCHO on December 30, 1988.⁷ The claimed lands are

⁷ 35 PNC § 1104 has since been repealed, but at the relevant time provided in subsection (a) that the LCHO would make determination of ownership of all lands within the Republic and provided in subsection (b) that (subject to certain restrictions) the LCHO would award ownership of public lands wrongly acquired by occupying powers to individual claimants. It is unlikely coincidental that Gibbons and Salii filed their claim two days before the date—January 1,

described as being located in the state of Koror in the hamlets of “Ngerbodel, Ngerchemai, Ngerias, Semiich, Top-side, Toker.” In response to the section labeled “Approximate area,” the claimants responded “See Exh. 2 (map).” No such map appears to have made it into the record before us. In response to the query “What right or interest do you claim in this land?”, the claimants responded “We claim titles and ownership as surviving heirs and as heads of clan and lineages.” According to the form, Gibbons and Salii “claim[ed] titles and ownership by birthrights and by [their] position in clan and lineages owning such lands.” The form alleges that the lands were “[c]laimed [] as public lands without explanation” and “[u]sed for government buildings, farming and others.”

Inspection of the 1988 public lands claim of Gibbons and Salii leaves the reader at a loss to discern the precise locations of the lands claimed or the identities of the clans or lineages for whom the lands were claimed. Moreover, based on the evidence adduced, the claim to “public lands”—as its name suggests—appears to have been an attempt by Gibbons and Salii to regain public lands. The 1988 public lands claim did not sufficiently put Ngirngabdangel on notice that Techeboet Lineage was asserting its ownership rights against him over the appealed lots. Based on the record on appeal, the 1988 public lands claim is too vague to have tolled the statute of limitations clock against Ngirngabdangel and in favor of Techeboet Lineage.

1989—set to bar further claims to public lands via subsection (b).

CONCLUSION

Because, on the record before us, the 1988 public lands claim of Gibbons and Salii did not toll the statute of limitations in Techeboet Lineage’s favor, the Land Court’s ruling below as to the matter at issue in this appeal is affirmed.⁸

⁸ Koror State Public Lands Authority (“KSPLA”) has separately appealed the Land Court’s determinations of ownership in the proceeding below, including five lots—Lot Nos. 181-191B, 181-191C, 181-191E, 181-191P, and 181-034H—appealed by Techeboet Lineage in the instant case. *See Koror State Pub. Lands Auth. v. Idong Lineage*, 17 ROP 82 (2010). In that appeal, concurrently decided, KSPLA was successful in achieving vacation of the award to Ngirngabdangel of those five lots (among others). However, that vacation was specific to KSPLA and does not permit Techeboet Lineage another opportunity to press its claims.

**KOROR STATE PUBLIC LANDS
AUTHORITY,
Appellant,**

v.

**IDONG LINEAGE, BELECHL
NGIRNGEBDANGEL, TELUNGALEK
RA IKED AND METIEK, NGERBODEL
HAMLET, and TECHEBOET
LINEAGE,
Appellees.**

CIVIL APPEAL NO. 08-058
LC/B 01-527; LC/B 01-528; LC/B 01-529;
LC/B 01-530

Supreme Court, Appellate Division
Republic of Palau

Decided: January 14, 2010

[1] **Appeal and Error:** Standard of Review

The Appellate Division reviews the Land Court's findings of fact for clear error. Under this high standard, a lower court's findings of fact will be deemed clearly erroneous only when it is so lacking in evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.

[2] **Property:** Statute of Limitations

In actions claiming land, the statute of limitations and the doctrine of adverse possession are two sides of the same coin. To employ the statute of limitations against competing claimants to land, a claimant must show that its possession of the land was actual, open, visible, notorious, continuous,

hostile, and under a claim of right for twenty years.

[3] **Property:** Statute of Limitations

Possession of land with consent of the owner is not hostile and therefore does not commence the running of the statute of limitations.

[4] **Property:** Adverse Possession

Land cannot be "taken" from the government through adverse possession.

[5] **Property:** Statute of Limitations

The statute of limitations cannot be employed to bar the government's claim to land.

[6] **Land Commission/LCHO/Land Court:** Claims

The Land Court must award contested land to a claimant and may not award the land to a non-claimant.

Counsel for Appellant: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; ALEXANDRA F. FOSTER, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

On October 31, 2008, the Land Court issued its determinations of ownership of twenty-five worksheet lots on Bureau of Lands and Surveys Worksheet No. C3 B 00. Koror State Public Lands Authority (“KSPLA”) claimed ten of the determined lots but was awarded none. KSPLA seeks reversal of the Land Court’s determination of those ten lots. The following lots are at issue: Lot Nos. 181-034H, 181-191A, 181-191B, 181-191C, 181-191E, and 181-191P (awarded to Belech Ngirngabdangel); Lot Nos. 181-191D and 181-191N (awarded to Idong Lineage); Lot No. 181-191H (awarded to Techeboet Lineage); and Lot No. 181-191L (awarded to Ngerbodel Hamlet).

KSPLA raises three primary arguments on appeal. First, KSPLA argues that competing claimants to all ten lots are barred by the statute of limitations because it has controlled the land for over twenty years. Second, KSPLA contends that the Land Court erred in awarding the six lots to Ngirngabdangel on the basis of the running of the statute of limitations because that defense is not effective against governmental entities in land claim actions. Lastly, KSPLA argues that the award of Lot No. 181-191H to Techeboet Lineage was clearly erroneous because the Land Court rejected the basis of Techeboet Lineage’s claim. We address each argument in turn and order a partial vacation of the Land Court’s determination.

BACKGROUND

As stated above, the Land Court made determinations of ownership as to twenty-five worksheet lots from Bureau of Land Surveys Worksheet No. C3 B 00 on October 31, 2008.

The determined land is located in Ngerbodel, Ngerchemai Hamlet, Koror State. *See* Land Ct. Case Nos. LC/B 01-527, LC/B 01-528, LC/B 01-529, LC/B 01-530, Decision at 2 (Land Ct. Oct. 31, 2008). The Land Court heard testimony over three days in October, 2007. KSPLA claimed ten worksheet lots, primarily relying on residential leases it alleged to administer on the land. *See id.* at 7-8. The Land Court found that individual lease holders occupied four of the lots, but awarded no lots to KSPLA.¹ *See id.* at 9, 16-17. The Land Court rejected KSPLA’s argument that the statute of limitations had run on its ten claimed lots because private claims to ownership of the land were asserted and pending during the leasehold terms. *See id.* at 16. The Land Court further stated that the lots at issue were not expropriated by the Japanese administration and therefore did not become government land at the end of World War II, the lots were not listed as government properties in the Tochi Daicho, and KSPLA’s leases contained a disclaimer provision stating that it might not be the owner of the lands. *See id.* at 17. KSPLA filed a notice of appeal followed by its opening brief. No responsive briefs were filed.

STANDARD OF REVIEW

[1] We review the Land Court’s findings of fact for clear error. *See Ngerungel Clan v. Eriich*, 15 ROP 96, 98 (2008). Under this high standard, a lower court’s finding of fact

¹ The Land Court only found that four of the lots were leased, but did not find the identity of the lessor or the lessees. *See* Land Ct. Decision at 9. Indeed, one of the lots found to be leased (Lot No. 181-191M) was not claimed by KSPLA.

will be deemed clearly erroneous only when it is so lacking in evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion. *See Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004). We conduct our review of questions of law, on the other hand, *de novo*. *See Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007).

DISCUSSION

Before addressing KSPLA's substantive arguments, we engage in preliminary housekeeping. KSPLA listed Telungalek ra Iked and Metiek as appellees on the face of its opening brief and served them with a copy of the brief. But KSPLA does not claim—and has never claimed—any of the lots awarded to Telungalek re Iked and Metiek (Lot Nos. 181-034, 181-034C, and 181-034E). KSPLA had no business listing Telungalek re Iked and Metiek as a party to the appeal in the first place and we dismiss them as appellees.

I. KSPLA's Statute of Limitations Defense

KSPLA argues that the Land Court erred by awarding Lot Nos. 181-191A, 181-191B, 181-191C, 181-191D, 181-191E, 181-191H, 181-191L, 181-191N, 181-191P, and 181-034H to other claimants in the face of its statute of limitations defense. KSPLA claims that the statute of limitations bars all competing claims to the lots because it leased the lots at issue to individuals at least as far back as 1976 and the Land Court hearing did

not take place until 2007.² (*See* Appellant's Br. at 8-11.) KSPLA misses the mark.

[2, 3] KSPLA's first miscue is its reliance on the lease documents as sufficient evidence to support its statute of limitations defense. As KSPLA itself points out, in actions claiming land, the statute of limitations and the doctrine of adverse possession are "two sides of the same coin." *Ilebrang Lineage v. Omtilou Lineage*, 11 ROP 154, 157 n.3 (2004); *see also infra* Section II. Therefore, KSPLA must show that its possession of the land was actual, open, visible, notorious, continuous, hostile, and under claim of right for twenty years to employ the statute of limitations defense against competing claimants. *See id.* KSPLA has failed in this regard. Rather, it submits the lease documents as its evidence without pointing the court to testimony demonstrating that it (or its lessees) actually possessed the land for twenty years with the requisite hostility necessary to invoke the statute of limitations defense.³ The testimony

² For simplicity of reference, we refer to KSPLA and the Trust Territory government (its predecessor for purposes of this claim) as one entity.

³ KSPLA states, without citation, that "Evidence in the record reflects that all appellees who claimed lots within Tract/Lot Numbers 40163, 40164, and 40165 were aware of the government's claim, possession, control, and maintenance of the lots as government or public lands as far back as 1974 and at the latest 1976." (Appellant's Br. at 10.) Especially where, as here, the appellant is represented by competent counsel, it is not the responsibility of the court to scour the record searching for facts to support the appellant's claim.

that KSPLA cites does not bolster its statute of limitations claim because it merely states that some of the claimants were aware of the leases, not that the lessees hostilely possessed the land. (*See* Appellant's Br. at 10-11.) KSPLA's one reference to possession, Roisisbau Ngirchechol's testimony that Delngelii Kintaro possessed Lot No. 181-191D since 1956 (*see id.* at 10), was explicitly dealt with by the Land Court when it found that Kintaro possessed the land with the consent of Idong Lineage. *See* Land Ct. Decision at 11-12. Possession with the consent of the owner is not hostile and therefore does not commence the running of the statute of limitations. *See Seventh Day Adventist Mission of Palau, Inc. v. Elsau Clan*, 11 ROP 191, 194 (2004) (requisite hostility for adverse possession not found where use is permissive). For these reasons, the Land Court was correct in finding that the appealed lots did not become the property of KSPLA through the running of the statute of limitations for recovery of land.

II. The Land Court's Imposition of Statute of Limitation Against KSPLA

KSPLA appeals the Land Court's award of Lot Nos. 181-191A, 181-191B, 181-191C, 181-191E, 181-191P, and 181-034H to Belechl Ngirngbedangel. The Land Court awarded these six lots to Ngirngbedangel because it found that any other claims to the lots had been "barred by the doctrine of estoppel, laches, and statute of limitations." Land Ct. Decision at 10. The Land Court's opinion is void of any discussion or analysis with respect to estoppel and laches, thus precluding meaningful review of those findings. We take the lack of estoppel and laches analysis to mean that the true basis for

the Land Court's awards to Ngirngbedangel was the statute of limitations bar. We review its awards accordingly and find that vacation of a portion of the Land Court's ownership determinations is necessary.⁴

The Land Court found that Ngirngbedangel purchased a parcel of land from Iked Etpison in 1976 and another parcel from Yukiwo Etpison in 1983. *See* Land Ct. Decision at 9. The Land Court found that any claims for recovery of the land are now barred by 14 PNC § 402 because no one objected to Ngirngbedangel's occupation during the twenty years following his purchase of the land.⁵ *See id.* at 10.

In Palau, the statute of limitations regarding actions to recover land and the doctrine of adverse possession are regarded as constant bedfellows. This view is so well entrenched in the case law that it would require us to embark on a startling departure

⁴ In actuality it appears that the Land Court failed to explicitly express its rationale for awarding Lot No. 181-191E to Ngirngbedangel rather than KSPLA. We would reach the same result—vacation of the award—regardless of whether we assumed that Lot No. 181-191E was also awarded on statute of limitations grounds or if we instead halted our analysis at the realization that the Land Court failed to sufficiently set forth the basis of its decision with respect to KSPLA's claim to Lot No. 181-191E. We are not pleased to have the luxury of such options; the Land Court should ensure that its opinions carefully set out the bases of each determination of ownership.

⁵ 14 PNC § 402(a)(2) provides that actions for the recovery of land (or any interest in land) shall be commenced within twenty years after the cause of action accrues.

from precedent to overrule it today. *See, e.g., Brikul v. Matsutaro*, 13 ROP 22, 24 (2005) (a claimant obtains much the same result whether claiming under adverse possession or invoking the statute of limitations; both doctrines require proof of the same elements); *Ilebrang Lineage*, 11 ROP at 157 n.3 (“14 PNC § 402(a) and adverse possession are two sides of the same coin.”); *Otobed v. Etpison*, 10 ROP 119, 120 (2003) (“This Court has treated the statute of limitations in land disputes as though it creates an ownership interest for an adverse claimant, just as adverse possession does.”); *Palau Pub. Lands Auth. v. Salvador*, 8 ROP Intrm. 73, 77 (1999) (“Adverse possession and the statute of limitations *must* be considered together.” (emphasis added)).

[4, 5] It is also well-established that land cannot be “taken” from the government through adverse possession. *See Salvador*, 8 ROP Intrm. at 76 (“[O]ne cannot obtain title against the government based upon a claim of adverse possession. This is a long-standing and well-known rule, admitting of few exceptions.”). Because land administered by Palau Public Lands Authority is treated as ‘government land’ for the purpose of avoiding adverse possession (*see id.* at 74 n.1), it is a fair extension to provide the same protection to lands held by state public lands authorities, as the public nature of land is not extinguished by the transfer of government land from the national public lands authority to a state public lands authority. *See* 35 PNC § 215 (authorizing the creation of state public lands authorities to carry out the same function as Palau Public Lands Authority on the state

level).⁶ Given that adverse possession and the statute of limitations are two sides of the same coin, it is a sensible extension of the rule that the statute of limitations defense cannot be asserted against the government in land claims—otherwise the bar against the use of adverse possession against the government would lack all meaning.

Connecting the dots, the Land Court’s decision granting the lots in question to Ngirngabdangel was clearly erroneous because the statute of limitations is not an effective defense against a government entity in a land claim contest. The awards of Lot Nos. 191-191A, 181-191B, 181-191C, 181-191E, 181-191P, and 181-034H to Belechl Ngirngabdangel are vacated. Because the basis of the vacation is specific to the government, the Land Court should consider only the claims of KSPLA and Ngirngabdangel in re-awarding these disputed lots.⁷ The Land Court is, of course, free to re-

⁶ We are cognizant that we have previously deemed that Koror State Public Lands Authority is not the “state government” for purposes of jurisdiction under ROP Const. art. X, § 5. *See Koror State Pub. Lands Auth. v. Diberdii Lineage*, 3 ROP Intrm. 305, 308 (1993). *Cf. Republic of Palau v. Airai State Pub. Lands Auth.*, 9 ROP 201, 206 (2002) (although separate from the state government itself, state public lands authorities are governmental entities). Setting jurisdictional gymnastics aside, the rule against obtaining government land via adverse possession focuses on the public nature of the land, not of the entity administering the land. The land held by KSPLA is public land; therefore it cannot be “taken” by adverse possession.

⁷ In a separate and concurrently-decided appeal, *Techeboet Lineage* appealed the award of

award the land to Ngirngebdangel upon reconsideration and with proper support.

III. KSPLA's Challenge to the Award of Lot No. 181-191H to Techeboet Lineage

[6] KSPLA appeals the award of Lot No. 181-191H to Techeboet Lineage on the ground that the award (or at least the reasoning supporting the award) was clearly erroneous. The Land Court found that the land was acquired by Kisaol, a non-claimant, and her Japanese husband. *See* Land Ct. Decision at 12. Because contested land must be awarded to a claimant and may not be awarded to a non-claimant, the Land Court was faced with the dilemma of awarding the lot to a claimant that it did not believe was the true owner. *See Ngirumerang v. Tmakeung*, 8 ROP Intrm. 230, 231 (2000) (“The Land Court can, and must, choose among the claimants who appear before it and cannot chose someone who did not, even though his or her claim might be theoretically more sound.”). The Land Court awarded the land to Techeboet Lineage because one of the claimants representing its interests was Bilung G. Salii, the niece of Kisaol, and “Bilung was the only claimant who claimed through her relationship to Kisaol.” Land Ct. Decision at 13.

certain lots to Ngirngebdangel, including five lots—Lot Nos. 181-191B, 181-191C, 181-191E, 181-191P, and 181-034H—also appealed by KSPLA. *See Techeboet Lineage v. Ngirngebdangel*, 17 ROP 78 (2010). We affirmed the award of all lots to Ngirngebdangel over Techeboet Lineage in the other appeal. The vacation in the instant case does not permit Techeboet Lineage another bite at the apple.

KSPLA argues two errors in the Land Court's determination: (1) the land was not owned by Kisaol, but rather by her Japanese husband; and (2) Techeboet Lineage's claim was not made through a relationship with Kisaol. (*See* Appellant's Br. at 17-18.) We decide this appeal on the second ground. Because the person whom the Land Court felt was the true owner of the lot did not file a claim to the lot, the Land Court was forced to award the land to one who it did not feel was the true owner. *See* Land Ct. Decision at 12-13. This difficult reality does not insulate the Land Court's decision from appellate review: the Land Court must still award the land to a claimant based on sound reasoning under the circumstances.

The Land Court awarded Lot No. 181-191H to Techeboet Lineage because one of its representatives is the niece of Kisaol (whom the Land Court deemed to be the true owner of the land). However, no testimony supports the Land Court's reasoning that Techeboet Lineage claimed the land *through* its representative's relationship with Kisaol. Although Salii made several vague remarks in her testimony to “Kisaol's property” or “property of Kisaol,” she later clarified that the claimed land was Idid Clan land and that Kisaol lived there as a clan member. (*See* Tr. 111:9-10 (“It's the property of Idid so Kisaol and her Japanese husband lived there.”); 111:18-19 (“It's Idid property and Kisaol lived there.”); 112:3-4 (“It's the property of Idid and Kisaol is a member of Idid that's why she lived there.”); 112:7-9 (“It's the property of Idid and Kisaol is a member of Idid that's why she lived there.”); 112:11-12 (“I just know that it's Idid property that is why Kisaol lived there.”); 121:19-20 (“It was [Idid Clan's] property from way back and Kisaol is an Idid

Clan member so she was living there.”.) According to Salii, Techeboet is a lineage of Idid Clan. (See Tr. 86:20-21.) Techeboet Lineage’s representative, Bilung G. Salii, testified that Kisaol lived on the land with permission of Techeboet Lineage, not as a landowner. It was clearly erroneous for the Land Court to base its decision on the reasoning that Techeboet Lineage’s claim was made through a relationship with the landowner Kisaol.

Although we empathize with the Land Court’s position of being forced to award land to one that it does not believe to be the true owner, we vacate its decision with regard to Lot No. 181-191H. On remand the court should re-determine ownership of the lot based on the evidence before it.⁸

CONCLUSION

For the above-stated reasons, we affirm in part and vacate in part the Land Court’s determinations of ownership in the proceeding below. On remand the Land Court should re-determine the vacated determinations of ownership consistent with the guidance in this opinion.

⁸ The Land Court is free to re-determine ownership in favor of Techeboet Lineage based on different reasoning.

**NGETELKOU LINEAGE,
Appellant,**

v.

**ORAKIBLAI CLAN,
Appellee.**

CIVIL APPEAL NO. 09-002
LC/S 07-478

Supreme Court, Appellate Division
Republic of Palau

Decided: February 3, 2010

[1] **Evidence:** Testimony of Witnesses

The trial court is not required to accept uncontradicted testimony as true. Although a finder of fact may not arbitrarily disregard testimony, the finder of fact is not bound to accept even uncontradicted testimony.

[2] **Evidence:** Expert Testimony;
Custom: Expert Testimony

Indeed, it is well established that, despite the presence of expert testimony on custom, a court is not obligated to explain the customary significance of its findings where it did not rely on custom in making its factual determinations.

[3] **Civil Procedure:** Res Judicata

The doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies in all other actions in the

same or any other jurisdictional tribunal of concurrent jurisdiction.

[4] **Appeal and Error: Preserving Issues**

When an issue is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. The Court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even an issue the parties fail to identify.

Counsel for Appellant: J. Uduch Sengebau Senior

Counsel for Appellee: Pro se (Abel Suzuky)

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.¹

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

Appellant Ngetelkou Lineage (“Ngetelkou”) appeals the *Summary of the Proceedings, Findings of Fact, Conclusions of Law and Determination of Ownership* (“Decision”) entered by the Land Court concerning a dispute between Ngetelkou and

Appellee Orakiblai Clan (“Orakiblai”) over the ownership of land located on Angaur Island. Specifically, Ngetelkou claims that the Land Court erred in awarding the land to Orakiblai because it disregarded the uncontested testimony of Ngetelkou’s expert customary witness. For the reasons that follow, we disagree and AFFIRM the Decision of the Land Court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

As indicated by the briefs, the issue on appeal is limited to the court’s treatment of the expert testimony in this case; thus, only an abbreviated version of the relevant facts is necessary.² The land at issue in this case is known as *Ngetelkou* and was identified as Lots 297-39A, 297-39B, 297-40, 297-41, 297-43, and 297-52 at the Land Court hearing.³ Ngetelkou traced its ownership of the six lots to the original acquisition of the lands from Orakiblai. At the hearing, Esuroi Obichang testified that Ngetelkou used the lands for several generations; however, since chief

² In its opening brief, Ngetelkou stated that, because the “argument on appeal is limited to the testimony of expert witness William Tabelual, Appellant will not summarize the testimonies of the other claimants.” (Appellant’s Br. at 6.)

³ During the hearing, the Land Court heard claims by the Orakiblai Clan, Ucheliou Clan, Soweï Clan, Ngetelkou Lineage, Ngerbuuch Clan, and Ballerio Pedro to lands in Angaur State described on the BLS Worksheet No. 297 as Lots 297-278, 297-36, 297-38, 297-39A, 297-39B, 297-40, 297-41, 297-43, and 297-52. As noted above, Ngetelkou claimed ownership of six of the nine listed lots.

¹ The panel finds this case appropriate for determination without oral argument, pursuant to ROP R. App. P. 34(a).

Ngirturong died during the Trust Territory times, no males of Ngetelkou have borne the chief title there nor has any member of Ngetelkou resided on the lands in question.

During the Land Court hearing, Ngetelkou called Techetbos William Tabelual (“Tabelual”) as an expert customary witness. Tabelual testified on a number of customary traditions regarding the transfer of lands between clans and lineages, namely, that clan properties were separate and distinct from lineage-owned properties. He testified further that whether a clan gives land to a lineage simply to use or to own outright depends on what was said at the time of the transfer. If, for example, a clan gave land to a lineage to own outright, then the lineage will continue to own those lands into perpetuity, even if the members of the lineage move away from the land, i.e., once the clan transfers ownership in the land to the lineage, the clan’s authority over the land is extinguished and, unless there was some previous understanding to the contrary, any reversionary interest in the land would also be extinguished. Finally, Tabelual testified that the land being named after the lineage indicates that it was assigned to the lineage as its property. (*See generally*, Testimony of William Tabelual at 05/07/09—1:58:51 - 2:12:06.)⁴

⁴ According to the Land Court, Ngetelkou also presented several pieces of documentary evidence supporting their ownership claims, the most important of which is Exhibit A, a 1958 Findings of Fact, Conclusions of Law and Judgment in *Merar and Remekel, representing Ngetelkou Lineage or Clan v. Ucherebuuch, Chief of and representing Orakiblai Clan*, Civil Action No. 34 (Tr. Div. 1958).

Orakiblai Clan claimed all nine of the parcels that were the subject of the hearing. Abel Suzuki (“Suzuky”) testified that Orakiblai’s claim was based on the 1950’s survey that resulted in the 1962 Angaur Land Settlement Map, Serial No. 355. He testified that the nine lots in question were all part of Lot 12-278, which is uniformly described as Orakiblai Clan land on the 1962 map. He went on to state that when he identified Orakiblai’s claims during monumentation, he followed the boundary markers of the 1950’s survey.⁵ Finally, Suzuki testified that there are no residences in any portion of this land and that he has personally planted coconut and betel nut trees on worksheet Lots 297-278 and 297-40 since he moved to Angaur in 1983. He noted that the site known as *Ngetelkou* is located in a small area near the crossroad on 297-40.

In finding that Ngetelkou failed to sufficiently prove its claim against Orakiblai, the Land Court stated as follows:

The Findings of Fact, Conclusions of Law and Judgment in Civil Action No. 34 confirms the testimony presented by Ngetelkou about how it acquired lands in Angaur. However, in that 1958 case brought by Ngetelkou against Orakiblai, the court held, after discussing Ngetelkou’s status as a separate lineage or clan of Angaur, that “the freedom of

⁵ Suzuki adopted Ngetelkou’s Exhibit A as evidence of Orakiblai’s claim instead.

action which Ngetelkou have been allowed to exercise in other matters does not free the lands, which they received the use of through the cooperation and permission of the Orakiblai Clan, from the traditional controls and rights of the Orakiblai Clan.” The court went on to hold that “regardless of whether Ngetelkou more closely resemble a conventional Palauan clan or conventional Palauan lineage, **their land rights on Angaur are held under the Orakiblai Clan.**

The court in Civil Action No. 34 rejected Ngetelkou’s argument, made in the instant case again, that Orakiblai gave outright ownership of land to Ngetelkou. Ngetelkou’s expert witness on custom testified that whether a lineage acquired permanent ownership or a use right only of lands assigned to it by a clan depended on what was said at the time. As early as 1958, the court determined that Orakiblai granted a use right only to Ngetelkou.

Land Ct. Case No. LC/S 07-478, Decision at 9-10 (December 29, 2008) (quoting *Merar and Remekel, representing Ngetelkou Lineage or Clan v. Ucherebuuch, Chief of and representing Orakiblai Clan*, Civ. Act. No. 34 (Tr. Div. 1958) (emphasis in original)). Accordingly, the Land Court determined that Orakiblai owns all of the disputed lands. This appeal followed.

STANDARD OF REVIEW

We review Land Court factual findings for clear error. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006). “Under this standard, if the findings are supported by evidence such that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless this Court is left with a definite and firm conviction that an error has been made.” *Id.* Moreover, “[i]t is not the appellate panel’s duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence.” *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). Rather, Land Court determinations are affirmed so long as the factual findings are “plausible.” *Id.* We review Land Court legal conclusions *de novo*. *Singeo v. Secharmidal*, 14 ROP 99, 100 (2007).

DISCUSSION

On appeal, Ngetelkou asserts that the Land Court erroneously concluded that Orakiblai Clan granted only a use right to the lands in Angaur by refusing to credit the uncontested expert testimony of customary witness Tabelual, which purported to establish that, once clan land is given out to a lineage, the clan’s right to the land is extinguished. Ngetelkou states,

Here Ngetelkou Lineage received the lands known as Ngetelkou from Orakiblai Clan. This finding is supported by the decision in Civil Action No. 34 (1958). Although the Land Court subsequently concluded that the lands known as Ngetelkou were not free from the traditional controls and rights

of the Orakiblai Clan, this conclusion was directly contradicted by the expert witness who explicitly testified that once clan lands are given to a lineage, the clan loses its authority over the lands.

(Ngetelkou's Br. at 9). For the reasons outlined below, we disagree.

[1, 2] First, "the trial court is not required to accept uncontradicted testimony as true." *Ngerungor Clan v. Mochouang Clan*, 8 ROP Intrm. 94, 96 (1999). Although "a finder of fact may not arbitrarily disregard testimony, the finder of fact is not bound to accept even uncontradicted testimony." *Ongklungel v. Uchau*, 7 ROP Intrm. 192, 194 (1999) (quoting *Elewel v. Oiterong*, 6 ROP Intrm. 229, 232 (1997)). In its Decision here, the Land Court made no explicit findings as to the testimony of the expert witness. It only noted that "Ngetelkou's expert witness on custom testified that whether a lineage acquired permanent ownership or a use right only of lands assigned to it by a clan depended on what was said at the time. As early as 1958, the court determined that Orakiblai granted a use right only to Ngetelkou." In doing so, the Land Court accepted, at least in part, the expert testimony and simply interpreted it differently than Ngetelkou would have liked. By invoking the 1958 Decision here, the Land Court emphasized that the 1958 court was clearly in a better position to adjudicate the factual questions regarding "what was said at the time." In doing so, it was entitled to rely on what appears to this Court to be the clear

and unambiguous *res judicata* effect of the previous land determination in the 1958 case. In addition to this evidence, the Land Court also relied on documentary and testimonial evidence, such as the 1962 Map and undisputed quitclaim deed of Lot 12-278 to Orakiblai Clan, the receipt of war claim proceeds for property damage and loss accepted by Orakiblai Clan, the use of the land as a cemetery, and the more recent use by the Orakiblai Clan for farming purposes. As such, the Land Court appeared to rely very little on the customary testimony presented in the case, but rather on other, more convincing factors, such as the *res judicata* effect of the 1958 case and the additional documentary pieces of evidence mentioned above. Indeed, it is well established that, despite the presence of expert testimony on custom, a court is not obligated to explain the customary significance of its findings where it did not rely on custom in making its factual determinations. See *Iderrech v. Ringrang*, 9 ROP 158, 161 (2002).

[3] With respect to the *res judicata* effect of the previous land determination in 1958, "[t]he doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies in all other actions in the same or any other jurisdictional tribunal of concurrent jurisdiction." 30A Am. Jur. 2d *Judgments* § 324 (2007). *Res judicata*, or claim preclusion, prevents the subsequent litigation by either party of any ground of recovery that was available in the prior action, whether or not it was actually litigated or determined. See *Renguul v. Airai State Pub. Lands Auth.*, 8 ROP Intrm. 282, 284 (2001)

(doctrine of *res judicata* bars litigating an issue that has been previously determined between the same parties in an earlier proceeding); *Ngerketiit Lineage v. Tmetuchl*, 8 ROP Intrm. 122, 123 (2000); *see also* Restatement (Second) of Judgments § 24 (1982); *Jim Bean Brands Co. v. Beamish & Crawford, Ltd.*, 937 F.2d 729, 736 (2d Cir. 1991). Ngetelkou argues that the Land Court's reliance on the 1958 judgment is misplaced because the "Judgment neither affirms nor establishes Orakiblai's ownership of the land known as Ngetelkou. It simply confirms Ngetelkou's status as a lineage of Orakiblai clan." (Ngetelkou's Br. at 10). We disagree.

Although it is true that the 1958 Judgment confirms Ngetelkou's status as a lineage of Orakiblai Clan, Ngetelkou's reading of it is suspiciously incomplete. The High Court in its 1958 Judgment also makes explicit findings regarding the land in question. First, it stated that "the freedom of action which Ngetelkou have [sic] been allowed to exercise in other matters does not free the lands, which they received *the use of* through the cooperation and permission of the Orakiblai Clan, from the traditional controls and rights of the Orakiblai Clan." *Merar*, Civ. Act. No. 34 (Tr. Div. 1958) (emphasis added). Then, the High Court reemphasized this by concluding that "regardless of whether Ngetelkou more closely resemble [sic] a conventional Palauan clan or conventional Palauan lineage, their land rights on Angaur are held under the Orakiblai Clan." *Id.*

Despite Ngetelkou's arguments to the contrary, this Court cannot envisage a clearer or more unambiguous determination of land rights than this. The 1958 Court clearly came

to the conclusion that Ngetelkou was given *use* rights only and that they held those rights under the traditional powers of the Orakiblai Clan. This, coupled with the other evidence presented at the trial, i.e., the 1962 Map and undisputed quitclaim deed of Lot 12-278 to Orakiblai Clan, the receipt of war claim proceeds for property damage and loss accepted by Orakiblai Clan, the use of the land as a cemetery, and the more recent use by the Orakiblai Clan for farming purposes, was sufficient for the Land Court to make an ownership determination despite the uncontested customary testimony.

[4] Although Orakiblai fails to offer a *res judicata* argument in its brief, "when an issue . . . is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Ongalibang v. Republic of Palau*, 8 ROP Intrm. 219, (2000) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1718 (1991)). The Court "may consider an issue antecedent to . . . and ultimately dispositive of the dispute before it, even an issue the parties fail to identify." *Id.* (quoting *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents*, 113 S. Ct. 2173, 2178 (1993) (citations and internal quotations omitted)). An appellate court may affirm or reverse a decision of a trial court even though the reasoning differs. *Inglai Clan v. Emesiochel*, 3 ROP Intrm. 219 (1992) (citing *Republic of Palau v. Pacifica Dev. Corp. and Koror State Government v. Republic of Palau*, 1 ROP Intrm. 383 (1987)); *see also* 5 Am. Jur. 2d *Appellate Review* § 775 (2007) ("An appellate court is not limited, in affirming a judgment, to grounds raised by the parties, or grounds relied upon by the court below.").

Thus, this Court holds that the 1958 Judgment of the High Court clearly made a determination as to land rights and was entitled to be afforded preclusive effect in the Land Court case appealed from here. During the course of the Land Court case, Ngetelkou pointed to no intervening actions taken by Orakiblai or Ngetelkou between the 1958 decision and the time of this claim that would change a subsequent court's determination about land rights. If anything, the facts have become less arranged in Ngetelkou's favor, in that it is uncontested that no males of Ngetelkou have borne the chief title there nor has any member of Ngetelkou resided on the lands in question since Trust Territory times. Rather, Ngetelkou only raises new arguments, which their privies could have raised in the previous case. This forms the very heart of the *res judicata* doctrine, which exists to give finality and legitimacy to judgments and which is highly favored in the courts of Palau.

CONCLUSION

For the reasons set forth above, the judgment of the Trial Division is AFFIRMED.

**NGERMENGLIAU CLAN,
Appellant,**

v.

**DILUBECH RECHEBEI,
Appellee.**

CIVIL APPEAL NO. 09-003
LC/B 08-0072

Supreme Court, Appellate Division
Republic of Palau

Decided: February 3, 2010

[1] **Descent and Distribution:** Heirs

In the absence of contrary evidence, it is not erroneous for the Land Court to presume that individually-owned land of a decedent passes to the decedent's children.

Counsel for Appellant: J. Roman Bedor

Counsel for Appellee: Susan Kenney-Pfalzer

BEFORE: ARTHUR NGIRAKLSONG,
Chief Justice; KATHLEEN M. SALII,
Associate Justice; ALEXANDRA F.
FOSTER, Associate Justice.

Appeal from the Land Court, the Honorable
SALVADOR INGEREKLII, Associate Judge,
presiding.

PER CURIAM:

Appellant Ngermengiau Clan appeals the Land Court's determination that Dilubech Rechebei is the owner of the taro patch commonly known as *Lemau*. Because

Ngermengiau Clan's challenge does not convince us that the Land Court's determination was clearly erroneous, we affirm the Land Court's decision below.

BACKGROUND

This appeal concerns the Land Court's Determination of Ownership No. 12-622 finding that Dilubech Rechebei is the fee simple owner of Worksheet Lot No. 181-180 on BLS Worksheet No. 2005 B 06. We will refer to the determined land by its common name, *Lemau*. *Lemau* is a taro patch located in Ngerchemai Hamlet in Koror State. *See* Land Ct. Case LC/B 08-0072, Decision at 1 (Land Ct. Jan. 14, 2009).

Four claimants sought ownership of *Lemau* in the Land Court's October 22, 2008 hearing: David Olkeriil Rubasch, Dilubech Rechebei, George Kebekol, and Ngermengiau Clan represented by John Sugiyama.¹ *See id.* at 2-3. The Land Court made the following pertinent findings of fact: (1) *Lemau* was listed in the Koror Tochi Daicho as the individual property of Iterir; (2) when Iterir died in 1965 there was no discussion regarding the disposition of *Lemau*; (3) Iterir only had one adopted child who survived her death, Ilong Isaol; (4) claimant David Olkeriil Rubasch, a grandchild of Ilong Isaol, lived with Iterir and her husband, but was not

adopted by Iterir; (5) Tikei (appellant's mother) started using *Lemau* in about 1939 and had complete control of it until she died in 1968; (6) after Tikei's death, Tikei's relatives used and controlled *Lemau* with no complaints from anyone until the present day; and (7) Ilong Isaol never used *Lemau*. *See id.* at 3-4.

Upon weighing the evidence, the Land Court found that Iterir owned *Lemau* in fee simple and conveyed *Lemau* to Tikei in 1939. *See id.* at 5-6. The Land Court found that Tikei's use and control of *Lemau* was not a mere "use right," but indicated actual ownership of the property. *See id.* Based on Tikei's ownership, the Land Court awarded *Lemau* to Tikei's daughter Rechebei. *See id.* at 8.

Ngermengiau Clan appeals the award of *Lemau* to Rechebei. Ngermengiau Clan's claim before the Land Court was that (1) Iterir was the owner of *Lemau*; (2) Iterir did not have children to inherit the land; (3) *Lemau* was not given out during Iterir's eldecheduch; (4) and, therefore, under Palauan custom, the elders of Ngermengiau Clan are entitled to decide the disposition of the property. (*See* Land Ct. Tr. at 68:16-69:5.) Ngermengiau Clan's representative, John Sugiyama, testified that he did not know whether Iterir gave out any of her land during her lifetime. (*See id.* at 72:24-27.)

STANDARD OF REVIEW

We review the Land Court's findings of fact for clear error. *See Ngerungel Clan v. Eriich*, 15 ROP 96, 98 (2008). Under this high standard, we will deem the Land Court's findings clearly erroneous and will reverse

¹ The Land Court decision refers to "Ngermengiau Lineage" but the Land Court's decision was appealed to us by "Ngermengiau Clan." During the hearing, John Sugiyama stated that he presented the claim of Ngermengiau Clan. (*See, e.g.*, Land Ct. Tr. at 77:18-23.) We therefore use the clan designation throughout this opinion.

only if such findings are so lacking in evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion. *See Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004). To the extent that the Land Court’s determinations of law are appealed, we review those *de novo*. *See Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007).

DISCUSSION

Ngermengiau Clan bases its appeal on two grounds: (1) the Land Court’s decision is based on speculation and conjecture; and (2) the Land Court relied on the wrong standard in its finding that *Lemau* was conveyed to Tikei. (Ngermengiau Clan Br. at 3.) We address each of these issues in turn.

I. Ngermengiau Clan’s Argument that the Land Court’s Decision is Based on Speculation

Ngermengiau Clan states that no evidence was presented that Iterir agreed to convey her interest in *Lemau* to Tikei. (*Id.* at 3-4.) Ngermengiau Clan argues that the Land Court inappropriately transformed a grant of the right to use *Lemau* by Iterir to Tikei into a conveyance of title to the land. (*Id.* at 4-5.) Without pointing us to specific portions of the record, Ngermengiau Clan contends that the evidence in the record suggests that Tikei held only a use right in *Lemau* and was not the owner. (*Id.* at 7.)

Without guidance of where to look in the record, we reviewed the transcript of the Land Court hearing. In it, we found testimony from two claimants that Tikei was the owner—not just the possessor—of *Lemau*:

David Olkeriil Rubasch made numerous such statements (*see, e.g.*, Land Ct. Tr. at 6:24-27 (“I found out that the name of the land is Lemau and it’s also the land that my grandmother, all this time, had been saying is the taro patch of Tikei.”); 8:4-6 (“I’m here to say that I believe the land became the taro patch of Tikei, that’s all I know.”); 9:13-14 (“I always knew that it was a taro patch for Tikei.”); 17:24-25 (“When I became aware of my surroundings until now it’s a taro patch of Tikei.”); 18:15 (“It was [given] from Iterir to Tikei.”); 19:26-28 (“It’s still the taro patch of Tikei and [Rechebei is] using it.”); 27:10-12 (“I believe that it’s Tikei’s taro patch because of the relationship between my mother Iterir and [Tikei].”); 28:1-7 (“And also because I had never heard my grandmother or my mother Iterir or my mother Ilong say that ‘that is my taro patch’. I have never heard from anybody that this is my taro patch. They were telling us whenever we go to the taro patch not to climb on the guava tree, because the taro patch belongs to Tikei.”); 30:25-27 (“[I]t is Tikei’s taro patch, because that person whose name [is] listed on the Tochi Daicho had given it to [her].”)), as did Rechebei herself (*see, e.g.*, Land Ct. Tr. at 34:1-2 (“When I think about it now, Iterir gave the taro patch to the *mechas* Tikei.”); 42:20-23 (“[Ilong said] ‘I will not claim it, because I would defy what my mother had done, because she gave it to your mother. I will not claim it so go ahead and claim it.’”)).

Backed by this evidence, as well as the case law cited by the Land Court,² we cannot

² *See Elewel v. Oiterong*, 6 ROP Intrm. 229, 233 (1997) (“While possession of land is not always an indication of ownership, we believe it

find that the Land Court was clearly erroneous in finding that Iterir conveyed title to *Lemau* to Tikei in 1939. That finding was not, as Ngermengiau Clan argues, based on speculation or conjecture. It was based on the sound application of case law to the evidence before the Land Court.

II. Ngermengiau Clan's Argument that the Land Court Relied on the Wrong Standard

Ngermengiau Clan's second argument is that, because the conveyance between Iterir and Tikei was based on Palauan custom or traditional law, clear and convincing evidence is required to establish the conveyance. (*See* Ngermengiau Clan Br. at 8.) Ngermengiau Clan's argument confuses the Land Court's findings.

The Land Court did not find that the conveyance of *Lemau* from Iterir to Tikei was pursuant to custom or traditional law. The Land Court found that Iterir simply gave *Lemau* to Tikei in 1939. *See* Land Ct. Decision at 5. The only mention of "custom"

a fair inference that occupation of the land by appellee's family following [the Tochi Daicholisted owner's] death and for the past thirty or more years is indicative of a tacit or de facto disposition of the land to them."); *see also* *Mesubed v. Iramek*, 7 ROP Intrm. 137, 138-39 (1999) (relying on the above-quoted language from *Elewel* and further stating that "[e]vidence regarding an individual's use and possession of land, and the absence of evidence that the adverse party acted consistent with ownership, is relevant in determining ownership of the land irrespective of whether the doctrine of adverse possession applies.").

in the Land Court's decision comes in tracing the land from Tikei to Rechebei:

The Court further concludes, as a matter of law, that Dilubech Rechebei has a superior right or claim under Palauan custom to inherit the individual property of Tikei and she is, therefore, the proper customary heir of Tikei.

Id. at 8.

[1] Even though the Land Court heard no expert evidence on Palauan custom, we have little problem affirming its decision that, out of the four claimants before it, Rechebei is the proper owner of *Lemau*. Having determined that *Lemau* was owned in fee simple by Iterir and then by Tikei, the Land Court was left to award the land to one of the four claimants before it, only one of whom (Rechebei) is Tikei's offspring. Ngermengiau Clan does not argue that it is a more worthy claimant of the land of Tikei than Rechebei.³ We do not need expert testimony to find that the Land Court's award to Rechebei, the daughter of Tikei, was not clearly erroneous. *See* *Otobed v. Etpison*, 10 ROP 119, 121 (2003) (in the absence of

³ Indeed, Ngermengiau Clan's brief contains no argument whatsoever as to the strength of its own claim. It simply attempts to poke holes in Rechebei's claim. Because Land Court dispositions such as the one appealed to us are inherently competitions between claimants, disappointed claimants would do well to argue the respective merits of their own claims as well as the perceived deficiencies in the claims of their rivals.

contrary evidence, it is not erroneous for the Land Court to presume individually-owned land of a decedent passes to the decedent's children).

CONCLUSION

For the aforementioned reasons, we affirm the Land Court's award of the land known as *Lemau* to Dilubech Rechebei.

IRACHEL ADELBAI,
Appellant,

v.

UCHELIOU CLAN,
Appellee.

CIVIL APPEAL NO. 09-001
Civil Action No. 04-109

Supreme Court, Appellate Division
Republic of Palau

Decided: February 10, 2010

Counsel for Appellant: Clara Kalscheur

Counsel for Appellee: Moses Uludong

BEFORE: ARTHUR NGIRAKLSONG,
Chief Justice; LOURDES MATERNE,
Associate Justice; KATHERINE A.
MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable
ALEXANDRA F. FOSTER, Associate Judge,
presiding.

PER CURIAM:

Appellant, Irachel Adelbai ("Irachel"), appeals a judgment entered by the Trial Division concerning Irachel's right to own, and remain on, property named *Ngermanrang*, where she has lived for many years. Specifically, the Trial Division found that (1) two deeds of transfer dated December 6, 2000, transferring *Ngermanrang* (Cadastral Lot Nos. 028 N 01 and 028 N 03) to Irachel were null and void; (2) the property instead belonged to Appellees, the Ucheliou Clan ("Ucheliou

Clan”), which is indeed a genuine clan; and, (3) Irachel must vacate the property within a reasonable time. For the reasons that follow, we AFFIRM the Judgment of the Trial Division.

BACKGROUND

As indicated by the briefs, the issue on appeal is extremely limited; thus, only an abbreviated version of the relevant facts is necessary.¹ On April 21, 2004, the Ucheliou Clan brought suit to eject Irachel from the house and the property of *Ngermanrang* and to have the two deeds of transfer for that land, which were executed between Irachel and Adelbai Remed (Irachel’s former husband and chief of the Ucheliou Clan) declared null and void. Irachel responded and also filed a counterclaim, which alleged that the Ucheliou Clan was nothing more than a construct of Adelbai Remed’s mind to create a venue for conferring private lands to his children from three different marriages. Not surprisingly, the Ucheliou Clan contended that they were indeed a traditional Palauan Clan, which has been in existence for hundreds of years.

At trial, Irachel conceded during closing that if the Trial Division concluded that the land belonged to Ucheliou Clan as a traditional Palauan Clan, then senior members of the clan would need to sign off on the deeds of transfer to validate the transfer. Several witnesses, including Otobed Adelbai and Rosania Masters (senior members of the Clan)

testified that they had never had signed, approved, or even seen the two deeds executed between Irachel and Adelbai Remed; thus, the Trial Division concluded that the primary issue was whether Ucheliou Clan was a traditional Clan or not: “If the Ucheliou Clan is a traditional Palauan Clan then [Irachel] must vacate the property, since the property is Clan land and the Clan has repeatedly asked [Irachel] to leave their land. If the Ucheliou Clan is a more recent creation of Adelbai Remed then *Ngermanrang* belongs either to Adelbai Remed’s children or to [Irachel], depending on the validity of [the] two deeds of transfer” *Ucheliou Clan v. Adelbai*, Civ. Act. No. 04-109, Decision (Tr. Div. Jan. 2, 2009).

In its decision, the Trial Division outlined its extensive findings of fact supporting its conclusion that the Ucheliou Clan is a traditional Palauan Clan. Indeed, Appellant has not appealed this portion of the decision of the Trial Division. Because it resolved this issue in favor of the Ucheliou Clan, the Trial Division declined to reach the second issue as to whether the deeds had properly transferred *Ngermanrang* to Irachel, because, as we noted above, it was undisputed that senior members of the Ucheliou Clan never signed the deeds of transfer.

Accordingly, the Trial Division issued its decision, concluding (1) two deeds of transfer dated December 6, 2000, transferring *Ngermanrang* (Cadastral Lot Nos. 028 N 01 and 028 N 03) to Irachel were null and void; (2) the property instead belonged to Appellees, the Ucheliou Clan (“Ucheliou Clan”), which is indeed a genuine clan; and, as a result, (3) Irachel must vacate the property

¹ The procedural history and factual background of this case are set out in more detail in the Trial Division’s Decision of January 2, 2009.

within a reasonable time. This appeal followed.

STANDARD OF REVIEW²

The trial court's findings of fact are reviewed for clear error. *Ongidobel v. Republic of Palau*, 9 ROP 63, 65 (2002). Under this standard, the factual determinations of the lower court will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion. *Dilubech Clan v. Ngaremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). Conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001); *Esebei v. Sadang*, 13 ROP 79, 81 (2006).

DISCUSSION

As we noted above, the issue on appeal is very limited. The gist of Appellant's argument is that, even though the Trial Division concluded that the Ucheliou Clan is a traditional Palauan Clan, it erred when it ordered Irachel to vacate the property without

making a customary finding or legal conclusion concerning the Clan's right to do so. Irachel argues that it was Appellee's burden at trial to put forth customary evidence regarding Ucheliou Clan's authority to evict a person from clan land. Because it failed to do so, Irachel argues that the only thing the trial established was that the Ucheliou Clan was a traditional Clan, and nothing more. If they wanted to eject her from the property, Ucheliou Clan were bound to prove that they had a right to do so under customary law. Just because the Trial Division found that the Ucheliou Clan was a traditional Clan and just because Ucheliou Clan brought suit to eject her, the Trial Division should not have summarily concluded that the latter necessarily followed from the former.

We begin by noting that, "this Court has consistently refused to consider issues raised for the first time on appeal." *Rechucher v. Lomisang*, 13 ROP 143. Irachel made no arguments at trial that Ucheliou Clan were bound to prove that they had a right to eject her under customary law. She elicited no testimony from any of the expert customary witnesses on issues relating to ejection and instead took the position that the case was about whether Ucheliou Clan was a traditional Clan or not. Most importantly, even though the Ucheliou Clan bore the burden to prove its right to eject her, Irachel herself failed to raise her latest argument in the form of an objection, even though Ucheliou's claim for ejection was at the very heart of the action. "Failing to object to a claim for relief before the trial court . . . constitutes a waiver." *Rechucher v. Seid*, 14 ROP 85 (2007).

Now, for the first time on appeal, Irachel asks this Court to consider a new

² The Appellant recited no applicable standard of review. We reemphasize that ROP R. App. P. 28(a)(7) requires all briefs to set forth any matters "necessary to inform the Appellate Division concerning the questions and contentions raised in the appeal." What is more, this Court has plainly stated that the "standard under which the Appellate Division is to review the issues before it is a matter necessary to the questions raised on appeal." *Scott v. Republic of Palau*, 10 ROP 92, 95 (2003). With this in mind, we require at the very least that the parties take their best shot.

argument about the Clan’s right to eject her from the land. Irachel states that her daughter, Ellen Adelbai, who claims to be a strong member of the clan, has testified that she does not consent to the Clan’s ejection of her mother. However, when Ucheliou Clan argued in their response brief that Irachel should not be entitled to raise this argument on appeal because it was not first raised at trial, Irachel failed to take advantage of her opportunity to submit a reply brief to point this Court to *any* place in the trial record that could conceivably be construed as embodying this new argument. Because the Trial Division was never presented with an opportunity to examine customary evidence regarding ejection or to consider Irachel’s objection to Ucheliou’s claims for relief, we can make no conclusions here other than to reemphasize that we lack jurisdiction to consider new arguments on appeal. Indeed, by now it should be axiomatic that arguments made for the first time on appeal are considered waived. *Badureang v. Ngirchorachel*, 6 ROP Intrm. 225 (1997); *Telei v. Rengiil*, 4 ROP Intrm. 224 (1994); *Udui v. Temot*, 2 ROP Intrm. 251 (1991).

Accordingly, the rule of law demands that we decline to consider Irachel’s argument on appeal because such argument was never raised during trial.

CONCLUSION

For the reasons set forth above, the judgment of the Trial Division is **AFFIRMED**.

**HOUSE OF TRADITIONAL LEADERS,
Appellants,**

v.

**KOROR STATE GOVERNMENT and
KOROR STATE LEGISLATURE,
Appellees.**

CIVIL APPEAL NO. 09-004
Civil Action Nos. 06-070, 06-075

Supreme Court, Appellate Division
Republic of Palau

Decided: February 10, 2010

[1] **Appeal and Error:** Standard of Review

We review grants of summary judgment *de novo*. The court considers whether the trial court correctly found that there was no genuine issue of material fact and whether, drawing all inferences in the light most favorable to the nonmovant, the moving party was entitled to judgment. To affirm a grant of summary judgment, the Court must reach the same conclusions of law as the trial court, and no deference to the trial court is appropriate.

[2] **Civil Procedure:** Summary Judgment

A factual dispute is material if it must be resolved by the fact finder before the fact finder can determine if the essential element challenged by the movant exists.

[3] **Constitutional Law:** Traditional Leaders

There is no conflict between Koror State Constitution, art. VI, § 1, which grants the House of Traditional Leaders (“HOTL”) supreme authority for all matters relating to traditional law and Koror State Public Law No. K-7-145-2004, which grants Koror State Public Lands Authority (“KSPLA”) the authority to administer the areas below the high water mark, because the statement granting HOTL “supreme authority” is in the context of the section titled Membership—not the section outlining its enumerated powers. The fact that an additional section is included in the Constitution, entitled “Powers and Responsibilities,” and the fact that ownership of lands below the high watermark is not listed in this section, completely undermines HOTL’s claim as to this source of conflict. If HOTL’s authority to administer public lands below the high water mark was not included in the clearly marked “Powers and Responsibilities” section in the Koror State Constitution, then that power and responsibility does not exist under the law, full stop.

Counsel for Appellants: J. Roman Bedor

Counsel for Koror State Government: Mark P. Doran

Counsel for Koror State Legislature: Raynold B. Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Appellants, The House of Traditional Leaders of Koror State (“HOTL”), along with ex-board members and former employees of Koror State Public Lands Authority, appeal a judgment entered by the Trial Division concerning a dispute over the authority to manage Koror State Public Lands below the high water mark. Specifically, HOTL and the others challenge the Trial Division’s rulings (1) that the Koror State Government (“KSG”)—and not HOTL—has the authority to use, manage, and administer Koror State Public Lands below the high water mark, and (2) that any contract—past, present, or future—entered into by HOTL concerning Koror State Public Lands below the high water mark is null and void. For the reasons that follow, we affirm the Judgment of the Trial Division.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In the early part of 2006, individuals who claimed to be members of KSPLA (“individual defendants”) executed two indenture deeds, which purported to transfer ownership in all Koror State public lands—both above and below the high water mark—to HOTL. On May 6, 2006, a group of plaintiffs representing the Koror State Government (“Plaintiffs”) sued both HOTL and the individual defendants for engaging in the improper transfer without the consent of the Koror State Government.¹

¹ The Koror State Government (“KSG”), the Koror State Public Lands Authority (“KSPLA”), and the Koror State Legislature

Plaintiffs claimed that the individual defendants had either not been appointed to KSPLA in a statutorily sufficient manner or had expired terms of office on the dates of the alleged transfers. Plaintiffs also alleged that HOTL, after having had the authority to administer the land improperly transferred to them, had improperly granted authorizations (1) to allow persons or entities to take mud or clay from the Milky Way area from the seabed and territorial waters of the State of Koror, and (2) to allow Belechel Ngirngbedangel to fill or reclaim reef or mudflats along the road to M-Dock. (Compl. ¶ 35.)

In their Answer, the individual defendants claimed that they had been, in fact, members of the KSPLA on the dates of the alleged transfer and that their terms had neither expired nor been undermined by a statutorily deficient appointment. Likewise, HOTL denied that they ever issued grants to allow persons to take mud or clay from the Milky Way and to fill or reclaim reefs or mud flats. In addition to these denials, both the individual defendants and HOTL put forward an affirmative defense, which can be summarized as follows:

Even though 35 PNC § 102² clearly confers ownership of all public lands below the high water mark to the Republic of Palau, and even though the Republic of Palau transferred authority over public lands to state

(“KSL”) were all eventually joined as Plaintiffs.

² 35 PNC § 102 is titled “National Government as owners of areas below high watermark; exceptions” and confirms that all marine areas below the ordinary high watermark belong to the government.”

governments (in this case the Koror State Government), and even though Koror State Public Law No. K-7-145-2004 established the KSPLA and granted *it* the authority to administer the areas below the high water mark, the underlying principles of Palauan traditional law still give HOTL the supreme authority to administer, manage, and control the lands and resources below high water mark.³ (Answer, Affirmative Defenses ¶ 2,3; *see also* Appellant’s Br. at 1.)

After discovery in the case had concluded, on July 26, 2007, HOTL and the individual defendants filed a Motion for Summary Judgment based on this affirmative defense. The Defendants stated:

The traditional law and statutory law are equally authoritative and in case of conflict statutory law shall prevail to the extent not in conflict with the underlying principles of traditional law. The basis of Defendant’s [sic] Motion for Summary Judgment and its Opposition to Plaintiffs’ Cross-Motions for Summary Judgments regarding control over public lands is that the underlying principles of traditional law

³ Specifically, HOTL argues that the underlying principles give authority to Ngara-Meketii and Rubelkul Kldeu, which are the two traditional councils of chiefs of Koror and which make up HOTL. HOTL also admitted that neither HOTL, nor the two Koror Councils of Chiefs, had ever filed claims for the return of public lands before the filing deadline in 1989.

supercedes the state's constitution, state statutes and national statutes. Moreover, the functions of traditional leaders may not be revoked by the government.

(Defs.' Opp'n. to Pls.' Mot. Summ. J. at 1-2 (internal citations omitted).) In support of their claims to traditional authority, HOTL submitted the affidavits of Madrengebuked Thomas O. Remengesau, Sr. and Ibedul Yukata M. Gibbons, which state that, even though Koror State currently owns the areas below the high water mark, the traditional chiefs used to own and administer these lands prior to their acquisition by colonizing powers in the early 20th century. (Aff. of Chief Maderengebuked at 3.)

Plaintiffs filed their Opposition to the Motion for Summary Judgment and Cross Motion for Summary Judgment, along with accompanying documents, on November 21, 2008. Therein, Plaintiffs did not dispute that the traditional chiefs formerly "owned" the public lands. However, they noted that the public lands had subsequently belonged to the Japanese government, the Trust Territory, and now the national and state governments. As such, Plaintiffs stated that the case was not about custom and traditional law, but rather, about who owns land and who has right to control land owned by the state. Plaintiffs claimed that the traditional chiefs did not provide any custom or traditional law to support their argument that they can control public lands which they do not own (because the traditional chiefs are no longer the "government"). Plaintiffs went on to state that

any claim of ownership by the traditional chiefs is barred by the statute of limitations and other applicable law (claims for public lands were required to be filed by January 1, 1989). Finally, Plaintiffs argued that, under the express language of the Koror State Constitution, (1) HOTL possesses no authority relating to public lands, (2) custom and traditional law does not apply to the exercise of sovereign power by the constitutional government of the State of Koror, and (3) the Koror State Constitution and applicable statutes do not violate underlying principles of traditional law.

The Trial Division heard oral arguments on January 8, 2009, and, on January 19, 2009, issued its Judgment and Decision. It began by noting that, while the parties do not disagree that KSG holds Koror State public lands in trust for the public, they disagree that HOTL should nonetheless be entitled to use, manage, and administer the lands below the high watermark because of their traditional roles. Addressing this dispute, the court acknowledged that it was required to grapple "with the interplay between the requirements that the elected government 'take no action to prohibit, revoke, or take away a role or function of a traditional leader,' and the requirement that the structure and organization of state government adhere to democratic principles." *Koror State Gov't, v. House of Traditional Leaders*, Civil Act. Nos. 06-070, 06-075, Decision at 12 (Tr. Div. Jan. 19, 2009) (citing *The Ngaimis v. Republic of Palau*, 16 ROP 26 (2008); *Gibbons v. Seventh Koror State Leg.*, 13 ROP 156 (2006); *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*, 6 ROP 198 (1997); *Ngardmau Traditional Chiefs, v. Ngardmau State Gov't*, 6 ROP 74 (1987)).

For guidance here, the Trial Division looked to the decision in *Ngara-Irrai*, which held that the people in each municipality are permitted to adopt the present system, a more traditional system, a combination of the two or any system of government that they think is suitable to their local needs and resources.” *Id.*; see also *Gibbons*, 13 ROP at 160. Because courts should only intercede in extreme cases where the democratically elected government interferes with the traditional rights of the chiefs, or vice versa, the Trial Division found that the authority of KSG to manage and administer lands below the high water mark does “not so blatantly interfere with the traditional powers of the chiefs as to require Court intervention.” *House of Traditional Leaders*, Civil Act. Nos. 06-070, 06-075, Decision at 12 (Tr. Div. Jan. 19, 2009) (citing *Ngardmau*, 6 ROP at 74). Finally—and most importantly on appeal—the Trial Division simply noted that none of HOTL’s enumerated powers under Koror State Constitution, art. VI, § 2, include the right to use, manage, and administer public lands below the high water mark. The Trial Division opined that, if the drafters of the Koror Constitution had intended for HOTL to administer Koror State public lands, that task would have been listed under the enumerated powers section in the Constitution. The Court stated clearly, “Defendants cannot look to a clause under the “Membership” section to back door their claim to control over Koror State public lands.” *House of Traditional Leaders*, Civ. Act. Nos. 06-070, 06-075, Decision at 15 (Tr. Div. Jan. 19, 2009).

For these reasons, the Trial Division granted Plaintiffs’ motion for summary judgment, declaring (1) that the Koror State Government—and not HOTL—controls Koror

State public lands below the high water mark, and (2) neither HOTL nor its representatives may enter into any contracts concerning Koror State public lands in the future and that any previous contract they made was null and void. In no portion of its decision did the Trial Division address the alleged factual dispute about traditional law purportedly created by the affidavit of Speaker Tero Uehara. HOTL then filed this appeal.

STANDARD OF REVIEW

[1] We review grants of summary judgment *de novo*. *Becheserrak v. Eritem Lineage*, 14 ROP 80, 81 (2007). The court considers “whether the trial court correctly found that there was no genuine issue of material fact and whether, drawing all inferences in the light most favorable to the nonmovant, the moving party was entitled to judgment. *Id.* To affirm a grant of summary judgment, the Court must reach the same conclusions of law as the trial court, and no deference to the trial court is appropriate. *Senate v. Nakamura*, 8 ROP Intrm. 190, 192 (2000).

DISCUSSION

HOTL’s argument on appeal is two-fold: First, the Trial Division erred in granting summary judgment because it ignored a genuine issue of material fact as to the underlying principles of traditional law regarding the use, management, and administration of the public lands of Koror State below the high water mark; second, even if a factual dispute did not exist, the Trial Division misinterpreted the law, because it failed to appropriately reconcile the conflict between underlying principles of traditional

law with 35 PNC § 102's statutory grant of authority to KSPLA. We disagree on both counts.

I. The Trial Division did not ignore a genuine issue of material fact as to the underlying principles of traditional law.

HOTL submitted the affidavits of Maderngbuked Thomas O. Remengesau, Sr. and Ibedul Yukata M. Gibbons, which state, *inter alia*, that even though Koror State currently owns the areas below the high water mark, the traditional chiefs used to own and administer these lands prior to their acquisition by foreign occupying powers. Now, HOTL contends that, when Appellees submitted an affidavit from Speaker Uehara that contradicted HOTL's claims to traditional ownership, the disagreement created a factual dispute about the principles of traditional law.

[2] This argument is unconvincing. Although the contradictory affidavits created a factual dispute, the disputed facts were simply immaterial to the Trial Division's ultimate determination of the case. A factual dispute is material if it must be resolved by the fact finder before the fact finder can determine if the essential element challenged by the movant exists. *Wolff v. Sugiyama*, 5 ROP Intrm, 105, 110 n.3 (1995).

The affidavit of Speaker Uehara is largely focused on proving that HOTL is not a traditional or customary organization of Koror. The affidavit states that, "HOTL is merely a creation of the Koror Constitution. . . . Because HOTL is not a customary or traditional organization, it has no customary / traditional functions with respect to public lands in Koror State." (Aff. of

Timothy Uehara at 2-3.) The affidavits of Maderngbuked Thomas O. Remengesau, Sr. and Ibedul Yukata M. Gibbons, on the other hand, were focused (1) on showing that the traditional chiefs, before the foreign occupying powers arrived, possessed control and authority over the areas below the high watermark, and (2) that HOTL now represents those chiefs.

First, the parties, as well as the Trial Division, acknowledged that the traditional chiefs possessed and administered the land prior to the foreign occupying powers. Therefore, no factual dispute exists as to the traditional chiefs' former ownership. Second, the factual dispute about whether HOTL is entitled to represent those traditional chiefs today simply did not matter to the Trial Division's decision. If anything, the Trial Division decided that issue in HOTL's favor by moving forward and performing its legal analysis about the interplay between the traditional rights of the chiefs and the right of the people of Koror State to choose its form of democratic government. This is the very definition of a non-issue. Accordingly, the Trial Division did not ignore genuine issues of material fact as to the underlying principles of traditional law, as there were simply none to ignore. The function of a summary judgment motion is to determine whether there is a material fact to be tried; if there is none, the court may proceed to determine the controversy as a matter of law. *The Senate of the First Olbiil Era Kelulau v. Remelik*, 1 ROP Intrm 90, 90 (Tr. Div. 1983).

II. The Trial Division did not misapply the law.

Appellant's argument that the Trial Division erred in granting KSG judgment as a matter of law can be summarized as follows:

(1) Before the entrance of foreign occupying powers, the traditional leaders of Koror (who are now represented by HOTL) were solely responsible for the administration and management of public lands below the high watermark; (2) Pursuant to Koror State Constitution, art. VI, § 1, HOTL retains that right today and has "supreme authority of the State of Koror for all matters relating to traditional law"; (3) Koror State Public Law No. K-7-145-2004, which established the KSPLA and granted *it* the authority to administer the areas below the high water mark, is in direct conflict not only with the underlying principles of traditional law but also with the Koror State Constitution, which allegedly retains supreme authority in HOTL; (4) A direct conflict such as this triggers Palau Constitution art. V, §1, which provides that "the government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition"; (5) Thus, the Trial Division should have declared Koror State Public Law No. K-7-145-2004 unconstitutional as matter of law.

We disagree. Contrary to Appellant's argument, we find that no conflict exists either between (1) statutory law and the Koror State Constitution, which HOTL asserts grants them *supreme authority* to administer the lands below the high water mark, or (2) between statutory law and HOTL's claims to so-called traditional ownership. Thus, there is no reason to reach the issue whether the Trial Division correctly resolved any alleged conflict. The authority of KSG to manage and

administer lands below the high water mark is clear under the law. Indeed, much in this case is clearer than HOTL has made it out to be.

Under 35 PNC § 102, all marine areas below the ordinary high watermark belong to the Republic of Palau. 35 PNC § 102; *see also* Palau Constitution, art. 1, § 1. The Republic of Palau transferred authority to lands below the high water mark to the state governments. *See* Palau Constitution, art. 1, § 2 ("Each state shall have exclusive ownership of all living and non-living resources . . . from the land to twelve nautical miles seaward from the traditional baselines."). In turn, Koror State Public Law No. K-7-145-2004 established the KSPLA and granted it the authority to administer the areas below the high water mark on behalf of the KSG. Based upon these fairly unequivocal statements of the law, neither party at the summary judgment stage or now on appeal disagree with the proposition that, at the very least, KSG holds Koror State public lands in trust for the public.

Nonetheless, HOTL claims that, because Koror State Constitution, art. VI, § 1 reads "[t]he House of Traditional Leaders, consisting of the Ngarameketii and the Rubekulkeldeu[,] shall be the *supreme authority* of the State of Koror for all matters relating to traditional law," HOTL, which is comprised of the two councils of traditional chiefs, is still entitled to exercise supreme authority over the lands below the high water mark. Koror State Constitution, art. VI, § 1 (emphasis added). We vigorously disagree.

[3] There is simply no conflict between Koror State Constitution, art. VI, § 1, which grants HOTL supreme authority for all matters

relating to traditional law and Koror State Public Law No. K-7-145-2004, which grants KSPLA the authority to administer the areas below the high water mark, because the statement granting HOTL “supreme authority” is in the context of the section titled Membership—not the section outlining HOTL’s enumerated powers. The Trial Division correctly noted, “Defendants cannot look to a clause under the Membership section to back door their claim to control over the Koror State Public lands. The language itself and the location of the clause reflects the intent of the drafters that HOTL’s ‘supreme authority . . . for all matters relating to traditional law’ is in the context of membership.” *House of Traditional Leaders*, Civil Act. Nos. 06-070, 06-075, Decision at 15 (Jan. 19, 2009). The fact that an additional section is included in the Constitution, entitled “Powers and Responsibilities,” and the fact that ownership of lands below the high watermark is not listed in this section, completely undermines HOTL’s claim as to this source of conflict. If HOTL’s authority to administer public lands below the high water mark was not included in the clearly marked “Powers and Responsibilities” section in the Koror State Constitution, then that power and responsibility does not exist under the law, full stop. Arguments to the contrary offend the basic tenets of statutory and constitutional construction.

Finally, HOTL also claims authority to administer the lands below the high water mark under pure traditional law, the Koror State Constitution notwithstanding. The argument is that their authority over the land, which flowed from customary and traditional law, was not extinguished by the foreign occupying powers, the Trusteeship

Agreement, or the Trust Territory Bill of Rights. This argument simply asks too much. Foremost, HOTL presented no evidence supporting this argument at the Trial Division, and arguments not raised at the trial level are waived, and may not be raised on appeal. *Koror State Gov't v. Republic of Palau*, 3 ROP Intrm. 314, 322 (1993). Second, even if we accepted the affidavits of Maderngbuked Thomas O. Remengesau, Sr. and Ibedul Yukata M. Gibbons as evidence that HOTL’s authority over lands below the high water mark was not extinguished by the foreign occupying powers, we would find that such evidence was neither clear nor convincing. *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225 (1996) (holding that proof of custom and tradition must be proved by clear and convincing evidence). The affidavits failed to address, in sufficient detail, how traditional ownership rights could survive foreign occupying powers and the 1989 filing deadline for claims for public lands, and now be asserted over lands that HOTL admits even now it does not own.

Accordingly, we hold that the Trial Division did not misapply the law as to the alleged conflict between traditional and statutory law, because no convincing evidence of any conflict was ever presented.

CONCLUSION

For the reasons set forth above, the judgment of the Trial Division is AFFIRMED.

**WILLY WALLY and SYLVIA WALLY,
Appellants,**

v.

**REPUBLIC OF PALAU,
Appellee.**

CIVIL APPEAL NO. 09-014
Civil Action No. 05-245

Supreme Court, Appellate Division
Republic of Palau

Decided: February 18, 2010

[1] **Evidence:** Judicial Notice

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Counsel for Appellants: Yukiwo P. Dengokl

Counsel for Appellee: Ronald K. Ledgerwood

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

FOSTER, Justice:

Appellants, Willy and Sylvia Wally (“Wally”), appeal an Order, which was issued by the Trial Division on March 11, 2009, determining the proper rate of interest to be applied to the value of land taken via inverse condemnation. Specifically, Wally contends that the Trial Division erred in finding that a three percent interest rate was both secure and reasonable enough to constitute just compensation under Article IV, Section 6 of the Palau Constitution, for the Republic’s taking of Wally’s land. For the reasons that follow, we AFFIRM the Trial Division’s Order.

BACKGROUND

This is the second time this case has come before the Appellate Division. Because this most recent appeal concerns the Trial Division’s determination, on remand, of the proper rate of interest to be applied to the value of Wally’s land, this Court will not recount the extensive factual and procedural history of the underlying dispute here.¹ With respect to the issue on appeal now, the pertinent facts are outlined below.

On May 7, 2007, the Trial Division ordered an award of three percent interest on the fair market value of Wally’s land. It based that interest rate upon 35 PNC § 318(b)(2). On appeal, the Appellate Division reversed the Trial Division’s award of three percent interest because 35 PNC § 318(b)(2) was inapplicable to the type of condemnation that occurred in the underlying case. Explaining

¹ The underlying facts of this case are set forth in the Court’s Opinion in *Wally v. Republic of Palau*, 16 ROP 19 (2008).

the reversal, the Appellate Division noted that two methods exist by which the government can exercise its eminent domain power. First, in a traditional condemnation proceeding, governed by 35 PNC §§ 311-317, the government files a complaint before taking the property. Second, in a “quick take” procedure, governed by 35 PNC §§ 318-319 and applicable only “[i]n the event the national government desires to enter into immediate possession of the property, [the government files] a declaration of taking and pay[s] a sum of money which is considered to be the fair value of the property to the Clerk of Courts.” 35 PNC § 318(a). The sum of money deposited with the clerk draws interest at the rate of three percent per year. 35 PNC § 318(b)(2).

In describing the Trial Division’s misapplication of the law, the Appellate Division stated that “Section 318(b)’s three percent interest provision is clearly in the context of a quick-take condemnation and that interest rate, by its own terms, applies only to a deposit made by the government to the Clerk of Courts.” *Wally v. Republic of Palau*, 16 ROP 19 (2008). The Appellate Division further noted, “[i]t is undisputed in this case that Appellee did not comply with 35 PNC § 318(a) and did not deposit any money with the Clerk of Courts.” *Id.* Therefore, the Appellate Division held that the Trial Division misapplied the law when it stated that 35 PNC § 318(b)(2)’s interest rate was binding in this case. It elaborated on the Trial Division’s misapplication of the law in the passage below:

It is true that *had* the trial court independently considered the facts of this case and found

that three percent was a reasonable interest rate, its factual finding would be subject to a clearly erroneous standard of review. It is also true that nothing precludes a trial court from considering statutory interest rates in reaching a reasonable interest rate. The problem, however, is that this is not what the trial court did. In its Findings of Fact and Conclusions of Law, the trial court stated that “[t]he statute on condemnation provides the only interest rate and it is three percent. If a different interest rate was contemplated at some point in the condemnation proceeding, the National Congress would have said so in the statute.” These statements indicate that the trial court was not using its discretion when it chose three percent as the applicable interest rate; rather, the trial court applied the three percent interest rate because it erroneously believed it was required to do so.

Id. at 7. Therefore, the Appellate Division remanded the case to the Trial Division to independently consider the facts of the case and to determine the proper rate of interest to be applied to the just compensation award.

On remand, the Trial Division ordered the parties to submit a preliminary set of briefs on November 24, 2008, which addressed the issue of the proper rate of interest. On

December 29, 2008, the Trial Division rejected the theories propounded in the preliminary briefs and ordered the parties to submit supplemental briefs on the issue. After supplemental briefing, the Court held a hearing on February 26, 2009, in which the parties presented additional evidence, in the form of oral testimony, to inform the Court's determination.

At the hearing, Wally called expert witness Mr. Kenneth Uyehara ("Uyehara"), who works as a real estate appraiser, performing evaluations and consultations since 1992. Uyehara testified that, based upon his methods and reasoning, an interest rate of ten percent per year was the proper rate of interest to be added to the just compensation award.² After cross-examining Uyehara, Appellee called Richard Ziegler ("Ziegler"), who works as a sales manager for the Bank of Hawaii. Ziegler testified that the average rate

of return or yield on a certificate of deposit over \$100,000.00 for the time period in question was 1.56%. Accordingly, he recommended an identical interest rate be applied here.

Following the hearing, the Trial Division entered its Order on March 11, 2009. It began by acknowledging its error in applying 35 PNC § 318(b)(2) in the previous award, and by accepting the instruction to "independently consider the facts of the case and determine a reasonable interest rate." *Wally v. Republic of Palau*, Civil Act. No. 05-245, Order at 1 (Tr. Div. Mar. 11, 2009). The Trial Division proceeded to outline the prudent investor standard, which courts routinely use to determine whether an interest rate provides just compensation and which is defined as "what a reasonably prudent person investing funds so as to produce a reasonable rate of return while maintaining safety of principal would receive." *Id.* at 2 (citing *Schneider v. County of San Diego*, 285 F.3d 784, 793 (9th Cir. 2002)).

² This valuation was calculated as follows. First, Mr. Uyehara calculated something called the "safe interest rate," which was based upon the annual yield for U.S. Treasury bills. Treasury bills are deemed safe because the U.S. has never defaulted on such obligations. Mr. Uyehara concluded that the safe interest rate was four percent. Uyehara then set the ceiling rate, which was fourteen percent and which was based upon equity yield rates in higher risk items like the U.S. stock market. Having established these parameters, Uyehara then looked at the prevailing interest rate of mortgages from the Palau National Development Bank, which is between eight percent and ten percent, and blended it with equity, which resulted in a yield of ten percent for the period in question, 2003-2007. (Appellant's Br. at 5-6 (citing Testimony of Kenneth Uyehara at 2:27:19-21; 2:27:22-00; 2:28:01-34)).

The Trial Division then proceeded to its analysis of the interest rates suggested by the parties. It began by noting that the rate suggested by the government was too low to constitute a reasonable rate of return, remarking that "a reasonably prudent person need not be limited to those investment vehicles obtained at a bank on island, when a variety of safe investments are accessible to Palauans via the internet or a broker." *Id.* at 2. On the other hand, it noted that Wally's suggested rate of ten percent was too high, stating, "[t]hat rate is based in part on the United States mortgage market, which is inapplicable to the value of land in Palau, and in part on investment vehicles which are

unavailable to those without a United States Social Security number. Additionally, as recent events have shown, mortgage-based investments are risky: they could provide high interest rates or fail to safely maintain the principal.” *Id.*

In the three sentence paragraph that followed, the Trial Division settled instead on a rate of three percent. It concluded: “In this case, three percent is an interest rate which is both secure and reasonable. This conclusion, reached after much consideration, is not based on 35 PNC § 318(b), or any other statute, but on the particular circumstances of this case. As Defendants have already been paid the principal and three percent interest thereupon, pursuant to an earlier order, no further payment is required.” *Id.* at 2-3. This appeal followed.

STANDARD OF REVIEW

The trial court’s findings of fact are reviewed for clear error. *Ongidobel v. Republic of Palau*, 9 ROP 63, 65 (2002). Under this standard, the factual determinations of the lower court will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion. *Dilubech Clan v. Ngaremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). “When reviewing for clear error, if the Trial Division’s findings of fact are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless the Appellate Division is left with a definite and firm conviction that a mistake has been committed.” *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Conclusions of law

are reviewed *de novo*. *Id.*; *Esebei v. Sadang*, 13 ROP 79, 81 (2006).

DISCUSSION

The gist of Wally’s argument on appeal is two-fold: first, the Trial Division erred when it rejected the ten percent rate offered by Wally’s expert; and second, it erred when it concluded that three percent was a reasonable rate instead. We will address these two arguments separately and in turn.

[1] As to Wally’s first argument, we vigorously disagree. The Trial Division heard ample testimony at the February 26, 2009 hearing, considered two rounds of briefs (primary and supplemental), and sufficiently outlined its reasoning in its March 11, 2009, Order such that this Court is not left with a firm conviction that a mistake has been made. Wally claims, for example, that the Trial Division’s consideration of the recent volatility of the U.S. mortgage market was improper speculation, stating, “such finding is pure speculation which the Trial Court may not engage in.” (Appellant’s Reply Br. at 2 (quoting *The Children of Ngeskesuk v. Esbei Espangel*, 1 ROP Intrm. 682, 690 (1989) (“In the absence of testimony and since the issue was not properly before the Trial Court, we hold that the Trial Court is not free to engage in speculations, especially where speculations have substantial impact on the interest of litigants.”))). Wally argued that the Trial Division was not entitled to consider the recent downturn because there was no evidence on the record about such events and because they were irrelevant to determining the proper rate of interest. We find this argument wholly unconvincing. Far from speculation, the recent downturn in the

mortgage market is a fact that is not subject to reasonable dispute and can be easily verified by resort to sources whose accuracy cannot be reasonably be questioned. *See* ROP R. Evid. 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”). Moreover, the recent downturn is probative of the volatility of mortgage markets generally, which bears directly on an investor’s reasonable expectations of return, especially one concerned with maintaining safety of principal. Accordingly, we hold that Trial Division did not err in its rejection of the ten percent interest rate.

As to Wally’s second argument contesting the Trial Division’s finding that a three percent rate was both secure and reasonable, we disagree as well. Here again, the Trial Division clearly heard ample testimony at the February 26, 2009 hearing, and clearly considered two rounds of briefs (primary and supplemental). Although it did not exhaustively outline its reasoning in its March 11, 2009 Order, this Court is sensitive to the fact that interest rate determinations like this one can be exceedingly difficult to make, and oftentimes are the result of a complex combination of factors, including statutorily-set interest rates for similar just compensation awards, such as the one outlined in 35 PNC § 318(b)(2), oral testimony, and documentary evidence. Here, the Trial Division clearly considered the arguments propounded by both parties, even to the extent of ordering supplemental briefing and holding a hearing to take oral testimony.

Wally claims that the Trial Division failed to explain how it arrived at the three percent interest rate; thus, this Court should remand the case for a fuller explanation, stating “[a]lthough a trial court need not discuss all the evidence it relied on to support its conclusion, the court’s decision must ‘reveal an understanding analysis of the evidence, a resolution of the material issues of ‘fact’ that penetrate beneath the generality of ultimate conclusions, and an application of the law to those facts.’” *Eklbai Clan v. Imeong*, 13 ROP 102, 107 (2006) (citing *Fritz v. Blailles*, 6 ROP Intrm. 152, 153 (1997)). However, this Court is satisfied with the way the Trial Division explained why it rejected the interest rates suggested by the opposing sides in this case. It called 10% too high and 1.56% too low—and most importantly, explained why. Having carefully considered both parties’ suggested rates, the Trial Division was entitled to conclude as a matter of law that a number between those interest rates best represented a secure and reasonable rate given the facts and circumstances of the case. Indeed, after hearing the testimony and reading the primary and supplemental briefs, the Trial Division stated that, “[t]his conclusion, reached after much consideration, is not based on 35 PNC § 318(b), or any other statute, but on the particular circumstances of this case.” *Wally*, Civil Act. No. 05-245, Order at 2 (Tr. Div. March 11, 2009). Accordingly, we hold that there is enough evidence for the Trial Division—and for this Court—to reach the three percent conclusion. Therefore, this determination, however approximate, was not reversible error and we AFFIRM the Trial Division’s Order.

CONCLUSION

For the reasons set forth above, we AFFIRM the Trial Division's Order.

MATERNE, Justice, dissenting:

Because I believe the Trial Division did not elaborate on its reasoning in proclaiming three percent as the "proper" interest rate in this case, I would remand this case back to the Trial Division for further elaboration. The Trial Division applied the prudent investor standard and rightfully rejected the interest rates suggested by the parties. It called 10% too high and 1.56% too low. However, the Trial Division failed to explain how it arrived at three percent as the secure and reasonable rate. It only stated, "[i]n this case, three percent is an interest rate which is both secure and reasonable. This conclusion, reached after much consideration, is not based on 35 PNC § 318(b), or any other statute, but on the particular circumstances of this case. As Defendants have already paid the principal and three percent interest thereupon, pursuant to an earlier order, no further payment is required." *Wally*, Civ. Act. No. 05-245, at 2.

Although the Trial Division heard ample testimony at the February 26, 2009 hearing, and clearly considered two rounds of briefs, it failed to explain how it arrived at the three percent interest rate. The Trial Division did not cite to any evidence proffered at the February 26, 2009 hearing, nor did it indicate that it was using the statutorily set interest rate of 35 PNC § 318(b)(2) as a guide post. In light of *Wally's* argument contesting the Trial Division's finding that a three percent rate was both secure and reasonable, I would remand

this matter for a fuller explanation of its reasoning.

**MARK'S BODY SHOP and BRIGHT
KIN,
Appellants,**

v.

**SERESANG IYAR,
Appellee.**

CIVIL APPEAL NO. 09-019
Small Claims No. 09-002

Supreme Court, Appellate Division
Republic of Palau

Decided: February 26, 2010

[1] **Appeal and Error:** Standard of Review

This Court employs the *de novo* standard in evaluating the conclusions of law of the Court of Common Pleas.

[2] **Agency:** Apparent Authority

An agent's apparent authority results from statements, conduct, lack of ordinary care, or other manifestation of the principal's consent, whereby third persons are justified in believing that the agent is acting within his or her authority. Apparent authority arises when a principal places an agent in a position which causes a third person to reasonably believe the principal had consented to the exercise of authority the agent purports to hold.

[3] **Civil Procedure:** Parties

When a party desires to raise an issue as to legal existence of any party or the capacity of any party to be sued the party desiring to raise

the issue shall do so by specific negative averment, which shall include such supporting particulars within the pleader's knowledge. The purpose of this rule is clearly to avoid the perverse incentive of parties playing "gotcha" with the judicial system, i.e., wasting scarce judicial resources by allowing the court and the parties to execute a trial under the mistaken assumption about a party's legal status.

Counsel for Appellants: Yukiwo P. Dengokl

Counsel for Appellee: Susan Kenney-Pfalzer

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

On Appeal from Court of Common Pleas, the Honorable LOURDES MATERNE, Associate Justice, presiding.¹

PER CURIAM:

This matter is before the Court on appeal from the Decision and Judgment entered in a small claims case by the Court of Common Pleas, in favor of Appellee Seresang Iyar ("Iyar") and against Appellants Mark's Body Shop and Bright Kin ("Appellants"). Having considered the briefs submitted by the

¹ Pursuant to 4 PNC § 304, Senior Judge Honora Remengesau Rudimch recused herself on January 19, 2009, because the owner of the auto shop is a close relative of her husband. The matter was forwarded to the Office of the Chief Justice, which subsequently assigned Associate Justice Lourdes Materne.

parties and the record, we AFFIRM in part and REMAND in part.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This appeal originates from a dispute over the loss of Iyar's automobile. In August or September of 2006, Iyar was involved in a car accident. After the accident, Iyar was taken to the police station to give her statement. From this point in time forward, neither party agreed at trial as to the events that followed.

According to Iyar, Jerry Nabeyama ("Nabeyama") told her that her car would be towed to Mark's Body Shop, because the towing is free if the car is repaired there. Iyar agreed, and called Mark's Body Shop approximately two weeks later. Iyar testified at trial that she spoke to an employee, Max Arminal ("Arminal"), who informed her that the "boss" was out of town and that the shop would hold her car until she was able to get a loan to pay for the repairs. Months later, when Iyar attempted to retrieve her car, she was informed either that the car had been disposed of or was simply nowhere to be found. In her complaint of January 15, 2009, Iyar alleged that Mark's Body Shop improperly disposed of or lost the car and claimed \$1,000.00, plus interest, for the value of the car.

According to Appellants, the only time Iyar's car had ever been seen at Mark's Body Shop was more than a year prior, when, in 2005, Iyar's father brought the car in for repairs. After the accident in 2006, Appellants claim that the car must have simply been left near a shop by Rafaela's

house near the Palasia Hotel. It disappeared at some point, never to be found. At the hearing, the shop's owner, Akemi Anderson ("Anderson"), denied that she ever saw the car at her shop. Likewise, Arminal denied ever speaking to Iyar on the phone about the car.

On September 15, 2009, the Court of Common Pleas issued its Findings of Fact and Decision in favor of Iyar in the amount of \$1,000.00. In the three-page Decision, the court acknowledged that almost no documentary evidence had been presented at the hearing proving Iyar's claim, i.e., no contract between Iyar and Mark's Body Shop was ever produced. However, the court also noted that the testimonial evidence at trial allowed it to make certain credibility determinations, which were ultimately dispositive of the underlying factual dispute. In making these credibility determinations, the court found Arminal's testimony to be wholly incredible. Although Arminal testified that he never had any conversation with Iyar, when confronted with the possibility that his failure to tell his boss about the phone call could result in his own liability for the value of the car, he later admitted to telling his boss about the conversation. Indeed, upon reading the transcript of the hearing, this Court sees with its own eyes the contradictions in Arminal's testimony and the evasiveness of his answers.

In its findings of fact, which the court issued orally from the bench, the court found as follows:

[The] Court accepts Plaintiff's argument that her car was taken to Mark's Auto Shop. She talked to somebody named Max who said that he will talk

to his boss, that she was under the impression that her car was gonna stay there for three months. She went after three months, her car was gone. Mr. Arminal and Mr. Loques [sic] lied to this Court. There is no question in this Court's mind that they took an oath, they testified and lied. The Court does not like liars. It will not stand for it. For the reasons stated, the Court believes Ms. Iyar's testimony and evidence that she . . . her car was brought to Mark's Auto Shop. She had asked them to take care of the car for three months while she finds money to pay for it. She went, her car was gone. The Court finds in favor of the Plaintiff for a thousand dollars.

Iyar v. Mark's Body Shop, Small Claim No. 09-002, Findings of Facts and Decision at 3 (Ct. Com. Pl. Sept. 15, 2009). This appeal followed.

STANDARD OF REVIEW

[1] This Court employs the *de novo* standard in evaluating the conclusions of law of the Court of Common Pleas. *Cura v. Salvador*, 11 ROP 221, 222 (2004). Factual findings are reviewed using the clearly erroneous standard. *Id.* Under this standard, the findings of the lower court will only be set aside if they lack evidentiary support in the record such that no reasonable trier of fact could have reached that conclusion. *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42,

46 (2006). The lower court's interpretation of a contract is reviewed *de novo*. *Palau Marine Indus. Corp. v. Pac. Call Invs., Ltd.*, 9 ROP 67 (2002).

DISCUSSION

Appellants' arguments on appeal can be summarized as follows. First, Appellants argue that the court's factual finding of liability is clearly erroneous because (1) there is not enough evidence to support the finding that Iyar is the legal owner of the car in question; (2) even if sufficient evidence exists proving she is the legal owner, there is insufficient evidence to support a finding that Appellants caused the loss of Iyar's car; (3) there is no evidence of a binding contract between the parties; and (4) even if the finding of liability can be sustained, the court's award of \$1,000.00 is clearly erroneous, having no basis in the record. Second, Appellants argue that the court's treatment of Mark's Body Shop as a legal entity is a misapplication of the law. Appellants argue (1) that Mark's Body Shop is not a legally recognized corporation and thus not subject to suit, and (2) that Anderson is actually the legal owner—not Bright Kin (“Kin”)—and thus Iyar sued the wrong defendants altogether.

In her response, Iyar begins by stating “[f]irst of all, it must be said that none of the arguments made in Appellant's Brief were made at trial and it is clear that arguments not presented to the Trial Division may not be raised for the first time on appeal.” (Appellee's Br. at 2 (citing *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317 (2001))). We note this, and in some instances agree. However, because the parties here proceeded pro se in a small claims action, this

Court will construe the trial transcript in such a way as to give the parties the benefit of the doubt where at all possible. We will address Appellants' four factual arguments first and then turn our attention to Appellants' argument about their improper designation as defendants in this case.

I. Factual Arguments

A. Ownership of the Car

On the first day of trial, Kin questioned Iyar's ownership of the car; accordingly, we shall construe this as preserving the issue for appeal and address the merits of this argument. (*See* Tr. at 2: 14-27). Appellants argue that the court erroneously assumed that Iyar was the rightful owner of the car, even though the evidence suggested that, at the time of the accident, the car was still registered in her father's name. We hold, however, that the evidence on the record was sufficient to support a finding, implied or otherwise, that Iyar held equitable title to the car.

The court accepted as true Iyar's testimony that (1) she was operating under an agreement with her father to place the car in her name after she paid off a loan to him; (2) she had in fact paid off the loan and had been in possession of the car for over a week at the time of the accident; and (3) they simply had not had the time to effect the paperwork to transfer the title legally. Having accepted the above testimony, the court was entitled to imply that Iyar held equitable title to the car at the time of the accident. *See Kaminanga v. Sylvester*, 5 TTR 312, 316-17 (1971) (holding that a purchaser in possession holds equitable title and is entitled to legal title as soon as the

purchase price has been paid).² Moreover, Appellants never pursued any line of questioning to this effect at trial, other than the initial question by Kin. Accordingly, given the evidence presented, the court's finding was not clearly erroneous. We affirm on this issue.

B. Loss of the Car

The court's finding that Appellants were responsible for the loss of Iyar's car is the central finding of the underlying dispute here. Accordingly, we hold that this issue was preserved for appeal. Appellants argue that, in finding liability, the court merely relied on Iyar's self-serving testimony, in which she stated that (1) Jerry Nabeyama had called the shop to tow the car, and (2) two weeks later, she had called and spoken to Arminal, who informed her that they would hold her car for her for three months until she could procure a loan to pay for the repairs. Foremost, Appellants state that Iyar's failure to call Jerry Nabeyama at trial to corroborate Iyar's version of event caused a "gaping hole in appellee's version that made it incredible." (Appellant's Reply Br. at 2). Second, Appellants state that the court was never presented with documentary evidence supporting Iyar's claim

² It should be noted that the case cited above concerned title to land—not personal property. However we hold that, just as there was no statute of frauds in the Trust Territory requiring a writing for a contract for the sale of land, there is currently no statute of frauds in the Republic with respect to the sale of goods. Accordingly, we hold that the statement of law contained in *Sylvester* holds true here, i.e., a contract of sale and purchase contemplates a subsequent execution of a deed transferring title.

that Mark's Body Shop was ever in possession of the car. Instead, Appellants contend, the court impermissibly concluded that Mark's Body Shop was responsible for the loss of the car based solely on its finding that Arminal's testimony was incredible. Appellants state, "[a]lthough the trial court is given deference when it comes to credibility determinations, credibility determinations should be based on facts." *Id.*

Although we agree that more documentary evidence would be helpful to determine conclusively what happened in the underlying case, we also note that testimonial evidence, such as Iyar's credible testimony and Arminal's incredible testimony presented below, can logically and permissibly lead to a trial court's determination of liability. This is a classic case of "he said / she said" in the context of a small claims dispute. The trial court found that Iyar's testimony was corroborated by (1) Anderson's testimony about the auto shop's phone call protocol in which the female "mamasang" always answered the phone and then passed the caller along to the person best suited to their needs, and (2) the inherent contradiction in Arminal's testimony regarding the occurrence *vel non* of the phone call. Had the trial court found Iyar's testimony to be incredible and Arminal's testimony to be credible, it could have determined that Iyar had not sufficiently proved her claim and thus found no liability on behalf of Mark's Body Shop. Here, however, when both Iyar and the court questioned Arminal, the court disbelieved Arminal's answers. Indeed, this appears wholly justified in light of his contradictory testimony. Where "there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous." *Ngiramos v.*

Dilubech Clan, 6 ROP Intrm. 264, 266 (1997). "Answers, or the lack thereof, to the probative questions of the court help the court make credibility determinations." *Worswick v. Kedidai Clan*, 14 ROP 161 (2006). The evasiveness and contradiction in Arminal's answers, coupled with corroboration by Anderson of Iyar's testimony, thus properly led the court to conclude that, based on the testimonial evidence, Iyar carried her burden and Mark's Auto Shop was liable for the loss of Iyar's car. We affirm on this issue.

C. Presence of a Contract

Appellants' argument that there was never any binding contract between the parties was never explicitly raised at trial; however, it was implied by the Appellants' testimony, in which each witness uniformly denied remembering speaking to her or seeing the vehicle. Accordingly, we shall address the merits of this argument as well. Appellants contend that there was no evidence that Iyar ever signed a contract containing the terms to which she testified, i.e., the three-month holding period and subsequent promise to repair. Appellants contend that the "formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange, and a consideration." *Palau Pub. Lands Auth. v. Tmui Clan*, 8 ROP Intrm. (2001) (citing *Kamiishi v. Han Pa Const. Co.*, 4 ROP Intrm. 37, 40 (1993)). Although it is true that no documentary evidence was ever produced proving a written contract between the parties, we hold that the combination of Arminal's incredible testimony with Iyar's credible testimony is sufficient to uphold the trial court's finding not only that Arminal possessed at least the apparent authority to bind Mark's Auto Shop but also that a

bailment was subsequently created between the parties.

[2] An agent's "apparent authority results from statements, conduct, lack of ordinary care, or other manifestation of the principal's consent, whereby third persons are justified in believing that the agent is acting within his or her authority." *Ngirachemoi v. Ingais*, 12 ROP 127, 130 (2005) (quoting 3 Am. Jur. 2d *Agency* § 76 (2002)). "Apparent authority arises when a principal places an agent 'in a position which causes a third person to reasonably believe the principal had consented to the exercise of authority the agent purports to hold.'" *Id.* (quoting *Makins v. Dist. of Columbia*, 861 A.2d 590, 594 (D.C. 2004)). As Iyar points out in her brief, she testified that she spoke with Arminal, who told her that the shop would hold the car for three months. Although Appellants argued at trial (1) that Arminal never spoke with Iyar and (2) even if he did, he lacked the authority to enter into contracts on behalf of the shop, the court disbelieved Arminal's testimony on this issue. Accordingly, in the court's permissible view, Arminal did in fact speak to Iyar about her car. Being in the position to take phone calls and make representations about the work of the shop is clearly a situation in which Arminal possessed at least apparent authority to bind the shop. Moreover, when the court discredited Romeo Loquez's ("Loquez") denial that Arminal was the person in charge of the shop when Mr. Bright Kin was off-island, the apparent authority theory holds even more sway. In light of the clear evasiveness of their answers at trial, we hold that the inferences drawn by the trial court as to Arminal's authority to bind the shop are permissible views of the testimonial evidence presented below and, once again, where "there

are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous." *Ngiramos v. Dilubech Clan*, 6 ROP Intrm. 264, 266 (1997).

For the same reasons, we hold that there was sufficient evidence below to support a finding that a bailment was created when Arminal assured her the shop would take care of the car for three months. Even though the trial court did not specifically address the issue of a bailment, the oral transaction is a classic example of one. As Iyar points out in her brief, the case at bar is similar to *Ngiralo v. Sbal*, 1 ROP Intrm. 85, 86 (Tr. Div. 1983). In *Sbal*, the Plaintiff took his car to Defendant's shop for repairs and, after a series of unfortunate events, the car was lost. The court stated,

[a] bailment is defined as "the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed, and the property returned or duly accounted for when the specific purpose is accomplished, or kept until the bailor reclaims it." 8 Am. Jur. 2d. *Bailments* § 2. There is no question that a bailment existed between plaintiff and defendant, and defendant was entrusted with plaintiff's vehicle for safe keeping while awaiting repair.

1 ROP Intrm. at 86. Here, the court's findings that the car was delivered to the shop—and

that Arminal promised the shop would take care of it for three months—was sufficient to create a bailment between the parties. Accordingly, we affirm on this issue.

D. Award

After making the above factual conclusions, the trial court awarded the sum of \$1,000.00 to Iyar. As Appellants rightly point out, however, the record is devoid of any evidence as to value of the car, much less the award of \$1,000.00. Iyar bore the burden of proof on the elements of her claim, which included proof of liability *and* damages. At no point during the three-day trial was the amount of damages ever discussed. In the absence of relevant evidence, a finding cannot be sustained on appeal. *Whipps*, 8 ROP Intrm. at 318. Furthermore, in her response brief, Iyar all but concedes that a remand is the most appropriate result with respect to this issue, acknowledging that the court never asked any questions about the amount of damages claimed. Accordingly, we hold that the trial court's award cannot be sustained on appeal because it is not supported by relevant evidence. We therefore remand this issue to the trial court for proceedings consistent with the determination of damages.

II. Legal Argument

As a final contention, Appellants challenge the court's treatment of Mark's Body Shop as a legal entity altogether. Appellants argue that Mark's Body Shop is not a legally recognized corporation and thus is not subject to suit; moreover, because Kin is not its legal owner (Anderson apparently is), the entire proceeding below was against the wrong defendant. After a thorough

scouring of the record below, the Court can find no instance where this argument was ever made by Appellants for purposes of preserving it on appeal.

[3] “When a party desires to raise an issue as to legal existence of any party or the capacity of any party to be sued . . . the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars within the pleader's knowledge.” ROP R. Civ. P. 9(a). The Court accepts Appellants' argument that small claims proceedings are informal and the parties are not normally bound by the specific strictures of the Rules of Civil Procedure. Appropriately, the Court does not expect these defendants to have raised this issue by some specific negative averment, and would be willing to accept any argument at all, even one that failed to include so-called supporting particulars. However, common sense and fairness dictate that the Court still insist the parties to have formulated some kind of objection at trial to an issue so fundamentally dispositive of the case, especially when the “actual” owner of Mark's Body Shop, Akemi Anderson, appeared and testified at trial.

According to the arguments made by the parties on appeal, Mark's Body Shop is not a registered corporation. We take the parties' word for it. Perhaps Iyar's uncertainty about Mark's Body Shop as a legal entity lead her to join Kin—the person who Iyar believed to be the legal owner of Mark's Body Shop—as a co-defendant in that action, instead of Anderson. Perhaps not. Whatever the reasoning, mistaken or not, behind Iyar's decision to sue these particular defendants, ROP R. Civ. P. 9(a) requires defendants in this case to correct the mistake at a far earlier

date than today. The purpose of this rule is clearly to avoid the perverse incentive of parties playing “gotcha” with the judicial system, i.e., wasting scarce judicial resources by allowing the court and the parties to execute a trial under the mistaken assumption about a party’s legal status. “This approach seems particularly appropriate because of the waste of judicial and litigant resources that would result from the dismissal of a suit as late as the trial when one of the parties lacks the requisite existence, capacity, or authority to sue or be sued.” 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure* § 1295 (3d ed. 2004). Had the Appellants raised this issue at trial, which they had ample opportunity to do, then according to the Republic’s liberal pleading rules, Iyar would no doubt have been allowed time to amend her pleading to include the “correct” parties. Failing to raise this clearly dispositive issue at trial prejudices Iyar, since the trial has now concluded. Accordingly, the Court finds that Appellants waived this issue by failing to raise it at trial. “Although an objection to a party’s . . . legal existence is not technically speaking an affirmative defense, it can be analogized to an affirmative defense and treated as waived if not asserted . . .” *Id.*

CONCLUSION

For the reasons set forth above, the Judgment of the Court of Common Pleas is AFFIRMED in part and REMANDED in part.

**NGARAMETAL ASSOCIATION,
Appellant,**

v.

**KOKICH INGAS,
Appellee.**

CIVIL APPEAL NO. 09-018

Civil Action No. 02-286

Supreme Court, Appellate Division
Republic of Palau

Decided: March 9, 2010

[1] **Appeal and Error:** Standard of Review

The Appellate Division reviews a lower court’s grant of summary judgment *de novo*.

[2] **Civil Procedure:** Summary Judgment

In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party. Summary judgment is not appropriate when genuine issues of material fact persist. The same standard applies to cross-motions for summary judgment.

[3] **Property:** Landlord/Tenant

A tenant-at-will is incapable of assigning its tenancy interest.

[4] **Appeal and Error:** Preserving Issues

As a general rule, an issue that is not raised in the trial court is waived and may not be raised on appeal.

Counsel for Appellant: William L. Ridpath

Counsel for Appellee: David F. Shadel

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Ngarametal Association challenges the Trial Division's decision granting summary judgment in favor of appellee Kokich Ingas and denying Ngarametal Association's cross-motion for summary judgment.¹ Although not originally a party to the suit below—a suit in which Ingas sued defendants Crystal Palace, Inc. (“CPI”) and Frank Ho—Ngarametal Association intervened below and timely appealed the Trial Division's summary

judgment decision.² After reviewing the record below and briefs on appeal, we affirm.

BACKGROUND

This appeal pertains to a three-story building (“the Building”). Before we get to the Building, however, we must trace the possession of the land on which the Building stands. Ingas occupied the land for years, and, on September 19, 1996, he entered into an agreement to lease the land from Koror State Public Lands Authority (“KSPLA”). Civ. No. 02-286, Decision at 6 (Tr. Div. Apr. 28, 2009). In late 1996, Ingas and Ho talked about Ho constructing a three-story building on Ingas's leasehold to serve as quarters for employees of his business, CPI. *See id.* Ingas and Ho came to some sort of understanding, but no written sublease was ever executed.

Ingas and Ho jointly applied for (and received) building permits. Ho constructed the Building on Ingas's leasehold in early 1997 and made use of it. *See id.* at 7. Neither CPI nor Ho ever paid rent for use of the Building. (*See* Ngarametal Ass'n Br. at 1.) On September 3, 2002, Ingas filed a complaint seeking, *inter alia*, ejectment of CPI/Ho from the land.³ CPI and Ho abandoned the Building in November 2004. (*See id.* at 2.)

¹ Although a trial court's denial of a motion for summary judgment is generally not directly appealable, “[w]hen an appeal from denial of summary judgment is raised in tandem with appeal of an order granting a cross-motion for summary judgment, [an appellate court] has jurisdiction to review the propriety of the denial of summary judgment by a district court.” 4 Am. Jur. 2d *Appellate Review* § 161 (2007).

² Ngarametal Association's status as intervenor confers proper standing to appeal. *See* 5 Am. Jur. 2d *Appellate Review* § 234 (“One who was not initially named as a party to the case may acquire standing to appeal by intervening in the trial court.”); *see also Tmetbab Clan v. Gibbons*, 5 ROP Intrm. 295, 297 n.3 (Trial Div. 1995).

³ Ingas filed an amended complaint on October 3, 2003.

Separately, CPI/Ho entered into a lease agreement with Ngarametal Association on June 3, 1996 for a building owned by Ngarametal Association on a neighboring property. (*See id.*) When CPI/Ho fell behind on the rental payments, Ngarametal Association negotiated for repayment of the debt. (*See id.*) As part of the agreement, dated April 6, 2004, CPI/Ho agreed to a repayment plan and assigned its “rights and interests” in the Building to Ngarametal Association as collateral. Ngarametal Association would only assume the rights and interests upon CPI/Ho’s default of the new agreement. CPI/Ho again fell behind and Ngarametal Association sent a notice of default to CPI/Ho stating its intent to take possession of the Building on October 6, 2004. (*See id.*) It was shortly thereafter that CPI and Ho abandoned the Building.

On April 14, 2005, Ingas moved for summary judgment in his lawsuit against CPI/Ho. Ngarametal Association, realizing that its rights and interests in the Building could be impacted by the outcome, moved to intervene in the action below on August 4, 2005 and filed an Intervenor’s Complaint on September 21, 2005. After the Trial Division granted the motion to intervene, Ngarametal Association simultaneously filed a cross-motion for summary judgment and an opposition to Ingas’s motion for summary judgment. Neither CPI nor Ho responded to either motion for summary judgment.⁴ The Trial Division issued an April 28, 2009

decision granting Ingas’s motion for summary judgment and denying Ngarametal Association’s cross-motion. That decision was amended as to the damage calculation and judgment was entered on May 22, 2009.

The Trial Division found that, because no lease was entered into, CPI/Ho was a tenant-at-will of Ingas. The court below further found that the parties had agreed that the Building would revert to Ingas at the end of the leasehold and that the tenancy was terminated by the filing of Ingas’s complaint against CPI/Ho. Therefore, the Trial Division reasoned, CPI/Ho owed Ingas back rent and neither CPI/Ho nor Ngarametal Association had any interest in the Building. Ngarametal Association filed a timely appeal of the Trial Division’s summary judgment decision.

STANDARD OF REVIEW

[1, 2] We review a lower court’s grant of summary judgment *de novo*. *See Becheserrak v. Eritem Lineage*, 14 ROP 80, 81 (2007). In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party. *See Obeketang v. Sato*, 13 ROP 192, 194 (2006). Summary judgment is, therefore, not appropriate when genuine issues of material fact persist. *See id.* The same standard applies to cross-motions for summary judgment. *See House of Traditional Leaders v. Seventh Koror State Legislature*, 14 ROP 52, 54 (2007).

DISCUSSION

Ngarametal Association’s appellate brief asserts that Ingas is unjustly enriched by the Trial Division’s award of the Building to

⁴ It appears that Ho died shortly before Ingas’s motion for summary judgment and CPI became defunct sometime during the pendency of the lawsuit below.

him. Ngarametal Association argues that Ingas is overcompensated by the award of both back-rent and the Building. (*See* Ngarametal Ass'n Br. at 4.) Ngarametal Association contends that a tenant (here, CPI/Ho) should recover the value of improvements made on a landlord's land under the theory of unjust enrichment. (*See id.* at 4-5.) Following that logic to its conclusion, Ngarametal Association reasons that it should be the one to recover the value of the Building from Ingas by way of its assumption of CPI/Ho's rights and interests in the Building. (*See id.* at 6.) Ngarametal Association asks us to grant it a lien on the Building equivalent to the value of the Building at the time of CPI/Ho's abandonment of the property. (*See id.*) Ngarametal Association does not otherwise address the Trial Division's decision.

Ingas's primary response is that Ngarametal Association failed to bring these arguments before the Trial Division and is therefore barred from arguing them before this Court. (*See* Ingas Br. at 2-4.) A review of the record before the lower court confirms the merit of this argument. Ngarametal Association's combined opposition to Ingas's motion for summary judgment and brief in support of its own motion for summary judgment says nothing of the theories of "unjust enrichment" or "restitution" for improvements on the land of another that it presses now. Ngarametal Association's brief to the Trial Division employs the following logic: (1) CPI/Ho owned the Building; (2) CPI/Ho assigned its rights and interests in the Building to Ngarametal Association as collateral for a debt; (3) CPI/Ho defaulted on its debt to Ngarametal Association; and therefore (4) Ngarametal Association owns the

Building. Ngarametal Association stated only that Ingas could not own the Building because no document shows that Ingas had an interest in the Building and because Ingas wrote a letter to his landlord, KSPLA, seeking permission to sublet land to CPI/Ho.⁵

[3] The Trial Division properly decided the issues brought before it in the summary judgment briefing by Ingas and Ngarametal Association. It found that, without a written lease agreement to satisfy the statute of frauds, CPI/Ho was a (sub)tenant-at-will on Ingas's leasehold. *See* Trial Div. Decision at 8-9 (citing Restatement (Second) of Property, *Landlord & Tenant* § 2.3(1) (1976)). Because a tenant-at-will is incapable of assigning its tenancy interest, the Trial Division was correct in finding that Ngarametal Association had no possessory interest in the Building. *See id.* at 13 (quoting Restatement (Second) of Property: *Landlord & Tenant* § 15.1, cmt. b ("An attempt by the landlord or the tenant to transfer his interest under the tenancy at will passes nothing to the transferee.")).

[4] What Ngarametal Association seeks in appeal however, is a restitutionary interest in the Building under an equitable doctrine. As a general rule, "an issue that is not raised in the trial court is waived and may not be raised on appeal." *Nebre v. Uludong*, 15 ROP 15, 25 (2008); *see also Kotaro v. Ngirchchol*, 11

⁵ In response to Ingas's letter, KSPLA stated it would approve the sublease contingent on its review and approval of the sublease agreement. Ngarametal Association freely admits that no sublease agreement ever existed. These letters between Ingas and KSPLA therefore do nothing to demonstrate that a sublease actually existed between Ingas and CPI/Ho.

ROP 235, 237 (2004) (“No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue.”); *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998) (stating that, for the sake of stability of land titles, the rule is especially strong in cases deciding interests in land).

In sum, Ngarametal Association only argued to the Trial Division that CPI/Ho owned the Building and that it assumed the rights of CPI/Ho in the Building. That is a very different question from what Ngarametal Association now asks us to decide: whether Ingas owes restitution to its tenant’s assignee for the improvement to its leasehold under the theory of unjust enrichment.⁶

⁶ Based on a footnote in the Trial Division’s opinion, it appears that Ngarametal Association may have argued some aspect of restitution at the summary judgment hearing before the Trial Division. See Trial Div. Decision at 13 n.17 (“At oral argument, Intervenor’s cited *Giraked v. Estate of Rechucher*, 12 ROP 133 (2005), to argue that Defendants, and by extension Intervenor, should be awarded either the Building or just compensation for the Building.”). The Trial Division went on to briefly examine and distinguish *Giraked*. Because Ngarametal Association did not order a copy of the audio recording or transcript of the summary judgment hearing pursuant to ROP R. App. P. 10(b), we do not know what it argued there. Attempting to reverse engineer the Trial Division’s footnote, it seems that Ngarametal Association’s *Giraked* argument may have been that CPI and Ho mistakenly believed that they had rented the land directly from KSPLA. But on appeal, Ngarametal Association’s *Giraked* argument seems to be that CPI and Ho mistakenly believed that they had

entered into a long-term sublease with Ingas. (See Ngarametal Ass’n Br. at 6.) Ngarametal Association cites Restatement of Restitution § 53 to us as support for its argument that such a mistaken belief is sufficient to support a claim for restitution (*see id.*), but nothing indicates to us that Section 53 was presented to the Trial Division below (it was not mentioned in *Giraked* or any of the summary judgment papers). It is the appellant’s responsibility to provide an adequate record for our review. See *Obakerbau v. Nat’l Weather Serv.*, 14 ROP 132, 135 (2007) (“[T]he duty to provide an adequate record rests on the appellant.”); *see also Pedro v. Carlos*, 9 ROP 101, 102 (2002) (“Without the transcript or counsel’s informed representation of the events at the hearing, we see no reason to question how the Land Court treated the plaintiff.”). We can only review what is before us, namely, the written record of the trial court. If Ngarametal Association wished for us to review the arguments presented at the summary judgment hearing, it should have provided us with a record of that hearing (or at very least filed an appellate reply brief explaining the deficiency).

In its answer to the amended complaint, CPI/Ho did plead the affirmative defense of unjust enrichment. (See Answer, Affirmative Defenses, ¶ 11 (Nov. 6, 2003) (“Plaintiff’s claim for eviction would result in plaintiff’s unjust enrichment.”).) But unjust enrichment was only raised there as a defense for the eviction portion of the action, and, upon CPI/Ho’s abandonment, eviction no longer was a going issue in the case. Regardless, unjust enrichment was not, on the record before us, argued as a defense in the summary judgment proceedings before the Trial Division. The Trial Division briefly addressed—and disposed of—what appears to be only a hypothetical unjust enrichment argument in a footnote to its opinion. See Trial Div. Decision at 12 n.16. We cannot fairly find fault in the Trial Division’s treatment of the issue, and we will not permit Ngarametal

Because we refuse to “review” issues not raised below, we affirm the Trial Division’s decision.

CONCLUSION

As explained above, the Trial Division’s grant of Ingas’s motion for summary judgment and denial of Ngarametal Association’s cross-motion for summary judgment is AFFIRMED.

**EDARUCHEI CLAN,
Appellant,**

v.

**SECHEDUI LINEAGE, CHILDREN OF
REMELIIK, FAMILY OF BLAU,
TAMIKO NGESKEBEL, CHILDREN OF
EMAUTELNGAL, and LEORY
NGIRAMOWAI,
Appellees.**

CIVIL APPEAL NO. 08-051
LC/R 06-411

Supreme Court, Appellate Division
Republic of Palau

Decided: March 29, 2010

[1] **Property:** Property Seized by
Occupying Powers

The fact that claimants’ ancestors may have left the land—or even have been evacuated from the land—during World War II does not prove that the Japanese administration actually expropriated the land.

[2] **Property:** Alienating Land

A clan lacks the authority to dispose of non-clan land because one cannot convey away land which does not belong to him.

Counsel for Appellant: Raynold B. Oilouch

Counsel for Sechedui Lineage: John K. Rechucher

Counsel for Ngeskebei: Yukiwo P. Dengokl

Association to argue the issue for the first time on appeal.

BEFORE: LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

Edaruchei Clan appeals eight determinations of land ownership made by the Land Court regarding land located within Homestead Lot 162 in Ngerkeiukl Hamlet in Peleliu State. We find no clear error in seven of the Land Court's awards, but we vacate the determination of Worksheet Lot 291-017A and remand for further consideration.

BACKGROUND

On July 29, 2008, the Land Court, per Judge Skebong, issued findings of fact, conclusions of law, and determinations of ownership concerning Homestead Lot 162. The actual determination of ownership certificates were issued on August 13, 2008. Over 200 claims were filed to land within Homestead Lot 162. The Land Court heard testimony over the course of nine days in March, 2007.

Homestead Lot 162 comprises 87 smaller worksheet lots. The entirety of Homestead Lot 162 was purportedly transferred from the Trust Territory government to Edaruchei Clan by quitclaim deed in 1962. Relying primarily on that quitclaim deed, the Land Court awarded ownership of 79 worksheet lots to Edaruchei Clan. The remaining 8 worksheet lots were

awarded to Family of Blau (Worksheet Lot R-130), Tamiko Ngeskebei (Worksheet Lots R-532, R-537, and 295-002A), Sechedui Lineage (Worksheet Lot R-133), Leory Ngiramowai (Worksheet Lot 291-034), Children of Remeliik (Worksheet Lot R-132), and Children of EmauteIngal (Worksheet Lot 291-017A). Edaruchei Clan appeals these eight determinations and claims that it should have been awarded all 87 worksheet lots in Homestead Lot 162.¹ Only Sechedui Lineage and Tamiko Ngeskebei filed briefs responding to Edaruchei Clan's opening brief on appeal.

STANDARD OF REVIEW

We review the Land Court's findings of fact for clear error. *See Ngerungel Clan v. Eriich*, 15 ROP 96, 98 (2008). Under this high standard, "findings will not be set aside as long as they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion." *Etpison v. Tmetbab Clan*, 14 ROP 39, 41 (2006). In reviewing for clear error, this Court will refrain from substituting its own judgment of the credibility of the witnesses or the weight of the evidence. *See Rechucher v. Lomisang*, 13 ROP 143, 145 (2006). When two permissible competing views of the evidence are present, a lower's court decision between the competing views cannot be considered clearly erroneous. *See Sungino v. Blaluk*, 13 ROP 134, 136 (2006). A lower court's

¹ Several of these same worksheet lots are also the subject of a separate appeal filed by Dmiu Clan. *See Dmiu Clan v. Edaruchei Clan*, 17 ROP 134 (2010). Dmiu Clan claims error in the Land Court's denial of its claims to, *inter alia*, Worksheet Lots No. R-130, R-132, and R-133.

finding of fact will be deemed clearly erroneous only when it is so lacking in evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion. *See Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004).

DISCUSSION

Edaruchei Clan presents several recurring arguments that it (literally) repeats throughout its brief. Instead of repeating our denial of these arguments as applied to each contested worksheet lot, we will address them universally at the outset.

I. Edaruchei Clan’s Recurring Arguments

A. The Japanese Taking of Ngerkeiukl Hamlet

Edaruchei Clan’s first recurring argument is that testimony that the entire Palauan population of Ngerkeiukl Hamlet was evacuated by the Japanese administration during World War II leads to the inevitable inference that the hamlet became wholly Japanese land and then Trust Territory government land. (Edaruchei Clan Br. at 9-10, 12, 16-17, 19, 22, 26.) Therefore, according to Edaruchei Clan, the 1962 quitclaim deed covering land located in Ngerkeiukl Hamlet effectively conveyed all the land in Homestead Lot 162. Edaruchei Clan further cites testimony of Postol Remeliik stating that when the people returned to the hamlet after the war, it was entirely “government land.” (Tr. 222:18-27.)

[1] Edaruchei Clan’s major premise is flawed because the fact that claimants’ ancestors may have left the land—or even

have been evacuated from the land—during World War II does not prove that the Japanese administration actually expropriated the land. It merely means that the residents left. Edaruchei Clan does not present any evidence, let alone evidence that would compel us to find the Land Court’s determination was clearly erroneous, that the Japanese administration actually took seven of the eight worksheet lots at issue.² And Postol Remeliik’s testimony that when the people returned to Peleliu after the war, the entire hamlet was “government land” is far from conclusive. A full reading of Postol Remeliik’s testimony indicates that the government claimed ownership of the lands, but the people disputed that claim. (Tr. 222:27-223:2 (“When the chief of these three hamlets, Ngerkiukl, Ngesias and Teliu discovered that their hamlets were government properties they tried to figure out ways to get their properties back because they were not government property.”).)

B. The Four Chiefs’ Accord

[2] Edaruchei Clan also hangs its hat on testimony that, upon learning that the hamlet had become Trust Territory government land, the four clans of Ngerkeiukl Hamlet got together and agreed to split the hamlet into four pieces by filing claims in the name of each clan. (*See* Edaruchei Clan Br. at 10, 13, 17, 20, 23, 27.) But any accord between the four clans to split the hamlet into four tracts of clan land has no effect on land that the clans did not own. In short, the clans lacked the authority to dispose of non-clan land. *See*

² For specific discussion of Worksheet Lot 291-017A, see section II(F), *infra*.

Riumd v. Tanaka, 1 ROP Intrm. 597, 604 (1989) (“One cannot convey away land which does not belong to him.” (quoting *Edeyaoch v. Timarong*, 7 TTR 54, 58 (Tr. Div. 1974))). Therefore such an agreement does nothing to prove that the individual lots at issue are clan-owned.

C. The Mention of War Claims Payments

Edaruchei Clan cries foul at each mention of the receipt of war claims payments by relatives of the claimants. (*See* Edaruchei Clan Br. at 11, 20.) Edaruchei Clan correctly states that receipt of war claims reparations does not *necessarily* prove landownership, as such payments were made in some instances for crops, houses, and other personalty rather than for the land itself. *See Uchelkumer Clan v. Isechal*, 11 ROP 215, 220 (2004). But such payments may still be considered along with other evidence, and the mere mention of the payments along with other evidence in support of the appellees’ claims does not demonstrate that the Land Court’s findings were clearly erroneous with respect to those worksheet lots.

D. Edaruchei Clan’s 1956 Land Claim

In 1956, Edaruchei Clan filed a claim with the government for the return of a large tract of land that purportedly includes all of the disputed lots. (Edaruchei Clan Br. at 6-7 & Ex. E.) That claim ultimately failed, but it appears to have laid the foundation for the later Homestead Lot and, eventually, the quitclaim deed. However, the then-chief of Edaruchei Clan, Uchelmekediu Ngireblekuu, and several supporters who attached their

names to Edaruchei Clan’s claim—Remeliik, Mabel, and Baulechong—are relevant to today’s dispute.

Four of the appellees—Leory Ngiramowai, Children of Remeliik, Sechedui Lineage, and Family of Blau—trace their claims to individual land ownership back to the signers of Edaruchei Clan’s 1956 land claim. Edaruchei Clan argues that it would be nonsensical for these four individuals to support Edaruchei Clan’s 1956 claim to the land in the name of the clan if, in fact, they were individual owners of the land. (*See* Edaruchei Clan Br. at 13-14, 17-18, 19-20, 26-27.) Therefore, according to Edaruchei Clan, the Land Court’s findings of individual ownership relating to these worksheets were clearly erroneous.

Edaruchei Clan’s inference is plausibly defeated by conflicting testimony. Postol Remeliik testified that the chiefs of the four clans of Ngerkeiukl Hamlet were advised that it would be a lengthy process if each individual landowner filed a claim for his or her land with the government. (Tr. 223:23-27.) Therefore, the chiefs decided that they would file four large claims in the name of the clans and then subsequently sub-divide the four large tracts internally among the individual landowners. (Tr. 225:24-226:26.) This testimony would explain why Ngireblekuu filed a claim for a large tract of land in the name of Edaruchei Clan—and Remeliik, Mabel, and Baulechong supported it—even though the tract included the signers’ personal property. Given this testimony, we do not find that the 1956 land claim demonstrates that the Land Court’s findings were clearly erroneous.

II. Arguments Regarding Specific Worksheet Lots

A. Worksheet Lots 295-002A, R-532, and R-537 – Tamiko Ngeskebei

Edaruchei Clan claims error in the Land Court's award of Worksheet Lots R-532, R-537, and 295-002A to Tamiko Ngeskebei. Tamiko testified that her father used the three lots before and after World War II. (Tr. 200:4-201:2; 208:9-16.) Tamiko testified that her father had a house on one of the lots and that her father's brother received war claims payments related to the land. (Tr. 201:21-202:4; 208:22-26.) All three lots were recorded in Tamiko's father's name in the Peleliu Tochi Daicho.³

Beyond the contentions previously dispatched, Edaruchei Clan argues that Tamiko's father, a member of Edaruchei Clan, used the land as a clan member-tenant rather than as an owner. (Edaruchei Clan Br. at 10-11.) Edaruchei Clan presents no evidence in support of this theory. Edaruchei Clan simply wishes the Court to draw the inference that because Tamiko's father was a member of Edaruchei Clan and he used the land that therefore the land must belong to Edaruchei Clan. But that is not the only permissible inference. The Land Court drew a different inference—that use of the land evidenced

³ Although the Peleliu Tochi Daicho is not afforded the presumption of accuracy attendant to most of the Tochi Daichos, it may nonetheless be considered as evidence of ownership. For an overview of the Peleliu Tochi Daicho, see *Mesebeluu v. Uchelkumer Clan*, 10 ROP 68, 70-71 (2003).

individual ownership rather than clan ownership. We cannot say that the Land Court committed clear error in failing to draw Edaruchei Clan's preferred inference.

B. Worksheet Lot 291-034 – Leory Ngiramowai

The Land Court awarded Worksheet Lot 291-034 to Leory Ngiramowai. LC/R No. 06-411, Decision at 8 (Land Ct. July 29, 2008). The lot was listed in the Tochi Daicho as individual property of Leory's grandfather, Ngireblekuu. Leory testified that the land was given to him at the eldecheduch of his father, Ngiramowai. (Tr. 185:19-186:3.) A competing claimant, Hilario Ilab, confirmed that Ngireblekuu resided on the land and that the land was given out to be the property of Leory Ngiramowai. (Tr. 508:25-509:23.)

Edaruchei Clan argues that perhaps Ngireblekuu occupied that land as chief of Edaruchei Clan rather than as landowner. (Edaruchei Clan Br. at 14.) Edaruchei Clan is merely speculating. Such unsupported speculation does not demonstrate that the Land Court's decision was clearly erroneous. We affirm the Land Court's award of Worksheet Lot 291-034 to Leory Ngiramowai.

C. Worksheet Lot R-132 – Children of Remeliik

The Land Court awarded Worksheet Lot R-132, a land known as *Meltalt*, to Children of Remeliik. This lot appears as Tochi Daicho Lot 1848 under Remeliik's name. Edaruchei Clan does not proffer any arguments in support of its claim to Worksheet Lot R-132 beyond those discussed in section I, *supra*. Those arguments do not

cause us to find that the Land Court clearly erred in awarding Worksheet Lot R-132 to Children of Remeliik rather than to Edaruchei Clan.

D. Worksheet Lot R-133 – Sechedui Lineage

The Land Court awarded Worksheet Lot R-133, a land known as *Lulk*, to Sechedui Lineage, finding that *Lulk* never came under the control of the Japanese administration and therefore could not be conveyed by the Trust Territory government to Edaruchei Clan by quitclaim deed. Land Ct. Decision at 7-8.

The Land Court found that *Lulk* was the property of Ngirchelui (a member of Sechedui Lineage) before the war and that after the war Ngirchelui's son Mabel occupied the land without interference by Edaruchei Clan. Mabel's son, Ebert Mabel, testified to his family's occupation of *Lulk* before and after World War II and this testimony was corroborated by Postol Remeliik. (Tr. 531:11-536:3; 541:5-542:4.) Again, Edaruchei Clan presents no novel arguments in favor of its claim to this land beyond those previously discussed. And again, we find no clear error in the Land Court's finding.

E. Worksheet Lot R-130 – Family of Blau

The Land Court awarded Worksheet Lot R-130, a land known as *Bairrak*, to Family of Blau. Land Ct. Decision at 5-6. The family's representative, Ngetchur Ngiralmu, testified that the land was previously owned by Baulechong but occupied by Blau. (Tr. 71:25-72:4.) The land passed from Baulechong to Family of Blau. (Tr.

71:28-72:4.) Ngiralmu's testimony that Blau and her family occupied and then owned *Bairrak* was corroborated by other witnesses. (Tr. 63:25-64:9; 89:25-92:15.) Based on this testimony, the Land Court determined that *Bairrak* was not acquired by the Trust Territory government and therefore the quitclaim deed was not an effective conveyance of *Bairrak* to Edaruchei Clan.

Edaruchei Clan contends that Family of Blau is claiming the wrong land. (Edaruchei Clan Br. at 27-28.) Family of Blau traces its ownership of Worksheet Lot R-130 back to Baulechong and Tochi Daicho Lot 1850. Edaruchei Clan claims that Worksheet Lot R-130 is not Tochi Daicho Lot 1850—that is, it is not *Bairrak*. Adalbert Eledui testified before the Land Court that *Bairrak* comprises Worksheet Lots 291-013A and 291-013B and not Worksheet Lot R-130. (Tr. 96:11-26.) Therefore, according to Edaruchei Clan, Ngiralmu's testimony has been undermined and Family of Blau has no claim to Worksheet Lot R-130. (Edaruchei Clan Br. at 28.) Edaruchei Clan also argues that the Land Court's statement that the testimony of Adalbert Eledui "corroborated" Ngiralmu's testimony demonstrates that the Land Court's decision regarding Worksheet Lot R-130 is patently wrong. (Edaruchei Clan Br. at 28.)

Eledui did testify that Ngiralmu was confused regarding the location of *Bairrak*. (Tr. 96:21-26.) But the Land Court's decision to credit Ngiralmu's testimony over Eledui's testimony is not ours to question on appeal. Both witnesses gave plausible testimony; we will not second-guess the lower court's credibility determination based on a cold record. And the Land Court's statement that Eledui's testimony "corroborated"

Ngiralmu's testimony is a correct statement in the context in which it was made—Eledui's testimony did corroborate Ngiralmu's claim that Family of Blau owned the land known as *Bairrak*. (Tr. 89:25-92:15.) Edaruchei Clan has failed to demonstrate that the Land Court's award of Worksheet Lot R-130 to Family of Blau was clearly erroneous.

F. Worksheet Lot 291-017A – Children of Emautelngal

The Land Court awarded Worksheet Lot 291-017A, a land known as *Diliou*, to Children of Emautelngal. Land Ct. Decision at 9. The Land Court found that Emautelngal, who died during the Japanese time, had owned *Diliou*, and that his grandson, Renguul, maintained a house on *Diliou* until wartime evacuation and then returned to live in the cement Japanese structure that had been built on the former site of the house. The Land Court found that *Diliou* remained Emautelngal's property, and, thus, presumably, could not be conveyed by the Trust Territory government to Edaruchei Clan.

Unlike the other worksheet lots involved in this appeal, Edaruchei Clan presents specific evidence of a taking of Worksheet Lot 291-017A by the Japanese administration. Edaruchei Clan argues that it is undisputed that the Japanese administration took possession of *Diliou*, destroyed the house on the property, and built a cement structure on the land. (Edaruchei Clan Br. at 22.) Children of Emautelngal's representative, Misako Kikuo, testified accordingly. (Tr. 289:18-290:23.) Edaruchei Clan therefore concludes that, because the land was indisputably physically taken by the Japanese, the land was transferred to the Trust Territory

government and then effectively was conveyed to Edaruchei Clan by quitclaim deed. (Edaruchei Clan Br. at 22-23.)

The Land Court's opinion states:

The court believed [Misako Kikuo's] testimony that Renguul, grandson of Emautelngal, maintained his house on the land until he was evacuated just before the war; and that he returned and lived in the structure that the Japanese had built on the site where his house previously stood. This credible evidence is sufficient to prove that only the site of the museum, Worksheet Lot 291-017A remained Emautelngal's property and that it should be awarded to the children of Emautelngal

Land Ct. Decision at 9 (footnote omitted).

It is unclear to us what the Land Court means by "Worksheet Lot 291-017A remained Emautelngal's property." It is undisputed, and the Land Court found, that the Japanese removed the house that was on the property, built a cement structure in its stead, and occupied the land during the war. If the Land Court means that Worksheet Lot 291-017A remained the property of Emautelngal throughout the war because it was not physically taken by the Japanese, then that conclusion is clearly erroneous because it contradicts the Land Court's own findings. But if the Land Court means that title to Worksheet Lot 291-017A remained with

EmauteIngal (or his heirs) throughout the Japanese occupation, then we need a clarified record from the Land Court describing the legal and factual basis for this finding. Either way, we vacate the Land Court's award of Worksheet Lot 291-017A to Children of EmauteIngal and remand to the Land Court for clarification and reconsideration. The Land Court is free, upon clarification, to re-award the lot to Children of EmauteIngal if the law and facts support such a conclusion.

CONCLUSION

For the forgoing reasons we AFFIRM the Land Court's decision regarding Worksheet Lots R-130, R-132, R-133, R-532, R-537, 291-034, and 295-002A. We VACATE the Land's Court determination regarding Worksheet Lot 291-017A and REMAND for further decision.

**DMIU CLAN and SYLBESTER
ALFONSO,
Appellants,**

v.

**EDARUCHEI CLAN, BLAU FAMILY,
CHILDREN OF REMELIHK,
SECHEDUI CLAN,
Appellees.**

CIVIL APPEAL NO. 08-054
LC/R 06-411

Supreme Court, Appellate Division
Republic of Palau

Decided: March 29, 2010

[1] **Appeal and Error:** Standard of Review

Findings of fact are reviewed for clear error. Under this high standard, findings will not be set aside as long as they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion. In reviewing for clear error, the Appellate Division must refrain from substituting its own judgment of the credibility of the witnesses or the weight of the evidence. When two permissible views of the evidence are present, a lower court's decision between the competing views cannot be clearly erroneous. A lower court's finding of fact will be deemed clearly erroneous only when it is so lacking in evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.

[2] **Property:** Tochi Daicho

Although the Peleliu Tochi Daicho is not afforded the presumption of accuracy attendant to most of the Tochi Daichos, it may nonetheless be considered as evidence of ownership.

Counsel for Appellants: Ernestine K. Rengiil

Counsel for Edaruchei Clan: Raynold B. Oilouch

Counsel for Sechedui Lineage: John K. Rechucher

BEFORE: LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

Dmiu Clan and Sylbester Alfonso cumulatively appeal 21 determinations of land ownership by the Land Court within Homestead Lot 162 located in Ngerkeiukl Hamlet in Peleliu State. Because we cannot say that these determinations were made in clear error, we affirm the findings of the Land Court.

BACKGROUND

On July 29, 2008, the Land Court issued findings of fact, conclusions of law, and determinations of ownership concerning Homestead Lot 162. The actual determination of ownership certificates were issued on August 13, 2008. Over 200 claims were filed

for land within Homestead Lot 162. The Land Court heard testimony over the course of nine days in March 2007.

Homestead Lot 162 comprises 87 smaller worksheet lots. The entirety of Homestead Lot 162 was purportedly transferred from the Trust Territory government to Edaruchei Clan by quitclaim deed in 1962. Relying primarily on that quitclaim deed, the Land Court awarded ownership of 79 worksheet lots to Edaruchei Clan. The remaining 8 worksheet lots were awarded to Family of Blau (Worksheet Lot R-130), Tamiko Ngeskebei (Worksheet Lots R-532, R-537, and 295-002A), Sechedui Lineage (Worksheet Lot R-133), Leory Ngiramowai (Worksheet Lot 291-034), Children of Remeliik (Worksheet Lot R-132), and Children of EmauteIngal (Worksheet Lot 291-017A).¹

This appeal concerns the claims of two frustrated claimants, Dmiu Clan and Sylbester Alfonso.² Dmiu Clan seeks reversal of the denial of its claims to fifteen lots: Worksheet Lot R-130 (awarded to Family of Blau), Worksheet Lot R-132 (awarded to Children of Remeliik), Worksheet Lot R-133 (awarded to Sechedui Lineage), and Worksheet Lots 291-013, 291-018, 291-019, 291-019A, 291-021,

¹ These eight lots are the subject of a separate appeal by Edaruchei Clan, 17 ROP 127 (2010), wherein Edaruchei Clan claims that it should have been awarded all 87 worksheet lots within Homestead Lot 162.

² The claim of Sylbester Alfonso, who is deceased, was made on behalf of Children of Ngirakelbid and was represented by George Kebekol.

291-021A, 291-022, 291-026, 291-027, 291-028, 291-046, and R-131 (awarded to Edaruchei Clan). Dmiu Clan holds a quitclaim deed to Homestead Lot 160 (which is adjacent to Homestead Lot 162)³ and claims that these fifteen lots are actually part of Homestead Lot 160 rather than Homestead Lot 162. Sylbester Alfonso appeals the Land Court's award of six lots (Worksheet Lots R-526, R-527, R-528, R-529, R-530, and R-545) to Edaruchei Clan rather than to Children of Ngirakelbid.

On appeal we have received briefs from appellants Dmiu Clan and Alfonso and appellees Edaruchei Clan and Sechedui Lineage. Neither Family of Blau nor Children of Remeliik has responded to Dmiu Clan's opening brief.

STANDARD OF REVIEW

[1] The parties are in agreement that the relevant standard of review, given that we are asked to review the Land Court's findings of fact, is for clear error. (Dmiu Clan Br. at 3; Alfonso Br. at 2; Edaruchei Clan Br. at 7-8; Sechedui Lineage Br. at 2.) Under this high standard, "findings will not be set aside as long as they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion." *Etpison v. Tmetbab Clan*, 14 ROP 39, 41 (2006). In reviewing for clear error, this Court will refrain from substituting its own judgment of the credibility of the witnesses or the weight of the evidence. *See Rechucher v. Lomisang*,

³ We make no determination in this opinion as to the ownership of any lot within Homestead Lot 160.

13 ROP 143, 145 (2006). When two permissible competing views of the evidence are present, a lower's court decision between the competing views cannot be considered clearly erroneous. *See Sungino v. Blaluk*, 13 ROP 134, 136 (2006). A lower court's finding of fact will be deemed clearly erroneous only when it is so lacking in evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion. *See Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004).

DISCUSSION

I. Dmiu Clan's Claims

A. Worksheet Lot R-130 – Blau Family

The Land Court awarded Worksheet Lot R-130, land known as *Bairrak*, to Blau Family. *See* LC/R No. 06-411, Decision at 5-6 (Land Ct. July 29, 2008). Dmiu Clan appeals that decision based on two pieces of evidence: (1) Idesong Sumang's testimony that *Bairrak* was owned by Dmiu Clan despite Blau Family's residence on the land; and (2) language in a 1977 Trust Territory District Court judgment stating that those in the *Bairrak* Lineage occupied land owned by Dmiu Clan.

Although Dmiu Clan does not dispute that Blau Family resided on *Bairrak*, Dmiu Clan maintains that the land was owned by the clan and not Blau Family. Idesong Sumang testified that older relations had told him that the house of *Bairrak* was on Dmiu Clan land. (Tr. 798:11-15.) Dmiu Clan also presented the judgment in *Obechabraucheliou v. Tuchesang*, Civ. Act. No. 67-77 (Trust Terr.

Dist. Ct. 1977) as evidence that Dmiu Clan owned *Bairrak*. That judgment stated that members of Bairrak lineage occupied lands owned by Dmiu Clan. *Obechabraucheliou*, Civ. Act. No. 67-77, at 2.

The Land Court instead chose to credit the testimony of Ngetchur Ngiralmu that *Bairrak* belonged to Blau Family. (Tr. 70:19-72:4.) Ngiralmu's testimony that *Bairrak* was given to Blau Family was corroborated by Adalbert Eledui and Ungiltekoi Baulechong. (Tr. 89:25-92:15; 63:25-64:9).

We cannot find that the Land Court acted unreasonably or clearly erroneously in awarding *Bairrak* to Blau Family. Dmiu Clan essentially asks us to reweigh the evidence to arrive at a different conclusion, which of course we cannot do. Both sides presented testimonial evidence and the Land Court found Blau Family's evidence more convincing. The Land Court was not bound to follow the statements made by the District Court for the Trust Territory in *Obechabraucheliou* as that case featured entirely different parties and dealt with an entirely different issue.⁴ Given the high standard Dmiu Clan must meet on appeal and the evidence supporting the Land Court's

decision, we will not disturb the award of *Bairrak* to Blau Family.

B. Worksheet Lot R-132 – Children of Remeliik

Dmiu Clan also appeals the award of Worksheet Lot R-132, a land known as *Meltalt*, to Children of Remeliik. The Land Court based its decision on testimony of Postol Remeliik. Land Ct. Decision at 8-9. Postol Remeliik testified that his father resided on the land until the war and that his family used the land after the war. (Tr. 605:1-606:20.) The Tochi Daicho listed this lot of land in the name of Remeliik. (Tr. 605:1-3.) Furthermore, Remeliik's children received war claims compensation for the land. (Tr. 605:19-26.)

On appeal Dmiu Clan argues that the award of *Meltalt* to Children of Remeliik was clearly erroneous because Idesong Sumang testified that although Remeliik occupied the land it was owned by Dmiu Clan. (Dmiu Clan Br. at 4-5.) Again, Dmiu Clan asks us to reweigh competing evidence and reach a conclusion contrary to the Land Court. The Land Court, hearing live testimony, was in a superior position to judge the credibility of the witnesses and arrive at factual determinations. Based on the cold transcript before us we cannot find that this determination was clearly erroneous.

C. Worksheet Lot R-133 – Sechedui Lineage

The Land Court awarded Worksheet Lot R-133, a land known as *Lulk*, to Sechedui Lineage based on testimonial evidence. Land Ct. Decision, at 7-8. Ebert Mabel testified

⁴ The issue in Civil Action No. 67-77 was: "After the death of Adelbeluu Baulechong, then the chief of Ucheliou clan in Ngerkiukl, who ha[s] the full right and authority to appoint a person to succeed the deceased and bear Adelbeluu in this clan?" *Obechabraucheliou*, Civ. Act. No. 67-77, at 5. Further, just because members of Bairrak Lineage occupied lands owned by Dmiu Clan, it does not follow that a land named *Bairrak* belongs to Dmiu Clan.

that his father's adoptive father, Ngirchelui (a member of Sechedui Lineage), resided on *Lulk* before the war and that his father, Mabel, occupied the land after the war without interference. (Tr. 531:11-536:3.) Postol Remeliik, a neighbor, corroborated this testimony and stated that he saw Ebert Mabel's ancestors working the land after the war. (Tr. 541:5-542:4.)

Dmiu Clan offers virtually no evidence in support of its claim to *Lulk*. (Dmiu Clan Br. at 4.) Without argument supporting Dmiu Clan's claim, this Court cannot say that the Land Court acted clearly erroneously by awarding *Lulk* to Sechedui Linage rather than Dmiu Clan based on the testimonial evidence.

D. Twelve Worksheet Lots Awarded to Edaruchei Clan

Dmiu Clan contends that twelve worksheet lots awarded to Edaruchei Clan were actually part of Homestead Lot 160 and therefore should have been awarded to Dmiu Clan instead. Adair Sumang attempted to demonstrate at the Land Court hearing that the contours of the Homestead Map of Peleliu did not match the contours of the worksheet map and that therefore these twelve lots (along with *Bairrak*, *Meltalt*, and *Lulk*) were truly part of Homestead Lot 160 instead of Homestead Lot 162. (Tr. 783:14-785:16.) This exercise did not convince the Land Court that the lots were improperly considered part of Homestead Lot 162.

Dmiu Clan's argument on appeal does not focus on mistaken contours or the similarities of maps, but rather on the testimony of Idesong Sumang. Idesong Sumang testified that these twelve lots at issue

were owned by Dmiu Clan as evidenced by a house site and a stone platform on the land. (Tr. 797:10-798:5.) Dmiu Clan contends that Idesong Sumang's testimony that an ancient Dmiu stone platform and a house of Dmiu Clan are present within the lots awarded to Edaruchei Clan demonstrates that the award was in error. (Dmiu Clan Br. at 5.) Dmiu Clan does not specify in its brief on which of the twelve lots at issue these structures may be found. Notwithstanding this omission, Dmiu Clan's argument here that occupation of the land demonstrates ownership is in strict contradiction to its earlier arguments that other claimants' residency on *Bairrak*, *Meltalt*, and *Lulk* did nothing to prove their ownership of those lots.

The Land Court did not credit Idesong Sumang's testimony in the face of the competing evidence of the 1962 quitclaim deed in Edaruchei Clan's favor. Because a rational decisionmaker could have reached this conclusion we do not find that it was clearly erroneous.

II. Alfonso's Claims

[2] Sylbester Alfonso appeals the Land Court's decision to the extent that it awarded six lots (R-526, R-527, R-528, R-529, R-530, and R-545) to Edaruchei Clan rather than to the Children of Ngirakelbid. The Land Court found that the only evidence in support of Alfonso's claim to the lots was that the lands were listed under his father's name in the Peleliu Tochi Daicho. Land Ct. Decision at 12. Although the Peleliu Tochi Daicho is not afforded the presumption of accuracy attendant to most of the Tochi Daichos, it may nonetheless be considered as evidence of ownership. For an overview of the Peleliu

Tochi Daicho, see *Mesebeluu v. Uchelkumer Clan*, 10 ROP 68, 70-71 (2003). The Land Court found that the Tochi Daicho listing was not sufficient to overcome Edaruchei Clan's evidence of ownership through its 1962 quitclaim deed. Land Ct. Decision at 12.

One of the Tochi Daicho lots, Tochi Daicho Lot 1821 (which constitutes Worksheet Lot R-545), was split between Homestead Lot 162 and Homestead Lot 163. In the Land Court case regarding Homestead Lot 163 the Court awarded the portion of Tochi Daicho Lot 1821 that is in Homestead Lot 163 to Alfonso. Alfonso argues that it is only sensible that he be awarded the rest of Tochi Daicho Lot 1821 (the portion that lies within Homestead Lot 162). (Alfonso Br. at 3.)

Determinations of land ownerships are, by their very nature, competitions. Although Alfonso may have had the superior claim to the portion of Tochi Daicho Lot 1821 that lies in Homestead Lot 163, that does not bar another claimant from presenting an even stronger claim to the portion of Tochi Daicho Lot 1821 that lies within Homestead Lot 162. Edaruchei Clan did not claim the portion of TD 1821 that lies within Homestead Lot 163. Therefore it would be unfair to hold the Land Court's determination in the adjudication of Homestead Lot 163 against Edaruchei Clan.

Alfonso further argues that the Land Court awarded Tochi Daicho Lot 1920 to Leory Ngiramowai based on very similar evidence to the evidence presented by Alfonso. (Alfonso Br. at 4.) Because of the similarity of the evidence Alfonso contends that the results should be the same—namely that he too should have been awarded his

claim. (Alfonso Br. at 4.) However, the evidence before the Land Court in the two claims was not as similar as Alfonso makes it out to be—another witness's testimony corroborated Ngiramowai's claim while Alfonso had no such corroborating testimony. And, even if the transcripts did read the same for both claims, the Land Court still could have fairly arrived at different results for the two claims based on the credibility and demeanor of the witnesses.

CONCLUSION

We cannot say that the appealed determinations of ownership were unreasonable. Although appellants may have felt that they had the stronger evidence, it is not our province to reweigh the evidence or overturn the Land Court's choice between two lines of plausible competing evidence. Accordingly, we AFFIRM the appealed determinations of ownership.

**ICHIRO RECHEBEI and BRERENG
KYOTA,
Appellants,**

v.

**ILAPISIS NGIRANGEANG
NGIRALMAU,
Appellee.**

CIVIL APPEAL NO. 09-021
Civil Action No. 05-032

Supreme Court, Appellate Division
Republic of Palau

Decided: March 30, 2010

[1] **Appeal and Error:** Standard of Review

An appellate court reviewing the denial of a Rule 60(b) motion can only review the trial court's Order denying that motion.

[2] **Judgments:** Relief from Judgments

Unlike Rules 60(b)(1)-(5), which outline specific reasons for relief from judgment, such as (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; and (3) fraud, Rule 60(b)(6) is the catch-all provision of Rule 60(b) and affords relief from a final judgment only under extraordinary circumstances.

[3] **Judgments:** Relief from Judgments

Foremost, Rule 60(b)(6) and the first five clauses of ROP R. Civ. P. 60(b) are mutually exclusive; relief cannot be granted under Rule 60(b)(6) if it would have been available under

one of the earlier clauses. This exclusivity is crucial because, if the motion could have been brought as a Rule 60(b)(2) motion, then the relief contemplated under Rule 60(b)(6) will be wholly unavailable regardless of how extraordinary the circumstances may or may not be.

Counsel for Appellants: Clara Kalscheur

Counsel for Appellee: John K. Rechucher

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES MATERNE, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Appellants Ichiro Rechebei and Brereng Kyota ("Rechebei and Kyota") appeal a June 8, 2009 Decision, in which the trial court denied their ROP R. Civ. P. 60(b) motion for relief from judgment. Specifically, Rechebei and Kyota claim that the trial court erred by failing to consider that the original trial court, presided over by Associate Justice Kathleen M. Salii, did not disclose her potential conflict of interest on the record in 2005. Rechebei and Kyota also allege that Justice Salii's failure to do so caused their delay in not seeking her recusal until 2008, long after the trial and the appeal for this matter were concluded. For the reasons that follow, we AFFIRM the June 8, 2009 Decision of the trial court.

BACKGROUND

This case was initially brought by Appellees Ilapsis Ngirangeang Ngiralmu and members of his family (“Appellees”). On February 3, 2005, Appellees applied for a Temporary Restraining Order (“TRO”), Preliminary Injunction, and Permanent Injunction to preclude Rechebei and Kyota from burying their sister, Dirraechetei Ito, in a stone platform on Smengesong Clan land (“Smengesong”). The case was assigned to Justice Salii.

In her chambers prior to the TRO hearing, Justice Salii disclosed that she had a familial relationship with one of the Appellees. Counsel for both parties were present at the time and, after consulting with their respective clients, neither counsel moved for a recusal. Justice Salii then heard and denied Appellees’ motion for a TRO. Rechebei and Kyota buried their sister at Smengesong on February 5, 2005.

A few months later, Ilapsis Ngirangeang Ngiralmu (“Ngiralmu”), the primary named Appellee, died. Not surprisingly, Rechebei and Kyota filed their own TRO to preclude the remaining Appellees from burying Ngiralmu on the stone platform at Smengesong. Justice Salii denied this motion, and the remaining Appellees buried Ngiralmu at Smengesong, creating a situation in which both parties’ dead were buried alongside one another on the stone platform.

Shortly before Ngiralmu’s burial, the remaining Appellees also filed a complaint for Declaratory Judgment, Mandatory Injunction, and Damages, asking the court to exhume the remains of Rechebei and Kyota’s sister from

the stone platform. As grounds for exhumation, Appellees claimed that they—not Rechebei and Kyota—are the strong senior members of Smengesong Clan and have the sole authority to decide who gets to be buried at Smengesong. Not surprisingly, Rechebei and Kyota challenged this claim in their answer, insisting instead that they are the strong senior members. Justice Salii presided over the trial of this case in August 2006 and, on November 15, 2006, issued her Decision and Judgment, finding in favor of the remaining Appellees. Rechebei and Kyota appealed the Decision. On February 14, 2008, the Appellate Division affirmed Justice Salii’s decision in a *per curiam* opinion. See *Rechebei v. Ngiralmu*, 15 ROP 62 (2008).

After their case had been affirmed on appeal, Appellees sought to enforce the Judgment by demanding, in a letter to Rechebei and Kyota, that they exhume the remains of their relatives buried at Smengesong. Rechebei and Kyota refused. On July 7, 2008, Appellees filed a motion for an order in aid of judgment. At Rechebei and Kyota’s request, Justice Salii held a status conference on October 29, 2008. At the conference, Rechebei and Kyota’s counsel voiced concern over Justice Salii’s potential conflict of interest with respect to her relationship to one of the remaining

Appellees, Santos Ngirasechedui.¹ Rechebei and Kyota moved for Justice Salii's recusal.

Although she granted Rechebei and Kyota's motion for recusal, Justice Salii stated that the "Court disclosed on the record its dislike for this seeming display of forum shopping, nearly four years after the case was filed and after the issuance of both trial and appellate decisions, but more importantly, after [Justice Salii] disclosed in chambers the potential conflict, which parties, through counsel, waived and agreed to have the case heard by the undersigned justice." *Ngiralmou v. Rechebei*, Civ. Act. No. 05-032, Order Granting Defense Motion For Recusal And To Reassign Case at 2 (Tr. Div. Nov. 26, 2008)).

The case, which by now required only a determination of the motion for order in aid of judgment, was reassigned to Associate Justice Alexandra Foster. On March 9, 2009, Justice Foster granted Appellees' motion and ordered to have the remains of Rechebei and Kyota's sister exhumed from Smengesong. Two months later, Rechebei and Kyota filed an ROP R. Civ. P. 60(b) ("Rule 60(b)") motion, seeking relief from the judgment and asking for a new trial on the basis that Justice Salii failed to disclose the extent of the family relationship earlier in the case. Rechebei and Kyota's Rule 60(b) motion pointed to a

number of factors justifying relief and a new trial, including Justice Salii's alleged assistance with—and attendance at—a funeral that occurred in July of 2006, as well as Justice Salii's failure to include her original disclosure of the potential conflict of interest on the record.

In denying Rechebei and Kyota's Rule 60(b) motion, the trial court began by stating,

this funeral occurred before the trial, before the decision, before Defendants filed their appeal, and almost two years before Defendants' current motion. Defendants acknowledge a delay in filing, but seek to justify the delay by explaining that Defendants' counsel first spoke to a witness on May 7, 2009, and filed this motion and the witness' accompanying affidavit the next day. The issue is not the delay between learning of the evidence and filing the motion, the issue is the delay in learning of the evidence.

Ngiralmou, Civ. Act. No. 05-032, Rule 60(b) Decision at 4 (Tr. Div. June 8, 2009). The trial court went on to express disbelief that it could have taken Rechebei and Kyota so long to uncover Justice Salii's involvement in such a public funeral. The trial court addressed Rechebei and Kyota's argument regarding Justice Salii's failure to include her original disclosure of the potential conflict of interest on the record in a more cursory fashion. The trial court noted that, "[i]t does not appear that Defendants inquired into, or investigated, the

¹ "Santos's wife, Bersik, and the mother-in-law of [Justice Salii], Itab, are cousins. Their biological mothers, Korang and Babelsau, are sisters. [Justice Salii's] husband . . . lived with Santos Ngirasechedui and his wife while attending PMA High School from 1980-1983." *Ngiralmou v. Ichiro Rechebei*, Civil Action No. 05-032, Order Granting Defense Motion For Recusal And To Reassign Case at 2 (November 26, 2008)).

Court’s disclosed relationship with one of the Plaintiffs at the time of the disclosure, or any time after the disclosure, up until May 7, 2009.” *Id.* at 5. The trial court made sure to note that, at the time of the disclosed conflict, Rechebei and Kyota never sought recusal. In a footnote, the trial court continued, stating “Defendants allege that their attorney—who is not Defendants’ current attorney—did not inform them of this relationship. Defendants, not Plaintiffs, ‘should bear the burden of [their] attorney’s alleged shortcomings.’” *Id.* at 5 n.5 (citing *Sugiyama v. NECO Eng’g Ltd.*, 9 ROP 262, 266 (Tr. Div. 2001)).

The trial court denied the 60(b) motion, based in large part on Rechebei and Kyota’s failure to meet the deadlines and standards required under ROP R. Civ. P. 60(b)(2) (“Rule 60(b)(2)”) and ROP R. Civ. P. 59(a) (“Rule 59(a)”). Rule 59(a) requires the injured party to file its motion before the Court within 10 days of the entry of judgment. *See* ROP R. Civ. P. 59(b). Alternatively, Rule 60(b)(2) allows a Court to relieve a party from a final judgment based on “newly discovered evidence,” which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), but such a motion must be made “not more than one year after the judgment, order, or proceeding was entered or taken.” ROP R. Civ. P. 60(b).

The trial court concluded that Rechebei and Kyota sought to avoid the one-year deadline by making their claim instead under ROP R. Civ. P. 60(b)(6) (“Rule 60(b)(6)”), which allows the court to relieve a party from a final judgment “for any other reason justifying relief from the operation of the judgment.” ROP R. Civ. P. 60(b)(6). The trial court noted that, because clause (6) and

the first five clauses are mutually exclusive, relief could not be granted under (6) if it would have been available under one of the first five. *See Ngiralmu*, Civ. Act. No. 05-032, Rule 60(b) Decision at 5 (citing *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85-86 (1997)). Concluding, the trial court finally stated that

to the extent Defendants had an argument for recusal, they could have raised it before trial or after trial, within the strictures of ROP R. Civ. P. 59 or 60(b)(2). Alternatively, Defendants could have raised this issue in their appeal. Instead they now seek to use this information one year after the appellate opinion, two years after the trial decision, and four years after initial disclosure of the information. They provide no justification for this delay and it is therefore unacceptable. Defendant’s Rule 60(b) motion is DENIED.

Id. at 6-7. This appeal followed.

STANDARD OF REVIEW

[1] An appellate court reviewing the denial of a Rule 60(b) motion can only review the trial court’s Order denying that motion. *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85 (1997) (citing *Browder v. Dir., Dep’t of Corrections of Illinois*, 98 S. Ct. 556, 560 at

n.7 (1978)).² Thus, the substance of the judgment by either trial court below is beyond the purview of this Court's consideration. The standard of review for the trial court's order denying a request for relief from judgment is whether the trial court abused its discretion. *Sugiyama v. Ngirasui*, 4 ROP Intrm. 177, 181 (1994). Under this standard, a trial court's decision will not be overturned unless it was "clearly wrong." *Tmichjol v. Ngirchomlei*, 7 ROP 66, 68 (1998).

DISCUSSION

Rechebei and Kyota's opening brief identifies five issues, the first three of which address actions by the original trial court in this case.³ Because decisional law in Palau is clear that an Appellate Court's review of the denial of a Rule 60(b) motion is limited to the trial court's Order denying that motion, we will not address these issues standing alone. However, to the extent that Rechebei and Kyota made similar arguments in their 60(b) motion below, we shall address the trial court's denial of those issues as pertains to the

² ROP R. Civ. Pro. 60(b) is derived from United States Fed. R. Civ. P. 60(b). It is therefore appropriate for this Court to look to United States case law construing Rule 60(b) for guidance. *Gibbons v. Gov't of Republic of Palau*, 1 ROP Intrm. 547 (1988).

³ Rechebei and Kyota identify these issues as (1) Did the original trial court err in failing to disqualify itself and in failing to place its conflict of interest on the record; (2) Did the original trial court err in failing to recuse itself prior to trial, and; (3) Did either error by the original trial court regarding its conflict of interest constitute reversible error such that a new trial is required. (Rechebei and Kyota's Opening Br. at 4.)

60(b) motion itself, under the appropriate standard of review.

I. Whether the trial court erred in denying Appellants' Rule 60(b) motion

[2] Despite the myriad arguments offered in the briefs, the central issue in Rechebei and Kyota's current appeal is whether the trial court erred in denying their Rule 60(b) motion. Rechebei and Kyota filed their Rule 60(b) motion on May 8, 2009, specifically seeking relief under Rule 60(b)(6), which allows a court to relieve a party from a judgment for "any other reason justifying relief from the operation of the judgment." ROP R. Civ. P. 60(b)(6). Unlike Rules 60(b)(1)-(5), which outline specific reasons for relief from judgment, such as, *inter alia*, (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; and (3) fraud, Rule 60(b)(6) is the catch-all provision of Rule 60(b) and affords relief from a final judgment only under extraordinary circumstances. *Irruul v. Gerbing*, 8 ROP Intrm. 153, 154 (2000) (citing *High v. Zant*, 916 F.2d 1507, 1509 (11th Cir. 1990)).

In making their Rule 60(b)(6) argument, Rechebei and Kyota stated that, during the time that they were in the process of briefing issues about the propriety of exhumation in this case, "additional information came to the attention of Defendants' counsel, giving specific information as to the closeness of the relationship of Justice Salii and her husband to the Plaintiffs." (Rechebei and Kyota's Rule 60(b) Mot. at 4 (Civ. Act. 05-032, Tr. Div. May 8, 2009)). This information provided evidence that, during the months leading up to

the trial of this matter, Justice Salii had visited Bersik Santos at the hospital and at her home during her illness. *Id.* Rechebei and Kyota also allegedly learned that, when Justice Salii’s husband was in high school, he lived with one of the plaintiffs in the underlying case, Santos Ngirasechedui. Rechebei and Kyota claimed that this additional evidence threw “a very large doubt on the issue of whether Defendants [Appellants] had a fair and impartial hearing of their claim.” *Id.* at 5.

In addition to learning of Justice Salii’s attendance of the funeral, Rechebei and Kyota claimed that Justice Salii’s failure to disclose on the record the extent of this relationship caused their admittedly extensive delay in filing the Rule 60(b)(6) motion. *Id.* at 6. Even though they conceded that Justice Salii did disclose this relationship to the parties in chambers at the outset of the case, Rechebei and Kyota stated “[a] judge should disclose *on the record* information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification” for precisely the reason that has caused difficulties in the present case. *Id.* (quoting ABA Model Code of Judicial Conduct, Commentary to Canon 3.E.(1)) (emphasis added). However, in their Rule 60(b) motion, as well as in their briefs on appeal, they failed to brief the issue of Justice Salii’s failure to place the conflict on the record more extensively.

Finally, Rechebei and Kyota cited to the *Estate of Tmetuchl v. Siksei*, 14 ROP 129 (2007), in which the Appellate Division reversed the trial court’s denial of a Rule 60(b) motion, holding that the presence of

inconsistent judgments as to the owner of certain mahogany trees in Aimeliik was sufficient to satisfy the “extraordinary circumstances” requirement for Rule 60(b)(6) motions. Rechebei and Kyota claimed that providing a fair and impartial trial as to the strength of members of a lineage is as extraordinary as the presence of inconsistent judgments in the *Estate of Tmetuchl* case.

In ruling upon Rechebei and Kyota’s Rule 60(b) motion, however, the trial court stated that

Defendants [Appellants] seek to avoid the deadlines and requirements of ROP R. Civ. P. 59 and 60(b)(2), by making their claim under ROP R. Civ. P. 60(b)(6). ROP R. Civ. P. 60(b)(6) allows the court to relieve a party from a final judgment “for any other reason justifying relief from the operation from judgment.” Clause (6) and the first five clauses are mutually exclusive; relief cannot be granted under (6) if it would have been available under one of the earlier clauses. . . . Here, Defendants could have sought relief under Rule 60(b)(2), but failed to do so in a timely manner.

Ngiralmu, Civ. Act. No. 05-032, Decision at 5 (Tr. Div. June 8, 2009) (internal citations omitted). In transforming Rechebei and Kyota’s Rule 60(b)(6) motion to a Rule 60(b)(2) motion, the trial court spent little time responding to the portions of Rechebei

and Kyota's arguments regarding Justice Salii's failure to include her potential conflict on the record, opting instead to focus on the one-year time bar of Rule 60(b)(2). By filing the putative Rule 60(b)(2) motion one year after the appellate opinion, two years after the trial decision, and four years after the initial disclosure of the potential conflict in Justice Salii's chambers, Rechebei and Kyota clearly did not meet the prescribed time limit under the rule.

As we noted before, Rule 59(a) requires the injured party to file its motion before the Court within 10 days of the entry of judgment. *See* ROP R. Civ. P. 59(b). Alternatively, Rule 60(b)(2) allows a Court to relieve a party from a final judgment based on "newly discovered evidence," which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), but such a motion must be made "not more than one year after the judgment, order, or proceeding was entered or taken." ROP R. Civ. P. 60(b). Because of the clear time bar, the question for us, here, is whether the trial court's decision to transform the Rule 60(b)(6) motion to a Rule 60(b)(2) motion was an abuse of discretion. We hold that it was not.

[3] Foremost, Rule 60(b)(6) and the first five clauses of ROP R. Civ. P. 60(b) are mutually exclusive; relief cannot be granted under Rule 60(b)(6) if it would have been available under one of the earlier clauses. *See Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85-86 (1997). This exclusivity is crucial here, because, if Rechebei and Kyota's motion could have been brought as a Rule 60(b)(2) motion, then the relief contemplated under Rule 60(b)(6) would be wholly unavailable to Rechebei and Kyota, regardless of how

extraordinary the circumstances may or may not be. To be sure, the parties have pointed to no contrary authority to this rule of mutual exclusivity, nor has the Court found any in its own research.

In assessing whether the trial court properly construed Rechebei and Kyota's motion as a 60(b)(2) motion, the case of *Idid Clan v. Olngembang Lineage*, 12 ROP 111 (2005) is particularly instructive. In this Land Court case, the Koror State Public Lands Authority ("KSPLA"), after losing at trial, filed a motion for relief from judgment under Rule 60(b)(1) and (2), based upon the discovery of a 1966 government document, entitled "Land Gazette," which referred to the lands in dispute and which significantly bolstered KSPLA's claim. In assessing whether to construe KSPLA's motion under Rule 60(b)(1) for mistake, inadvertence, surprise, or excusable neglect, or Rule 60(b)(2) for newly discovered evidence, the Court acknowledged that the discovery of the Land Gazette months after trial did not fit easily into either of the prescribed provisions. However, using a common sense approach, it ultimately concluded that the KSPLA motion sought relief based on the Land Gazette being newly discovered evidence because "where a claim sounds very much like a claim regarding newly discovered evidence, the claim is controlled by 60(b)(2) and should not be labeled as if brought under a different provision of Rule 60(b). *Idid Clan*, 12 ROP at 119 (quoting *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 355 F.3d 574, 588 (6th Cir. 2004)).

Here, we recognize that the discovery of Justice Salii's potential conflict likewise does not fit easily into a prescribed category.

For that very reason, however, we cannot say that the trial court abused its discretion in construing it as newly discovered evidence, especially in light of the approach taken in the *Idid Clan* case. Perhaps another trial court could have viewed the discovery of Justice Salii's failure to disclose her relationship on the record as something other than newly discovered evidence—perhaps even a circumstance that fit more precisely within the catch-all provision. This trial court did not and, based on the *Idid Clan* case and on the language used by the parties themselves, we cannot say that it was “clearly wrong” in doing so. *Tmichjol v. Ngirchomlei*, 7 ROP 66, 68 (1998). We therefore AFFIRM the June 8, 2009 Decision of the trial court as to this issue.

II. Whether the trial court erred in granting exhumation on the basis of affidavits or customary experts rather than holding a hearing

Rechebei and Kyota make one final argument, which, although unconvincing, is worth noting briefly. Rechebei and Kyota contend that it was an abuse of the trial court's discretion to order exhumation without holding a hearing to elicit expert testimony. They state, “[w]hen deciding an issue of such importance, and where customary experts disagree, it was incumbent upon the Trial court to hold a hearing so that the issue could be fully heard and resolved. Its failure to hold a hearing was error.” (Rechebei and Kyota's Br. at 28). Although we agree that exhumation is a serious issue that could, under certain circumstances, warrant a hearing, on December 10, 2008, the parties agreed at a status conference to resolve the issue without one. The trial court's subsequent order read,

At this morning's conference, the parties agreed to file motions concerning whether Plaintiffs, as senior strong members of the clan, are entitled to require that Defendants remove the remains of Dirraechetei Ito and Johana Rechebei from a stone platform on Smengesong. . . . The parties have agreed to try to resolve this matter short of a hearing. Both parties will file motions . . . to answer this question by close of business on February 11, 2009.

Ngiralmu, Civ. Act. No. 05-032, Order (Tr. Div. Dec. 10, 2008).

In their appellate briefs here, Rechebei and Kyota do not dispute that they agreed to submit briefs instead of holding a hearing. Rather, they make an unconvincing argument focusing on the word “try,” i.e., we promised we would “try” to resolve the issue without a hearing, not that we would in fact resolve it without one. Needless to say, Rechebei and Kyota never moved for a hearing subsequent to their apparent agreement at the status conference in December of 2008. As has been the pattern for Rechebei and Kyota in this action, they come with too little, too late, after having orally agreed to the contrary of their current requests, and after having had the opportunity to object at a far more auspicious time than the present. As to this issue, the trial court clearly did not err in granting exhumation solely on the basis of the affidavits of customary experts.

CONCLUSION

For the reasons set forth above, the June 8, 2009 Decision of the trial court is **AFFIRMED**.

**PACIFIC CALL INVESTMENTS, INC.,
Appellant/Cross-Appellee,**

v.

**TAI CHIN LONG,
Appellee/Cross-Appellant.**

CIVIL APPEAL NO. 09-006
Civil Action Nos. 04-182, 166-92

Supreme Court, Appellate Division
Republic of Palau

Decided: April 14, 2010

[1] **Appeal and Error:** Standard of Review

A lower court's order of contempt under the Contempt of Courts Act (14 PNC §§ 2201-2207) is reviewed for abuse of discretion.

[2] **Contempt of Court:** Rationale for Contempt

Civil contempt may serve the purpose of compensation or coercion and is used to rectify contempt as far as it affects another party. Criminal contempt punishes contempt while vindicating the authority of the court.

[3] **Contempt of Court:** Sanctions

Where the purpose of an order of civil contempt is compensation, a fine payable to the complainant is the appropriate sanction, but where the purpose is coercion, the court may exercise its discretion and should consider the character and magnitude of the harm threatened by continued contumacy and

the probable effectiveness of any suggested sanction in bringing about the result desired.

Counsel for Appellant/Cross-Appellee: David F. Shadel

Counsel for Appellee/Cross-Appellant: Richard Brungard

BEFORE: ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Before us are the cross appeals of Pacific Call Investments, Inc. (“Pacific Call”) and Tai Chin Long. While the two appealed issues spring from the same lower court case, they relate to different lower court decisions. Pacific Call appeals the Trial Division’s confirmation of sale of all assets of Palau Marine Industries Corp. (“PMIC”) to Long and Long appeals the Trial Division’s finding of contempt against PMIC and Long’s attorney, Richard Brungard. Because of the separate nature of the cross-appeals, this opinion treats them separately. We first consider Pacific Call’s appeal and then turn to the cross-appeal of Long.

I. Pacific Call’s Appeal of the Trial Division’s Order Confirming the Sale of PMIC’s Assets to Long.

A. Background

On November 7, 2000, Pacific Call obtained a \$4,425,525 judgment against PMIC; on October 21, 2005, Long obtained a \$605,280.35 judgment against PMIC. Because PMIC lacked the assets to fulfill either judgment (let alone both), a priority contest ensued. The basis of Long’s judgment was twelve promissory notes, three of which occurred prior to Pacific Call’s judgment. The Trial Division found that Long had priority over Pacific Call as to \$118,660, the portion of his judgment attributable to the first three promissory notes. *See* Civ. Act. Nos. 04-182, 166-92, Order (Tr. Div. Apr. 9, 2007), *aff’d Pac. Call Invs., Inc. v. Palau Marine Indus. Corp.*, 15 ROP 50 (2008).

Before the priority dispute was resolved, the Trial Division made the following order:

[E]ither [Pacific Call] or Long (or both of them) may, upon giving 30 days public notice, sell (either in lots or individually) at public auction all and any of the properties in which PMIC has any claim, interest, rights, privilege, possession, or ownership, such sale to be about 45 days after February 23, 2007.

Civ. Act. Nos. 04-182, 166-92, Order at 2. (Tr. Div. Feb. 9, 2007).

Pursuant to that court order, Pacific Call issued a Notice of Sale announcing a sale on April 26, 2007. The notice stated that Pacific Call “will solicit bids to sell, as is and without any warranty or guaranty, all property in which [PMIC] may have any interest,

ownership, or claim.” Pacific Call’s Notice of Sale at 1, Civ. Act. Nos. 04-182, 166-92 (Tr. Div. Mar. 8, 2007). The property to be sold at the auction included “at least the following items”: (1) PMIC’s lease from Koror State Public Lands Authority;¹ (2) the items on an attached PMIC Fixed Asset Summary Report; (3) a 33-foot boat; and (4) “[o]ther property (including accounts receivable, equipment, tools, furnishings, vehicles, aircraft equipment, construction equipment, and machinery) as it becomes known to Pacific Call and as announced later.” *Id.* at 1-2.

The Trial Division’s order had stated that the sale must occur at the courthouse conference room, but Pacific Call noticed the auction to occur at PMIC’s conference room. Upon Pacific Call’s motion, the Trial Division issued an April 9, 2007 order changing the place of the sale to PMIC’s premises. The order also stated that the sale was to take place on April 27, 2007 (whereas Pacific Call noticed the sale for April 26, 2007). The Trial Division further ordered PMIC to serve Long and Pacific Call with an updated report of its assets in anticipation of the sale, “identify[ing] the exact current location of each asset listed and identify[ing] the make, model, size, license/serial number, and other identifying features of each vehicle, computer equipment, and other items of property.” Civ. Act. Nos. 04-182, 166-92, Order to Change Place of Sale and Provide an Updated List of Assets at 2 (Tr. Div. Apr. 9, 2007).

On April 25, 2007, Pacific Call filed a “Postponement of Sale” with the Trial

Division and served a copy on counsel for PMIC, Long and Koror State Public Lands Authority. Pacific Call claimed that it could not go forward with the sale because PMIC had failed to furnish an updated report of its assets. Later that same day Long filed a “Motion to Appoint Alternate Auctioneer and to Clarify Sale Date” with the Trial Division. The filing sought to have Long’s counsel, Richard Brungard, substituted as auctioneer because Pacific Call’s counsel was no longer willing to go through with the noticed sale. The motion also sought clarification that April 27, 2007 (as stated in the Trial Division’s previous order) and not April 26, 2007 (as stated in Pacific Call’s Notice of Sale) was the true scheduled date of the auction. The Trial Division did not act on either the “Postponement of Sale” or the “Motion to Appoint Alternate Auctioneer and to Clarify Sale Date” before the purported sale date.

According to Long, Brungard visited PMIC’s premises on April 26, 2007 at 9:00 a.m. and again at 4:30 p.m. and found that no one had sought to purchase PMIC’s assets that day. Then, on April 27, 2007, Brungard conducted an auction of all of PMIC’s assets. Those present at the sale included PMIC’s president, general manager and attorney. Brungard, the only bidder, bid a portion of Long’s judgment to purchase all of the assets of PMIC on behalf of Long. Later that same day Brungard telephoned Pacific Call’s attorney, David Shadel, and informed him of the sale. Brungard inquired whether Pacific Call wanted to make a bid or if Shadel knew of anyone else who wanted to make a bid, but Shadel declined to answer. Shadel suggested that if Long was going to auction the assets then Long should pay for the advertising expenses of the sale.

¹ The lease was subsequently canceled by Koror State Public Lands Authority and thus removed from PMIC’s asset pot.

Long then filed a motion with the Trial Division seeking confirmation of the sale. Pacific Call opposed the motion. The Trial Division ruled that the sale had been effective and confirmed the sale of PMIC's assets to Long in exchange for his partial judgment of \$129,338.76.² See Civ. Act. Nos. 04-182, 166-92, Order on Pacific Call's Motion for Reconsideration and Long's Motion to Confirm Sale at 3-5 (Tr. Div. Sep. 28, 2007).

B. Standard of Review on Appeal

The parties disagree as to the standard of review on appeal. Pacific Call argues that the confirmation of sale should be reviewed *de novo* while Long contends that it should be reviewed for abuse of discretion. (Pacific Call Br. at 3-4; Long Resp. Br. at 6.)³ This appeal does not involve review of factual findings of the Trial Division. Instead we are reviewing the Trial Division's legal conclusions; therefore we will review *de novo*. See *Estate of Rechucher v. Seid*, 14 ROP 85, 88-89 (2007).

² This figure was reached by adding post-judgment interest of \$10,678.76 to the priority portion of Long's judgment (\$118,660).

³ Each party filed three briefs for a total of six briefs in the cross-appeals. Pacific Call filed an opening brief and a reply brief and Long filed a responsive brief in the appeal of the order confirming the sale. Long filed an opening brief and a reply brief and Pacific Call filed a responsive brief in the cross-appeal challenging the order of contempt. Because each party filed only one brief of each kind (opening, responsive, and reply), we will cite to them as such (e.g., Pacific Call Br., Pacific Call Resp. Br., Pacific Call Reply Br.) without confusion.

C. Discussion

The Trial Division erred in entering its September 27, 2007 order granting Long's motion to confirm the sale. Long's attorney hijacked the sale noticed by Pacific Call's attorney; such a sale should not receive judicial blessing.

In short, the court gave both Pacific Call and Long the power to hold a sale on 30 days' notice. Pacific Call noticed a sale, but then noticed a postponement of the sale. Long filed a motion to have his representative appointed as alternate auctioneer. The motion was not ruled upon in advance of the sale. Long went ahead and held the sale anyway, and, not surprisingly, the only bidder that showed up was Long's representative. Without an order from the court appointing Long's counsel, Brungard, alternate auctioneer, he did not have the authority to hold the sale noticed by Pacific Call.

Long argues that under 14 PNC § 2104 ("Levying execution"), Pacific Call's attempt to postpone the sale was ineffective and Brungard's appointment as alternate auctioneer was proper. Assuming (without deciding) that this section of the code applies to the facts at hand, Brungard's self-appointment as auctioneer was still improper. The statute contemplates "[c]ompletion of sale by person other than one making levy": if the duly authorized person "starts to levy execution and for any reason is prevented from or fails to complete the matter, the Director of the Bureau of Public Safety, policeman or other person duly authorized may complete the levy, sale, and payment of proceeds as provided in this section." 14 PNC § 2104(e).

Long argues that Pacific Call's attorney, Shadel (an authorized person), started to levy execution but did not complete the sale; therefore it was proper for Long's attorney, Brungard (another authorized person) to complete the sale. (Long Resp. Br. at 10-11.) Long's argument is not persuasive. Long was authorized to sell PMIC's assets upon giving 30 days' notice. But Long was not authorized to sell PMIC's assets upon Pacific Call's notice. Pacific Call's notice of sale stated that it (and not some other party) would solicit bids for PMIC's assets. *See* Civ. Act. Nos. 04-182, 166-92, Pacific Call's Notice of Sale at 1 (Tr. Div. Mar. 8, 2007). Without a court order appointing Long's agent as replacement auctioneer, Brungard did not have authority to usurp Pacific Call's sale.

The Trial Division's confirmation of sale must therefore be reversed.⁴ On remand, the Trial Division should state explicitly what type of sale is ordered. We do not fault the Trial Division for the language used in its current order, but the parties make many pages of hay over whether the order contemplates a sale at execution or a judicial sale and the ramifications of each. To safeguard against future misunderstanding, the Trial Division should issue a new order authorizing a fresh

⁴ Long devoted one sentence of his brief to seek sanctions against Pacific Call for its "frivolous and misleading or worse" appeal. (Long Resp. Br. at 15.) Far from frivolous, Pacific Call's appeal is meritorious. Parties (and their counsel) are cautioned from including a boilerplate request for sanctions in every filing in hopes of some day grasping the brass ring of attorney fees.

sale of PMIC's assets and clarifying the nature of the sale.⁵

II. Long's Appeal of the Trial Division's Contempt Order Against PMIC and Brungard.

Having dispensed with the disputed sale, we now turn our attention to the cross-appeal. Long appeals the Trial Division's January 25, 2008 order finding Long's attorney, Brungard, and PMIC in contempt. The order of contempt was the product of Pacific Call's October 25, 2007 motion seeking an order of contempt. The purportedly contumacious conduct is laid out below.

A. Background

In April 2002 (after Pacific Call secured its \$4.4 million judgment against PMIC), the Trial Division issued two orders directing that neither PMIC nor its agents,

⁵ We recognize the reality that almost three years have elapsed since the April 27, 2007 sale and that many of the assets may have since depreciated or have been dissipated. Instead of attempting to stuff the proverbial omelette back into the eggshell, the Trial Court may wish to receive evidence on the total value of PMIC's assets as of the date of the sale and, to the extent those assets do not exceed \$129,338.76 (the amount of Long's priority judgment, including interest, on that date), simply award those assets to Long. If the total value of the assets at the time of the sale was greater than Long's priority judgment, then the excess assets should be awarded (payable by Long) to the next-in-line creditor, Pacific Call, up to the amount of its judgment, and so on down the line until all assets are exhausted.

employees, and officials were to “sell, assign, transfer, alienate, encumber, or otherwise dispose of in any manner any of [PMIC’s] property, income, or assets or negotiate or attempt to do so without court order” with the exception that PMIC could pay its “ongoing operating expenses as it incurs them.” *See* Civ. Act. No. 166-92, Orders (Tr. Div. Apr. 19 & 26, 2002). Almost five years later, on January 23 and February 7, 2007, PMIC wrote two checks totaling \$3,000 to Brungard to pay for his legal services to Long. Pacific Call took issue with this disbursement and made an October 25, 2007 motion for contempt against PMIC and Brungard pursuant to the Contempt of Courts Act (14 PNC §§ 2201-2207). The trial court granted the motion and found PMIC and Brungard in contempt on January 25, 2008. According to Long, Brungard then returned the \$3,000 to PMIC.⁶ The Trial Division subsequently denied Long’s motion to reconsider its finding of contempt and awarded attorney fees to Pacific Call related to the contempt motion.

B. Standard of Review

[1] We have previously stated that we review a trial court’s “exercise of its inherent power to issue either civil or criminal contempt citations under the abuse of discretion standard.” *Dalton v. Heirs of*

Borja, 5 ROP Intrm. 95, 98 (1995); *see also Cushnie v. Oiterong*, 4 ROP Intrm. 216, 219 (1994) (“We review a court’s imposition of sanctions pursuant to its inherent powers under an abuse of discretion standard.”). But we pause to note that the contempt order at issue was imposed pursuant to the civil contempt statute (14 PNC § 2204), not the lower court’s inherent power. *See* Civ. Act. Nos. 04-182, 166-92, Order Granting in Part and Denying in Part Motion for Contempt at 4 (Tr. Div. Jan. 25, 2008) (quoting “pertinent part” of 14 PNC § 2204). However, because it appears that the Contempt of Courts Act (14 PNC §§ 2201-2207) was an attempt by the legislature to codify courts’ inherent contempt powers (or at least some of them), we see no reason to deviate from the abuse of discretion standard of review.⁷ Whether a court’s contempt powers arise inherently or under the Contempt of Courts Act, a court is afforded wide discretion to exercise its contempt powers. *See* 14 PNC § 2204 (stating that courts “have the power” to find persons in civil contempt, but not mandating use of that power). We therefore review only for an abuse of that discretion.

An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant

⁶ Separately, Brungard was disciplined for accepting the checks by order of the Disciplinary Tribunal. *See In re Brungard*, 15 ROP 144 (2008). That decision was appealed to the Supreme Court, but the appeal was dismissed because the Appellate Division lacks jurisdiction to hear appeals from the Disciplinary Tribunal. *See In re Brungard*, Civ. App. No. 09-010 (Mar. 18, 2009).

⁷ We need not decide today whether the Contempt of Courts Act forms a perfect overlap with the inherent power of courts to issue contempt citations. *See, e.g., Dalton*, 5 ROP Intrm. at 103-04 (rejecting the contention that the inherent power of the Trial Division to impose criminal contempt sanctions was overridden by the Contempt of Courts Act).

or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

Eller v. Republic of Palau, 10 ROP 122, 128-29 (2003) (quoting *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987)). Stated somewhat more succinctly, a court abuses its discretion when it is “clearly wrong.” *Tmilchol v. Ngirchomlei*, 7 ROP Intrm. 66, 68 (1998) (quoting *Intercontinental Trading Corp. v. Johnsrud*, 1 ROP Intrm. 569, 573 (1989)).

C. Discussion

Civil and criminal contempt are discrete mechanisms, each designed to safeguard distinct interests. Our civil contempt statute reads in part:

Courts of the Republic have the power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, *by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded or prejudiced*

14 PNC § 2204 (emphasis added). The criminal contempt statute, which permits a

court to punish an offender for a wilful failure to obey its mandate, order, or command, does not similarly limit the court’s punishment powers to scenarios in which a party’s right or remedy has been impaired. *See* 14 PNC § 2203(g).

[2] This unique limitation, permitting civil contempt orders in only those instances where “a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced” (14 PNC § 2204), highlights the different interests served by civil and criminal contempt. Civil contempt is an instrument used to rectify contempt so far as it affects another party. Criminal contempt, on the other hand, punishes contempt while vindicating the authority of the court. We have addressed this distinction previously:

Contempt can be either civil or criminal. The primary distinction between civil contempt and criminal contempt is whether the sanction imposed is coercive or punitive. A civil contempt proceeding is primarily coercive because a contemnor is able to avoid punishment through compliance. Criminal contempt, on the other hand, is primarily punitive because a court imposes an unconditional sentence to punish the contemnor for disrespecting the court’s dignity or disobeying its order. Civil contempt is normally initiated by an aggrieved party, whereas criminal contempt is

generally initiated by the court itself.

Cushnie, 4 ROP Intrm. at 219 (reviewing contempt order issued under inherent powers of trial court).

[3] We would only add to the words of *Cushnie* that civil contempt can also serve the purpose of compensation as well as coercion. See *United States v. United Mine Workers of Am.*, 67 S. Ct. 677, 701 (1947) (sanctions for civil contempt should be imposed in order “to coerce the defendant into compliance with the court’s order, [or] to compensate the complainant for losses sustained”); cf. *id.* at 700-01 (“Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court.”). Where the purpose is compensation, a fine payable to the complainant is the appropriate sanction, but where the purpose is coercion, “the court’s discretion is otherwise exercised” and “[i]t must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” See *id.* at 701.

As stated earlier, the appealed order of contempt was one for civil, not criminal, contempt. See Civ. Act. Nos. 04-182, 166-92, Order Granting in Part and Denying in Part Mot. for Contempt at 4 (quoting “pertinent part” of 14 PNC § 2204). Furthermore, the Trial Division, in quoting the coercion language of *Cushnie* without any discussion of compensation, seemingly sought its order to have a coercive effect on PMIC and Brungard. See *id.* at 4-5. Because we find that the Trial

Division’s order could not have achieved such an effect, we must vacate it.

The violations of the court’s orders to preserve PMIC’s assets occurred on January 23 and February 7, 2007, but Pacific Call did not file its motion for civil contempt until October 25, 2007.⁸ Almost one month earlier, on September 28, 2007, the Trial Division confirmed the April 27, 2007 sale of all assets of PMIC to Long. Therefore, although Pacific Call still held a \$4.4 million judgment against PMIC at the time of its motion for contempt, all assets of PMIC had already been sold to a higher-priority creditor in a judicially-confirmed sale.

By the date of the contempt motion, no prospective motivation to coerce PMIC or Brungard to abide by the court’s orders to preserve PMIC’s assets existed. Given the confirmation of the sale of all of PMIC’s assets to Long, no coercion was necessary to ensure compliance with the court’s order to preserve assets because all the assets of PMIC

⁸ In his appellate reply briefing, Long raises the “statute of limitations” of 14 PNC § 2205(c) for the first time. (See Long Reply Br. at 18-20.) That provision states that an alleged contemnor has the right to be charged with contempt within three months of the alleged act of contempt. Because this issue passed unmentioned before the Trial Division (not to mention the initial round of appellate briefing), it is waived and we shall not consider it on appeal. See *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004) (“No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue.”); see also *Rechucher v. Lomisang*, 13 ROP 143, 149 (2006) (applying axiom of *Kotaro* to statute of limitations defense).

had already been sold.⁹ The only affront, then, was to the court, but such violations of court orders should be punished—should an offended court see fit—through the distinct mechanism of criminal contempt. *See* 14 PNC § 2203(g).

Indeed, it is unclear how the recourse ordered by the court for the violation of its orders benefitted Pacific Call, the allegedly-aggrieved moving party. The Trial Division ordered Brungard and PMIC to “return the money paid to Brungard out of PMIC’s account, in the amount of \$3000.00, to PMIC by March 12, 2008.” *See* Civ. Act. Nos. 04-182, 166-92, Order Granting in Part and Denying in Part Motion for Contempt at 8. Failure to comply would result in a fine of \$50.00 each for each day until the \$3,000 was returned. *See id.* Brungard and Pacific Call were additionally ordered to pay Pacific Call’s attorney’s fees in connection with the contempt motion. *See id.* Turning back to the wording of our civil contempt statute (14 PNC § 2204), the disposition of \$3,000 by PMIC to Brungard did not cause “a right or remedy of” Pacific Call to be “defeated, impaired, impeded or prejudiced” at the time of the contempt order because all of the assets of

⁹ Analyzing the contempt order from the perspective of compensation reaches the same result. No actual loss to Pacific Call occurred from the time the checks were issued to Brungard until the time the contempt order was entered because all assets of PMIC were sold to Long and none to Pacific Call. No compensation was therefore necessary. It would be sheer supposition (and, given the circumstances, highly unrealistic) for us to speculate that Pacific Call would have collected a (relatively speaking, minuscule) portion of its judgment had PMIC’s assets totaled \$3,000 more.

PMIC had been sold to Long.¹⁰ The Trial Division abused its discretion in failing to deny the motion. We therefore vacate the order of contempt, including the assessment of attorney’s fees against PMIC and Brungard related to the motion for contempt.¹¹

CONCLUSION

For the reasons stated herein, the Trial Division’s confirmation of sale of all assets of PMIC to Long is REVERSED and the order of contempt entered against PMIC and Brungard is VACATED.

¹⁰ Our reversal today of the order confirming the sale does not alter our analysis of the contempt order. We review the Trial Division’s order of contempt by assessing the information available to it at the time of the contempt order, not through the colored spectacles of hindsight.

¹¹ Long again seeks attorney fees via a one-sentence add-on to his brief. (*See* Long Br. at 24.) As explained in note 4, *supra*, we need not address such a cursory request. In the proper instance, a request for attorney fees should be accompanied by sufficient factual and legal citation to inform a reviewing court. Having been presented with none, we assume that none exists. *See, e.g., Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 50 (2006) (appellate courts should refuse to hear inadequately briefed claims). We also make no determination on the attorney’s fees assessed in the Brungard disciplinary proceeding, as that matter is not before us.

**BILUNG GLORIA SALII and IBEDUL
YUTAKA GIBBONS,
Appellants,**

v.

**KOROR STATE PUBLIC LANDS
AUTHORITY,
Appellee.**

CIVIL APPEAL NO. 09-008
LC/B 07-35, 07-36, 07-37

Supreme Court, Appellate Division
Republic of Palau

Decided: April 16, 2010

Counsel for Appellants: Salvador Remoket

Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG,
Chief Justice; ALEXANDRA F. FOSTER,
Associate Justice; HONORA E.
REMENGESAU RUDIMCH, Associate
Justice Pro Tem.

Appeal from the Land Court, the Honorable
ROSE MARY SKEBONG, Associate Judge,
presiding.

PER CURIAM:

Appellants Bilung Gloria Salii and
Ibedul Yutaka Gibbons (“Appellants”) appeal
the Land Court’s *Summary of the
Proceedings, Findings of Fact, Conclusions of
Law, and Determination of Ownership*
 (“Determination of Ownership”) in a return-
of-public-lands case concerning the island

commonly known as Malakal. Specifically,
Appellants contend that the Land Court
committed reversible error by finding that
Appellants failed to prove that Malakal Island
was originally owned by Idid Clan, but was
rather chutem buai, or public land, prior to the
Japanese administration. For the reasons that
follow, we AFFIRM the Land Court’s
Determination of Ownership.

BACKGROUND

This case involves the ownership of
Malakal Island, specifically described by the
Land Court as Ngerungesiil/Ngemelachel,
located in Malakal, Koror State.¹ The Land
Court’s hearings spanned over one week,
commencing July 22, 2008, and concluding
August 6, 2008. Five parties filed timely
claims to all or part of the lands. These
claimants were (1) T pang Lineage (Estate of
Dilobesch Merar); (2) Ingeaol Clan; (3) Idid
Clan (Bilung Gloria Salii and Ibedul Yutaka
Gibbons); (4) Minoru Ueki; and (5) Koror
State Public Lands Authority (“KSPLA”).

On January 28, 2009, following the
submission of written and oral closing
arguments, the Land Court issued a
Determination of Ownership for Malakal
Island in favor of KSPLA. In the
Determination of Ownership, the Land Court
found that Idid Clan had not met its burden of
proving the elements of a return-of-public
lands claim. Specifically, the Land Court
found that Idid Clan failed to establish that it

¹ Lot No. 006 B09; Lot No. 006 B10; Lot
No. 006 B11; Tract 40585A; Tract 40398A; Lot
No. 006B 01; Lot No. 006 B02; Lot No. 006 B03;
Lot No. 006 B04, and Lot No. 40859 on Bureau of
Lands and Surveys Worksheet No. 006 B001.

owned Malakal prior to the taking by the Japanese administration. Thus, it concluded that the land should remain public land under KSPLA's authority.

In making this determination, the Land Court began by noting that Idid Clan had presented "a wealth of evidence" regarding the authority of the Ibedul over Koror during the mid-to-late 1800s. It conceded that the documentary and testimonial evidence presented by Idid Clan, including the textbook entitled the "*History of Palau*, letters of Andrew Cheyne, Dr. Kramer's manuscript, and Hijikata's work, support[ed] the idea that by the mid-1800s, the Ibedul was the most important chief in the Koror area of Palau and had authority over the affairs of Koror, including Malakal." See Determination of Ownership at 15. However, the Land Court ultimately concluded that Idid Clan insisted on asking the wrong question, i.e., the issue was not whether the Ibedul and Idid Clan exerted some authority over Malakal, but rather whether they exerted so much that they should be considered owners.

The Land Court remarked,

[o]ther than the evidence that the Ibedul is the paramount chief of Koror with some authority over who uses Malakal, Idid Clan has presented little evidence of other indicia of ownership, such as use of Malakal or occupation of the island by clan members. The historical documents indicate that Idid Clan was not the original owner of Malakal in terms of

first discoverers—the texts indicate that Ingeaol Clan, through Idesiar, was there first. Moreover, there is a large amount of evidence that many people, including several non-Palauans, lived and worked on Malakal in the late 1800s and early 1900s. Traders like Cheyne, Tetens, and Kubary ran their operations from Malakal. Moreover, by 1910 there were Japanese settlements on the island. Rubasch Olikong testified that his predecessors used Malakal as a site for a Teping drying business. Although the Court found that Ingeaol Clan did not establish that Rubasch was in charge of Malakal, there is no evidence contradicting his claim that Rubasch Mouai used the island. The sheer number of non-Idid users of Malakal weakens Idid's claim of exclusive ownership.

Id. at 15-16.

The Land Court went on to discuss the testimony of Idid Clan's witnesses, which purported to establish, *inter alia*, that (a) the Ibedul lived on Malakal and was buried there; (b) there was an area on Malakal known as Kingelela Bilung, which is a stone platform where the Bilung allegedly went to dry her hair after bathing; (c) in 1952, Bilung Ngerdokou directed some women to clear a taro patch on the island; and (d) the "whole of Koror" knows that Idid Clan owns Malakal. In appraising the testimony, the Court decided

that the “evidence is not as impressive as it might appear.” *Id.* First, the Land Court noted that other testimony elicited at the hearing suggested that the Ibedul resided on Malakal not because Idid owned the island, but rather because the Ibedul was ill and the people of Koror did not want other villages to know their leader was weak. Second, the Land Court voiced concern that the stone platform upon which the Bilung allegedly dried her hair was mentioned nowhere in Dr. Kramer’s detailed manuscript. And finally, the Land Court observed that Idid Clan’s assertion that the “whole of Koror” knows that Malakal belongs to Idid Clan was undermined *ab initio* by the existence of the current lawsuit, i.e., at the very least, the witnesses of T pang Lineage and Ingeiaol Clan begged to differ.

The Land Court then scrutinized the evidence presented by the parties opposing Idid Clan’s claims, stating that, in addition to Idid Clan’s “evidence of ownership being underwhelming, there is contrary evidence that suggests that the land was not owned by the clan.” *Id.* For example, it observed that Cheyne’s purchase of Malakal required the signatures of all the chiefs of Koror, not just the Ibedul’s. In doing so, it inferred that “Malakal is something other than clan land.” *Id.* Likewise, the Land Court noted that no *omsolel a blai* (principal house site), no *lkul a dui* (chief’s wife’s taro patch), nor *klobak* (village council) exist on Malakal. These facts, it concluded, lend credence to KSPLA’s argument that Malakal was not owned by any clan prior to the Japanese administration, but rather was public land.²

² The Land Court also pointed out that Malakal is now, and was at the time immediately

In conclusion, the Land Court conceded that the determination that Malakal was most likely public land rather than the property of Idid Clan was a “close call.” However, it observed that the failure of Idid Clan to file a claim for Malakal when given the opportunity to do so in the 1950s nudged the Land Court further away from Idid Clan’s position. In doing so, it was careful to quote from *Idid Clan v. Olngembang Lineage*, 12 ROP 111, 117 (2005), which states that “[w]hile it is clear that a claim for public land should not be denied merely because it was not claimed during the 1950s, we cannot say that, in a closely contested case like this one, the failure of Idid Clan to claim the land—where Idid’s representatives sought the return of other lands, but not this one—was wholly immaterial.” *Id.* at 17 (quoting *Idid Clan*, 12 ROP at 117).³ In the end, the Land Court determined that the evidence, at best, indicates that the Ibedul had some authority over Malakal as the highest ranking chief of Koror—but not outright ownership—and that Malakal fit more precisely within the context of public land during the time immediately prior to the Japanese administration.

prior to the Japanese administration, volcanic and heavily forested. It stressed that this topography is entirely consistent with traditional notions of public land, which includes the interior of Babeldoab and “the numerous islands of the Chelebacheb complex, the mangrove swamps and the sea and reefs.” *Determination of Ownership* at 17 (citing KSPLA Ex. F(1) at 296).

³ According to Bilung Salii’s testimony below, Idid Clan did file a claim in the 1950s, but the files were subsequently destroyed by an employee of KSPLA. The Land Court discredited this testimony.

Idid Clan and Ingeaol Clan timely appealed the Land Court's Determination of Ownership. On September 18, 2009, the Appellate Division dismissed Ingeaol Clan's appeal, leaving Idid Clan as the sole Appellant in this appeal.

STANDARD OF REVIEW

We review Land Court factual findings for clear error. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006). "Under this standard, if the findings are supported by evidence such that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless this Court is left with a definite and firm conviction that an error has been made." *Id.* Importantly, "[i]t is not the appellate panel's duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence." *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). Where there are two permissible views of the evidence, the Land Court's choice between them cannot be clearly erroneous. *Sambal v. Ngiramolau*, 15 ROP 125, 126 (2007) (citing *Baules v. Kuartel*, 13 ROP 129, 131 (2006)). Unless the Land Court made a clear error, the Appellate Division cannot reverse, even if it would have weighed the evidence differently. Put simply, Land Court determinations are affirmed so long as the factual findings are plausible. *Kawang Lineage*, 14 ROP at 146.

DISCUSSION

The Constitution provides for the return of public land to its original owners when the land became public due to its "acquisition by previous occupying powers or their nationals through force, coercion, fraud,

or without just compensation or adequate consideration." ROP Const. art. XIII, § 10. This constitutional directive is implemented by 35 PNC § 1304(b). "To prove a claim under section 1304(b), a claimant must demonstrate that: (1) he or she is a citizen who has filed a timely claim; (2) he or she is either the original owner of the land, or one of the original owner's 'proper heirs;' and (3) the claimed property is public land which attained that status by a government taking that involved force or fraud, or was not supported by either just compensation or adequate consideration." *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 94 (2006); *see also Markub v. Koror State Pub. Lands Auth.*, 14 ROP 45 (2007); *Estate of Ngiramechelbang v. Ngardmau State Pub. Lands Auth.*, 12 ROP 148, 150 (2005). If a claimant fails to prove these three necessary elements, title cannot be transferred pursuant to §1304(b), and the property remains public land. At all times, the burden of proof is on the claimants, not the governmental land authority, to satisfy these three elements. *Ngiratrang*, 13 ROP at 93-94.

In their opening brief, Appellants contend that the main issue on appeal is whether the Land Court erred by finding that Appellants failed to prove that Malakal Island was originally owned by Idid Clan, but was rather public land prior to the Japanese administration. In arguing that the Land Court committed clear error, Appellants largely recapitulate their arguments before the Land Court below. Indeed, Appellants begin by recounting the evidence it presented at the Land Court, pointing to the historical accounts showing control by the Ibeduls and Bilungs, and to Dr. Kramer's description of Malakal in the early 1900s, which indicated that Malakal was the county seat of the Ibedul. Appellants

also rehash the argument relating to the area called Kingelel a Bilung, the stone platform where the Bilungs allegedly dried their hair. Finally, Appellants cite to various portions of testimony indicating that users of the land in Malakal, such as taro farmers, were required to ask the Ibedul for permission. At no point in this discussion do Appellants seek to discount the testimony of the other claimants that ran contrary to these assertions. Rather, they lodge a final complaint, “What else could a claimant for return of public land submit as evidence to meet its burden?” (Appellants Br. at 6.)

Appellants’ complaint here wholly fails to address the competing evidence, which was presented by the other claimants at the hearing and which undermined Idid Clan’s claims to exclusive ownership. Indeed, the Land Court received evidence from four other claimants for the same property, all of whom cited, with varying degrees of persuasion, reasons both supporting their own ownership claims and undermining Idid Clan’s. The Land Court thoroughly discussed all such evidence in its Determination of Ownership and found, in the end, the “close call” favored KSPLA. Appellants here make no attempt to discuss the insufficiency of this competing evidence, nor the Land Court’s error in crediting KSPLA’s claims over theirs. Rather, Appellants repeat the arguments they made below, only this time in a louder, more appellate-sounding voice.

As a final note, in asserting that the Land Court committed clear error, Appellants misapprehend their own burden. In their opening brief, Appellants state “there was a clear error committed by the Land Court. No testimony or evidence below proved that the

land was chutem buai.” (Appellant’s Br. at 6.) The law clearly states that, at all times, the burden of proof is on the claimants, not the governmental land authority, to satisfy the three elements of §1304(b). *Ngiratrang*, 13 ROP at 93-94. It was not KSPLA’s burden to prove that Malakal was public land immediately prior to the Japanese administration. Rather, it was Idid Clan’s burden to prove that it was more likely that Idid Clan owned it. The Land Court determined, after detailed consideration of the evidence on both sides, that Idid Clan failed to meet its burden. We agree and reemphasize that “[i]t is not the appellate panel’s duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence.” *Kawang Lineage*, 14 ROP at 146.

CONCLUSION

For the reasons set forth above, the Findings of Fact, Conclusions of Law, and Determination of Ownership of the Land Court is AFFIRMED.

**UCHELKEUKL CLAN,
Appellant,**

v.

**ISIDORO RUDIMCH and DEAN
RUDIMCH,
Appellees.**

CIVIL APPEAL NO. 09-016
LC/M 01-747, 01-748

Supreme Court, Appellate Division
Republic of Palau

Decided: April 20, 2010

[1] **Appeal and Error:** Standard of Review

When a lower court chooses between two permissible views of evidence, the Appellate Division should not disturb its factual findings.

Counsel for Appellant: Clara Kalscheur

Counsel for Appellees: Yukiwo P. Dengokl

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Land Court, the Honorable RONALD RDECHOR, Associate Judge, presiding.

PER CURIAM:

Appellant Uchelkeukl Clan¹ contends that the Land Court erred in awarding ownership of three lots to the Children of Indalcio Rudimch. Because the Land Court did not clearly err in deciding the appealed issues, we affirm the Land Court’s decision below.

BACKGROUND

Uchelkeukl Clan appeals from three determinations of ownership by the Land Court awarding land to the Children of Rudimch rather than appellant. The lots at issue—Lot Nos. 03M010-002, 03M010-007, and 03M010-008 on Worksheet No. 03M010—were awarded to the Children of Rudimch in Determination of Ownership Nos. 11-331, 11-332, and 11-333, respectively. These three lots are located in Ngerkeai Hamlet in Aimeliik State. The Land Court, per Judge Rdechor, conducted a hearing on the parties’ claims to the land over four days in November, 2008 and conducted a site visit as part of the hearing. After receiving written closing arguments and replies, the Land Court took the matter under advisement and issued its findings of facts, conclusions of law, and determinations of ownership on April 14, 2009. *See* Land Ct. Case Nos. LC/M 01-747, 01-748, Decision (Land Ct. Apr. 14, 2009). Uchelkeukl Clan filed a timely appeal to those determinations, contending that the Land Court erred in denying its claims to the land. As laid out below, the parties’ views diverge

¹ Although appellant refers to itself as “Uchelkeyukl Clan” in the text of its brief, we utilize the spelling of the appellant used in the caption, as that is how appellant self-identified itself in its Notice of Appeal.

on the history and common names of the land at issue.

I. Uchelkeukl Clan’s Version of the History of the Land.

Uchelkeukl Clan states the following history of the land (*see* Uchelkeukl Clan Br. at 6-7):

The three properties of *Meker*, *Kerekur*, and *Oltachel* have belonged to Uchelkeukl Clan since time immemorial and title has never been transferred away from the clan. In the early 1900s, the Rengulbai title bearer of the Uchelkeukl Clan permitted a group of Pohnpeians to live on a portion of *Meker* and use some of the coconut trees. During this time members of Uchelkeukl Clan continued to live on other portions of *Meker*, as well as on *Kerekur* and *Oltachel*, and built houses on the lands.

The Pohnpeians sold the coconut trees to a Japanese national, but the Japanese national later misconstrued the sale to be a sale of the land rather than just a use-right to the coconut trees. No written record of the sale from the Pohnpeians to the Japanese national was made. Documents exist stating that the Japanese national gave his interest in *Meker* to his Palauan mother-in-law, Urrimech. These documents also retrospectively claim that the land was sold by the Pohnpeians to the Japanese national.

Following World War II, the land of *Meker* was awarded to Urrimech in an appeal over ownership of the land by the Trust Territory Government. In 1962, Suekosan Rechuldak (apparently the sister-in-law of the Japanese national) executed a quit claim deed

transferring her interest in *Meker* to “Indalesion” Rudimch.

II. Children of Rudimch’s Version of the History of the Land.

For its part, the Children of Rudimch recount the history of the land as follows (*see* Rudimch Br. at 4-7):

The land known as *Meker* (which comprises at least all of the three claimed lots if not more) was sold by a Palauan clan to the German government in 1911 to be used for the settlement of Ponapean prisoners.² Ownership of *Meker* passed to the Japanese government once that government took over administration of Palau, and the Japanese government asserted ownership over the land in 1922 when the Ponapean prisoners left. In 1922 the Japanese government gave *Meker* to Juichiro Miyashita (a Japanese national) under a homestead contract that vested ownership in Miyashita after payment of rent for 25 years. Miyashita built a house on *Meker* and lived there briefly before renting out the land to sharecroppers for a number of years. Miyashita deeded his interest in *Meker* to his mother-in-law, Urrimech, on July 15, 1945 (shortly before the term of his homestead contract was fulfilled) and relocated to Japan. Urrimech leased out *Meker* for the next two years.

As part of the land registration administered by the United States after the conclusion of World War II, Urrimech filed a claim to the land, but the land was awarded to

² “Ponapeans” were inhabitants of Ponape, the previous moniker of what is now known as Pohnpei, home to present-day “Pohnpeians.”

the Trust Territory Government. No other claimants filed claims to the land. Urrimech appealed the decision, and the Trust Territory High Court overruled the determination of ownership in favor of the Trust Territory and instead awarded *Meker* to Urrimech upon the condition that she complete the final payment of the homestead contract. Urrimech did so and *Meker* was released to her. *Meker* was sold by Urrimech's daughter, Sueko Rechuldak, to Indalecio Rudimch on April 20, 1962.

Around 2005, some persons claiming to be acting under the authority of Uchelkeukl Clan entered a portion of *Meker* and began to cut down coconut trees and other plants. Two of Rudimch's relatives, Dean and Ivan Rudimch, sued to quiet title and for ejectment and damages on behalf of the estate of one of Rudimch's sons, Isidoro Rudimch.

STANDARD OF REVIEW

The parties properly agree that factual findings of the Land Court are reviewed under the clearly erroneous standard. *See Ngerungel Clan v. Eriich*, 15 ROP 96, 98 (2008). Under this high standard, we will deem the Land Court's findings clearly erroneous and will reverse only if such findings are so lacking in evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion. *See Singeo v. Secharmida*, 14 ROP 99, 100 (2007). Although a *de novo* standard of review is applicable to the Land Court's determination of law, no such legal determinations have been appealed.

DISCUSSION

[1] Read in a vacuum, both parties' purported histories of the land sound reasonable. And, both parties presented some evidence in support of their stories, although the Children of Rudimch produced far more documentary evidence. When a lower court chooses between two permissible views of evidence, we will not disturb its factual findings. *See Ngirmang v. Oderiong*, 14 ROP 152, 154 (2007). For the reasons laid out below, Uchelkeukl Clan has failed to prove that the Children of Rudimch's view of the evidence is "impermissible."

Uchelkeukl Clan identifies three bases for its appeal. First, it claims that the notice of the 1950s hearing that eventually resulted in the determination of ownership in favor of Urrimech (a predecessor-in-interest of the Children of Rudimch) only related to the lot commonly known as *Meker* and not to the other two lots commonly known as *Kerekur* and *Oltachel*. Therefore Uchelkeukl Clan states that the Land Court should not have relied upon the determination of ownership in Urrimech's favor when deciding the current ownership of *Kerekur* and *Oltachel*. Second, Uchelkeukl Clan contends that the Land Court erred by assuming that Uchelkeukl Clan was not referenced as a landowner or land claimant on any of the maps submitted by the Children of Rudimch. Lastly, Uchelkeukl Clan claims that the Land Court improperly discounted the testimony of its witness Sariang Timulech.

Uchelkeukl Clan's first argument, that the previous determination regarding the ownership of *Meker* did not include all of the three lots currently at issue, must fail. Uchelkeukl Clan's major premise is that the 1954 notice of hearing of the land referred

only to the land of *Meker* and did not name either *Kerekur* or *Oltachel*.

At the outset we note that Uchelkeukl Clan argues that each of the three numbered worksheet lots boast different common names, whereas the Children of Rudimch contend that all three lots (although called different names) are part of a larger tract named *Meker*. Uchelkeukl Clan stated in the record that Lot No. 03M010-002 is *Meker*, Lot No. 03M010-007 is *Kerekur*, and Lot No. 03M010-008 is *Oltachel*. (See Land Ct. Case Nos. LC/M 01-747, 01-748,. Uchelkeukl Clan Closing Argument at 1 (Land Ct. Feb. 3, 2009)). However Uchelkeukl Clan has also stated that both Lot Nos. 03M010-002 (*Meker*) and 03M010-007 (*Kerekur*) are part of *Meker* (while steadfastly maintaining that *Oltachel* is a wholly distinct land). (See *id.* at 1-2.)

Therefore, by Uchelkeukl Clan's own admission, any notice of hearing naming *Meker* would put prospective claimants on notice that the hearing would pertain to at least Lot Nos. 03M010-002 and 03M010-007. And, if, as the Land Court determined, *Meker* comprises *Oltachel* as well (or at least the portion of *Oltachel* contained within Lot No. 03A010-008), the 1954 notice for hearing on *Meker* would have notified claimants to all of the three lots-at-issue. Indeed, as explained below, Uchelkeukl Clan's entire basis for appeal boils down to the question of whether the Land Court erred in its determination that Lot No. 03A010-008 is part of the greater land known as *Meker* that was awarded to Urrimech in the 1950s and conveyed to Indalecio Rudimch in 1962.

In reaching its decision that Lot No. 03A010-008 is part of *Meker*, the Land Court

relied upon no single piece of evidence. See Land Ct. Decision at 11-13. First, the Land Court recounted testimony of the Children of Rudimch's witnesses stating that the Rudimch family has used Lot No. 03A010-008 the same as it has used the rest of the land purchased by Indalecio Rudimch since 1962. The Land Court also relied on testimony that the Rudimch family planted coconut trees on Lot No. 03A010-008 and that the family understood the boundary of *Meker* to extend to a land known as *Klsobel* (which is not the same as Lot No. 03A010-008). The Land Court further noted that the maps entered into evidence by the Children of Rudimch demonstrated that the Rudimch land bordered *Klsobel* without reference to any land in the immediate area owned by Uchelkeukl Clan. Because *Meker* extended all the way to *Klsobel* (beyond Lot No. 03A010-008), the Land Court found that Lot No. 03A010-008 is part of *Meker*. To support this conclusion, the Land Court referenced testimony of Uchelkeukl Clan's witness, Sariang Timulech, demonstrating a discrepancy between the land Uchelkeukl Clan claims is *Oltachel* (and not *Meker*) and the boundaries of Lot No. 03A010-008.

Uchelkeukl Clan claims that, in determining that Lot No. 03A010-008 lies within the borders of *Meker*, the Land Court erred in its "assumption" that the maps entered into evidence by the Children of Rudimch contain no reference to Uchelkeukl Clan as a landowner or land claimant. Uchelkeukl Clan admits that it is not named on any of the maps, but argues that the maps make references that are broad enough to include the clan and were not drawn with the intention of specifically identifying all owners or claimants of land. However, the Land

Court stated as much in its opinion and factored that consideration into its decision: “It is true that these maps were not created to indicate ownership of land adjacent to that being surveyed. Nevertheless, these maps serve as good evidence of who claimed what at the time of each particular survey.” Land Ct. Decision at 13. We will not overturn the Land Court’s determination of ownership because it chose one competing inference over another regarding one category of evidence, especially when that evidence was considered along with other categories of evidence in reaching the final determination.

Uchelkeukl Clan’s final asserted point of error—the Land Court’s decision to discount a portion of Sariang Timulech’s testimony—is not well-taken. Sariang Timulech testified that houses of certain Uchelkeukl Clan members were located on *Oltachel*. When the Land Court visited the site, however, some of the houses were located on Lot No. 03A010-008 and some were located on nearby land outside the lot boundaries. Uchelkeukl Clan contends that this discrepancy caused the Land Court to unfairly “dismiss” a portion of Timulech’s testimony. Uchelkeukl Clan complains that the Land Court ignored the fact that the land commonly known as *Oltachel* and Lot No. 03A010-008 may not overlap completely and therefore Timulech’s testimony could have been accurate despite the location of some of the houses outside of the boundaries of the worksheet lot.

In actuality, however, the Land Court did appreciate that *Oltachel* and Lot No. 03A010-008 may not share perfect boundaries. *See* Land Ct. Decision at 13 (“Court Exhibit 1, however, indicates that

while these persons may or may not have lived in *Oltachel*, many of [] them lived outside of Lot No. 03M010-008.”). The Land Court did not find that the discrepancy undermined Timulech’s testimony—it found that the discrepancy undermined Uchelkeukl Clan’s assertion that the land commonly known as *Oltachel* and Lot No. 03A010-008 were identical. *See id.* (“This discrepancy undermines Uchelkeukl Clan’s assertion that *Oltachel* and Lot No. 03M010-008 are one and the same.”). Uchelkeukl Clan misreads the Land Court’s opinion in this respect. Given that the Land Court did not “dismiss” a portion of Timulech’s testimony, we cannot find that any such dismissal was clearly erroneous.³

Given the breadth and variety of evidence before the Land Court in favor of its finding that *Oltachel*—or at least the part of *Oltachel* contained within Lot No. 03M010-008—is in fact a portion of the greater land *Meker*, we cannot say that its ruling was clearly erroneous. Uchelkeukl Clan has presented us with no new legal arguments, but instead asks us to review the same evidence presented before the Land Court and reach a different conclusion. The evidence is not so overwhelming as to require such a result. Prudence dictates that we reserve reversal of factual determinations of a lower court for

³ To the extent that the Land Court chose to discount some (or all) of Timulech’s testimony, we defer to the lower court’s judgment on such credibility determinations. *See, e.g., Sungino v. Blaluk*, 13 ROP 134, 137 (2006) (“Furthermore, ‘it is not the duty of the appellate court to test the credibility of the witnesses, but rather to defer to a lower court’s credibility determination.’” (quoting *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004)).

only those situations in which the lower court's rulings are clearly erroneous. That scenario is not presently before us.

CONCLUSION

Because the Land Court's findings were not clearly erroneous on the appealed bases, we AFFIRM its decision below determining ownership of Lot Nos. 03M010-002, 03M010-007, and 03M010-008 in favor of the Children of Rudimch and against Uchelkeukl Clan.

**TIMOTHY UEHARA. a.k.a. TERO
UEHARA,
Appellant,**

v.

**REPUBLIC OF PALAU,
Appellee.**

CRIMINAL APPEAL NO. 09-001
Criminal Case No. 07-036

Supreme Court, Appellate Division
Republic of Palau

Decided: April 29, 2010

[1] **Appeal and Error:** Standard of Review

Interpretation of the perjury statute is a question of law that the Appellate Division reviews *de novo*.

[2] **Criminal Law:** Perjury

Under Palau's perjury statute, the term "legal substitute" refers to a substitute for an oath, not for the requirement that the defendant swear to the oath (or legal substitute) before a competent person. One may be guilty of perjury by taking either an oath or a legal substitute, but whichever phrase applies, it must have occurred before a competent person.

[3] **Statutory Interpretation:** Ambiguity

The first step in interpreting a statute is to refer to its plain language. If that language is clear and unambiguous, the Court need not move beyond it. If the statute is not

susceptible of more than one construction, courts should not be concerned with the consequences resulting from its plain meaning.

[4] **Criminal Law:** Perjury

The most common definition of perjury requires proof of (1) an oath or legal substitute therefor; (2) authorized or required by law; (3) taken before a competent person or tribunal; (4) a false statement of material fact; and (5) knowledge of the falsity.

[5] **Criminal Law:** Perjury

To be guilty of perjury under a statute requiring an oath “taken before” a competent person, one typically must have taken the oath or legal substitute *in the actual presence* of such person.

[6] **Criminal Law:** Perjury

Courts generally hold that the taking of an oath is a personal matter, and it cannot be taken or subscribed in a representative capacity. It is an act which may not be delegated to an agent, for by its very definition, an oath must be administered personally.

[7] **Criminal Law:** Perjury

For purposes of perjury, a valid oath typically cannot be administered by telephone.

[8] **Criminal Law:** Perjury

To convict one of perjury under 17 PNC § 2601 based on a written form, the government must at least establish that the

defendant signed an oath or legal substitute therefor in the physical presence of a person competent to administer it.

[9] **Criminal Law:** Perjury

Public official’s signatures “under penalty of perjury” were not sufficient to establish guilty of perjury, without proof that defendant took an oath “before” a competent person.

[10] **Criminal Law:** Misconduct in Public Office

The three elements of misconduct in public office, under 17 PNC § 2301, are: (1) status as a public official; (2) an illegal act; (3) committed under the color of office.

[11] **Criminal Law:** Information

A criminal information is sufficient if it contains all of the essential elements of the offense charged and fairly informs the accused of the charges against him which he must defend. The Court reviews the sufficiency of an information in light of practical rather than technical considerations.

[12] **Criminal Law:** Multiplicity and Duplicity of Information

An information is duplicitous where a single count charges the defendant with more than one criminal offense. A duplicitous information is troublesome because it may be unclear whether a subsequent conviction rests on merely one of the offenses within a single count and, if so, which one. This implicates concerns of double jeopardy and proper notice of the charges against the defendant.

[13] **Criminal Law:** Multiplicity and Duplicity of Information

An information listing three separate counts of perjury and three separate counts of misconduct in public office in two broad paragraphs was not duplicitous where each paragraph was titled and numbered accordingly, listed three dates for the respective counts, and stated three separate documents upon which each charge was based.

[14] **Special Prosecutor**

The Office of the Attorney General and the Special Prosecutor have concurrent jurisdiction to prosecute public officials. The Special Prosecutor's authority to prosecute public officials is not limited to cases where the Attorney General has a conflict in interest.

[15] **Criminal Law:** Sufficiency of the Evidence

The Appellate Division reviews a challenge to the sufficiency of the evidence for clear error and defers to the Trial Court's opportunity to assess the credibility of witnesses. The Court asks only whether there is evidence, viewed in a light most favorable to the prosecution, from which a rational trier of fact could have found defendant guilty beyond a reasonable doubt. If so, the Court will not disturb the conviction even if it might have reached a different conclusion in the first instance.

Counsel for Appellant: F. Randall Cunliffe

Counsel for Appellee: Office of the Special Prosecutor

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Supreme Court, Trial Division, Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Timothy Uehara, a former Koror State legislator, appeals the Trial Division's judgment finding him guilty of three counts of perjury and three counts of misconduct in public office. During his tenure, Uehara purportedly leased property that he did not own and failed to include his rental income on financial disclosure forms, as required by the Code of Ethics Act. Uehara now challenges his convictions and sentence. After considering Uehara's various arguments, we find error in the perjury convictions, but we uphold his convictions for misconduct in public office.

BACKGROUND

Uehara was a member of the Koror State Legislature from 2000 until 2005, during which time he also co-owned the Four Seasons, a business located on T-Dock in Meketii, Koror. The property upon which the Four Seasons operated was held in trust by the Koror State Public Lands Authority (KSPLA), which purportedly leased it to Uehara and his co-owners. No written lease was discovered or produced at trial. Regardless of whether a lease existed, Uehara, while serving as a public official, leased the property to various tenants, collecting monthly rental payments that ultimately totaled approximately \$22,000.

Uehara did not remit any of this income to the KSPLA, nor did he disclose to the tenants that he was not the true owner of the property or that he did not have a written lease from the KSPLA.

As a Koror State legislator, Uehara was subject to the Code of Ethics Act and was required to file an annual financial disclosure statement with the Ethics Commission. *See* 33 PNC § 605(b), (c). The statement demands that the public official disclose his financial interests, including a list of “Assets and Income Sources totaling \$500 or more,” for the previous reporting period. *Id.* § 605(c); Financial Disclosure Statement, Form EC-1 (Part I). Uehara filed his first statement on January 17, 2001, reporting his financial status for the year 2000. Uehara stated that he owned a house and three boats but listed no additional income. In a separate section, he indicated that he had an ownership interest in the Four Seasons. In three subsequent short-form disclosure statements¹—filed on January 15, 2002, January 28, 2003, and November 14, 2005, respectively—Uehara certified that he had no new reportable sources of income and therefore no changes to his 2000 statement.

Uehara signed, or authorized an Ethics Commission employee to sign, each of the four disclosure statements. Preceding the

¹ If a public official’s financial interests for a reporting period are identical to those reported on the prior disclosure statement, he or she may file a shorter form certifying, under penalty of perjury, that his or her financial interests have not changed. 33 PNC § 605(d); *see also* Financial Disclosure Statement Optional Form, Form EC-1-A.

signature line on each form is the following language:

I certify under penalty of perjury that I have used all reasonable diligence in the preparation of this statement, and the information on this form and all attached statements are true, complete, and correct to the best of my knowledge.

See Financial Disclosure Forms EC-1, EC-1-A.² Uehara did not sign the three short-form disclosure statements before a notary public, an Ethics Commission employee, or anyone else. For his 2002 form, Uehara, by telephone, directed a Commission employee, Kalista Decherong, to sign on his behalf. For his 2003 and 2005 forms, Uehara signed the documents at an earlier time and later submitted them to the Commission with his signature already on them.

The government subsequently discovered that Uehara’s disclosure forms were inaccurate and incomplete. Specifically, Uehara did not report the \$22,000 of rental income received from leasing the property on T-Dock from 2001 to 2004. On February 20, 2007, the Special Prosecutor (“SP”) charged Uehara with a variety of offenses stemming from the above-described conduct. The SP charged Uehara with forty-three counts of grand larceny, alleging that he unlawfully stole property from his tenants, who unwittingly paid him rent for the KSPLA property. The SP also alleged that Uehara

² This language closely tracks the language in the Code of Ethics Act, 33 PNC § 605(f).

obtained the rental income by misrepresenting his ownership and therefore charged him with forty-three counts of false pretenses/cheating. Finally, the SP charged Uehara with three counts of perjury and three counts of misconduct in public office—one count of each crime for each of the three incomplete disclosure statements he submitted to the Ethics Commission.

Uehara’s trial began on February 19, 2008. After the SP presented its case-in-chief and the court adjourned for the day, Uehara suffered a mild stroke and required medical attention. The court continued the trial indefinitely. During the interim, the SP resigned and left Palau. Uehara moved to dismiss the case because of the inevitable delay in replacing the SP. In response, the Office of the Attorney General (“AG”) notified the court that it intended to take over Uehara’s prosecution. On May 28, 2008, the court denied Uehara’s motion to dismiss and, noting that the trial had already commenced, permitted the AG to represent the Republic.

After additional continuances related to Uehara’s health, the trial resumed on January 22, 2009. On January 23, the trial court acquitted Uehara on all counts of grand larceny and false pretenses, but it convicted him of perjury and misconduct in public office. The court found that Uehara knowingly filed three false disclosure statements in violation of the Code of Ethics Act and contrary to the written oath on the forms. The court then sentenced Uehara to six years in prison for each conviction, to run concurrently, with all but twelve months suspended, and it assessed a \$10,000 fine for each count. Uehara now appeals.

ANALYSIS

Uehara presents numerous issues on appeal, attacking both his convictions and his sentence. He argues that the information against him was defective, that the court should not have permitted the Republic’s change of counsel, that his convictions for perjury were improper, that the convictions were not supported by the evidence, and that the court made additional errors of law. After a thorough review of this case, the Court finds error in Uehara’s perjury convictions and therefore addresses that issue first. We reject the remainder of his arguments.

I. Perjury Convictions

[1] The trial court convicted Uehara of three counts of perjury under 17 PNC § 2601 for knowingly falsifying his three short-form disclosure statements. Uehara avers that the Republic did not prove the elements of perjury under § 2601 beyond a reasonable doubt. Specifically, he argues that he did not take an oath or affirmation in the presence of a person competent to administer it. The Republic, however, asserts that submitting a false financial disclosure statement, signed “under penalty of perjury,” is sufficient to support his conviction. Interpretation of the perjury statute is a question of law that this Court reviews *de novo*. *Lin v. Republic of Palau*, 13 ROP 55, 57 (2006); *Rechucher v. Republic of Palau*, 12 ROP 51, 53 (2005).

[2] We begin with Palau’s perjury statute, which reads as follows:

Every person who *takes an oath or any legal substitute therefor before a competent*

tribunal, officer, or person, in any case in which a law of the Republic authorizes an oath or any legal substitute therefor to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, deposition, or certificate by him subscribed is true, and who wilfully and contrary to such oath or legal substitute therefor states or subscribes any material which he does not believe to be true, shall be guilty of perjury, and upon conviction thereof shall be imprisoned for a period of not more than five years.

17 PNC § 2601 (emphasis added). The question before this Court is whether simply signing a financial disclosure form and submitting it to the Ethics Commission constitutes “taking” an oath or legal substitute

therefor³ “before” a competent person under § 2601.

[3] The first step in interpreting a statute is to refer to its plain language. *Lin*, 13 ROP at 58. If that language is clear and unambiguous, the Court need not move beyond it. *Id.* (citing *Senate v. Nakamura*, 7 ROP Intrm. 212, 216 (1999)). As this Court noted in *Lin*, if a statute is not susceptible of more than one construction, courts should not be concerned

³ Although the information charging Uehara with perjury spoke only of an oath, the Republic argued on appeal that the financial disclosure statement should be construed as a “legal substitute.” This argument, however, does not alter the Court’s inquiry of whether the words to which Uehara was required to swear—whether called an oath, affirmation, or something else—was taken “before a competent tribunal, officer, or person.” Under a plain reading of § 2601, the term “legal substitute” refers to a substitute for the *oath*, not for the requirement that the defendant swear to the oath (or legal substitute) “before a competent . . . person.” The statute’s term “therefor” refers directly back to the term “oath,” and both terms precede the phrase “before a competent tribunal, officer, or person.” Further, the statute later uses the same language on two occasions: “in any case in which the law of the Republic authorizes an *oath or legal substitute therefor to be administered*,” and “contrary to such *oath or legal substitute therefor*.” In both instances, this phrase again joins the two terms, with “therefor” referring back to the term “oath” in the same manner as the first. The plain meaning of this language is that one may be guilty of perjury by taking either (a) an oath or (b) a legal substitute for the oath, but whichever phrase applies, it must have occurred “before” a competent person. Thus, the government’s argument on this point does not affect the remaining analysis in this case, which relates to the term “before” in § 2601.

with the consequences resulting from its plain meaning. *Id.*

According to the express wording of § 2601, one must take an oath or legal substitute “before” a competent person to be guilty of perjury. Turning to the common usage of the term, Webster’s Dictionary defines “before” as “in the presence of”; “in sight or notice of”; “face to face with”; and “confronting.” *Webster’s Third New Int’l Dictionary* 197 (1981). This usage, as applied to § 2601, would require one to appear and take an oath or legal substitute in the presence of another person to be guilty of perjury.

[4] This interpretation of § 2601 is consistent with a wealth of legal authority concerning standard perjury principles and U.S. perjury statutes with language similar to § 2601.⁴ The most common definition of

⁴ The federal perjury statute in the United States, as well as certain “false declaration” statutes in various states, punish false statements made in broader circumstances than those encompassed by statutes like § 2601. *See* 18 U.S.C. § 1621. Specifically, the federal statute and the laws of many states expressly provide that a false written statement signed “under the penalties of perjury” is sufficient to render one guilty of perjury even if it is not notarized or otherwise properly sworn. *See id.* § 1621(2) (referring to 28 U.S.C. § 1746); *see also, e.g., Pfeil v. Rogers*, 757 F.2d 850 (7th Cir. 1985); *Dickinson v. Wainwright*, 626 F.2d 1184 (5th Cir. 1980); *United States v. Zonca*, 94 F. Supp. 2d 1127 (M.D. Fla. 1999), *aff’d* 208 F.3d 1012 (11th Cir. 2000); *People v. Ramos*, 430 Mich. 544 (1988) (noting that the federal perjury statute and laws in California, Washington, and Wyoming are broader than Michigan’s and permit prosecution for perjury for a written declaration “under the penalties of perjury”). In each of these cases,

perjury, which includes the same elements under Palau’s statute, requires proof of (1) an oath or legal substitute therefor; (2) authorized or required by law; (3) taken before a competent person or tribunal; (4) a false statement of material fact; and (5) knowledge of the falsity. 60A Am. Jur. 2d *Perjury* § 6 (2003); *see also* 17 PNC § 2601.

[5] To meet these elements, the defendant must have taken the oath or legal substitute in the actual presence of a competent person. The crux of a perjury conviction is that the defendant violated a solemn, formal oath or affirmation—something weightier than a signature. Perjury is a serious crime, and requiring an oath before a competent person is not a mere technicality. Its purposes are “to impress upon the swearing individual an appropriate sense of obligation to tell the truth, and to ensure that the affiant consciously recognizes his or her legal obligation to tell the truth”; to bind the conscience of the swearing individual; and to permit prosecution for perjury if the statements are false. 58 Am. Jur. 2d *Oath and Affirmation* § 5 (2002). To further these purposes, the “taking” of the oath may vary in form but at minimum requires “some unequivocal and present act, in the presence of an officer to administer the oath, whereby the affiant consciously takes on himself the obligation of the oath.” 60A Am. Jur. 2d *Perjury* § 9.

Therefore, a perjury statute mandating an oath “taken before” a competent tribunal or person (such as § 2601) typically requires that

however, the basis of the conviction was the federal or state “false declaration” statute. Palau has no equivalent provision.

the false statement must “be given under an oath actually administered,” which in turn means that “the declarant must take upon himself or herself the obligations of an oath *in the presence* of an officer authorized to administer it.” 58 Am. Jur. 2d *Oath and Affirmation* §§ 6, 17 (emphasis added). This is true under standard U.S. perjury law,⁵ as well as cases in many states holding or suggesting that, under a statute such as Palau’s, a document not signed in the presence of a person authorized to give an oath will not sustain a perjury conviction.⁶

⁵ See 60A Am. Jur. 2d *Perjury* § 9 (“The oath, a necessary basis for a prosecution for perjury, must be solemnly administered by a duly authorized officer. . . . [T]here is a valid oath sufficient to form the basis of a charge of perjury when there is some unequivocal and present act, *in the presence of an officer authorized to administer the oath*, whereby the affiant consciously takes on himself the obligation of the oath.” (emphasis added)); *id.* § 11 (“In order to support a perjury charge, the oath under which false testimony is given must have been administered by a person having lawful authority to do so”); *id.* § 75 (“Under both federal and state law, proof of the charge of perjury requires that sufficient evidence be offered for the jury to find, beyond a reasonable doubt, that *an oath was administered to the defendant* by a duly authorized officer before he or she gave the allegedly false testimony.” (emphasis added)).

⁶ See, e.g., *Harrison v. State*, 923 P.2d 107, 108-10 (Alaska Ct. App. 1996) (false affidavit, not signed before a notary, could not support perjury conviction under a statute requiring the statement to be “knowingly given under oath or affirmation,” but it *did* suffice for conviction under a separate statute providing for perjury if a statement is “knowingly given under penalty of perjury”); *People v. Viniegra*, 130 Cal. App. 3d

In recent times, some courts have excused certain formalities associated with a sworn oath (such as swearing on a Bible or raising one’s right hand), but a court may not disregard the lack of an oath or affirmation before a competent person altogether. As a New York court held long ago, a statute providing that “[i]t is no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner” applied only where *some oath* was given; it does not apply where no oath was administered, for the statute “cannot cure that which never had life enough to be sick.” *People ex rel Greene v. Swasey*, 203 N.Y.S. 22, 25 (Sup. Ct. 1924).

[6, 7] Consistent with these rules, courts generally hold that “[t]he taking of an oath is a personal matter, and it cannot be taken or subscribed in a representative capacity. It is an act which may not be delegated to an agent, for by its very definition, an oath must be

577, 584-86 (1st Dist. 1982) (holding, in a similar case to this one, that a false welfare application, signed “under the penalties of perjury” but not in the presence of a notary or authorized officer, could constitute a violation of California’s welfare laws but was *insufficient* to demonstrate a false swearing or oath for perjury); *State v. Johnson*, 553 So.2d 730, 723-33 (Fla. App. 2d Dist. 1989) (holding that statutory requirement of a “sworn statement” requires administration of oath, and simply signing a document under penalty of perjury does not suffice); *Mickelsen v. Craigco, Inc.*, 767 P.2d 561, 564 (Utah 1989) (holding that a valid verification must include a written oath or affirmation and be signed by the affiant in the presence of a notary or other authorized person); see also 51 A.L.R. 840, *Formalities of administering or making oath* (listing many similar cases).

administered personally.” 58 Am. Jur. 2d *Oath and Affirmation* § 9. A natural extension of this principle is that a valid oath, even for a sworn affidavit similar to the Ethics Commission form, typically cannot be administered by telephone. *Id.* § 18. “[T]here must be present the officer, the affiant, and the paper, and there must be something done which amounts to the administration of the oath.” *Id.* (quotations omitted).

[8] In sum, the common usage of the term “before” in Palau’s perjury statute is consistent with the prevailing interpretations of similar U.S. perjury statutes that require an oath to be “taken before” a competent person. We therefore hold that to convict one of perjury under 17 PNC § 2601 based on a written form, the government must at least establish that the defendant signed an oath or legal substitute therefor *in the physical presence* of a person competent to administer it. Such a requirement ensures that perjury remains a serious crime reserved for the type of cases contemplated by the legislature, where defendant violates the solemn oath or its legal substitute.

Turning to the facts of this case, the information charging Uehara asserted that he committed perjury in violation of § 2601, but Uehara did not “take” an oath or legal substitute therefor “before” anyone. First, there was no evidence that Uehara appeared and signed his disclosure statements before a notary public, an Ethics Commission employee, or anyone else who could acknowledge his written affirmation. All evidence was to the contrary. Kalista Decherong, an Ethics Commission employee, testified that she signed Uehara’s form filed on January 22, 2002. She stated that Uehara,

over the telephone, “asked me to do this for him ‘cause he was away a [sic] the Babeldaob.” (Tr. 44). As to the 2003 and 2005 forms, the only testimony concerning an oath was as follows:

Q. [Counsel for Uehara] That⁷ was not executed in front of you, was it?

A: [Decherong] Yes it was ‘cause I received it here.

Q: Wasn’t this sent over to you just with the signature on it and you filled the rest of it in?

A: Yes, ‘cause I asked him and he told me on the phone that ‘I don’t have any new business or anything.’ So I said, we . . . you have to get your form and do it before February 1st.

Q: And so this [form] came to you with the signature on it and then you filled out the rest of the form?

A: Yes.

Q: And then Exhibit 42,⁸ is that the same thing, the form came to you with the signature on it and you filled out the rest of the form?

A: Yea.

⁷ Uehara’s counsel was referring to Exhibit 41, which was Uehara’s 2003 disclosure statement.

⁸ Exhibit 42 was Uehara’s 2005 disclosure statement.

(Tr. 45.) Furthermore, there was no notary seal or a signature by an Ethics Commission employee, attesting that Uehara in fact acknowledged the language on the forms that he signed.

For a crime as serious as perjury, this evidence is not sufficient to prove that Uehara took an oath “before” a competent person. Uehara signed the 2003 and 2005 disclosure statements in his own time, in the absence of a person competent to administer an oath, and then submitted them to the Ethics Commission. And the evidence is certainly insufficient for perjury concerning Uehara’s 2002 form, which he did not even sign personally. The Republic presented no evidence that Uehara even knew he was authorizing his signature “under penalty of perjury” on the 2002 form. At oral argument, the Republic argued that a public official should not be allowed to escape criminal penalty for otherwise wrongful conduct merely by asking someone else to sign his form. This Court agrees. But here Uehara was charged with *perjury*, not simply with filing a false disclosure statement.

The Code of Ethics Act provides criminal penalties for “any person who knowingly or willingly violates any provision” of the Act. 33 PNC § 611(a). The Ethics Act does not require a public official to take an oath before a competent person. It requires only that the official verify that the information he discloses is accurate, to the best of his knowledge, and he violates the Act by knowingly submitting a false statement to the Commission. The trial court found ample evidence that Uehara knowingly omitted information from his three disclosure forms and therefore violated the Ethics Act. The

Republic, however, did not charge Uehara with violating the Ethics Act. The Court must therefore analyze Uehara’s conduct under the charged perjury statute, which expressly requires an oath taken before a competent person.

[9] In this case, the Republic’s failure to prove that Uehara took an oath or legal substitute therefor “before” a competent person dooms his perjury convictions. The Republic’s argument that signing a document “under penalty of perjury” is, by itself, sufficient to sustain a perjury conviction runs counter to substantial legal authority concerning statutes like § 2601. Furthermore, the trial court made no factual findings concerning the oath or legal substitute required by § 2601, nor did it address whether Uehara took such an oath or whether the person who allegedly administered it was “competent.”⁹ These are essential elements of perjury under § 2601. Instead, the trial court framed the perjury question only as whether the Republic met “each element of proof beyond a reasonable doubt that Defendant did submit false financial disclosure statements to the Ethics Commission on each of the three disclosure forms.” Crim. Case No. 07-036, Decision at 5 (Tr. Div. Jan. 23, 2009). These are not the elements of perjury; these are the elements of violating the Ethics Act.

The Court holds that Uehara’s convictions of three counts of perjury were in

⁹ At oral argument, Uehara focused most of his efforts on asserting that an Ethics Commission employee should not be considered a “competent person” under the perjury statute. Because we resolve this case on other grounds, we need not address this issue and express no opinion on it.

error. Specifically, there was no proof that Uehara took any oath or legal substitute therefor “before a competent tribunal, officer, or person.” We must therefore reverse his perjury convictions.

II. Misconduct in Public Office Convictions

The Court will next address the impact of reversing Uehara’s perjury convictions on his remaining convictions for misconduct in public office. Uehara argues that the Court must overturn these convictions because the perjury convictions were the sole bases for them. We disagree and uphold his convictions under 17 PNC § 2301.

[10] The Palau National Code defines the crime of misconduct in public office as follows:

Every person who, being a public official, shall do any illegal acts under the color of office . . . shall be guilty of misconduct in public office

17 PNC § 2301.¹⁰ Therefore, the three elements of the offense are: (1) status as a public official; (2) an illegal act; (3) committed under the color of office. The commonly accepted definition of “illegal” is

“contrary to or violating a law or rule or regulation or something else . . . having the force of law.” *Webster’s Third New Int’l Dictionary* at 1126; *see also Black’s Law Dictionary* 763 (8th ed. 2004) (defining illegal as “[f]orbidden by law; unlawful”).

In its information charging Uehara with misconduct in public office, the SP alleged all three elements of the offense: that he (1) was a Koror State legislator at the time of the alleged misconduct; (2) was acting under the color of that office, and (3) committed illegal acts. Concerning the last element, the SP alleged that Uehara committed illegal acts in two ways: perjury and violation of the Ethics Act. Specifically, the information stated that Uehara “made false statements in financial disclosure statements submitted to the Ethics Commission in violation of 17 PNC § 2601 and 33 PNC § 605(f), all in violation of 17 PNC § 2301.” (emphasis added). As mentioned above, § 605(f) requires a public official to verify “that he has used all reasonable diligence in preparing the statement and that to the best of his knowledge the statement is true and correct.” By charging Uehara with misconduct in public office based on his violations of *both* 17 PNC § 2601 and 33 PNC § 605(f), the Republic needed only to prove that he violated one of the two statutes, in addition to the remaining elements of § 2301. The information put Uehara on notice that the SP intended to seek a conviction for misconduct in public office based on violations of both § 2601 (perjury) and § 605(f) (the Ethics Act).

After trial, the court below found that the Republic proved the elements of misconduct in public office beyond a

¹⁰ Section 2301 also provides that a public official may commit misconduct in public office if he “wilfully neglect[s] to perform the duties of his office as provided by law.” Uehara was not charged with violating this part of § 2301, and we therefore confine our discussion to the “illegal act” portion.

reasonable doubt. Specifically, it found that (1) Uehara was a Koror State legislator at the time he signed his financial disclosure statements; (2) he signed the statements under color of that office (or, as the trial court put it, “by virtue of his office”); and (3) he committed illegal acts by submitting three false forms. Concerning the specific illegal acts, the trial court found the evidence “overwhelmingly clear” that Uehara knowingly filed “false financial disclosure statements to the Ethics Commission on January 15, 2002, January 28, 2003, and November 14, 2005.” Crim. Case No. 07-036, Decision at 6. (Tr. Div. Jan. 23, 2009). Although the trial court was mistaken that these findings supported Uehara’s perjury convictions, it found every factual element necessary to conclude beyond a reasonable doubt that Uehara violated § 605(f) of the Ethics Act. Therefore, even though the Republic did not formally charge Uehara with violating the Ethics Act, the trial court expressly found that he violated it on three occasions and therefore committed three “illegal acts.” Because the trial court found all elements of § 2301 beyond a reasonable doubt, we uphold Uehara’s convictions for misconduct in public office. We now turn to the remainder of Uehara’s issues on appeal.

III. Duplicity of the Information

Uehara next argues that the government’s charging document was duplicitous. The court found Uehara guilty of three counts of perjury and three counts of misconduct in public office, but the information grouped each category of charge into single paragraphs entitled, respectively, “COUNTS 87-89 (Perjury),” and “COUNTS 90-92 (Misconduct in Public Office).” Uehara

claims that each paragraph actually constituted only one count, meaning that each count charged him with multiple offenses. The court below rejected Uehara’s pretrial objection to the information, and we review this conclusion of law *de novo*. *Lin*, 13 ROP at 57; *Rechucher*, 12 ROP at 53.

[11] In general, “[a] criminal information is sufficient if it contains all of the essential elements of the offense charged and fairly informs the accused of the charges against him which he must defend.” *Franz v. Republic of Palau*, 8 ROP Intrm. 52, 55 (1999); *see also* ROP R. Crim. Pro. 7(c)(1); *United States v. Debrow*, 346 U.S. 374 (1953) (holding that sufficiency of an indictment is not a question of whether it could have been made more definite and certain). We review the sufficiency of an information in light of practical rather than technical considerations. *Gotina v. Republic of Palau*, 8 ROP Intrm. 56, 57-58 (1999); *see also* 1 Charles Alan Wright, *Federal Practice & Procedure: Criminal* § 123 (3rd ed. 1999) (“The precision and detail [of an information] are no longer required, imperfections of form that are not prejudicial are disregarded, and common sense and reason prevail over technicalities.”).

[12] An information is duplicitous where a single count charges the defendant with more than one criminal offense. *Republic of Palau v. Avenell*, 13 ROP 268, 269 n.2 (Tr. Div. 2006); *see also United States v. Hughes*, 310 F.3d 557, 560 (7th Cir. 2002). A duplicitous information is troublesome because it may be unclear whether a subsequent conviction rests on merely one of the offenses within a single count and, if so, which one. This implicates concerns of double jeopardy and affording the defendant proper notice of the charges against

him. *See Hughes*, 310 F.3d at 560; *see also* 1A Wright, *supra*, § 142 (“The vice of duplicity is that there is no way in which the jury can convict on one offense and acquit on another offense contained in the same count.”).

[13] With these principles in mind, we find nothing improper about the information against Uehara. Even a quick read makes apparent that each paragraph charged three counts of perjury and three counts of misconduct in public office. Each paragraph is titled and numbered accordingly, and each begins by listing the three separate dates of Uehara’s three separate disclosure statements. Those three documents were the basis for each count against him. An individually numbered list of paragraphs outlining each count might have been clearer (and repetitious), but our primary concern is whether the information apprised Uehara of the charges against him and whether one can determine on which counts the court convicted him.¹¹ The information satisfied these requirements.

Furthermore, Uehara makes no claim of prejudice. He is asking us to put form over function without a legitimate reason for doing so, and we decline the invitation. We find that the information is not duplicitous, that is, it does not charge multiple offenses in a single count, and it sufficiently apprised Uehara of the charges against him.

¹¹ Although not a component of the information itself, the summons served on Uehara also listed the charges against him as “Perjury (3 counts)” and “Misconduct in Public Office (3 counts),” further notifying Uehara that the government alleged three separate counts of each offense.

IV. The Republic’s Change of Counsel

Uehara next claims that the trial court erred by permitting the AG to take over his prosecution after the SP resigned and left Palau. Uehara makes a variety of arguments to support this challenge: that the AG must have had a conflict because that is a necessary predicate to the SP’s authority; that the two offices are not fungible; and that the lack of a formal substitution of counsel somehow undermines his conviction. We reject each of his arguments.

[14] We begin by noting that the AG and the SP have concurrent jurisdiction to prosecute public officials. *See* 2 PNC § 503; *Republic of Palau v. Sakuma*, 2 ROP Intrm. 23, 29 (1990). As it relates to this case, the legislature granted the SP two distinct powers: to investigate and prosecute any legal transgressions committed by a public official or government employee, 2 PNC § 503(a)(1); and to prosecute for the Republic in any case in which the Ministry of Justice has an actual or potential conflict of interest, *id.* § 503(a)(2).

Uehara argues that the SP may *only* prosecute a public official where the AG has a conflict of interest, meaning that permitting the AG to take over this case must have restored such a conflict. We have previously rejected this argument, albeit while addressing the issue from the other direction. In *Sakuma*, the defendants were public officials who argued that the AG could not prosecute them because the legislature granted the SP sole and exclusive authority to do so. 2 ROP Intrm. at 28. We disagreed, noting that the law creating the SP granted it the power to prosecute public officials but did not divest the AG of that same power. *Id.* at 29. We therefore held that

the SP and the AG possess concurrent authority to prosecute public officials, and the SP is the sole prosecutorial option only where the AG has a conflict of interest or some other ethical concern. *Id.* A necessary corollary to our decision in *Sakuma* is that the SP may prosecute a public official even where the AG has no conflict of interest or ethical concern.

This result accords with the plain language of 2 PNC § 503. Section 503(a)(1) states that the SP has the power to prosecute elected or appointed government officials. The statute does not limit this authority to situations in which the AG has a conflict. Nor does it divest the AG of the power to prosecute public officials, which it otherwise possesses, or state that the SP is the only office that may instigate such a prosecution. The Code of Ethics Act even expressly permits either office to enforce the statute, stating that “[p]rosecution under this section may be undertaken by the Attorney General or Special Prosecutor.” 33 PNC § 611(a).

The next section, § 503(a)(2), then provides that the SP also may prosecute on behalf of the national government where the AG has a conflict of interest. Unlike § 503(a)(1), subsection (2) vests exclusive prosecutorial authority in such a situation to the SP, and it does not limit its scope to prosecuting public officials. The two provisions are distinct and cannot logically be read together. Either office may prosecute a public official, unless conflicted out. We find that the plain language of § 503 and our decision in *Sakuma* foreclose Uehara’s argument.

Having concluded that either office had authority to prosecute Uehara, we turn to

his arguments that the offices are not fungible and that the trial court should have required a formal substitution of counsel. Both the AG and the SP are arms of the executive branch and have the same client—the Republic. Although they possess different powers, the two offices had concurrent authority to prosecute Uehara. The SP resigned and left Palau, and the Republic was left with a choice: dismiss the case and risk forfeiting its prosecution, or substitute the AG. The Republic’s interests required someone to take the case, and permitting the AG to do so was not error. Nor was the lack of a formal substitution. Although this case involves somewhat odd—and hopefully unique—circumstances, Uehara again attempts to place form over function. Uehara, his counsel, and the trial court were on notice of the change, and both parties knew that future filings should be served on the AG, not the SP.

Finally, and perhaps most importantly, Uehara has not explained how the change of counsel prejudiced or harmed him. The Republic had already rested its case-in-chief when Uehara became ill. Had the court dismissed the case, the Republic may have been precluded from re-prosecuting it. Uehara attempted to claim prejudice in his reply brief, but he is unable to point to a single circumstance that caused him harm. He merely noted that after the switch, the AG was required to interpret documents drafted by the SP. Without more, we find no error below.

V. Sufficiency of the Evidence

[15] To the extent that Uehara asserts that the Republic did not produce evidence sufficient to sustain his convictions for

misconduct in public office, the Court disagrees.¹² Convincing an appellate court that there was insufficient evidence for a conviction is a tall task; we review such a challenge for clear error and defer to the Trial Court's opportunity to assess the credibility of the witnesses. *See Labarda v. Republic of Palau*, 11 ROP 43, 46 (2004). We ask only whether there is evidence, viewed in the light most favorable to the prosecution, from which a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *Id.* If so, we will not disturb the conviction even if we might have come to a different conclusion upon hearing the matter in the first instance. *Id.*

We find, as did the trial court, that there was ample evidence that Uehara knowingly failed to disclose reportable income on his financial disclosure statements. His primary argument on this point is that an Ethics Commission employee testified that his initial disclosure form, filed for the year 2000, was "all filled in good." He claims that the Ethics Commission implicitly approved his forms as substantively accurate by accepting them without comment. Uehara's contention is borderline disingenuous. The forms unambiguously required Uehara to disclose all income not earned from his government job, and there was evidence that he was collecting regular monthly income from KSPLA property at T-Dock. The Commission had no way of knowing whether he had additional, undisclosed sources of income. The

Commission was thus unable to opine on whether Uehara's forms were substantively adequate; it only reviewed the form, confirmed that he filled in each section, and concluded that it was facially complete. Uehara cannot have reasonably believed that the Commission's silence authorized his failure to report additional rental income.

The record is replete with additional evidence suggesting that Uehara knowingly and willfully furnished false information on his disclosure statements. The initial form required disclosure of any income source of over \$500, and it listed "Rents and Royalties" as an example. In each subsequent form, Uehara certified that he had no additional sources of income, despite receiving over \$20,000 in rent. Again, we must only determine whether there was evidence from which a reasonable fact finder could have found Uehara guilty of violating § 2301 beyond a reasonable doubt, and we conclude that there was.

VI. Merger

The last of Uehara's arguments is that his conviction for perjury merges with his conviction for misconduct in public office, such that convicting and punishing him for both crimes violates his right against double jeopardy. *See Palau Const. art. IV, § 6; Scott v. Republic of Palau*, 10 ROP 92, 96 (2003) (noting that protection against double jeopardy insulates defendant from being tried, convicted, or punished more than once for the same offense). Because we have already determined that Uehara's perjury convictions were in error, we need not address this argument. Uehara will only be punished for one crime—misconduct in public

¹² Because we have already ruled on the perjury convictions, the Court limits this section to Uehara's claims that the Republic did not adequately prove that his financial disclosure statements were actually false.

office—thereby relieving any potential double jeopardy concerns.

CONCLUSION

Palau’s perjury statute requires a defendant to take an oath or legal substitute therefor “before” a competent person. In this case, the Republic produced no evidence—and the trial court made no factual finding—concerning this essential element of perjury under 17 PNC § 2601. We therefore REVERSE the trial court’s decision finding Uehara guilty of three counts of perjury. The SP’s information, however, charged Uehara with misconduct in public office based on both his alleged perjury *and* his violations of the Code of Ethics Act, and the trial court expressly found all of the elements of the latter. We therefore AFFIRM the trial court’s decision finding Uehara guilty of three counts of misconduct in public office, in violation of 17 PNC § 2301. Given the altered outcome of this case, we REMAND to the trial court for re-sentencing in light of this opinion.

**DIRRAMERKONG
UCHERREMASECH, KEDEI
TEOCHO, DILYOLT
UCHERREMASECH, and MARINO
HIROICHI,
Appellants,**

v.

**FUYUKO HIROICHI,
Appellee.**

CIVIL APPEAL NO. 09-009
Civil Action Nos. 02-061, 02-119

Supreme Court, Appellate Division
Republic of Palau

Decided: May 14, 2010¹

[1] **Constitutional Law:** Interpretation;
Statutory Interpretation: Ambiguity

The first rule of construing a statute or constitutional provision is that the Court begin with the express, plain language used by the drafters and, if unambiguous, enforce the provision as written. The Court should read the drafters’ language according to its common, ordinary, and usual usage, unless a technical word or phrase is used.

[2] **Constitutional Law:** Interpretation;
Statutory Interpretation: Ambiguity

Ambiguity exists where a provision or term is capable of being understood by reasonably well-informed persons in two or more

¹ The panel finds this case appropriate for submission without oral argument, pursuant to ROP R. App. P. 34(a).

different senses. If a provision is unambiguous, we do not even begin the task of interpreting it.

[3] **Constitutional Law:** Interpretation

When ascertaining the plain meaning of a constitutional provision, the Court should read an article's sections together, not as parts standing on their own. The Court should assume that the drafters inserted every part of the article for a purpose and attempt to avoid a construction of one provision that would render another superfluous. The Court should attempt to find that all sections and provisions of the Constitution are in harmony.

[4] **Constitutional Law:** Citizenship;
Property: Acquisition Limited to Palauans

For citizenship under Article III, Section 1, of the ROP Constitution one must demonstrate (1) that she was a citizen of the Trust Territory immediately prior to the effective date of the Constitution; and (2) that she has at least one parent of recognized Palauan ancestry. The term "parent" in Section 1 includes an adoptive parent of recognized Palauan ancestry.

[5] **Appeal and Error:** Preserving Issues

A litigant who does not raise an argument before the trial court waives that issue and may not pursue it for the first time on appeal. The trial court must first have an opportunity to opine on, or at least consider, an issue before an appellate court has anything to review.

[6] **Civil Procedure:** Admissions

Rules 8(b) and 8(d) of the Rules of Civil Procedure exist so that the parties may establish at the outset those allegations that are not in dispute and will not be an issue at trial, as opposed to those that are contested and will require proof for the plaintiff to prevail. Consequently, an admission in a pleading is generally treated as binding on the parties and on the court.

[7] **Property:** Mortgage

A mortgage is a contract whereby the mortgagor pledges real property to a mortgagee as security for the mortgagor's performance of some act or obligation. It must be in writing, recorded, and should contain a legal description of the mortgaged property, a description of the obligations for which the property will serve as security, and the names and addresses of each mortgagor and mortgagee.

[8] **Property:** Mortgage

In certain circumstances, a document that purports to be a deed might be properly interpreted by a court as a mortgage. Whether a deed is in fact a security instrument depends on several factors.

Counsel for Dirramerkong, Kedei, and Dilyolt: Carlos H. Salii

Counsel for Marino Hiroichi: John K. Rechucher

Counsel for Appellee: Siegfried B. Nakamura

BEFORE: ARTHUR NGIRAKLSONG,
Chief Justice; LOURDES F. MATERNE,
Associate Justice; HONORA E.

REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This appeal concerns the rightful ownership of certain land in Peleliu State. The trial court determined that the late Hiroichi Ucherremasch properly transferred the disputed property to his wife, Fuyuko, who, although born of Japanese parents, was eligible to acquire a property interest in Palau. Appellants, Hiroichi's sisters and son, appeal the court's decision and seek to eject Fuyuko from the land and house she has inhabited for over twenty-five years. For the reasons below, we find no error in the trial court's decision.

BACKGROUND

This dispute concerns land known as *Bkulasang* and *Ibesachel*, located in Ngerchol Hamlet, Peleliu State. The story begins with a man named Ucherremasech, who had one son, Hiroichi, and five daughters.² Upon his death years ago, Ucherremasech's property, including *Bkulasang* and *Ibesachel*, was transferred to his children to share equally. In 1990, a Determination of Ownership named

² Hiroichi has three biological sisters, Dirramerkong Ucherremasech, Kedei Teocho, and Dilyot Ucherremasech. His other two siblings are half-sisters, namely Bosech Itpik and Ngetechuang Aitaro. At trial, three of Hiroichi's sisters were deceased, Dirramerkong was no longer mobile enough to come to court, and only Kedei testified.

Hiroichi and his five sisters the fee simple owners of *Bkulasang* as tenants-in-common, and in 1998, the siblings obtained a Certificate of Title reflecting their joint ownership.

Bkulasang is a large property comprised of various plots of land.³ This dispute is over one particular tract, on which the Trust Territory government built three houses. This land is bordered by the sea to the north and a main road to the south, and there is a house near the water and another near the road. From 1984 until his death, Hiroichi and his second wife, Fuyuko, lived in the third house, located in the middle of the property. Fuyuko continues to live there today.

This family dispute started sometime prior to 2000, when Hiroichi sought a bank loan to finance renovations to his house. At the time, *Bkulasang* was one large property, and Hiroichi attempted to use his interest in it as collateral for the loan. But the bank denied his application over concerns that the land contained too many owners, and it advised him that his chances of receiving the loan would improve if he segregated a smaller portion of the property and was its sole owner.

Consequently, Hiroichi informed his siblings that he needed to use a portion of *Bkulasang* as collateral for a loan. He intended to use the land containing his house and the one near the road (but not the land containing the house near the sea). He hired a surveyor to demarcate the smaller portion of the property, and he placed rebar near the road to mark the boundaries. On January 31, 2000,

³ *Bkulasang* contains at least Lots 051 R 01, 051 R 02, and 051 R 03, although it may be larger. Only those lots are relevant to this appeal.

three of Hiroichi's sisters, Dirramerkong, Dilyolt, and Kedei, signed a deed by which they conveyed their interests in the subdivided portion of *Bkulasang* to Hiroichi.⁴

The January 2000 document, entitled "Deed of Transfer," notes the sisters' joint interests in *Bkulasang*, stating also that Ngetechuang had passed away. The document then reads:

That we the undersigned surviving sisters of Hiroichi Ucherremasech do hereby agrees [sic] with our consents and without force to transfer and quitclaim a parcel of our property described above to our brother, Hiroichi Ucherremasech.

That the area of the parcel of our land that we all agrees [sic] to transfer and quitclaim to our brother, Hiroichi Ucherremasech, is 6,555 square meters.

That said parcel of our land is described as follows: 051 R02 with an area of 6,555 square meters bounded to the North by saltwater to the South by

the main road to the East by 051 R03 and to the West by 051 R01.

That our brother, Hiroichi Ucherremasech, shall have a full power and authority to control that said parcel of our land. We all agrees [sic] to loose [sic] our interests to the said parcel of our land.

The three sisters each signed the Deed of Transfer before a notary public, whose signature and seal also appear on the document.

At trial, the parties disputed the validity of the January 2000 Deed of Transfer. The trial court afforded the most credit to the testimony of the notary public, Becheseldil "Taruu" Nakamura. Nakamura recalled that she met with two of the sisters, Dilyolt and Dirramerkong, in a room with Hiroichi, Dilyolt's son Johnny, and Fuyuko's son Willy. Nakamura explained to the women that they did not have to sign the document and asked them whether they were on medication, able to understand what they were signing, and if they were "not of right mind." The two sisters assured her that they understood. Nakamura then read the Deed of Transfer in both English and Palauan, also explaining that the ownership, power, and control of the property would go to Hiroichi. Nakamura testified that at one point, Dirramerkong tried to stop her from reading because she claimed to already know what the document was about. Nakamura persisted in reading the entire document, however, and both women signed it.

⁴ Hiroichi's two half-sisters, Ngetechuang and Bosech, did not sign the deed of transfer. Ngetechuang had passed away at that time, and Bosech was in poor health and passed away later that year. Although both sisters had adult children, nothing in the record suggests that Hiroichi or his other three sisters conferred with the descendants before executing the transfer.

Nakamura then went to Dilyolt's house, where she met Kedei, the third sister, and her son John. Nakamura informed Kedei that her sisters had already signed the Deed of Transfer, and she detailed the document in much the same way as she had to Dilyolt and Dirramerkong. Nakamura read the entire document to Kedei in Palauan, and Kedei signed it. Nakamura notarized the document and later testified that she believed the three sisters understood what they were signing.

The sisters argued at trial that Hiroichi had deceived them. According to them, Hiroichi merely requested to use part of their property as collateral for a loan that would fund renovations and other improvements to his home. In discussions with Hiroichi about the matter, the sisters reminded him of their father's wish that the property never be transferred outside the family. They claimed that Hiroichi did not explain that he was obtaining full ownership of the land, and they claimed ignorance of the nature of the Deed of Transfer, believing it merely granted permission to use the property as collateral, not an outright transfer.

On December 29, 2000, approximately a year after the sisters executed the Deed of Transfer, Hiroichi signed a document entitled "Dikesel A Kloklet A Hiroichi Ucherremasech" ("Dikesel"). The Dikesel purported to transfer some of Hiroichi's properties to his wife, Fuyuko, and some to his son, Marino. Among the land transferred to Fuyuko was the disputed subdivided plot on *Bkulasang* that was the subject of the 2000 Deed of Transfer. Hiroichi signed the Dikesel before a notary public. He died approximately two months later.

The parties offered competing interpretations of the Dikesel at trial, each supported by an expert on Palauan custom. According to Marino, the Dikesel was a final will and testament; Fuyuko maintained, however, that the Dikesel was an inter-vivos transfer effective upon execution.

Fuyuko presented testimony that Hiroichi signed the Dikesel before a notary, that he understood the document, that he was not on any medication, and that he felt no compulsion to sign. The trial court credited the testimony of the notary, Pamela Anastasio, who testified that she fully explained the document to Hiroichi and read it to him in Palauan. Anastasio believed that Hiroichi understood what he was signing. Fuyuko also testified that Hiroichi had previously declared his intention to give her the property on which their house was built (the subdivided lot on *Bkulasang*), but she had no role in preparing or drafting the Dikesel.

Not even one month after signing the Dikesel, on January 19, 2001, Hiroichi signed a Deed of Conveyance purporting to convey his interests in twelve properties to his son, Marino. Marino testified that he was close to his father, and although he lived in Saipan, he returned home to Peleliu on several occasions. Marino claimed that on one of those trips, Hiroichi gave him some land documents and told Marino to procure the appropriate paperwork to transfer certain lands to him. Marino did not do anything concerning this matter for many years. When Marino learned that Hiroichi was sick, he returned to Palau and had an attorney draft the Deed of Conveyance.

Among the twelve properties purportedly conveyed to Marino in the 2001 Deed of Conveyance was the subdivided plot in dispute in this case. Of course, Hiroichi had already conveyed this property to Fuyuko in the Dikesel. As with the other documents, Hiroichi signed the Deed of Conveyance before a notary public, although this time he was in the hospital. The notary did not ask Hiroichi whether he was on any medication, and she merely summarized the document to Hiroichi in Palauan. Hiroichi, however, confirmed that he understood it and signed the document.

For a reason that is unclear, Marino enlisted a notary public to witness Hiroichi's signature on the Deed of Conveyance a second time, on February 23, 2001. At this point, Hiroichi was weak and indicated that he understood the notary only by nodding his head. He could not physically sign the document, so he placed a fingerprint on it instead. Later that same day, Hiroichi passed away.

The trial court cited a variety of circumstances and inconsistent testimony undermining the validity of the January 2001 Deed of Conveyance and the second execution on February 23. But whatever the effect of that document, Hiroichi intended to transfer some land to his son Marino. Hiroichi had previously asked Dirramerkong to move from the house near the sea to clear room for Marino, and the Dikesel transferred that house and other nearby property to him.

After considering all of the evidence, particularly the circumstances surrounding the Dikesel and the 2001 Deed of Conveyance, the trial court concluded that Hiroichi was not

fully apprised of the land he purportedly was transferring to Marino in the 2001 Deed of Conveyance. The court noted that Marino, not Hiroichi, had drafted the Deed of Conveyance, and the notary only summarized it rather than read it verbatim. Furthermore, the court cited some confusion in the listed Cadastral Lot Numbers associated with the various plots of land on *Bkulasang*. The plot 051 A 02 properly represents the house near the sea, which was granted to Marino, but after Hiroichi subdivided the lot to obtain his loan, the surveyor also wrote the new number for the plot containing the other two houses as 051 A 02. As a result, the court found that Hiroichi was not attempting to undo his prior transfer to Fuyuko or give away land that he had already transferred, but rather that he believed he was conveying any remaining interests in his property.

After the *eldech duch*, Fuyuko remained in her house on *Bkulasang*. The sisters attempted to convince her to leave, but Fuyuko filed this action to quiet title to the land.

The appellants claimed, based on a variety of arguments, that Hiroichi's 2000 transfer of the disputed subdivided plot to Fuyuko was invalid and unenforceable. First, they asserted that Fuyuko was not a true Palauan citizen and therefore could not acquire title to land in Palau. Fuyuko was born in Palau in 1936. Her biological parents are Japanese, but they returned to Japan when Fuyuko was only eight years old. A Palauan couple, Rebluud Ngiraiibngiil and Etebai Dirraiyebukl, adopted and raised Fuyuko, and she has lived in Palau for her entire life. She was a citizen of the Trust Territory before Palau's independence, and the trial court

found that she became a citizen of Palau at the date the Constitution took effect.⁵ Fuyuko has voted in every election as a citizen of Palau, and she has had a Palauan passport—listing her nationality as Palauan—since 1960.

Second, the sisters claimed that the court should enforce their father's wish that *Bkulasang* be passed to his children's children, and not outside the family. Third, the sisters challenged the validity of their January 2000 Deed of Transfer, specifically arguing that it was fraudulent and that the Deed did not sufficiently describe the subject property. Fourth, the sisters averred that the *Dikesel*, signed in December 2000, was not an inter-vivos transfer and thus did not pass Hiroichi's interest in the subdivided lot to Fuyuko.

The trial court found against the appellants. It first held that Fuyuko was entitled to acquire title to land in Palau because she is a Palauan citizen under Article III, Section 1 of the Constitution. The court then determined that Ucherremasech's wishes, expressed to his children, were not enforceable and were also undermined by Ucherremasech's own previous transfers to individuals outside the family. The court then turned to the January 2000 Deed of Transfer and found that it was not procured by fraud, and it adequately described the property being transferred from the sisters to Hiroichi. Therefore, Hiroichi validly possessed his sisters' interests in the subdivided property. The court next determined that the *Dikesel* was a valid inter-vivos transfer conveying

⁵ As explained below, Appellants challenge the Trial Division's finding that Fuyuko was in fact a Trust Territory citizen in the first place.

Hiroichi's interest in the subdivided lot to Fuyuko.⁶ Because the descendants of Hiroichi's other two sisters, Bosech and Ngetechuang, did not consent to the initial transfer in 2000, Hiroichi only owned—and could only convey—the property as a tenant-in-common with those descendants. Therefore, as the result of the valid transfer to Fuyuko, Hiroichi retained no interest in the subdivided lot capable of transfer to Marino via the 2001 Deed of Conveyance. The court concluded by holding that Fuyuko holds Hiroichi's interest in the subdivided parcel, meaning that she owns the land as a tenant-in-common with the descendants of Bosech and Ngetechuang; the court then determined that, as a matter of equity, Fuyuko may remain in her house on the property. Marino and the three sisters now appeal.

ANALYSIS

The appellants raise three issues for this Court's review. First, we must determine whether Fuyuko was entitled to acquire title to property in Palau; if not, any purported conveyance would have been ineffective. Second, the sisters assert that the trial court erred in its treatment of the 2000 Deed of Transfer. Finally, the sisters assert that the trial court clearly erred by overlooking Kedei's testimony that she did not intend to transfer her full interest to Hiroichi; rather, they assert that the court should have treated the 2000 Deed of Transfer as a mortgage.

⁶ On appeal, the appellants do not challenge the trial court's ruling that the *Dikesel* was a valid inter-vivos transfer of Hiroichi's property interest to Fuyuko. We therefore limit our review to whether Hiroichi had any interest to convey based upon the January 2000 Deed of Transfer.

The appellants raise questions of both law and fact. We review the trial court’s legal conclusions *de novo* and its factual determinations for clear error. *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007). We will not set aside a finding of fact so long as it is supported by evidence such that any reasonable trier of fact could have reached the same conclusion, unless we are left with a definite and firm conviction that an error has been made. *Rechiriki v. Descendants of Telbadel*, 13 ROP 167, 168 (2006).

I. Fuyuko’s Citizenship

Article XIII, Section 8 of the Palau Constitution provides that “[o]nly citizens of Palau . . . may acquire title to lands or waters in Palau.” The Constitution defines a “citizen” in two ways: (1) “[a] person who is a citizen of the Trust Territory of the Pacific Islands immediately prior to the effective date of this Constitution and who has at least one parent of recognized Palauan ancestry,” ROP Const., art. III, § 1; and (2) “[a] person born of parents, one or both of whom are citizens of Palau or are of recognized Palauan ancestry.” ROP Const. amend XVII; *see also* ROP Const. art. III, § 2, *repealed by* ROP Const. amend. XVII.⁷

⁷ The Seventeenth Amendment was enacted on November 19, 2008. This provision amended Article III, Section 4 and repealed Article III, Sections 2 and 3. Section 2 of Article III, as originally drafted, stated that “[a] person born of parents, one or both of whom are citizens of Palau is a citizen of Palau by birth.” The Seventeenth Amendment therefore expanded the original Section 2 to include as Palauan citizens those individuals born of parents who are of recognized Palauan ancestry, not solely those born of Palauan

The parties do not dispute Fuyuko’s ancestry, but they disagree about its effect on her citizenship. As noted above, Fuyuko was born in Palau in 1936 to parents of Japanese ancestry. This fact renders her ineligible to qualify as a Palauan citizen under the Seventeenth Amendment (or the original version of Article III, Section 2) because she was not “born of” a Palauan parent. There is also no dispute, however, that both of Fuyuko’s adoptive parents were of recognized Palauan ancestry. This case therefore turns on the proper interpretation of Article III, Section 1, specifically whether an adoptive parent may constitute a “parent of recognized Palauan ancestry” under that section. If the Court concludes that an adoptive parent qualifies, it must then consider whether Fuyuko was a Trust Territory citizen immediately prior to the Palau Constitution’s effective date.

A. Definition of “Parent” in Article III, Section 1

The Constitution provides for Palauan citizenship for any person who was a Trust Territory citizen at the time the Palau Constitution took effect and “who has at least one parent of recognized Palauan ancestry.” ROP Const., art. III, § 1. The question presented by this case is whether Fuyuko, adopted by Palauan parents in 1944—long

citizens. The trial court analyzed this case under Article III, Sections 1 and 2, despite the repeal of the latter. The amendment, however, does not change the Court’s analysis for purposes of this opinion. This case concerns the interpretation of Article III, Section 1, which uses only the language “one parent of recognized Palauan ancestry.” To the extent that this Court refers to Section 2, it is to compare it with Section 1 of the Constitution as originally drafted.

before the Palauan Constitution took effect—meets Section 1’s requirements.

[1, 2] The first rule of construing a statute or constitutional provision is that we begin with the express, plain language used by the drafters and, if unambiguous, enforce the provision as written. *See Lin v. Republic of Palau*, 13 ROP 55, 58 (2006). The Court should read the drafters’ language according to its common, ordinary, and usual usage, unless a technical word or phrase is used. *See Dalton v. Bank of Guam*, 11 ROP 212, 214 (2004); *see also Yano v. Kadoi*, 3 ROP Intrm. 174, 182-83 (1992). Ambiguity exists where a provision or term is “capable of being understood by reasonably well-informed persons in two or more different senses.” *Uherbelau*, 12 ROP at 185 (quotations omitted). If a provision is unambiguous, we do not even begin the task of interpreting it. *Id.*; *see also Senate v. Nakamura*, 7 ROP Intrm. 212, 216-17 (1999) (“[I]f the language of a statute is clear, the Court does not look behind the plain language of the statute to divine the legislature’s intent in enacting the legislation.”).

[3] When ascertaining the plain meaning of Article III, the Court should read its sections together, not as parts standing on their own. *See 73 Am. Jur. 2d Statutes* § 103 (“Sections and acts in *pari materia*, and all parts thereof, should be construed together and compared with each other.”); *see also Erlenbaugh v. United States*, 409 U.S. 239 (1972) (noting “the principle that individual sections of a single statute should be construed together”). The Court should also assume that the drafters inserted every part of Article III for a purpose and attempt to avoid a construction of one provision that would

render another superfluous. *See 73 Am. Jur. 2d Statutes* § 164 (“As a general rule, a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”). This is particularly true concerning constitutional provisions: “Applying sound principles of constitutional construction, . . . it is the function of this court in interpreting the Constitution to find . . . that all sections and provisions of the Constitution are in harmony. Should a discordant note be heard among two or more provisions of the Constitution, it is our task to bring them into harmony if such is possible.” *Fritz v. Salii*, 1 ROP Intrm. 521, 544-45 (1988).

With these principles in mind, we turn to Sections 1 and 2 of Article III, as originally drafted. After examining the common usage of the language in the two provisions, as well as their interrelationship and their most logical and reasonable construction, we find no ambiguity in Section 1 and need not step beyond the text to refer to the provision’s constitutional history.

Beginning first with the plain meaning of the term “parent,” it is commonly defined as “[t]he lawful father or mother of someone.” *Black’s Law Dictionary* 1144 (8th ed. 2004). This popular legal dictionary goes on to note that “[i]n ordinary usage, the term denotes more than responsibility for conception and birth. The term commonly includes . . . the adoptive father or the adoptive mother of a child” *Id.* Thus, without express language modifying the term “parent,” its common usage would include adoptive parents.

This usage is bolstered by reading Sections 1 and 2 together. In Section 1, the drafters referred only to a “parent” and used the verb “has.” In Section 2, however, the drafters inserted additional language: “A person *born of* parents, one or both of whom are citizens of Palau” (emphasis added). The drafters’ inclusion of the “born of” language in Section 2—while omitting it from Section 1—indicates their understanding that this additional language was necessary to clarify that one’s *biological* parents must be Palauan before granting citizenship under Section 2.⁸ Likewise, they presumably left this “born of” language out of Section 1 for a reason.⁹

⁸ Similarly, Article III, Section 4, which concerns naturalization, states: “A person *born of parents*, one or both of whom are of recognized Palauan ancestry, shall have the right to enter and reside in Palau and to enjoy other rights and privileges as provided by law, which shall include the right to petition to become a naturalized citizen of Palau” Likewise, the Second Amendment provided: “A person *born of parents*, one or both of whom are or [sic] recognized Palauan ancestry, is a citizen of Palau by birth. . . .” and, as already mentioned, the Seventeenth Amendment also includes the same “born of” language. These provisions, located in the same Article of the Constitution, are further evidence that the drafters understood the need for a distinction between a “parent” and a biological parent and knew how to create it.

⁹ Although we need not venture into the murky waters of the Constitution’s history and the drafters’ intent, we observe that the trial court correctly noted that an earlier draft of Section 1, as recorded in the Palau Constitutional Convention Committee Report, had *included* the same “born of” language that is found in Sections 2 and 4 of Article III, as well as the Seventeenth

Furthermore, adopting Marino’s interpretation of Section 1—that “parent” means only one’s biological parent—would render the entire provision redundant and superfluous when read alongside Section 2. Under such a construction, Section 2 would have encompassed every person covered by Section 1. Section 2 provides that any biological child of at least one Palauan citizen is considered a Palauan citizen as well. Similarly, the Second and Seventeenth Amendments both provide that anyone “born of” at least one parent of recognized Palauan ancestry is a citizen of Palau by birth. There would be no need for Section 1 if the term “parent” therein was limited to biological parents, and the requirement that one be a Trust Territory citizen prior to the effective date of the Constitution would be meaningless. If one were the *biological* child of at least one parent of recognized Palauan descent, then she would have been a Palauan citizen under the former Section 2, the Second Amendment, or, now, the Seventeenth Amendment. The only logical reading of Section 1 is that it encompasses a broader class of individuals than those formerly covered by Section 2.

[4] The Court finds the plain language of Article III, Section 1 to be unambiguous, particularly when read in conjunction with Section 2. For citizenship under Section 1, one must demonstrate (1) that she was a citizen of the Trust Territory immediately prior to the effective date of the Constitution; and (2) that she “has at least one parent of

Amendment. At some point, the drafters removed this language from Section 1 but retained it in Sections 2 and 4, creating at least an inference that the omission was intentional and purposeful.

recognized Palauan ancestry.” The Court holds that the term “parent” in Section 1 includes an adoptive parent of recognized Palauan ancestry.¹⁰ Fuyuko meets this requirement due to her 1944 adoption by two Palauan parents, and we move to the issue of her Trust Territory citizenship at the time the Constitution took effect.

B. Fuyuko’s Status as a Trust Territory Citizen

Marino also asserts that Fuyuko was not a Trust Territory citizen prior to the effective date of the Constitution, and she therefore could not become a Palauan citizen under Article III, Section 1. Marino makes two arguments based on the former Trust Territory Code. First, he asserts that Fuyuko’s birth in Palau was not enough to render her a Trust Territory citizen under 53 TTC § 1. Second, he argues that no other Trust Territory law granted her citizenship, including the naturalization statute, 53 TTC § 2.

¹⁰ The Court, of course, confines its holding to the facts before it. Here, Fuyuko Hiroichi was adopted in 1944, long before Palau’s Independence or the effective date of the Constitution. Today’s holding is therefore limited to circumstances in which the person claiming citizenship under Section 1 was adopted during the time of the Trust Territory government. The Court is not holding that adoption to a Palauan parent, alone, is sufficient to confer citizenship under Section 1, which expressly requires that one also have been a Trust Territory citizen at the Constitution’s effective date. Nor is the Court holding that an adoption of a former Trust Territory citizen occurring *after* the Constitution took effect would be sufficient under Section 1. Those are not the facts before the Court, and it expresses no opinion on them.

Section 1 of Title 53 of the Trust Territory Code reads: “All persons born in the Trust Territory shall be deemed to be citizens of the Trust Territory, except persons, born in the Trust Territory, who at birth or otherwise have acquired another nationality.” Despite that Fuyuko was born in Palau over seventy years ago, adopted by Palauan parents at age eight, was over fifty years old at the time of independence, has lived in Palau for her entire life, was married to a Palauan man, has a Palauan passport, and has voted in every Palauan election, Marino claims that her birth to Japanese parents made her a Japanese citizen from the start, rendering her unable to attain citizenship in the Trust Territory under 53 TTC § 1.

[5] Marino’s argument is shaky, but we need not reach its merits because he never propounded it before the trial court. A litigant who does not raise an argument before the trial court waives that issue and may not pursue it for the first time on appeal. *Nebre v. Uludong*, 15 ROP 15, 25 (2008); *Basilus v. Basilus*, 12 ROP 106, 110 (2005); *Kotaro v. Ngirchchol*, 11 ROP 235, 237 (2004) (going so far as to state that “[n]o axiom of law is better settled”); *Ngaraard State Pub. Lands Auth. v. Rechucher*, 10 ROP 11, 12 (2002). The reason for this principle is clear: the trial court must first have an opportunity to opine on, or at least consider, an issue before an appellate court has anything to review.¹¹

¹¹ There are limited exceptions to the general rule: where the issue raised for the first time on appeal would “prevent the denial of fundamental rights, especially in criminal cases where the life or liberty of an accused is at stake,” or where the court should “consider the public good over the personal interests of the litigants”

Marino did not challenge Fuyuko's Trust Territory citizenship until his appeal. More significantly, the parties stipulated at trial, before the court, that Fuyuko was a Trust Territory citizen. The trial court therefore had no reason to question Fuyuko's status as a Trust Territory citizen, nor did Fuyuko have any need to present evidence to prove it.

What's more, Marino and the other appellants admitted that Fuyuko was a Palauan citizen from the beginning of this case. In the first paragraph of Fuyuko's complaint,¹² filed on June 18, 2002, she alleged that she "is a citizen of Palau residing in Palau." In a joint Answer and Counterclaim filed on July 31, 2002, the defendants, including Marino, admitted to this paragraph. Marino, recognizing that his individual claims to some of the property might conflict with the other defendants, retained new counsel and filed an Amended Answer and Counterclaim on November 29, 2002. In it, he *again* admitted to paragraph one of Fuyuko's complaint. Finally, in the first paragraph of his Counterclaim, he averred "[t]hat Counterclaim Plaintiff [Marino] and Counterclaim Defendants [Fuyuko and all other claimants to the property] are residents and citizens of the Republic of Palau," an

or if "the general welfare of the people is at stake." *Ulechong v. Morrico Equip. Co.*, 13 ROP 98, (2006) (citing *Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994)). There may be others, such as an argument that the court lacks subject matter jurisdiction, which can never be waived, *see id.* n.5, but Marino has not averred that any exception applies.

¹² We may consider the parties' pleadings as part of the record on appeal. ROP R. App. P. 10(a).

allegation that Fuyuko then admitted in her answer to Marino's pleading.¹³

[6] Rule 8 of the ROP Rules of Civil Procedure governs pleadings, which are documents that represent the road map for the litigants' journey toward trial. Rules 8(b) and (d)—which provide that a party must admit or deny each averment upon which the opposing party relies and that the failure to deny such an averment will be deemed an admission—exist so that the parties may establish at the outset those allegations that are not in dispute and will not be an issue at trial, as opposed to those that are contested and will require proof for the plaintiff to prevail. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1261 (3d ed. 2004). Consequently, an admission in a pleading is generally treated as binding on the parties and on the court. *See April v. Palau Pub. Utilities Corp.*, 17 ROP 18 (2009) (refusing to inquire into an issue already "admitted by the most formal means possible"); *see also* 61A Am. Jur. 2d *Pleading* § 407; 29A Am. Jur. 2d *Evidence* §§ 784, 788; *cf. Palau Marine Indus. Corp. v. Pac. Call Invs., Ltd.*, 9 ROP 67, 71 (2002) (holding that even withdrawn or amended pleadings can constitute an admission). Marino attacks Fuyuko for failing to present evidence that she was a Trust Territory citizen, but, given his admissions,¹⁴

¹³ Fuyuko denied that Marino was a resident of Palau; she admitted all other averments in paragraph one of Marino's Counterclaim, including that she was a citizen of Palau.

¹⁴ The Court relies on Marino's admissions only to find that Fuyuko was a citizen of the Trust Territory, not as the basis for finding her to be a citizen of Palau. Although Marino admitted that Fuyuko is a Palauan citizen in his pleadings,

she had no reason to believe such proof was necessary.

The Court finds that Fuyuko is a citizen of Palau. Not only did Marino fail to contest her citizenship below and admit that she is a Palauan citizen, there was more than

which would typically bind the parties, the trial court addressed the constitutional issue in its Decision because it came to light at trial, where counsel for both parties questioned Fuyuko about her heritage and mentioned it during closing arguments. According to Rule 15(b) of the Rules of Civil Procedure, if the parties expressly or impliedly consent to try an issue not raised by the pleadings, the court shall treat that issue “in all respects as if they had been raised by the pleadings” and may amend the pleadings to conform to the evidence produced. ROP R. Civ. P. 15(b); *see also* 61A Am. Jur. 2d *Pleading* § 809. The most common way a party impliedly consents to trying a new issue is by failing to object (or affirmatively responding) to the production of evidence relevant to the new issue. *Id.* §§ 382, 822, 826. If this occurs, a formal motion to amend may not be necessary, and the trial court’s judgment can effectuate the amendment. *Id.* § 815. Such an amendment is often recognized as an exception to the general rule that a defendant’s failure to timely raise an affirmative defense constitutes waiver. *See id.* § 830. Here, Fuyuko did not object to evidence concerning her Palauan citizenship and instead proceeded to try the issue before the trial court. The issue of Fuyuko’s Trust Territory citizenship, however, did not arise at trial. This Court therefore need not determine the appropriateness of trying the issue of her Palauan citizenship or whether the pleadings were effectively amended to conform to the evidence pursuant to Rule 15(b). Instead we use Marino’s admissions as further support for finding that she was a Trust Territory citizen immediately prior to the effective date of the Palau Constitution.

enough evidence that she was a Trust Territory citizen and was adopted in 1944, during the Trust Territory government, by two parents of recognized Palauan ancestry. She qualified as a citizen under Article III, Section 1. As such, Fuyuko was eligible to acquire title to land in Palau under Article XIII, Section 8.

II. Validity of the January 2000 Deed of Transfer

Appellants’ next challenge is that the Deed of Transfer conveying the three sisters’ interest in the subdivided plot of land on *Bkulasang* was invalid. Specifically, they assert that the court improperly altered the language of the Deed to change the parties’ intention.

The appellants’ argument fails at its initial premise, *i.e.*, that the trial court “unilaterally and after the fact, reformed the deed so that 051 R 02 now should read as 051 R 03A.” (Appellants’ Br. at 8.) The trial court made no such reformation. The trial court’s duty was to interpret the meaning of a potentially ambiguous portion of the Deed of Transfer. It did so, properly, and its use of “051 R 03A” to describe the property in question was merely for convenience. It did not alter the deed.

The confusion on this point resulted from use of a cadastral map prepared by the Bureau of Lands and Surveys. After Hiroichi decided to split up *Bkulasang* to obtain his loan, he hired a surveyor to mark the new lots. The surveyor performed the work, but on the final map, labeled 051 R 00, there are two parcels marked 051 R 02. One is a smaller plot identified by a typewritten 051 R 02; the

other is larger with the number 051 R 02 written by hand. The larger plot is 6,555 square meters and contains two of the three government houses mentioned above. It is bordered on the north by the ocean, on the south by the main road, on the west by 051 R 01, and on the east by 051 R 03. The smaller plot, which Hiroichi later conveyed to Marino, contains the house by the sea.

Appellants argue that the 2000 Deed of Transfer—which lists the lot being transferred simply as 051 R 02—is unclear as to whether it refers to the area described by the typewritten 051 R 02, the handwritten 051 R 02, or some combination. To be given effect, a deed should adequately describe the property, which means some definite way to identify the land, such as the lot's configuration or its size. *See Salii v. Omrekongel Clan*, 3 ROP Intrm. 212, 213-14 (1992).

At trial, the surveyor testified that he made a mistake in labeling the cadastral map, and the parcel identified by the handwritten 051 R 02 should have been denominated as a different lot, for example 051 R 03A. The trial court, acknowledging the mistake, stated in a footnote that to avoid confusion, it would refer to the smaller, typewritten plot as 051 R 02, and to the larger, handwritten plot as 051 R 03A. The two lots numbered 051 R 02 are obviously two separate parcels of land, and the trial court used two separate means of identifying them. The trial court could have used a different number or name, but it would not have changed the property reflected on the map, nor would it have amended the parties' intentions as expressed in the Deed of Transfer. The trial court's inquiry remained

the same: which part of *Bkulasang* did the sisters intend to convey to Hiroichi?

Turning then to the court's interpretation of the Deed of Transfer, the court faced an ambiguous term in the document because it referred only to "051 R 02," a description that could have meant either of the lots. The court was entitled, therefore, to use extrinsic evidence to resolve the ambiguity. *See, e.g., Carlos v. Whipps*, 6 ROP Intrm. 43, 44 (1996) ("In general, a deed is void if the language used to describe the land being conveyed is not sufficiently certain. In such cases of uncertainty, the courts have allowed the use of extrinsic evidence to determine the true intent of the parties." (citation omitted)). The primary extrinsic source was Cadastral Map 051 R 00, which, when read in conjunction with the description of the property on the Deed of Transfer, conclusively establishes that the Deed referred to the larger lot marked with the handwritten 051 R 02, not the smaller one identified by the typewritten 051 R 02. In addition to the lot number, the Deed described the subject property as "an area of 6,555 square meters bounded to the North by saltwater to the South by the main road to the East by 051 R 03 and to the West by 051 R 01." This description accurately describes only one plot of land within *Bkulasang*: the lot identified by the handwritten 051 R 02, which the trial court referred to as 051 R 03A.

Having found that the description of the property was sufficiently precise to give effect to the Deed, the only other way that the sisters can avoid the transfer is if they were duped by fraud or some other impropriety during the conveyance. The trial court rejected the sisters' claim that Hiroichi had

fraudulently procured their signatures and found that they understood the document they were signing. These are factual questions reviewed for clear error only. *See Rechirikl*, 13 ROP at 168.

In resolving the question of fraud, the trial court found that the sisters did not prove that Hiroichi made any fraudulent misrepresentation, the first element of a fraud claim. *See Isimang v. Arbedul*, 11 ROP 66, 74 (2004). We agree. The evidence before the trial court was that a notary public read each sister the document in both Palauan and English and that they understood it. The notary even testified that one sister attempted to stop her while reading it, saying that she knew what it was about, but the notary persisted in performing the duties of her job. The sisters' children were present and also assisted in explaining the document to them, and no one objected. Even if Hiroichi stated that he planned to use the land as collateral, the ambiguity of such a statement (for it technically is true), combined with the clarity of the document itself and the overwhelming evidence that the sisters were apprised of its impact by a neutral notary, all counsel against a finding of fraud. Without something more, the court did not err by finding that Hiroichi committed no fraud.

The evidence also supported the trial court's finding that the sisters understood the document they were signing. On appeal, one sister, Kedei, states that "[s]he did not think that by signing the document . . . the land would become Hiroichi's individual property." Instead, she believed that the document merely granted Hiroichi permission to use the property as collateral for a loan. The document itself, however, stated that the

sisters agreed "to transfer and quitclaim a parcel of our property described above to our brother, Hiroichi Ucherremasech," and that Hiroichi "shall have a full power and authority to control that said parcel of our land." The Deed concluded in unambiguous terms that the sisters "all agrees [sic] to loose [sic] our interests to the said parcel of our land." The document never mentions a loan, collateral, a right of use (rather than ownership), or any other indicia of anything but a conveyance of full ownership. The notary testified that she read the document to the sisters in both Palauan and English and that she believed they understood it. This is sufficient to support the trial court's conclusion.

III. Mortgage versus Outright Conveyance

The sisters' final argument, one related to the previous issue, is that the trial court should have treated the 2000 Deed of Transfer as a mortgage, not an outright conveyance. The sisters invoke 39 PNC §§ 604(g) and 605, which provide that any interest in real property that may be transferred may also be mortgaged, and defines a "mortgage" as "a contract in which real property is made the security for the performance of an act, usually but not necessarily the payment of debt, without the necessity of change of possession and without the transfer of title."

The sisters' argument fails on multiple fronts. First and foremost, as we just stated in the last section, the 2000 Deed of Transfer was unambiguous and clearly conveyed a full property interest to Hiroichi. The document did not mention a loan, mortgage, or collateral. The sisters were unable to prove that they intended it to be a mortgage, that

they did not understand the document, or that they were fraudulently induced to sign it.

[7] Second, and more fundamentally, the sisters confuse the meaning of a mortgage. It is a contract whereby the mortgagor pledges real property to a mortgagee as security for the mortgagor's performance of some act or obligation. 39 PNC § 604(g). That "act or obligation" is typically to repay a debt, but it may be otherwise. A mortgage must be in writing and should contain a legal description of the mortgaged property, a description of the obligations for which the property will serve as security, and the names and address of each mortgagor and mortgagee. 39 PNC § 621. It must also be recorded. *Id.* § 622.

[8] The appellants are correct that, in certain circumstances, a document that purports to be a deed might be properly interpreted by a court as a mortgage. See *Ngirchehol v. Kotaro*, 14 ROP 173 (2007); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317 (2001). However, such a document is typically a contract between the mortgagor and the person to whom the obligation will be owed, for example a bank or lender. Whether a deed is in fact a security instrument depends on the following factors:

- (a) the existence of a debt to be secured;
- (b) the survival of the debt after execution of the deed;
- (c) the previous negotiations of the parties;
- (d) the inadequacy of consideration for an outright conveyance;
- (e) the financial condition of the purported grantor; and

(f) the intentions of the parties.

Ngirchehol, 14 ROP at 176.

It is not difficult to see that the Deed of Transfer in this case is not a mortgage. The sisters' purported transfer of their interest in the property was not made to secure any obligation that they owed to Hiroichi; likewise, Hiroichi did not hold it as a form of security to protect such an obligation. There was no discussion of a debt between Hiroichi and his siblings, consequently there was no debt to survive after the transfer was made. The parties did not intend that the Deed serve as a mortgage in any way, and the trial court did not clearly err by failing to treat it as such.

CONCLUSION

The trial court did not err in determining that the 2000 Deed of Transfer was valid, free of fraud, and sufficiently specific to be given effect. Consequently, Hiroichi Ucherremasch possessed his sisters' interests in the land in question, and he properly conveyed them to his wife of many years, Fuyuko Hiroichi, who is a Palauan citizen under Article III, Section 1 of the Palau Constitution and may acquire title to land in Palau. For these reasons, we AFFIRM.

JEROME YOSHIDA BLESOCH,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 09-003
Criminal Citation Case No. 08-082

Supreme Court, Appellate Division
Republic of Palau

Decided: May 21, 2010

[1] **United States:** Precedential Value of United States Law

Without guidance by Palauan law, the Court may refer to United States common law principles concerning probation and sentencing.

[2] **Criminal Law:** Probation

Probation is a court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending him to prison. It is remedial in nature; it seeks to rehabilitate defendants deemed receptive to supervision and guidance and, although still punishment, has been described as a matter of grace, a conditional liberty, or a favor, rather than a right.

[3] **Criminal Law:** Probation

Whether to order probation is within the trial court's sound discretion.

[4] **Criminal Law:** Probation

The general rule is that, upon revocation of probation, the sentencing court may execute the entire sentence that it originally imposed and suspended. The period of probation is not tied to or intertwined with the potential prison sentence, and while a person remains at large on probation, the suspended portion of the sentence remains in full.

[5] **Criminal Law:** Probation

When a court is considering a sentence after revocation, it need not credit the defendant for time spent on probation. Probation and a prison sentence are two separate components of the punishment for the convicted offenses, and the trial court, upon revocation, has the discretion to impose the entire suspended prison sentence or any lesser term.

[6] **Criminal Law:** Probation; **Criminal Law:** Double Jeopardy

Because probation and imprisonment are distinct parts of a single punishment, the execution of a suspended sentence upon revocation does not violate the double jeopardy clause. Executing a suspended sentence after revoking probation is merely the second part of the original punishment.

Counsel for Appellant: Salvador Remoket

Counsel for Appellee: Office of the Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Supreme Court, Trial Division, Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Jerome Blesoch appeals the trial court's order revoking his probation and requiring him to spend one year in the Koror Jail for convictions that occurred in 2008. He claims that the court improperly increased his original sentence beyond its fixed term and therefore violated his constitutional right to be free from double jeopardy. *See* ROP Const. art. IV, § 6. This Court finds no error in the trial court's order and upholds Blesoch's sentence.

BACKGROUND

On May 28, 2008, the Republic charged Blesoch with three counts of trafficking in a controlled substance and one count of possession of the same. *See* 34 PNC §§ 3301, 3302. Blesoch pled guilty to two of the trafficking counts.¹ On August 12, 2008, the trial court accepted his plea agreement, imposed a three-year prison sentence, suspended the entire sentence, and placed Blesoch on probation for three years.

After one successful year of probation, Blesoch again ran into legal trouble. He pled guilty to grand larceny, accessory after the fact to burglary, aiding and abetting burglary, driving under the influence, and reckless

¹ These convictions occurred in Criminal Case No. 08-082, which the Court will refer to as the "2008 convictions."

driving.² On August 28, 2009, the trial court sentenced him to five years in prison on these counts, suspended the final three years, and ordered probation for that period.

Blesoch's 2009 offenses constituted violations of the terms of his 2008 probation. The trial court ordered a revocation hearing for October 14, 2009,³ after which it revoked Blesoch's probation and ordered him to serve one year of his suspended three-year prison sentence, to run consecutive to the two-years' imprisonment for his 2009 convictions. Blesoch opposed this sentence on double jeopardy grounds, arguing that the additional year in prison, when added to the two-year sentence for his 2009 convictions, resulted in greater punishment than the original three-year sentence imposed in 2008. The trial court disagreed, and Blesoch now appeals.

ANALYSIS

Blesoch repeats on appeal his argument below: that the revocation order executing one year of his three-year sentence for the 2008 convictions violated the Constitution's double jeopardy clause. Blesoch asserts that all punishment for his 2008 offense—whether probation or jail time—must conclude within three years of the date of the original sentence, that is, by

² These convictions occurred in Criminal Case Nos. 09-028, 09-031, 09-066, 09-141, and 09-144, which the Court will refer to as the "2009 convictions."

³ Although a probation revocation proceeding commonly is initiated by the probation office or a prosecutor, the trial court is authorized to do so on its own motion. ROP R. Crim. P. 32.1(a).

August 12, 2011. The trial court's order, however, requires his imprisonment for those convictions to occur until at least August 28, 2012.⁴ Phrased a different way, Blesoch is arguing that he should receive credit against his original three-year prison sentence for time spent on probation, such that the court cannot impose a prison sentence that would, when added to his probation, exceed a *total* of three years. Blesoch's appeal raises questions of law, which we review *de novo*. *Isechal v. Republic of Palau*, 15 ROP 78, 79 (2008). The Court concludes that Blesoch's position is incorrect and reflects a misunderstanding of the mechanics of probation and of sentencing generally.

[1] The Court begins with Palau's sentencing framework before moving to the constitutional issue of double jeopardy. Rule 32.1 of the Rules of Criminal Procedure outlines the process for revoking or modifying probation but does not address an appropriate sentence upon revocation. The legislature has spoken on this issue, granting a trial court the authority, upon revoking probation due to violation of its terms, to "impose any sentence which may have initially been imposed had the court not suspended imposition of sentence in the first instance." *Id.* § 3110(c). This is the only guidance provided by Palauan law, and the Court finds no cases discussing the provisions in detail. Accordingly, the Court refers to United States common law principles concerning probation and

sentencing. See 1 PNC § 303; *Becheserrak v. Republic of Palau*, 7 ROP Intrm. 111, 114 (1998).

[2,3] Probation is "a court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." 21A Am. Jur. 2d *Criminal Law* § 844 (2008). Probation is remedial in nature; it seeks to rehabilitate those defendants deemed receptive to supervision and guidance and, although still a form of punishment, has been described as "a matter of grace," a "conditional liberty," or a "favor," rather than a right. *Id.*; see also *Thomas v. United States*, 327 F.2d 795, 797 (10th Cir. 1964). Probation is a means for the defendant to avoid a prison term that the court otherwise would have imposed. Accordingly, whether to order probation is within the trial court's sound discretion. See 17 PNC § 3110(a) (granting court discretion to impose probation "when satisfied that the ends of justice and the best interests of the public as well as the defendant will be served"); see also ROP R. Crim. P. 32.

[4] The general rule is that, upon revocation of probation, the sentencing court may execute the entire sentence that it originally imposed and suspended. *Roberts v. United States*, 320 U.S. 264, 265 (1943); *United States v. Berry*, 814 F.2d 1406, 1410 (9th Cir. 1987); *United States v. Briones-Garza*, 680 F.2d 417, 423 (5th Cir. 1982); *Thomas*, 327 F.2d at 797. The period of probation is not tied to or intertwined with the potential prison sentence, see 3 Charles Alan Wright, et al., *Federal Practice and Procedure: Criminal* § 529 (3d ed. 2004), and "while a person remains at large on probation, the suspended portion of the sentence remains

⁴ Blesoch will serve at least two years for his 2009 convictions, which began on August 28, 2009. When that term is over on August 28, 2011, Blesoch will then serve his one-year sentence for his 2008 convictions, which will end on August 28, 2012.

in full,” 21A Am. Jur. 2d *Criminal Law* § 844. Where a court imposes a fixed prison sentence at the defendant’s initial sentencing,⁵ it “hangs over him” as an incentive to comply with the terms of probation, and he is aware that he will be subject to that sentence if he violates them. *Roberts*, 320 U.S. at 268; *see also Briones-Garza*, 680 F.2d at 423.

[5] According to these general principles, when a court is considering a sentence after revocation, it need not credit the defendant for time spent on probation. *Won Cho*, 730 F.2d at 1265; *Briones-Garza*, 680 F.2d at 423; *Baber*, 368 F.2d at 465; *Thomas*, 327 F.2d at 797; *see also* 3 Wright, et al., *supra*, § 542. Probation and a prison sentence are two separate components of the punishment for the convicted offenses, and the trial court, upon revocation, has the discretion to impose the

entire suspended prison sentence or any lesser term. *Roberts*, 320 U.S. at 265; *Thomas*, 327 F.2d at 797; *State v. Mapp*, 984 A.2d 108 (Conn. App. Ct. 2009); *Wilkerson v. State*, 918 N.E.2d 458 (Ind. Ct. App. 2009); *McDonald v. State*, 16 So. 3d 83 (Miss. Ct. App. 2009); *State v. Harrington*, 218 P.3d 5 (Idaho Ct. App. 2009).

[6] Because probation and imprisonment are distinct parts of a single punishment, the execution of a suspended sentence upon revocation does not violate the double jeopardy clause. The Palau Constitution ensures that “[n]o person shall be placed in double jeopardy for the same offense.” ROP Const. art. IV, § 6. This clause not only protects against a second prosecution for the same offense after acquittal or conviction, but also against multiple punishments for the same offense. *See Scott v. Republic of Palau*, 10 ROP 92, 96 (2003); *Kazuo v. Republic of Palau*, 3 ROP Intrm. 343, 346 (1993); *see also North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Executing a suspended sentence after revoking probation, however, is merely the second part of the original punishment. It is a consequence that the defendant knew would be coming if he did not comply with the terms of probation. *See, e.g., United States v. Pettus*, 303 F.3d 480, 487 (2d Cir. 2002). In essence, the probation—and the defendant’s freedom—is the carrot, whereas the suspended sentence is the stick; they are alternative portions of a single punishment. As Justice Frankfurter once commented, “to set a man at large after conviction on condition of his good behavior and on default of such condition to incarcerate him, is neither to try him twice nor to punish him twice.” *Roberts*, 320 U.S. at 276-77 (Frankfurter, J., dissenting). Therefore, “there is no double jeopardy

⁵ A trial court also has the option to suspend the *imposition* of a sentence, not just its execution. *See* 17 PNC § 3110; *Roberts*, 320 U.S. at 267-68; 21A Am. Jur. 2d *Criminal Law* §§ 841, 843 (comparing suspension of the imposition and execution of a sentence); 3 Wright, et al., *supra*, § 529. In this situation, at the original sentencing, the court imposes the term of probation but does not impose a fixed sentence in the event of revocation. Therefore, the defendant is unaware initially of the precise prison term that will be imposed if he violates his probation, and “[u]pon revocation of the probation, the court may then impose any sentence which may have initially been imposed had the court not suspended imposition of sentence in the first instance.” 17 PNC § 3110; *see also Roberts*, 320 U.S. at 268; *United States v. Won Cho*, 730 F.2d 1260, 1265 (9th Cir. 1984); *Baber v. United States*, 368 F.2d 463, 465 (5th Cir. 1966). In Blesoch’s case, however, the trial court expressly imposed a three-year prison sentence but suspended its execution, and we therefore limit the discussion accordingly.

protection against revocation of probation and the imposition of imprisonment.” *United States v. DiFrancesco*, 449 U.S. 117 (1980); *see also Roberts*, 320 U.S. at 267-68; *Thomas*, 397 F.2d at 797.

Applying these principles to Blesoch’s appeal, the Court finds no error below. The trial court initially imposed a three-year prison sentence, but suspended it to afford Blesoch the opportunity to avoid jail time if he complied with the terms of probation. He failed to do so. The trial court therefore possessed the discretion to execute his entire original sentence, which remained suspended *in full* during Blesoch’s probationary period. To Blesoch’s benefit, the trial court only executed one year of the three-year sentence. Requiring this punishment to be served consecutively with his sentence for the 2009 convictions was also within the trial court’s discretion, *see Kazuo*, 3 ROP Intrm. at 344 (holding that a trial court has discretion to determine whether a sentence in a criminal case should run consecutively with another sentence in a separate criminal case), nor does it run afoul of the double jeopardy clause because the two prison terms are for two wholly separate offenses. The court’s order did not implicate the double jeopardy clause.

CONCLUSION

For the foregoing reasons, we AFFIRM.

THERESIA OLKERIIL,
Appellant,

v.

**REPUBLIC OF PALAU and MINISTRY
OF EDUCATION,**
Appellees.

CIVIL APPEAL NO. 09-027
Civil Action No. 03-018

Supreme Court, Appellate Division
Republic of Palau

Decided: June 23, 2010

[1] **Civil Procedure:** Summary Judgment

A successful Rule 56 movant must establish the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. But, in considering such a motion, the court must view all evidence in the light most favorable to the non-moving party as well as draw all inferences in that party’s favor. A grant of summary judgment is unwarranted when genuine issues of material fact persist or when, in the absence of genuine issues of material fact, the moving party is not entitled to judgment as a matter of law.

[2] **Civil Procedure:** Counterclaims

In ascertaining the compulsory or permissive nature of a counterclaim, it is relevant (1) whether substantially the same evidence will support or refute the plaintiff’s claim as well as the defendant’s counterclaim and (2) whether a “logical relationship” exists between the claim and the counterclaim.

Neither test is dispositive, but must be weighed with other considerations in light of the purpose of the compulsory counterclaim requirement: to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation on claims arising from a single transaction or occurrence.

[3] **Civil Procedure:** Counterclaims

A failure to plead a compulsory counterclaim under Rule of Civil Procedure 13 bars a party from bringing a later independent action on that claim.

[4] **Civil Procedure:** Counterclaims

Constitutional claims may be barred by the compulsory counterclaim requirement of Rule of Civil Procedure 13.

[5] **Civil Procedure:** Counterclaims

The compulsory counterclaim bar imposed by Rule of Civil Procedure 13 is wholly separate from the common law doctrine of *res judicata*.

Counsel for Appellant: Raynold B. Oilouch

Counsel for Appellees: Nelson J. Werner

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Theresia Olkeriil appeals the Trial Division’s grant of summary judgment in favor of defendants-cum-appellees Republic of Palau and Ministry of Education (“MOE”). The Trial Division found that Olkeriil’s current claims were extinguished for failure to bring them as counterclaims in an earlier suit filed by the Republic against Olkeriil and her (now-deceased) husband, Timothy Olkeriil. Although the Republic and MOE requested oral argument, we deny that request and decide this case on the briefs in accord with our appellate rules. *See* ROP R. App. P. 34(a). We affirm the Trial Division’s grant of summary judgment.

BACKGROUND

In Civil Action No. 99-299, the Republic sought to enjoin the Olkeriils from trespassing on its land and to eject the Olkeriils and their house and other buildings from its land. *See* Civ. No. 99-299, Decision at 1 (Tr. Div. Mar. 2, 2000). The Trial Division stated that “[t]he land at issue is part of the land on which the Koror Elementary School is situated.” *Id.* The Trial Division entered judgment in favor of the Olkeriils, finding that the Olkeriils’ deed prevailed over the Republic’s deed to the land. *See id.* at 4-5. The Olkeriils did not file any counterclaims to Civil Action No. 99-299.

In the presently-appealed matter, Olkeriil sued the Republic and MOE for trespass, ejectment, an injunction, and damages regarding a parcel of Olkeriil’s land allegedly encroached upon by the Koror Elementary School. (*See* Olkeriil Compl. ¶¶ 7-23.). Olkeriil filed a motion for partial summary judgment, but the Trial Division denied the motion, finding that it was not

properly “made and supported” under ROP R. Civ. P. 56(e). The Republic then filed for summary judgment, claiming that Olkeriil’s complaint is barred because she did not raise her claims as compulsory counterclaims in the earlier action as required by ROP R. Civ. P. 13(a). After receiving Olkeriil’s written opposition and hearing oral argument, the Trial Division issued its Decision and Judgment granting summary judgment in defendants’ favor and dismissing Olkeriil’s complaint with prejudice.

STANDARD OF REVIEW

[1] Our well-worn standard of review of a grant of summary judgment is *de novo*. See, e.g., *U Corp. v. Shell Co.*, 15 ROP 137, 140 (2008). A successful Rule 56 movant must establish the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See ROP R. Civ. P. 56(c). But, in considering such a motion, the court must view all evidence in the light most favorable to the non-moving party as well as draw all inferences in that party’s favor. See, e.g., *U Corp.*, 15 ROP at 140. A grant of summary judgment is unwarranted when genuine issues of material fact persist or when, in the absence of genuine issues of material fact, the moving party is not entitled to judgment as a matter of law. See ROP R. Civ. P. 56(c).

DISCUSSION

Our Rules of Civil Procedure direct:

A pleading shall state as a compulsory counterclaim any claim which at the time of serving the pleading the

pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) at the time the action was commenced the claim was the subject of another pending action; or

(2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

ROP R. Civ. P. 13(a) (“Rule 13(a)”).

I. Olkeriil’s Appellate Arguments

Olkeriil argues that the Republic’s earlier claim (Civ. No. 99-299) concerned only the parcel of land where Olkeriil’s house was located and did not concern the parcel of land that is the subject matter of the present suit, namely the parcel of land upon which the Koror Elementary School is located. Because, in her view, the two suits concern different parcels of land, the two suits arise out of separate transactions or occurrences and therefore the present claims need not have

been presented as compulsory counterclaims in the earlier suit. Olkeriil also argues that the Trial Division did not define the property line between her land and the Republic's land in Civil Action No. 99-299 and therefore the instant case is needed to fully resolve the boundary.

For purposes of identifying compulsory counterclaims under Rule 13(a), Olkeriil contends that the phrase "arises out of the same transaction or occurrence" has no "all-embracing definition" and should be applied flexibly. (Olkeriil Br. at 7 (quoting 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 13.13 (2nd ed. 1996)).) But Olkeriil also quotes language stating that "[s]ubject to the exceptions, any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim" and "only claims that are unrelated or are related, but within the exceptions, need not be pleaded." (Olkeriil Br. at 8 (quoting 3 Moore et al., *supra*, ¶ 13.13).)

Olkeriil further argues that the presence of Koror Elementary School on her property constitutes a "taking" under ROP Const. art. IV, § 6, and therefore she is entitled to just compensation from the Republic or MOE or both. Olkeriil claims that a procedural rule such as Rule 13(a) cannot function to deprive her of her constitutional right to just compensation for this taking.

II. The Republic and MOE's Appellate Arguments

The Republic and MOE argue that the same parcel of land is at issue in the current action (Civ. No. 03-018) as was at issue in the

earlier action (Civ. No. 99-299) and therefore the Trial Division properly dismissed the complaint for violating Rule 13(a). The Republic and MOE contend that Olkeriil has identified the land at issue in both cases as the same 2,482.5 square meters: compare Civ. No. 99-299, Pre-Trial Stmt. by Defs. at 1 (Tr. Div. Feb. 28, 2000) ("The issues to be presented by defendants during trial are the following: 1. Whether the May 27, 1992 Warranty Deed conveyed the ownership and title of 750 tsubos (2,482.50) square meters of Claim No. 90 land to defendants.") with Civ. No. 03-018, Olkeriil Compl. ¶ 5 (Tr. Div. Jan. 27, 2003) ("Plaintiff owns a certain parcel of land located in Ngerbeched Hamlet, Koror State, Palau, more fully described as: Lot No. 40175-part; land known as 'Desekel'; containing the size of 2,482.5 sq. mtr.; and shown on Drawing No. 4021/77 (herein referred to as the 'Land.').").

In assessing the phrase "arises out of the same transaction or occurrence" for purposes of Rule 13(a), the Republic and MOE advocate for the "logical relationship test," which inquires "whether the issues of law and fact raised by the claims are largely the same and whether substantially the same evidence would support or refute both claims." (Republic Br. at 7 (quoting *Sanders v. First Nat'l Bank & Trust Co.*, 936 F.2d 273, 277 (6th Cir. 1991)).) The Republic and MOE cite to additional American case law:

a claim has a logical relationship to the original claim if it *arises* out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts

serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.

(Republic Br. at 7 (quoting *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 715 (5th Cir. 1970)); see also Republic Br. at 7 (quoting *Maddox v. Kentucky Fin. Co.*, 736 F.2d 380, 383 (6th Cir. 1984) (considering “the interests of judicial economy and efficiency” in analyzing the compulsory nature of a counterclaim)).¹)

As did Olkeriil, the Republic and MOE cite to authority stating that “transaction or occurrence” should be interpreted “flexibly,” but by “flexibly,” the appellees’ authorities mean “broadly.” (See, e.g., Republic Br. at 8 (quoting *Warshawsky & Co. v. Arcata Nat’l Corp.*, 552 F.2d 1257, 1261 (7th Cir. 1977) (“As a word of flexible meaning, ‘transaction’ may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.”)); 3 Moore et al., *supra*, ¶ 13.13 (“courts should give the phrase ‘transaction or occurrence that is the subject matter’ of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits”).)

¹ In its brief the Republic misquoted the language (albeit not the meaning) of the *Maddox* opinion. Counsel should take care that all citations are accurate.

Because the Republic and MOE read the two claims—one claiming that the Olkeriils’ house is on the Republic’s land and one claiming that Koror Elementary School is on Olkeriil’s land—arise from the same transaction or occurrence (the ownership of the greater 2,482.5 square meters of land), they contend that the Trial Division properly found that Rule 13(a) requires that Olkeriil’s current claim must have been brought, if at all, as a compulsory counterclaim to the earlier suit.

The Republic and MOE also argue that, through Rule 13(a), res judicata bars the current suit (Civ. No. 03-318). The appellees state that res judicata bars relitigation of a claim or defense if a final judgment exists in which the parties, subject matter, and causes of action are identical or are substantially identical.

In response to Olkeriil’s argument that Rule 13(a) cannot bar her claim that the Republic and MOE unconstitutionally have “taken” her property without just compensation, the appellees respond that constitutional claims—just like any other claim—may be waived if not properly raised. Therefore, according to the appellees, Rule 13(a) bars Olkeriil’s constitutional claim along with her claims for trespass and ejectment.

ANALYSIS

We have not previously defined the phrase “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim” as used in Rule 13(a). In crafting our definition, we are mindful to avoid substituting words lacking inherent

meaning for the ones contained in the rule, as such a definition would bring us no closer to an objective test. *See* 6 Charles Alan Wright, et al., *Federal Practice and Procedure* § 1410 (2d ed. 1990) (finding “futility” in “trying to reduce transaction or occurrence to a single definition” and stating that “[b]y and large, the courts have refrained from making any serious attempt to define the transaction or occurrence concept in a highly explicit fashion.”).

[2] The Trial Division applied two tests used by United States federal courts in ascertaining the compulsory or permissive nature of a counterclaim: (1) whether substantially the same evidence will support or refute the plaintiff’s claim as well as the defendant’s counterclaim, and (2) whether a “logical relationship” exists between the claim and the counterclaim. Both of these tests are helpful in analyzing whether a counterclaim is compulsory, but because neither is without flaw, we refrain from adopting either as dispositive. We must weigh these factors, as well as other considerations where appropriate, in light of the purpose of the compulsory counterclaim requirement: “to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation on claims arising from a single transaction or occurrence.” 6 Wright et al., *supra*, § 1409.

Examining whether substantially the same evidence will be involved in both the claim and the would-be counterclaim directly reflects the purpose of the compulsory counterclaim rule. The interest of judicial economy is served by the avoidance of multiple suits in which substantially the same evidence is presented. However, we must be careful in weighing the overlap of evidence, because it is not an absolute proxy for the

compulsory nature of a counterclaim. *See id.* § 1410 (“[T]his test also has a weakness because some counterclaims may be compulsory even though they do not meet it. Certainly a counterclaim arising from the same events as those underlying plaintiff’s claim is compulsory, even though the evidence needed to prove the opposing claims may be substantially different.”).

The “logical relationship” test is the leading Rule 13(a) test among federal courts in the United States. *See id.* (“[T]he logical relation test has by far the widest acceptance among the courts.”). Our concern with assessing the existence of a “logical relationship” between the claim and the counterclaim is that the meaning of the words “logical relationship” are not inherently apparent on their face. It tests the meaning of words in need of definition (“transaction or occurrence”) with words (“logical relationship”) which themselves lack definiteness. Although brevity is often a boon, placing these two words in the stead of the original three does not satisfactorily clarify the matter the at hand, and the further we stray from the text of the rule the more likely we are to misconstrue its meaning. We do, however, find some guidance in the explanation of the logical relation test by the American courts: “[A] counterclaim is logically related to the opposing party’s claim when separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts.” *See Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3rd Cir. 1961) (stating that the American version of Rule 13(a) renders counterclaims compulsory “[w]here multiple claims involve many of the same factual issues, or the same factual and legal issues, or

where they are offshoots of the same basic controversy between the parties”).

We recognize that the logical relationship test “is a loose standard that should be interpreted broadly and realistically in the interest of avoiding a multiplicity of suits.” 20 Am. Jur. 2d *Counterclaim, Recoupment, and Setoff* § 31 (2005). It’s flexibility is both a virtue and a vice—it permits consideration of the particular facts at hand while carrying forth the potential for inconsistent application. But the murky work of probing the depths of these subtleties are trails better blazed by future jurisprudential explorers. Marking the trail head—as we have done—is sufficient for purposes of the present appeal. We now apply Rule 13(a) to the disputes at hand.

The same piece of land is at issue in the current suit as was adjudicated in the 1999 suit. As much as Olkeriil would like to now say that the 1999 suit only involved the plot of land on which her house was physically situated, that was not the case. The Trial Division clearly stated in its disposition of the 1999 suit that “[t]he land at issue is part of the land on which the Koror Elementary School is situated.” Civ. No. 99-299, Decision at 1 (Tr. Div. Mar. 2, 2000). Nor is it the case that the current suit only involves the plot of land on which a portion of the elementary school is situated. As identified by Olkeriil, both suits call into question the ownership of the greater tract—the 2,482.5 square meters of land—comprising both the plots on which Olkeriil’s house and a portion of the elementary school are situated. *See* Civ. No. 99-299, Pre-Trial Stmt. by Defs. at 1 (Tr. Div. Feb. 28, 2000) (“The issues to be presented by defendants during trial are the following: 1.

Whether the May 27, 1992 Warranty Deed conveyed the ownership and title of 750 tsubos (2,482.50) square meters of Claim No. 90 land to defendants.”); Civ. No. 03-018, Olkeriil Compl. ¶ 5 (Tr. Div. Jan. 27, 2003) (“Plaintiff owns a certain parcel of land located in Ngerbeched Hamlet, Koror State, Palau, more fully described as: Lot No. 40175-part; land known as ‘Desekel’; containing the size of 2,482.5 sq. mtr.; and shown on Drawing No. 4021/77 (herein referred to as the ‘Land’).”

[3] Olkeriil’s current suit is related to the “same transaction or occurrence” as the 1999 suit—it involves a contest between the same parties over ownership (under the guise of trespass and ejectment) of the same tract of land. Any claim for ejectment or trespass that Olkeriil wished to bring against the government should have been brought as a counterclaim in the 1999 case in which the government attempted to eject Olkeriil from the very same land. Because Olkeriil failed to bring her claims as counterclaims in the earlier suit, Rule 13(a) works to bar her from bringing them now. *See* 6 Wright et al., *supra*, § 1417 (“A failure to plead a compulsory counterclaim bars a party from bringing a later independent action on that claim.”).²

² Olkeriil further argues that the instant action is needed to define the precise boundaries of her property that apparently went undefined in Civ. No. 99-299. As the Trial Division correctly pointed out, if Olkeriil feels that the decision in that case failed to fully address all the issues before the court, she could move to enforce the judgment. A new suit is not necessary for that purpose.

[4] Olkeriil sets forth a constitutional argument in addition to her rule-based one. Olkeriil contends that the elementary school’s presence on her land constitutes a “taking” under the Palau Constitution, Article IV, Section 6, and that Rule 13(a) cannot be used to bar such a constitutional claim. Regulation of procedure—such as statutes of limitation and compulsory counterclaims—generally apply to constitutional claims and non-constitutional claims alike. *See* 51 Am. Jur. 2d *Limitation of Actions* § 36 (2000) (“A constitutional claim may become time barred, just as any other claim can, unless *the constitution itself provides otherwise.*”); *see also* 14 PNC §§ 401, *et seq.* (creating no exception for constitutional claims for purposes of the statutes of limitation). *But see Kumangai v. Isechal*, 1 ROP Intrm. 587, 590 (1989) (expressing reluctance in applying time bars to actions involving issues of custom and traditional law under ROP Const. art. V, § 2). The takings clause does not guarantee Olkeriil the right to bring a claim in any manner, at any time, no matter how far removed from the alleged taking; it only creates a cause of action to be brought within the bounds of reasonable procedural rules.³ As the Trial Division succinctly put it: “Plaintiff cannot sleep on her Constitutional rights.” Civ. No. 03-018, Decision and Judgment at 8 (Tr. Div. Sept. 15, 2009).

[5] As its final argument, the Republic wishes to employ *res judicata*—or a hybrid of *res judicata* channeled through Rule 13(a)—in barring Olkeriil’s claim. We must be plain:

³ Of course, overly-strict procedural rules that limit the filing of constitutional claims so severely as to strip the constitutional guarantees of their meaning would not survive review.

the claim-extinguishment that Rule 13(a) has wrought is simply a rule-based one. It is not appropriate to speak of the extinguishment of a claim via Rule 13(a) in terms of the judicially-created common law doctrine of *res judicata*, nor vice versa. *See* Restatement (Second) of Judgments cmt. b (1980) (“In the absence of a statute or rule of court otherwise providing, the defendant’s failure to allege certain facts either as a defense or as a counterclaim does not normally preclude him from relying on those facts in an action subsequently brought by him against the plaintiff.”); *id.* § 22 cmt. f (“Normally, in the absence of a compulsory counterclaim statute or rule of court, the defendant has a choice as to whether or not he will pursue his counterclaim in the action brought against him by the plaintiff.”); 6 Wright et al., *supra*, § 1410 (“[Most courts apply the doctrine that] absent a compulsory counterclaim rule, a pleader is never barred by claim preclusion from suing independently on a claim that he refrained from pleading as a counterclaim in a prior action.”). Let those which are separate be treated separately. Our compulsory counterclaim rule and *res judicata* are not two sides of the same coin; mixture of these concepts only leads to unnecessary confusion and clouded analysis. And, because we have found a rule-based bar to Olkeriil’s claim, we will not indulge in a dicta-laden discussion of *res judicata*.

CONCLUSION

After reviewing the relevant submissions and legal authorities, we find that the Trial Court’s decision is in accord with our own analysis. We therefore AFFIRM the Trial Court’s grant of summary judgment.

**BEVOLI IMEONG, ISIDORO
TAKISANG, KALISTO JOSEPH,
VELENTINA SUKRAD, and OURROT
OF ELKBAL CLAN,
Appellants,**

v.

**ELIA YOBECHE, JOB KIKUO, and
EKLBAI CLAN,
Appellees.**

CIVIL APPEAL NO. 08-055
Civil Action Nos. 09-261, 01-179, 01-180

Supreme Court, Appellate Division
Republic of Palau

Decided: June 24, 2010¹

[1] **Appeal and Error:** Standard of Review; **Custom:** Appellate Review

Status and membership in a lineage are questions of fact, as is the existence of a purported customary law, and the Appellate Division reviews these findings of fact for clear error. The Court will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record.

[2] **Appeal and Error:** Fact Finding; **Custom:** Appellate Review

An appellate court's role is not to determine issues of fact or custom as though hearing them for the first time. The trial court is in the

best position to hear the evidence and make credibility determinations, and if the evidence before it is insufficient to support its findings, the Court should remand rather than determine unresolved factual or customary issues on appeal.

[3] **Custom:** Clan Membership; **Custom:** Title Holders

A person's actions or behavior may be relevant to determining ocell status with a clan, but that fact is typically determined first and foremost based on blood, birthright, and ancestry.

[4] **Appeal and Error:** Standard of Review; **Custom:** Title Holders

Trial Court's unexplained findings that *both* of two competing factions were ocell clan members merit remand. The Trial Court must sufficiently explain its findings based on facts in the record before it, such that the Appellate Division can adequately review them.

Counsel for Appellants: Kevin N. Kirk

Counsel for Appellees: Douglas F. Cushnie

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; ALEXANDRA F. FOSTER, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

¹ The panel finds this case appropriate for submission without oral argument, pursuant to ROP R. App. P. 34(a).

This case, now over ten years old, is presently on its fourth trip up the appellate ladder. We remanded the matter to the Trial Division for the third time on April 26, 2006, and both parties have appealed portions of that court’s latest decision. The underlying dispute concerns the identity of the true senior strong members of the Eklbai Clan. Two competing factions claim this status. At stake is the power to appoint the Clan’s chief male title bearer, Iyechaderchemai, and in turn that individual’s authority to control land owned by Eklbai Clan. Having reviewed the parties’ arguments and the record below, we unfortunately must again remand this matter for reconsideration.

BACKGROUND

Eklbai Clan is the highest clan in Ngerchemai Hamlet, Koror State. This appeal is the latest round of a case that began with a simple complaint for trespassing,² although these parties have been engaged in various disputes that go back many years. Here, a seemingly innocuous property dispute eventually spawned disagreement over the identity of the Clan’s true strong members, leading to two additional lawsuits in 2001. The three actions were consolidated for trial, at which the identity of the Clan’s leadership was the central issue.

This case started in 1999, when Eklbai Clan’s undisputed chief male titleholder, Iyechaderchemai Kikuo Remeskang, sued defendants Imeong and Takisang for trespassing on clan-owned land known as

Eklbai.³ In defense, Imeong and Takisang claimed that they received permission to reside on the property from certain strong Eklbai members. Remeskang, however, contended that those individuals were not even members of Eklbai Clan, much less strong ones.

In 2001, while the case was pending, Kikuo Remeskang passed away. Eklbai Clan sought to amend its complaint in the 1999 action to reflect its appointment of Elia Yobech, Remeskang’s nephew, as the new Iyechaderchemai.⁴ Contesting Yobech’s right to the title, however, were Kalisto Joseph and a group who purported to be Eklbai Clan’s true senior strong female members, or ourrot.⁵

This group (the “Joseph faction”) filed a new case, seeking declaratory and injunctive relief.⁶ The Joseph faction asserted that the

³ The land commonly called *Eklbai* is described as Tochi Daicho Lot 553.

⁴ Those individuals siding with Elia Yobech will hereinafter be referred to as the “Yobech faction.” The named parties are Elia Yobech, Job Kikuo, and the Eklbai Clan.

⁵ Expert testimony defined a clan’s “ourrot” as the senior strong female members. This accords with other Palauan cases. *See Ngirmang v. Orrukem*, 3 ROP Intrm. 91, 91 (1992) (defining the ourrot as “senior female members”); *see also Ngirmang v. Filibert*, 9 ROP 226, 229 (Tr. Div. 1998) (“A senior ourrot is generally the oldest female of a maternal line of a clan, provided that she has attained a high enough age and has fulfilled her service and contribution obligations to the clan.”).

² *See Eklbai Clan v. Imeong*, Civ. Action No. 99-261.

⁶ *See Joseph v. Yobech*, Civ. Action No. 01-179.

Clan's true ourrot selected Kalisto Joseph as Iyechaderchemai, with the approval of the Ngerchemai klobak, or council of chiefs. Yobech responded that he had been selected as Iyechaderchemai by his aunt, Ibau Oiterong, who held the highest female title in Eklbai Clan, Uchelbil ra Kumer. Yobech argued that the klobak also accepted his appointment—one month before Joseph. Both Joseph and Yobech sought to enjoin the other from acting as chief on Eklbai Clan's behalf.

The third action leading to this appeal was also filed in 2001.⁷ Kalisto Joseph sought to enjoin Job Kikuo from building and earth-moving on Eklbai Clan land. Kikuo purportedly received permission to use the land from his father, former Iyechaderchemai Kikuo Remeskang. Joseph, however, claimed that he was the new titleholder and therefore his consent was required.

The consolidated cases went to trial in February 2002. Each faction claimed to possess the male title, and both produced evidence that certain of its members constitute Eklbai Clan's true senior strong female members and were therefore authorized to make the appointment.

According to the Yobech faction, it has held Eklbai Clan's highest male and female titles in an unbroken line for over 150 years, tracing its ancestry to a man named Tengeluk, who was purportedly Iyechaderchemai many years ago. This title was passed down among Tengeluk's descendants, and the titleholders directly

preceding Yobech were his uncles Sumang and Kikuo Remeskang. The Joseph faction does not dispute that Sumang and Kikuo both served as Iyechaderchemai, and their tenures are well documented.⁸ Both men are brothers of Eklbai Clan's alleged female titleholder, Uchelbil ra Kumer Ibau Oiterong, and the Yobech faction presented considerable evidence supporting Oiterong's position as Uchelbil ra Kumer. Several witnesses testified that they recognize her by that title, and she is also identified as such in Resolution No. 6-52 of the Sixth Koror State Legislature, which commemorated the life and service of her brother, the late Iyechaderchemai Remeskang. Even Joseph faction witnesses acknowledged that Oiterong is recognized in the hamlet as Uchelbil ra Kumer. The Yobech faction claimed that this title, like its counterpart male title, has been in the family's line for over a century. Oiterong's sister, Bsechel, held the title before her, and their mother, Rukebai, before that.

Elia Yobech is Oiterong's nephew. Upon the death of Iyechaderchemai Remeskang and after the traditional mourning period and related customs, Oiterong claims to have named Yobech as the next titleholder. As Uchelbil ra Kumer, Oiterong allegedly possesses the greatest authority in naming a successor to the male title, although expert witnesses explained that custom generally requires consent or approval by a clan's ourrot before submitting the name for the klobak's acceptance. Yobech supposedly held a debes, or customary feast, and five of the nine chiefs of Ngerchemai either attended or sent a

⁷ See *Joseph v. Kikuo*, Civ. Action No. 01-180.

⁸ See, e.g., *Sumang Yechadrechemai v. Ebau*, 3 TTR 511 (Tr. Div. 1968) (identifying Sumang as Iyechaderchemai of Eklbai Clan).

representative. Expert testimony suggested that this should be sufficient to indicate the klobak's acceptance of the new titleholder.

On the other side, the Joseph faction made similar claims regarding Kalisto Joseph's ascendancy to the title of Iyechaderchemai. The Joseph faction traces its connection to Eklbai Clan back to a man named Ngirameong, who is listed in the Tochi Daicho for several Eklbai-owned lots. The Joseph faction asserts that Ngirameong was a former titleholder, that his descendants represent the true strong members of Eklbai Clan, and that the purported ourrot selected Joseph as the next titleholder. The Yobech faction, however, argued that Ngirameong was a drifter who was taken in by Ibau Oiterong's mother, Rukebai, in 1923 and who never held a title in the Clan. They state that the Joseph faction cannot demonstrate any link to Eklbai Clan prior to Ngirameong's appearance.

The Joseph faction produced testimony and documentation, including family trees, indicating that the purported ourrot descended from a maternal, female line several generations back. The evidence was less clear, however, whether this ancestry is part of Eklbai Clan. The parties did not dispute that members of the Joseph faction have held titles in Mowai over the years, including the highest male (Ngiramowai) and female (Dirramowai) titles. The Joseph faction claims that these titles are melanges to Eklbai Clan titles, meaning that these titleholders typically ascend to the Eklbai titles upon the death of the most recent titleholder. The parties disputed the status of Mowai, however. While the Joseph faction claimed that it was a lineage within Eklbai Clan, the Yobech

faction asserted that it was a separate clan altogether, having no authority in Eklbai.

Joseph claimed that he also held a debes feast, approximately one month after Elia Yobech. He produced a document demonstrating the klobak's attendance and acceptance of his appointment, signed by seven of the nine chiefs in the hamlet, including the chief of the second-highest ranking clan. Unlike Yobech, Joseph was also accepted by and seated in the Koror House of Traditional Leaders. Ibedul Yutaka Gibbons testified that this body recognized Joseph as Iyechaderchemai, although he suggested that it also would have seated Elia Yobech had his name been presented. Yobech does not appear to contest that Joseph was seated by the klobak and the House of Traditional Leaders; rather, he claims that these groups violated custom by doing so.

After hearing the competing claims, the first trial court found in favor of the Joseph faction. The procedural posture from this point can be found in more detail in our last opinion, *Eklbai Clan*, 13 ROP at 103-07. For purposes of this appeal, it is enough to note that we have remanded the case to the trial court on three separate occasions. In the first, we noted that the trial court's reasons for reaching its decision were unclear, and we asked the court to elaborate. *See Eklbai Clan v. Imeong*, 11 ROP 15, 17-18 (2003).

The case returned to this Court, and the trial court's new decision relied heavily on Joseph's acceptance by the klobak and the Koror House of Traditional Leaders. The trial court reasoned that by accepting Joseph as Iyechaderchemai, these groups *must* have also determined that those presenting him

constituted Eklbai's true ourrot. On November 22, 2004, we remanded a second time, noting that reliance on the klobak's acceptance alone created a presumption that was not an appropriate rule of law. *See Eklbai Clan v. Imeong*, 12 ROP 17, 23 (2004). We held that the klobak's acceptance of a proposed titleholder may be relevant, but it does not automatically follow that the presenting ourrot are the clan's true senior strong female members. *Id.* at 23. We therefore remanded for the trial court to determine which faction represented Eklbai's true strong members.

The case reappeared in our Court for a third time, and again we reversed and remanded to the trial court. *See Eklbai Clan*, 13 ROP 102. Although the court considered additional evidence in determining which faction constitutes Eklbai's true strong members, we found its opinion "cursory and insufficient to demonstrate that the decision was based on an adequate analysis of the evidence beyond the council's acceptance of Joseph as Iyechaderchemai." *Id.* at 107. We listed a significant amount of testimony that the trial court did not adequately address, and we instructed it to reconsider the evidence and "make findings as to who comprises the senior strong members of Eklbai Clan." *Id.* at 109.

That finally brings us to the proceeding that is the subject of this appeal. After acknowledging our instructions from the prior opinions, the trial court addressed the competing evidence and issued new findings of fact.⁹

⁹ The original trial judge was no longer on the court, and the matter was assigned to the Honorable Lourdes F. Materne, Associate Justice.

Turning first to the Yobech faction, the trial court found that its members have held the chief male title of Iyechaderchemai in an unbroken line for approximately 150 years. As for the female title, the court ruled that the Yobech faction has also held this title for over 100 years and that Ibau Oiterong has been Uchelbil ra Kumer since 1992. The court cited the testimony of many witnesses who know Oiterong as Uchelbil ra Kumer, including witnesses for the Joseph faction. Given this lengthy history of leadership within the Clan, the court held that the evidence supported the Yobech faction's claim and that "others maternally related to Ibau Oiterong qualify as ochell or strong members of Eklbai Clan." Civ. Act. Nos. 99-261, 01-179, 01-180, Further Findings of Fact at 4 (Tr. Div Oct. 8, 2008).

Moving to the Joseph faction, the trial court found that its members are *also* strong or ochell members of Eklbai Clan. The court found that Ngirameong and some of his descendants within the Joseph faction have lived on the land called *Eklbai*, and most of the Clan's lands were once listed in the Tochi Daicho under Ngirameong's name, indicating he was a strong member at that time. The court also noted that some Joseph faction members, including Ngirameong's sister, are buried at the odesongel, which indicates rank within a clan.

Having found both factions to be strong members of Eklbai Clan, the trial court turned to the issue of the proper male titleholder. First, it held that Kalisto Joseph could not have been appointed Iyechaderchemai because Uchelbil ra Kumer Oiterong did not participate in his selection. On the other hand, Elia Yobech was not

properly selected because custom requires that the ourrot (which the court found includes members of the Joseph faction) approve of a nominee before requesting the klobak’s acceptance. Thus, Elia Yobech was also not properly appointed as Iyechaderchemai.

The consequence of these conclusions was that neither Yobech nor Joseph had the authority to control Eklbai Clan property. Yobech could not eject Beverly Imeong and Isidoro Takisang; Joseph could not enjoin Job Kikuo from performing work on Clan land. Not surprisingly given the history of this case, both factions cross-appealed, and the case is before us for a fourth time.

ANALYSIS

[1, 2] The parties each contest the trial court’s conclusion that members of the competing faction are the true strong members of Eklbai Clan. The Yobech faction argues that the Joseph faction is not part of Eklbai Clan at all (and certainly not strong); the Joseph faction argues that the Yobech faction, having descended from a male, cannot possibly be strong or ochell. We review the trial court’s findings of fact for clear error. *Nebre v. Uludong*, 15 ROP 15, 21 (2008). Under this standard, we will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record. *See id.*; *see also Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006). Status and membership in a lineage are questions of fact, as is the existence of a purported customary law. *Ngiraswei v. Malsol*, 12 ROP 61, 63 (2005).¹⁰ It is

important to note at the outset that an appellate court’s role is not to determine issues of fact or custom as though hearing them for the first time. *See Sambal v. Ngiramolau*, 14 ROP 125, 127 (2007) (“The Appellate Division does not reweigh the evidence.”). The trial court is in the best position to hear the evidence and make credibility determinations, *see id.* at 126 n.1, and as an appellate tribunal, our review is limited. If the evidence before the trial court is insufficient to support its findings, we should therefore remand rather than determine unresolved factual or customary issues on appeal.

In our last opinion remanding this case, we instructed the trial court to “review the record, consider all of the evidence presented, and make findings as to who comprises the senior strong members of Eklbai Clan.” *See Eklbai Clan*, 13 ROP at 109. Specifically, we noted a dearth of analysis regarding the Yobech faction’s evidence in the previous trial court’s decision. We therefore consider now whether sufficient evidence in the record supports the court’s conclusions. After reviewing the parties’ claims, our prior opinions, the pleadings, transcripts, evidence, and relevant legal authority, we find that the trial court erred by finding that *both* the Yobech and Joseph factions comprise the senior strong members of Eklbai Clan. We are loathe to remand this matter yet again, but the evidence at trial does not support the court’s conclusion, which—as both parties seem to agree—appears factually untenable and perhaps even impossible.

¹⁰ The existence and content of a custom must be established by clear and convincing

evidence. *Ngiraswei*, 12 ROP at 63.

The trial court began by finding certain Palauan customs based on expert testimony. The court noted: (1) “senior female members of a clan are those who can trace their lineage through the female line”; (2) “it is possible to be from the male line (‘Ulechell’) and yet attain the status of a senior member (‘Ourrot’) through services and recognition by ochell members”; and (3) “the female title holder is a strong female member.” Civ. Act. Nos. 99-261, 01-179, 01-180, Further Findings of Fact at 3 (Tr. Div Oct. 8, 2008). As becomes apparent in the remaining discussion, the trial court was not clear on how it applied these three customs, nor did it make any additional customary findings to aid its analysis.

The trial court next turned to the evidence in favor of the Yobech faction. The court’s conclusion that the Yobech faction has held Eklbai’s male and female titles in an unbroken line “as far as the German time,” *id.*, is properly supported by documents and the testimony of several witnesses, including those for the Joseph faction. Nothing suggests that anyone challenged Yobech faction’s right to bear these titles throughout the years, at least until the present dispute. The court’s conclusion that Ibau Oiterong has held the highest female title in Eklbai Clan since 1992 was also supported by testimony from several witnesses who recognize Oiterong as Uchelbil ra Kumer, as well as the Ibedul’s acknowledgment of her title in a Koror State Resolution. Up to this point, the trial court’s conclusions are valid and adequately supported.

Based on these findings, the court then found that the Yobech faction are “ochell or strong” members of Eklbai Clan. Civ. Act. Nos. 99-261, 01-179, 01-180, Further

Findings of Fact at 4 (Tr. Div Oct. 8, 2008). In explaining this conclusion, the court merely stated that “Ibau Oiterong as the female title bearer is a senior strong member of Eklbai and others maternally related to Ibau Oiterong qualify as ochell or strong members of Eklbai Clan of Ngerchemai Hamlet.” *Id.* The trial court apparently reasoned that Oiterong’s status as Uchelbil ra Kumer (as well as the Yobech faction’s historical line of titleholders) meant that she *must* be a “ochell or strong” Eklbai member. Likewise, an implicit finding in the trial court’s conclusion that relatives of Oiterong are ochell is that Oiterong is herself ochell. Again, it appears that the trial court reached this conclusion based on the family’s long string of titleholders and its third finding of custom listed above—that a clan’s female title holder is a strong member.

The trial court, however, did not explain its finding or how it made the logical jump to find that Ibau Oiterong and all of those maternally related to her are ochell, and we are left to speculate about its reasoning. More importantly, the trial court’s finding disregards the undisputed testimony that the Yobech faction descends from a man named Tengeluk. According to the customary evidence, in the ordinary case this would render Tengeluk’s descendants ulechell members, not ochell.¹¹ An expert witness testified that ulechell members may attain the status of an ochell member if a clan’s ochell line dies out, but the trial court did not make any findings concerning this customary rule, nor did it apply such a rule to find that the Yobech faction attained ochell status in this

¹¹ It is undisputed that Tengeluk’s wife was not from Eklbai Clan.

fashion. Perhaps the trial court determined that the string of titleholders, going all the way back to Tengeluk himself, was enough to find that the Yobech faction must have attained ochell status at some time, regardless of the faction's original status. Nonetheless, the trial court did not discuss this critical issue, and its ruling is thus unclear and unexplained.

The only other relevant custom the trial court addressed is that an ulechell member may gain strength and even attain the status of an ochell member through services and recognition by a clan's other ochell members. Despite this customary finding, the trial court did not apply the principle to this case. It did not find that anyone from the Yobech faction attained ochell status this way, nor that any other ochell members of Eklbai (if there were any) approved of it. Furthermore, the expert testimony suggested that if a clan member attained ochell status by this route, her maternal descendants would not automatically become ochell members of the clan or otherwise possess ochell status, as the trial court found, but that such status is attained only on an individual basis.

In short, there is ample evidentiary support for finding that the Yobech faction has held the male and female titles for generations. The trial court, however, did not express how it took the next analytical step in concluding that Oiterong and those maternally related to her are "ochell or strong members of Eklbai Clan." Civ. Act. Nos. 99-261, 01-179, 01-180, Further Findings of Fact at 4 (Tr. Div Oct. 8, 2008). There may be good reasons for this conclusion, but this Court is left guessing at what they are.

The picture does not get clearer after reviewing the trial court's discussion of the Joseph faction's evidence. Despite this Court's instruction to reconsider all of the evidence in the record, the trial court began by noting that it would not disturb the prior trial judge's credibility findings and agreed that there was sufficient evidence that the Joseph faction constitutes "the true members of Eklbai."¹² *Id.* at 5. To support this conclusion, the court cited evidence that Ngirameong lived on the land called Eklbai; he was called Ngireklbai by members of the Ngerchemai community; Ngirameong's name is listed in the Tochi Daicho as the individual owner of many Eklbai Clan lots; and certain relatives of Ngirameong are buried at the Eklbai odesongel, or stone platform, an indication of rank within a clan. *Id.* From this evidence alone, the trial court determined that the Joseph faction "constitutes the true members of Eklbai Clan and that the ochell members or strong senior members" are certain members of the faction. *Id.* at 5-6.

[3] The trial court's discussion of the Joseph faction's evidence takes several unarticulated logical steps and does not

¹² These statements, in isolation, might not warrant remand. But in light of the outstanding factual questions and other inconsistencies, they raise a concern that the trial court unduly deferred to the prior trial court's factual determinations while conducting its review of the record. We remanded this case for a fresh and independent analysis of that record. The trial court was not instructed to review the prior findings, as an appellate court would do, and the trial court owed them no deference. On remand, the trial court should reevaluate the evidence independent of the prior trial court's findings and reach its own determinations.

address certain crucial points. First, the court found ochell status based on behavioral evidence such as Ngirameong's nickname, his presence at Eklbai land, his name in the Tochi Daicho, and the burial of certain relatives at the odesongel. This evidence may be relevant, but ochell status within a clan typically is determined based on blood, birthright, and ancestry, rather than actions or behavior. *Cf. Orak v. Ueki*, 17 ROP 42 (2009) (rejecting a trial court's finding that behavioral evidence, without more, was sufficient to establish that one faction comprised strong clan members). The trial court did not discuss the Joseph faction's ancestors other than Ngirameong, a male, nor did it make any findings about the faction's history in Eklbai. It did not address the Yobech faction's argument—which was supported by some testimony—that Ngirameong was a drifter who arrived in Eklbai in 1923 and lived there with permission from Ibau Oiterong's mother, Rukebai. According to that version of events, Ngirameong's relatives then gradually joined him at Eklbai. Thus, although the Joseph faction's members descended from a female, maternal line of some clan, it appears that their first connection to *Eklbai Clan* was through a man, Ngirameong, rendering the Joseph faction, at best, ulechell of Eklbai Clan.

This last point raises a more fundamental, yet unanswered question: is the Joseph faction part of Mowai, Eklbai, or both? Although the Joseph faction produced evidence that it is part of Eklbai Clan, it also established that several of its members have held the chief male and female titles of Mowai. Indeed, at the time Kalisto Joseph was purportedly named Iyechaderchemai, he was Ngiramowai, Mowai's chief male title

holder. The parties disputed whether Mowai was a lineage within Eklbai or a separate clan. There was not much evidence on this issue, and the trial court made no determination concerning this central fact. If Mowai is a separate clan in Ngerchemai, then the Joseph faction would likely have no claim to a title in Eklbai Clan. If it is a lineage within Eklbai, however, then perhaps the Joseph faction could constitute the Clan's strong members. Without clarity on this point, one cannot ascertain the Joseph faction's true status.

Turning from the trial court's findings to the parties' briefs, both factions assert that because there is no blood relation between them, a finding that *both* are ochell is impossible. Because they appear to agree on this point, we will not belabor it, but matters of ochell status and strength within a clan are typically determined by bloodlines and ancestry. More often than not, there can be no ties in matters such as these. Perhaps the court determined that the two factions represented separate lineages of Eklbai and somehow could have been strong members without family relation, or that both sides were ulechell members, all ochell members had died out, and therefore they both had a claim to strength within the Clan. If so, the trial court did not state or explain how this could be, and the decision provides little insight to its reasoning. Given the parties' unified response that the trial court's resolution is impossible, we find that it at least requires further explanation.

[4] To summarize, the trial court obeyed our instruction to reconsider the evidence and make a finding concerning the true strong members of Eklbai Clan. Taken independently, there is *some* evidentiary

support for each faction’s claims to that status. But much of the evidence was contradictory, and to decide that *both* factions are ochell members is seemingly untenable in light of the record below. More importantly, if such a finding could be supported by the evidence, the trial court did not adequately articulate how it reached this conclusion. The trial court merely made a list of supporting evidence for each faction, declined to explain the evidentiary value of the various facts, and then called it a tie. A number of factual questions remain unanswered: the Yobech faction’s evidence of title holders is powerful, but if its members descended from a male (Tengeluk), how and when did its members attain status as ochell members, rather than ulechell? And if certain members achieved that status through service or deeds, how does it extend to maternal relatives? Or did the Clan’s ochell line die out long ago? Did the trial court rely solely on the string of titleholders to conclude that, regardless of the past, the Yobech faction *must* have attained ochell status? And on the other side, a significant amount of evidence suggested that Mowai is a separate clan in Ngerchemai and that members of the Joseph faction have held their titles, so is Mowai a separate clan or a lineage within Eklbai Clan? And if Ngirameong’s first connection with Eklbai Clan was in 1923, and all of his relatives moved to Eklbai land after him, how and when did they become ochell members of Eklbai? By listing these questions, we do not intend to limit the scope of the trial court’s inquiry on remand or provide a complete checklist of outstanding factual issues. The trial court’s directive remains the same: which faction—Yobech or Joseph—comprises the true senior strong and potentially ochell members of Eklbai Clan? The answer cannot be both.

Finally, both factions have asked this Court to find in their favor based on the current record, rather than remand yet again. We would welcome a way to resolve this matter once and for all, and we have scoured the record in search of evidence that would either require or preclude a finding that one faction is stronger as a matter of law. But the record is full of competing yet unresolved facts, and it is not this Court’s role to decide between them on appeal. What is more, we have refused to resolve these factual matters in our two most recent opinions remanding this case to the trial court. In our second opinion, we noted the parties’ dispute over which faction contained the Clan’s true members and stated: “We are in no position to make findings on this issue, and we decline Appellants’ invitation to do so. But we agree with Appellants that some finding in this regard was crucial: a finding that one or the other of Joseph or Yobech was Iyechaderchemai . . . cannot stand without some finding that the people who nominated him are true members of the Clan.” *Eklbai Clan*, 12 ROP at 22 (footnote omitted). In our last remand, we stated that despite certain evidence in Yobech’s favor, “[w]e specifically reject the Yobech faction’s suggestion that we now enter judgment in their favor.” *Eklbai Clan*, 13 ROP at 109. The record upon which we based these statements has not changed, and therefore our position also cannot change. Determining Eklbai Clan’s true senior strong and potentially ochell members is essential and best left to the trial court.

CONCLUSION

This is not a legally complex case, but it is a factually difficult one. Matters of clan membership and strength inherently rely on

facts and evidence from generations past, and the parties' alleged histories often contradict or overlap. The Court is also sensitive to the amount of time and money this matter has cost the competing parties. We would strongly prefer to bring this litigation to an end in this proceeding. It would be even better if the two competing factions were able to conclude this matter on satisfactory terms outside of court. *Cf. Filibert v. Ngirmang*, 8 ROP Intrm. 273, 276 (2001) (“The selection of a title bearer is the Clan’s responsibility, not the Court’s.” Although the courts have constitutional authority over matters presenting issues of customary law, . . . it remains true that disputes over customary matters are best resolved by the parties involved rather than the courts.” (quoting *Sato v. Ngerchelong State Assembly*, 7 ROP Intrm. 79, 81 (1997))). But in the likely event that the parties decline to resolve this dispute independently, the outstanding factual determinations are for the trial court.

On remand, the trial court may choose to receive additional evidence, and, given the amount of time since the first trial, this may benefit both parties and the court. In any event, the trial court should review the complete record and make an independent and conclusive determination as to which faction—Yobech or Joseph—comprises the true senior strong and potentially ochell members of Eklbai Clan. The trial court should articulate its reasoning to the best of its ability, making explicit any customary law or findings of fact upon which it relies. We sincerely hope that this will be the last time this matter appears in the trial court. For these reasons, we find that the trial court clearly erred in its factual findings and REVERSE its decision that both the Yobech and Joseph

factions comprise the ochell members of Eklbai Clan; we REMAND this matter for the trial court to reconsider in light of this opinion.

**IDID CLAN,
Appellant,**

v.

**JOAN DEMEI, YUKIWO ETPISON,
EBUKEL NGIRALMAU, ESTATE OF
NGIRCHORACHEL ILILAU, and
REMUSEI TABELUAL,
Appellees.**

CIVIL APPEAL NO. 09-013
LC/B 07-213, 07-214, 07-216, 07-217, 07-
218

Supreme Court, Appellate Division
Republic of Palau

Decided: July 12, 2010¹

[1] **Appeal and Error:** Standard of Review

The proper location and identity of certain Worksheet Lots are findings of fact, which the Court reviews for clear error.

[2] **Land Commission/LCHO/Land Court:** Claims

A party has a duty to claim and monument all of the disputed lots that it believes it owns. The failure to do so will render a party unable to pursue a claim to those lots.

[3] **Civil Procedure:** Law of the Case Doctrine

The law-of-the-case doctrine does not apply when the decision invoked was in a different case.

[4] **Civil Procedure:** Res Judicata

Res judicata precludes redetermination of a factual issue that is actually litigated and determined by a valid and final judgment, and which is essential to that judgment. If issues are previously determined, but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded.

[5] **Descent and Distribution:** Applicable Law

In determining who shall inherit a decedent's property, the court must apply the statute in effect at the time of the decedent's death.

[6] **Appeal and Error:** Basis of Appeal

Appellate courts generally should not address legal issues that the parties have not developed through proper briefing. It is not the Court's duty to interpret broad, sweeping arguments, to conduct legal research for the parties, or to scour the record for any facts to which the argument might apply.

[7] **Property:** Adverse Possession; **Property:** Statute of Limitations

Adverse possession and the twenty-year statute of limitation are two sides of the same coin and are generally considered together, usually with the same party relying on both doctrines. A claimant typically will obtain the same result whether claiming under a twenty-

¹ The panel finds this case appropriate for submission without oral argument. *See* ROP R. App. P. 34(a).

year adverse possession claim or invoking the twenty-year statute of limitations.

[8] **Property:** Adverse Possession

The burden is on the party asserting adverse possession to establish its elements.

[9] **Property:** Adverse Possession

To prove adverse possession, one must show that the possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of title or right for twenty years. The doctrine does not apply where any one of these elements is lacking, and the party asserting adverse possession must affirmatively prove its claim by clear and convincing evidence.

[10] **Property:** Adverse Possession

Possession of property is notorious when an adverse claim of ownership is evidenced by such conduct as is sufficient to put a person of ordinary prudence on notice of the fact that the land in question is held by the claimant as his or her own. The mere possession of land does not in and of itself show the possession is notorious or hostile; rather, there must be some additional act or circumstance indicating that the use is hostile to the owner's rights, and the true owner must know of an occupancy that is in opposition to his or her rights and inconsistent with legal title.

[11] **Courts:** Judicial Bias

Parties to any legal proceeding are entitled to a fair, impartial arbiter. This goal is protected by both the Palau Constitution, which requires due process of law, and various laws and

professional standards. In Palau, judges are required to adhere to the standards of the Code of Judicial Conduct of the American Bar Association except as otherwise provided by law or rule.

[12] **Courts:** Judicial Bias

Under the ABA Model Code, a judge should not preside in a case in which he is interested, biased, or prejudiced, and this includes circumstances where the judge's impartiality might reasonably be questioned based on all the circumstances, even where no actual bias exists.

[13] **Courts:** Judicial Bias

A judge typically should recuse himself if the judge knows that the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is a person who has more than a de minimis interest that could be substantially affected by the proceeding.

[14] **Courts:** Judicial Bias

The burden of establishing judicial bias or the appearance thereof is on the party alleging it, and it is a heavy one. Whether to grant a motion for disqualification is within the trial court's sound judicial discretion. Such a motion must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy or set forth circumstances such that a reasonable person would question whether the judge could rule impartially.

[15] **Courts:** Judicial Bias

A party must move for recusal at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim. This requirement is one of substance and not merely one of form. An untimely objection or motion to disqualify a judge waives the grounds for recusal, and this is particularly true when the party seeking disqualification waits until after it receives an adverse ruling to raise the issue.

Counsel for Appellant: Carlos Salii

Counsel for Appellees: Pro se

BEFORE: LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice, Pro Tem.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Senior Judge, presiding.

PER CURIAM:

At dispute in this case are five separate plots of land in Ngerbodel, Koror State. The Land Court determined ownership of each tract, and, for a variety of reasons, Idid Clan was not awarded any of the disputed property. Idid Clan now appeals and makes several arguments. After considering each of them—despite a noticeable lack of legal support—we find no error below.

BACKGROUND

This case began as a proceeding under the Land Claims Reorganization Act of 1996 to establish ownership of five worksheet lots in Ngerbodel. *See* 35 PNC § 1301 *et seq.*

Multiple claimants purported to own the five disputed properties; the claims began as separate cases, but the court consolidated them into a single proceeding.² Each worksheet lot allegedly corresponds to a lot (or portion thereof) registered in the Tochi Daicho. The Land Court held a hearing on all claims on April 29 and October 6, 2008.

Appellant Idid Clan, represented by Bilung Gloria Salii, filed a claim to Tochi Daicho Lots 278, 279, and 280. These lots are registered as the individual property of a woman named Kisaol, who was Bilung Salii's aunt and an Idid Clan member. Kisaol's mother, Dirrechong, was the sister of Bilung Salii's mother, Maria. Kisaol moved to Japan sometime in the 1950s, where she passed away in 1969. During her time in Palau, Kisaol adopted Appellee Remusei Tabelual.

According to the worksheet maps produced at the hearing, Tochi Daicho Lots 278, 279, and 280 correspond with the largest disputed worksheet lot, No. 05B004-002. Idid Clan, however, claimed that these three Tochi Daicho lots encompassed other nearby worksheet lots as well, namely Lots 181-072, 181-073, and 181-074. On the worksheets, which were the result of monumentations by the parties, Worksheet Lot 181-072 was listed as T.D. Lot 286, and Worksheet Lots 181-073 and 181-074 were listed as parts of T.D. Lot 275.

² The five lots (and corresponding case numbers) are Lot No. 181-073 (Case No. LC/B 07-213), Lot No. 181-074 (Case No. LC/B 07-214), Lot No. 181-072 (Case No. LC/B 07-216), Lot No. 181-064A (Case No. LC/B 07-217), and Lot No. 05B004-002 (Case No. LC/B 07-218).

In support of its claim to T.D. Lots 278, 279, and 280, Idid Clan argued that the lands have always belonged to the Clan, even though they are registered in the Tochi Daicho as Kisaol's individual property. Idid Clan produced testimony that the lots were used by various Clan members over the years since Kisaol's departure for Japan, under the management and permission of Clan leaders. The competing claimants to T.D. Lots 278, 279, and 280 are two individuals who seek ownership through adoption—David Sokok Olkeriil³ and Remusei Tabelual.

T.D. Lot 275 is registered in the Tochi Daicho as property of Mengesebuuch. Idid Clan has no relationship to Mengesebuuch and made no formal claim to Lot 275. Mengesebuuch is the mother of Metiek, who is the mother of Appellee Ebukel Ngiralmu. The other Tochi Daicho lot in dispute is Lot 286, which is registered as belonging to the chief title Iked, with Mengesebuuch's son Etpisong as administrator. Ebukel Ngiralmu claimed this land as niece of Etpisong.

After the hearing, the Land Court determined the ownership of each lot. The Land Court awarded Worksheet Lot 181-073, which was purportedly part of T.D. Lot 275, to Appellee Joan Demei. The court found that Idid Clan, despite claiming that this worksheet lot was part of T.D. Lots 278, 279, and 280, was not a valid claimant. Idid Clan never

filed a formal claim for T.D. Lot 275, Worksheet Lot 181-073, or otherwise became a party in Case No. LC/B 07-213. Rather, the boundaries of Idid Clan's original claim, filed in 1973, align closely with only Worksheet Lot 05B004-002. The Land Court found that Idid Clan should have filed a claim if it wished to assert ownership to this additional land, particularly in light of the boundaries depicted on the worksheet map used at the hearing. Despite this finding, the Land Court also addressed the merits of Idid Clan's claim and determined that it was not the proper owner of Worksheet Lot 181-073. It based this conclusion on the same 1973 claim, finding that Idid Clan's claim consisted of only the land depicted as Worksheet Lot 05B004-002. The Land Court noted that Bilung Salii had assistance when she first monumented the Clan's claim; that she attended more recent monumentations and did not redraw the boundaries; and that the only inference is that one of the sketches is inaccurate. The Land Court concluded that it was reasonable to treat the initial boundaries—which coincide with those on the modern-day worksheet—as the correct depiction of T.D. Lots 278, 279, and 280, rather than Idid Clan's more recent assertions that these historical documents are incorrect. Thus, Idid Clan was not a proper claimant for Worksheet Lot 181-073.

The only remaining claimant was Joan Demei, who claimed as a successor in interest to a former claimant, Enita Etpison Tucheliaur. Enita testified that she was given this land at the eldecheduch for Mengesebuuch's son, Etpisong, and that she used the property over the years. The Land Court credited this testimony, which was corroborated by other witnesses. Enita had

³ David Sokok Olkeriil sought ownership through his father, Sokok, who was Kisaol's half-brother. David claimed that Kisaol adopted Sokok before her departure; that Sokok therefore inherited the property upon Kisaol's death; and that David inherited Sokok's interest upon his death.

previously transferred her interest to Joan Demei, and the Land Court found in Demei's favor.

Moving to Worksheet Lot 181-074, the Court found against Idid Clan for the same reasons—the land was not part of T.D. Lots 278, 279, and 280, and the Clan did not file a claim for this property. The remaining claimant was Etpisong's son, Yukiwo Etpison, to whom the Land Court awarded the lot.

The Land Court awarded Worksheet Lot 181-072 to Ebukel Ngiralmu after finding against Idid Clan for the same reasons. Etpisong was Ngiralmu's uncle, and she claimed that he left this property to her. The Land Court then awarded Worksheet Lot 181-064A to the estate of Ngirchorachel Ililau. Unlike the prior lots, Idid Clan did not claim that this property was part of T.D. Lots 278, 279, and 280; rather, it simply claimed that it owned the property. Again, however, Idid Clan did not file a claim, so the Land Court disregarded its arguments.

Finally, the Land Court reached the dispute in which Idid Clan was a proper claimant—for Worksheet Lot 05B004-002, which corresponded to T.D. Lots 278, 279, and 280. The Land Court first addressed Idid Clan's assertion that it has always owned this land, which conflicts with the Tochi Daicho listing under Kisaol's individual name. The Land Court properly stated that the Tochi Daicho listing is presumed to be accurate, and a party must establish its inaccuracy by clear and convincing evidence. The Land Court cited some evidence in Idid Clan's favor, but it ultimately found it to be insufficient to negate the Tochi Daicho listing. The court noted that the Japanese knew how to

distinguish between clan-owned and individual property, evidenced primarily by Kisaol's registration in other parts of the Tochi Daicho as the administrator of Idid Clan property. But for the lot in dispute, she was named as the individual owner. Finding no clear and convincing evidence to rebut the Tochi Daicho presumption, the Land Court held that Kisaol had owned T.D. Lots 278, 279, and 280 individually. As a result, the Land Court addressed the claims of the two remaining claimants. The court rejected David Sokok Olkeriil's claim that Kisaol adopted his father, Sokok. Turning to Remusei Tabelual, no one disputed that Kisaol adopted her, and under the statute applicable upon Kisaol's death in 1969, the property passed to Tabelual.

Idid Clan, having failed on all of its claims, now appeals.

ANALYSIS

Idid Clan raises four issues on appeal. First, it asserts that the Land Court erred by concluding that Worksheet Lots 181-073 and 181-074 are part of T.D. Lot 275, rather than part of T.D. Lots 278, 279, and 280. Second, it claims that the Land Court violated 25 PNC § 301 by awarding T.D. Lots 278, 279, and 280 to Remusei Tabelual, rather than Idid Clan. Third, it argues that it owns the disputed property based on adverse possession and the statute of limitations. Fourth, it claims that the Land Court judge had a disqualifying conflict of interest such that the entire proceeding below should be invalidated. We address—and reject—each of Idid Clan's arguments.

I. Boundaries of T.D. Lots 278, 279, and 280

[1] Idid Clan’s first argument on appeal is unclear. The title of this section of its brief states that “the Land Court abused its discretion when it rejected testimony regarding Idid claim.” (Appellant’s Br. at 6.) But its discussion attacks only the Land Court’s inclusion of Idid Clan as a claimant to T.D. Lot 275, calling this a “red herring” and suggesting that the Land Court purposely mislabeled Idid Clan’s claims due to its alleged conflict of interest. (Appellant’s Br. at 4.) Idid Clan states that it was never a claimant to Lot 275, but rather it alleged that the lots it actually claimed—T.D. Lots 278, 279, and 280—covered property which the Land Court erroneously found to be part of T.D. Lot 275. The Clan also invokes the law-of-the-case doctrine, arguing that a previous Land Court determined that T.D. Lot 275 is located on the other side of a road from those worksheet lots at issue in this case. Although Idid Clan’s precise claim is unclear, it appears to be arguing that the Land Court incorrectly found that Worksheet Lots 181-073 and 181-074 are not part of T.D. Lots 278, 279, and 280. The proper location and identity of Worksheet Lots 181-073 and 181-074 are findings of fact, which we review for clear error. *Tkel v. Ngiruos*, 12 ROP 10, 12 (2004).

[2] First, the Land Court did not err in determining that Idid Clan was not an official claimant to T.D. Lots 275, 286, or 287-1, a fact Idid Clan does not dispute. Idid Clan’s claim was solely for T.D. Lots 278, 279, and 280, which were originally part of Case No. LC/B 07-218, and the Clan claimed that those lots encompass all of the other worksheet lots in dispute. Nonetheless, a party has a duty to

claim and monument all of the disputed lots that it believes it owns. *See Ucherremasch v. Rechucher*, 9 ROP 89, 91 (2002); *see also Nakamura v. Isechal*, 10 ROP 134, 138 (noting that only those filing a claim for land are considered “parties”). If Idid Clan thought that its claims extended to what were marked as Worksheet Lots 181-072, 181-073, and 181-074, then it should have filed claims for those lots on the same basis as its claims for T.D. Lots 278, 279, and 280. Instead, in 1973, Bilung Salii filed claims for only T.D. Lots 278, 279, and 280, and despite future monumentations, never adjusted or supplemented those claims. Idid Clan was on notice that other claimants disputed the boundaries of these lots and their corresponding Tochi Daicho lot numbers. This is particularly important given the competing depictions of the land in question; Idid Clan’s 1973 claim showed a lot that aligned closely with only Worksheet Lot 05B004-002. Including the other worksheet lots in its claim would have created a greater area than Idid Clan’s initial claim, and if it sought this additional property, it should have filed a separate claim or amended its original one.

Second, the Land Court did not clearly err in determining that T.D. Lots 278, 279, and 280 did not include Worksheet Lots 181-072, 181-073, or 181-074. The most persuasive evidence, which the Land Court cited, is Idid Clan’s aforementioned 1973 claim and the description of the land it purported to own. Bilung Salii and another Idid Clan member attended the 1973 monumentation, which resulted in a sketch of the land appearing remarkably similar to the modern-day Worksheet Lot 05B004-002 only. The southern edge of the properties in both

depictions is composed primarily of coastline, and the other boundaries are roughly equivalent. Comparing the two maps and referring to the coastline and adjacent lots, the area Idid Clan now claims is much larger than its original claim. The Clan asserts that the original monumentation is wrong, but it has attended more recent monumentations, and rather than re-draw the boundaries it has simply asserted that the additional lots fall within T.D. Lots 278, 279, and 280. As the trial court noted, Idid Clan had ample opportunity to ensure that the worksheet lots it claimed were correctly monumented and depicted on the map, yet the Clan only recently revised its claim. There was evidence supporting the Land Court's determination that T.D. Lots 278, 279, and 280 are limited to the land depicted by Worksheet Lot No. 05B004-002, and thus its conclusion was not clear error.

[3] The last argument Idid Clan appears to make is that a prior Land Court's determination concerning part of T.D. Lot 275 should have preclusive effect on the court's rulings in this case. Specifically, Idid Clan refers to a determination of ownership (DO 12-576) and accompanying decision in Case No. LC/B 07-211, in which the Land Court determined ownership of Worksheet Lot No. 181-075. This lot is depicted on the worksheet map as another part of T.D. Lot 275. Idid Clan purports to apply the law-of-the-case doctrine, but this does not apply because the decision was in a different case altogether. *See Renguul v. Ngiwal State*, 11 ROP 184, 186 (2004) ("Pursuant to the [law-of-the-case] doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or by a

higher court in the identical case." (internal quotations omitted)).

[4] Presumably, the Clan intended to argue *res judicata*, which precludes redetermination of a factual issue that is actually litigated and determined by a valid and final judgment, and which is essential to that judgment. *Rechucher v. Lomisang*, 13 ROP 143, 147 (2006). Under that doctrine, "[if] issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." *Id.* (quoting Restatement (Second) of Judgments § 27 (1982)). In LC/B 07-211, the Land Court determined the owner of Worksheet Lot 181-075, which corresponded with at least part of T.D. Lot 275. The Land Court, however, did not conclude that T.D. Lot 275 was located *solely* on one side of the road, and ownership of the worksheet lots disputed in the present case were not before that court. There was no determination of ownership for Worksheet Lot Nos. 181-073 and 181-074, and the Land Court in this case did not err by declining to apply *res judicata*.

The true location of T.D. Lots 278, 279, and 280 was a factual determination for the Land Court, which had before it evidence from which a reasonable trier of fact could have reached the same conclusion; its decision on this issue therefore was not clear error. *See Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 165 (2002) ("[W]here there are two permissible views of the evidence, the court's choice between them cannot be clearly erroneous.").

II. Applicability of 25 PNC § 301(b)

Idid Clan's next argument is that "[t]he Land Court below awarded Tochi Daicho Lot Nos. 278, 279, and 280 to Appellee Remusei Tabelual in clear violation of 25 PNC § 301(b)." (Appellant's Br. at 8). Specifically, Idid Clan asserts that Kisaol was not a bona fide purchaser, and the property in question should "be disposed of in accordance with the desires of the immediate maternal or paternal lineage to whom the deceased was related by birth or adoption and which was actively and primarily responsible for the deceased prior to [her] death." 25 PNC § 301(b).

[5] This argument is incorrect. As the Land Court correctly noted, in determining who shall inherit a decedent's property, the court must apply the statute in effect at the time of the decedent's death. *Ngiraswei v. Malsol*, 12 ROP 61, 63 (2005) (quoting *Wally v. Sukrad*, 6 ROP Intrm. 38, 39 (1996)); see also *Anastacio v. Yoshida*, 10 ROP 88, 90 (2003). Kisaol died in Japan in 1969, and the Land Court applied the intestacy statute applicable at that time, Palau District Code § 801.

Section 801(c), as it read in 1969, provided that in the absence of a will, "lands held in fee simple by an individual shall, upon the death of the owner, be inherited by the owner's oldest living male child of sound mind, natural or adopted, or, if male heirs are lacking, by the oldest living female child of sound mind, natural or adopted . . ." Section 801 was later amended, but the version in effect in 1969 said nothing of a bona fide purchaser. See *Wally*, 6 ROP Intrm. at 39.

Kisaol did not have a will, nor did she have any biological children. The Land Court

noted this and then considered the arguments of two individuals who claimed to inherit from Kisaol through adoption. The court rejected David Sokok Olkeriil's claim, as it was entitled to do, and he did not appeal that decision. The court then credited Remusei Tabelual's claim of adoption, which was supported by testimony and not disputed at trial. The trial court did not violate 25 PNC § 301(b), which did not yet exist at the time of Kisaol's death.

Finally, Idid Clan makes a brief, undeveloped, catch-all argument under the law-of-the-case doctrine and *res judicata*. These doctrines do not apply. Idid Clan cites a prior dispute over a different lot, Tochi Daicho Lot 704, which was adjudicated in Case No. LC/B 07-530. Several parties claimed ownership to T.D. Lot 704, including Idid Clan and Remusei Tabelual. As with the lots disputed in this case, Lot 704 was registered under Kisaol's name in the Tochi Daicho. In that case, the Land Court determined that Kisaol had transferred Lot 704 to her close relatives before leaving for Japan. Her cousin, Ibedul Ngoriakl, eventually sold the property, and the Land Court awarded the lot to the purchasing party's descendant. Idid Clan stated that it wished to honor that sale and supported the purchasing claimant's right to title.

[6] Once again, the law-of-the-case doctrine does not apply because the determination upon which Idid Clan relies was in an entirely different proceeding. See *Renguul*, 11 ROP at 186. As for *res judicata*, Idid Clan cites no law on this argument, nor

does it explain why it should apply.⁴ Nonetheless, the argument fails on the merits. As we mentioned, the doctrine only applies to a factual issue actually litigated and determined by a final judgment, and which is essential to that judgment. *Rechucher*, 13 ROP at 147. Here, the previous dispute concerned T.D. Lot 704 only. The prior Land Court’s judgment did not rely on a finding that Kisaol had transferred *all* of her properties before she left for Japan. Rather, the only finding that was essential to its judgment—and therefore entitled to preclusive effect—is that Kisaol gave Lot 704 to three relatives, and the court made no determination regarding the lots in this case, T.D. Lots 278, 279, and 280. Furthermore, the Land Court found in favor of a party *other* than Idid Clan, which merely supported the prevailing party’s claim. The Land Court in this case did not err in refusing to apply *res judicata*.

III. Statute of Limitations/Adverse Possession

⁴ Idid Clan’s entire argument on this point is: “In addition, *Res Judicata*, bars Remusei from making the same claim based on the same facts against the same party, i.e., Idid Clan.” (Appellant’s Br. at 11.) This is insufficient to develop this issue adequately, and this Court need not even consider it. It is not the Court’s duty to interpret this sort of broad, sweeping argument, to conduct legal research for the parties, or to scour the record for any facts to which the argument might apply. As we have previously noted, “[a]ppellate courts generally should not address legal issues that the parties have not developed through proper briefing.” *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 50 (2006) (quotations omitted).

[7] Idid Clan’s third argument on appeal is that it is the rightful owner of T.D. Lots 278, 279, and 280 based on adverse possession and 14 PNC § 402, the statute of limitations governing “actions for the recovery of land or any interest therein.”⁵ Idid Clan states that none of the other claimants have used or exerted ownership over the disputed lots for more than twenty years, whereas Idid Clan members—namely Bilung Ngerdokou and, since 1975, Bilung Salii—have been permitting other Clan members to use the land during this period.

[8] Yet again, Idid Clan cites not one iota of legal authority to support its argument, other than the section of the Code containing the statute of limitations, 14 PNC § 402. The burden is on the party asserting adverse possession to establish its elements. *See Children of Ngiramechelbang Ngeskesuk, v. Brikul (Brikul II)*, 14 ROP 164, 166 (2007)

⁵ As we have previously noted, adverse possession and the twenty-year statute of limitation are “two sides of the same coin.” *Ilebrang Lineage v. Omtilou Lineage*, 11 ROP 154, 157 n.3 (2004). “Adverse possession and the statute of limitations are generally considered together . . . usually [with] the same party relying on both doctrines—arguing that they have occupied the land for longer than 20 years, thus satisfying the adverse possession requirements, and that the landowner failed to bring an action against an unlawful occupier within the 20-year limitations period and so the claim is now barred.” *Brikul v. Matsutaro (Brikul I)*, 13 ROP 22, 24 (2005) (quotations omitted). A claimant typically will obtain the same result whether claiming under a twenty-year adverse possession claim or invoking the twenty-year statute of limitations. *Palau Pub. Lands Auth. v. Salvador*, 8 ROP Intrm. 73, 77 (1999).

(citing *Seventh Day Adventist Mission of Palau, Inc. v. Elsau Clan*, 11 ROP 191, 193 (2004)). This Court has addressed adverse possession in several cases, and Idid Clan could have at least included the elements of the doctrine in its brief.

Furthermore—and even more importantly—the Clan presented very little *factual* evidence to support its claim. It merely averred “that other claimants have not used portions of the three lots claimed by Idid over a long period of time but rather people such as Isabella Sumang and others have used portions of these lots through permission of Idid Clan members, namely Bilung Ngerdokou and the present Bilung.” (Appellant’s Br. at 9.) Even by its own statement, the Clan appears to be claiming adverse possession of only “portions of the three lots,” and it does not explain the identity of the “others” using them. Despite its undeveloped argument, the Court will address the merits.⁶

[9] To acquire title by adverse possession, the claimant must show that the possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of title or right for twenty years. *Brikul II*, 14 ROP at 166. The doctrine does not apply where any

⁶ It is also unclear whether Idid Clan even raised this argument before the Land Court, which did not analyze adverse possession or the statute of limitations in its decision. To the extent that Idid Clan raises this issue for the first time on appeal, it has waived it. See *Nebre v. Uludong*, 15 ROP 15, 25 (2008). We will consider the merits of the claim because Idid Clan did assert that its members have exercised control over the property for many years, but it does not appear to have argued these issues below.

one of these elements is lacking, *id.*, and the party asserting adverse possession must affirmatively prove its claim by clear and convincing evidence, *Elsau Clan*, 11 ROP at 193.

[10] Particularly relevant here are the elements of a continuous, notorious claim of title or right by Idid Clan. “Possession of property is notorious when an adverse claim of ownership is evidenced by such conduct as is sufficient to put a person of ordinary prudence on notice of the fact that the land in question is held by the claimant as his or her own.” *Brikul II*, 14 ROP at 166. The mere possession of land does not in and of itself show the possession is notorious or hostile; rather, there must be some additional act or circumstance indicating that the use is hostile to the owner’s rights, and the true owner must know of “an occupancy that is in opposition to the owner’s rights and in defiance of, or inconsistent with, legal title.” *Id.* at 166-67. Stated another way, the party claiming adverse possession must demonstrate “an assertion of ownership adverse to that of the true owner and all others.” *Brikul I*, 13 ROP at 25.

Apart from the blanket assertion that Bilung Salii and several of her relatives have granted “others” permission to use “portions” of the land in question over the past twenty years, Idid Clan has not established the elements of adverse possession by clear and convincing evidence. Its claim on appeal is cursory, conclusive, and broad, and the Land Court made no factual findings concerning the issue. For example, the Clan has not demonstrated that it claimed actual title or ownership, to the exclusion of all others and hostile to the claims of Kisaol’s descendants. Idid Clan also did not present sufficient

evidence that its claim to ownership or title was continuous; it stated that several different individuals have used portions of the property in dispute, but it must demonstrate that *Idid Clan's* claim to ownership was continuous *and* that this claim was notorious and known to the true owners. The Clan also has not demonstrated which properties it is claiming by adverse possession, nor has it established by clear and convincing evidence that its use or claim to the land was hostile. The Land Court alluded to this issue when it noted that the other claimants may have permitted certain Idid Clan members to use or manage the property out of respect to them. The facts are unclear, but even assuming Idid Clan was managing the property continuously, its adverse possession claim would fail if it knew that it was doing so by permission of the true owners.

These are but a few outstanding factual issues. The main point is that even if Idid Clan could have demonstrated each element of adverse possession by clear and convincing evidence at trial, its arguments on appeal lack specificity and support, and it has failed to establish that it produced clear and convincing evidence of adverse possession below. It was incumbent on Idid Clan to demonstrate that its use and claim of ownership were hostile to the other claimants, continuous (despite possession or use by other individuals), and notorious. It has not done so here.

IV. Land Court Judge's Purported Conflict of Interest

Finally, Idid Clan raises a potential conflict of interest concerning the presiding Land Court judge. According to the Clan, the judge's ex-wife is a niece of Appellee Ebukel

Ngiralmu (or could be considered as such under Palauan matrilineal society). The judge and his ex-wife had a son during their marriage, and, according to Idid Clan, this means that the judge's ex-wife and son could be "direct beneficiaries of the award he made to Ebukel Ngiralmu." (Appellant's Br. at 10.) Declining once again to cite any legal authority or supporting evidence, Idid Clan claims that "the presiding judge's mind was at [*sic*] clouded that his decisions is [*sic*] called into question," and that "the conflict is so serious that it warrants reversal of all awards made below and calls for another hearing." *Id.* For the following reasons, we disagree.

[11] Parties to any legal proceeding are entitled to a fair, impartial arbiter. This goal is protected by both the Palau Constitution, which requires due process of law, and various laws and professional standards. In Palau, judges are required to "adhere to the standards of the Code of Judicial Conduct of the American Bar Association except as otherwise provided by law or rule." 4 PNC § 303.⁷

⁷ The Model Code of Judicial Conduct imposes higher standards than the minimum constitutional requirement of due process. *See Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). Unlike the elevated standard imposed by the Model Code, which requires disqualification for either actual impartiality or the appearance of such, the due process clause requires only that a presiding judge be free of *actual* bias. *Id.*; *see also State v. Canales*, 281 Conn. 572, 593, 594-95 (2007). The appearance of partiality or bias alone is not unconstitutional. *Bracy*, 520 U.S. at 904-05. Idid Clan is unclear whether it bases its argument on constitutional grounds or the Model Code; it mentions neither source. Instead, it merely invokes fairness and the "integrity of the

[12, 13] Under the Model Code, a judge should not preside in a case in which he is interested, biased, or prejudiced, and this includes circumstances where the judge's impartiality might reasonably be questioned based on all the circumstances, even where no actual bias exists. *See* ABA Model Code of Judicial Conduct R. 2.11(A) (2007); *see also* 46 Am. Jur. 2d *Judges* § 80 (2006); 28 U.S.C. § 455(a); *United States v. Carlton*, 534 F.3d 97, 100 (2d Cir. 2008); *Canales*, 281 Conn. at 593. As it pertains to this case, a judge typically should recuse himself if “[t]he judge knows that the judge, the judge’s spouse . . . , or a person within the third degree of relationship to either of them, or the spouse . . . of such a person is: . . . (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding” ABA Model Code of Judicial Conduct R. 2.11(A)(1)(c). The Code defines a “third degree of relationship” as including one’s uncle, aunt, nephew, and niece. ABA Model Code of Judicial Conduct, Terminology at 7. Furthermore, “knowledge,” in this circumstance, means actual knowledge of the interest or conflict, although such knowledge can be inferred from the circumstances. *Id.* at 6.

Under these provisions, one could argue that the Land Court judge should have recused himself from this matter. According to Idid Clan’s allegations, his ex-wife is the niece of a party (Ebukel Ngiralmu) who potentially stands to benefit in some way from this proceeding. Putting aside for the moment the issue of whether one’s ex-wife falls within

Court.” In any event, we find no error under the Model Code, which necessarily means that there was no constitutional impropriety below.

the term “spouse” in Model Rule 2.11(A), the judge’s son is also obviously within at least a “third degree of relationship” with the judge and allegedly stands to benefit from this proceeding as well.

[14] Idid Clan’s argument on appeal fails, however, for several reasons. First, it has not shown that the judge’s ex-wife or son have anything more than a “de minimis interest,” nor that any such interest, if it exists, could be “substantially affected.” Presumably, although it does not explain its reasoning, Idid Clan is asserting that some day in the future, Ebukel Ngiralmu might leave the property awarded to her in this case to her niece, the judge’s ex-wife. The judge’s son, then, would be in line to inherit or receive this property from his mother. But Idid Clan provides no facts to support these assertions—such as whether Ngiralmu has children of her own or whether she has expressed any intent to give property to the judge’s ex-wife.⁸ Instead, the Court is left guessing, which is clearly insufficient to establish grounds for a judge’s disqualification. *See* 46 Am. Jur. 2d *Judges*

⁸ In fact, the Land Court indicated in its decision that Ebukel Ngiralmu desired to transfer ownership of the lot in question, No. 181-072, to her son, Wilhoid Ngiralmu. Ebukel even included a document in the file indicating such a transfer. The Land Court properly declined to make an ownership decision based on this purported transfer, finding only that Ebukel’s claim was superior to the other claimants. This information, however, further damages Idid Clan’s claim that the Land Court judge should have recused himself. After a transfer to Ebukel’s son, the judge’s ex-wife’s and son’s potential interest in the property would be even further attenuated.

§ 181 (“A motion to disqualify must be well-founded and contain facts germane to the judge’s undue bias, prejudice, or sympathy or set forth circumstances such that a reasonable person would question whether the judge could rule impartially. A litigant’s vague and unverified assertions of opinion, speculation, and conjecture are insufficient.”). Idid Clan also presented no legal authority or case law that this sort of interest is more than “de minimis.” The burden of establishing prejudice or the appearance thereof is on the party alleging it, and it is a heavy one. *See* 46 Am. Jur. 2d *Judges* § 200. Whether to grant a motion for disqualification, had Idid Clan made one, is within the trial court’s sound judicial discretion, *Carlton*, 534 F.3d at 100; *see also* 46 Am. Jur. 2d *Judges* § 169, and the Clan has not presented sufficient facts from which this Court could determine that the trial judge abused that discretion.

[15] More importantly, Idid Clan did not raise this issue below. In its brief, it claims that the “conflict of interest was not disclosed or discussed on the record, and no waiver was made.” (Appellant’s Br. at 10.) Once again, Idid Clan cites to no legal authority to support this statement, nor any facts or circumstances relevant to waiver.⁹ The law is clear that “[a]

party must move for recusal ‘at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.’” *United States v. Amico*, 486 F.3d 764, 773 (2d Cir. 2007) (quoting *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333-34 (2d Cir. 1987)); *see also* 46 Am. Jur. 2d *Judges* § 173. “The requirement of a timely filing is one of substance and not merely one of form,” and “[t]he basis of requiring a timely objection is that courts disfavor allowing a party to shop for a new judge after determining the original judge’s disposition toward a case.” 46 Am. Jur. 2d *Judges* § 173; *see also id.* § 208. “An untimely objection or motion to disqualify a judge waives the grounds for recusal,” *id.* § 208, and this is particularly true when the party seeking disqualification, knowing of the possible prejudice, waits until after it receives an adverse ruling to raise the issue, *id.* §§ 208, 210. Finally, there is at least some authority that “[j]udicial acts taken before recusal may not later be set aside unless the litigant shows *actual impropriety or actual prejudice*; an appearance of impropriety is not enough to poison the prior acts.” *Id.* § 215 (emphasis added).

⁹ The reader may notice a theme running through this opinion. Idid Clan’s opening brief contained several unexplained conclusions, with little or no citation to supporting legal authority. This Court has previously refused to address arguments lacking sufficient support. *See Ngirmeriil*, 13 ROP at 50. In *Ngirmeriil*, we quoted then-Judge Scalia, writing for the D.C. Circuit, who said that “[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal

questions presented and argued by the parties before them. Thus, [appellate rules] require[] that the appellant’s brief contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.” *Id.* at 50 n.10 (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)) (quotations omitted). Although we have addressed Idid Clan’s myriad arguments, we warn its counsel to be more comprehensive in the future; if not, the Court may refuse to consider unsupported arguments.

On appeal, Idid Clan makes no mention of when it purportedly learned of the Land Court judge's potential conflict of interest. This alone renders its argument insufficient to meet its burden, and it is likewise insufficient to establish that the Clan was unaware of this potential bias prior to trial, during trial, or within the time limit for post-trial motions. The Clan did aver, however, that "it is a matter of public knowledge that the presiding judge's ex-wife, is a niece of Appellee Ebukel Ngiralmu or could be considered as such under Palauan matrilineal society. It is also a matter of public knowledge a son was born during that marriage and that marriage ended only a few years ago and after the presiding judge had been appointed to the bench." (Appellant's Br. at 10.) Thus, the only information produced by Idid Clan is that it was or should have been aware of the potential conflict of interest before, during, and after trial. Rather than raise this issue to the court below, it waited until it received an adverse judgement and now seeks to nullify that judgment by arguing conflict of interest. The Court finds that Idid Clan waived its challenge on appeal, and even if it did not, it has not established a conflict of interest warranting reversal of the trial court's decision.

CONCLUSION

For the foregoing reasons, the Land Court's decision in this matter is AFFIRMED.

DONALD HARUO,
Appellant,

v.

RESORT TRUST, INC.,
Appellee.

CIVIL APPEAL NO. 10-007
Civil Action No. 03-125

Supreme Court, Appellate Division
Republic of Palau

Decided: July 2, 2010

[1] **Appeal and Error:** Standard of Review

We review *de novo* the issue of whether the undisputed facts of defendant's participation in litigation and delay in seeking arbitration constitute a waiver of arbitration.

[2] **Arbitration:** Waiver of Right to Arbitrate

The right to arbitrate given by a contract may be waived, and the arbitration process is intended to expedite the settlement of disputes and should not be used as a means of furthering and extending delays.

[3] **Arbitration:** Waiver of Right to Arbitrate

It is undisputed that a litigant may waive its right to invoke arbitration by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.

[4] **Arbitration:** Waiver of Right to Arbitrate

Reduced to its essentials, to determine the existence of waiver of a right to arbitrate requires a synthesized evaluation of the extent of the litigation to date and the extent of the prejudice incurred by the nonmoving party. Put another way, whether a party has waived its right to arbitrate involves a case-by-case analysis of the degree to which a party has substantially invoked the judicial process and prejudiced the other party in doing so.

[5] **Arbitration:** Waiver of Right to Arbitrate

Prejudice is the touchstone for determining whether a right to arbitrate has been waived.

[6] **Arbitration:** Waiver of Right to Arbitrate

Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration. However, delay and the extent of the moving party’s trial oriented activity are material factors in assessing a plea of prejudice.

[7] **Arbitration:** Waiver of Right to Arbitrate

Waiver of the right to compel arbitration is not to be inferred lightly and courts should resolve any doubts about waiver of the right to arbitrate in favor of arbitration. American courts have routinely held that the party asserting waiver bears a very heavy burden of proof to prove the elements of waiver.

[8] **Arbitration:** Waiver of Right to Arbitrate

Factors used to determine whether a party has been prejudiced are: (1) timeliness or lack thereof of a motion to compel arbitration; (2) the degree to which a party seeking to compel arbitration, or to stay court proceedings pending arbitration, has contested the merits of its opponent’s claims; (3) whether the party has informed its adversary of an intention to seek arbitration even if it has not yet filed a motion to stay district court proceedings; (4) extent of its non-merits practice; (5) its assent to trial court’s pretrial orders; and (6) extent to which both parties have engaged in discovery.

[9] **Arbitration:** Waiver of Right to Arbitrate

Where a party has chosen to save litigation costs awaiting the outcome of a related case that party cannot now argue the delay was prejudicial.

[10] **Arbitration:** Waiver of Right to Arbitrate

Particularized assertions of prejudice must be accompanied by particularized evidence of costs and of the nonmoving party’s financial inability to pay.

Counsel for Appellant: William L. Ridpath

Counsel for Appellee: Rachel A. Dimitruk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

Appellant Donald Haruo (“Haruo”) appeals a January 29, 2010 Order Granting a Motion to Dismiss in favor of Appellee Resort Trust, Inc. (“RTI”), in which the court concluded, *inter alia*, that RTI had not waived its right to compel arbitration. Specifically, Haruo contends that, because RTI substantially invoked the judicial process during the seven-year time period between the filing of his Complaint and RTI’s filing of its Motion to Dismiss, RTI caused Haruo to suffer actual prejudice—thus, the court should have retained jurisdiction over the case, instead of ordering the dispute to arbitration in Japan. Despite the admittedly lengthy delay in the underlying case, we nonetheless AFFIRM the Trial Division’s Order Granting the Motion to Dismiss for the reasons outlined below.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 30, 1997, Haruo and RTI entered into an “Agreement for Services” (“Agreement”), under which Haruo promised to further RTI’s plans to construct a golf course and resort in Aimeliik State. After a dispute arose over RTI’s obligation to pay, Haruo filed a complaint alleging breach of contract against RTI on April 9, 2003. RTI filed its answer, along with a litany of counterclaims, on July 31, 2003. In its answer, RTI did not assert arbitration as an affirmative defense. As noted by both the trial court and the parties, the case essentially sat

stagnant for several years. In addition to the delay caused by the unforeseen cancer diagnosis and subsequent treatment of RTI’s counsel, the parties also mutually agreed to delay the case to allow the resolution of *Republic of Palau v. Airai*, Civil Action Nos. 99-186, 99-209, in which the contract between RTI and Haruo was a central issue. The Special Prosecutor ultimately dismissed his appeal in the criminal case in December, 2007.

Despite the self-imposed delay between July 2003 and December 2007, several filings did occur. Haruo not only answered RTI’s counterclaims, but also filed his first discovery requests, including interrogatories, on April 6, 2004. Between early 2004 and late 2007, the parties set and subsequently postponed a number of trial dates. Then, on November 9, 2007, the court held a status conference in which the court set deadlines for discovery (March 2008) and pretrial motions (June 2008). After RTI requested to extend these deadlines, the court moved the deadline for discovery to July 12, 2008, with pretrial motions due September 13, 2008. On July 11, 2008, RTI answered Haruo’s discovery requests and served its own discovery requests on Haruo. Both parties acknowledge that, at this time, RTI informed Haruo’s counsel of its intent to request arbitration. RTI also encouraged Haruo not to respond to its discovery requests. Approximately two months later, RTI once again requested an extension to move the deadlines for discovery and pretrial motions. Once again, the court granted it. On February 23, 2009, only twenty-nine days prior to the March 24, 2009 trial date, RTI filed its motion to dismiss based upon the choice of law and arbitration provisions in the Agreement.

The Agreement between RTI and Haruo states in Article 11:

Any and all disputes arising from or in connection with this Agreement or a transaction conducted under this Agreement shall be settled by mutual consultation between parties in good faith as promptly as possible, but failing an amicable settlement, shall be settled by arbitration. The arbitration shall be held in Nagoya, Japan and conducted in accordance with the rules of Japan Commercial Arbitration Association. The award of the arbitration shall be final and binding upon the parties.

Article 12 states that “[t]hat this Agreement shall be interpreted and construed in accordance with the law of Japan.”

In his response to the Motion to Dismiss, Haruo raised two primary arguments against enforcement of the arbitration clause: first, Palau’s common law does not allow for enforcement of arbitration agreements, and second, even if Palau law allows for the enforcement of arbitration agreements, RTI had nonetheless waived its right to arbitrate by virtue of its participation in the litigation for the past seven years. In its reply, RTI contended that Haruo had failed to produce any evidence of prejudice; the delay was a result of the mutual agreement of the parties; and neither party had substantially litigated the merits.

After a September 9, 2009 hearing, the trial court issued its Order Granting RTI’s Motion to Dismiss on January 29, 2010. In its Order, the trial court (1) upheld the choice of law clause directing that Japanese law be applied to interpretations of the Agreement; (2) concluded that U.S. common law does not mandate the invalidation of arbitration clauses in Palau; and (3) found that RTI had not waived its contractual right to arbitration. With respect to the latter, the court specifically found that RTI’s seven-year delay in filing its Motion to Dismiss was not sufficient by itself to constitute waiver, especially because RTI never substantially invoked the judicial process. The court noted that “[a]lthough this litigation has strung on for many years, little of substance has been litigated, and it does not appear that RTI has taken advantage of the judicial process to obtain discovery it would not be able to acquire in arbitration.” *Haruo v. Resort Trust, Inc.*, Civ. Act. No. 03-125 (Tr. Div. Jan. 29, 2010). Likewise, the court noted that Haruo had failed to demonstrate that he had been prejudiced by RTI’s delay. This appeal followed.

STANDARD OF REVIEW

[1] We review *de novo* the issue of whether the undisputed facts of defendant’s participation in litigation and delay in seeking arbitration constitute a waiver of arbitration. *Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691, 694 (9th Cir. 1986); *see also* 4 Am. Jur. 2d *Alternative Dispute Resolution* § 106 (2007) (“A trial court’s finding of a right to arbitrate is reviewed *de novo*.”).

DISCUSSION

The gist of Haruo’s argument on appeal, which largely recapitulates his briefs below, is as follows: (1) RTI substantially invoked the judicial process during the seven-year litigation with Haruo; (2) Haruo suffered actual prejudice as a result of RTI’s “filing of its eleventh hour Motion to Dismiss;” thus (3) RTI waived its right to arbitrate.¹ For the reasons outlined below, we disagree and affirm the trial court’s Order Granting RTI’s Motion to Dismiss.

I. Basic Legal Principles

[2, 3] Even though his substantive arguments fail to carry the day, Haruo accurately outlines the rules of law governing waiver of a party’s right to arbitrate. Indeed, there is no question that “[t]he right to arbitrate given by a contract may be waived” and that “the arbitration process is intended to expedite the settlement of disputes and should not be used as a means of furthering and extending delays.” (Appellant’s Br. at 3-4 (quoting 4 Am. Jur. 2d *Alternative Dispute Resolution* § 107)). Likewise, it is undisputed that “[a] litigant may waive its right to invoke [arbitration] by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.” (*Id.* at 4 (quoting *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987))).

¹ In his mere five-page opening brief, Haruo identifies one issue on appeal, challenging only the trial court’s decision as to waiver. Accordingly, this Court will not address the portions of the trial court’s Order deciding the enforceability of the Agreement’s choice of law clause or the enforceability *vel non* of arbitration provisions in Palau.

[4] Reduced to its essentials, to determine the existence of waiver of a right to arbitrate requires a synthesized evaluation of the extent of the litigation to date and the extent of the prejudice incurred by the nonmoving party. Put another way, whether a party has waived its right to arbitrate involves a case-by-case analysis of the degree to which a party has substantially invoked the judicial process and prejudiced the other party in doing so. *See e.g.* 4 Am. Jur. 2d *Alternative Dispute Resolution* § 107 (stating that merely taking part in litigation is not enough to waive a right to arbitration unless a party has substantially invoked the judicial process to its opponent’s detriment); *Cotton v. Slone*, 4 F.3d 176, 179 (2d. Cir. 1993) (“waiver will be inferred if a party engages in protracted litigation that results in prejudice to the opposing party”); *Fisher*, 791 F.2d at 694 (holding that waiver of a right to arbitration has occurred if the party seeking to compel arbitration has knowledge of an existing right to compel arbitration; acts inconsistent with that existing right; and the party opposing arbitration suffers prejudice resulting from such inconsistent acts).

[5-7] To undertake this synthesized evaluation, it is helpful to consider the following. First, “prejudice is the touchstone for determining whether a right to arbitrate has been waived.” *Hoxworth v. Blinder, Robinson, & Co.*, 980 F.2d 912, 925 (3d Cir. 1992); *see also Fraser*, 817 F.2d at 252 (“the dispositive question is whether the party objecting to arbitration has suffered actual prejudice”).² Second, “neither delay nor the

² RTI rightly points out that some American courts do not require a particularized showing of prejudice in order to find that a party has waived

filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver

its right to arbitrate, stating “[t]wo circuit courts have held that in discrete circumstances a finding of waiver does not require a determination that the party resisting arbitration suffered prejudice.” (Appellee’s Br. at 7 (citing *Cabintree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 2005) (holding that removal of the case to federal court and substantial engagement in discovery before seeking to compel arbitration amounted to waiver in and of itself, without a specific showing of prejudice needed); *Khan v. Parsons Global Servs. Ltd.*, 521 F.3d 425 (D.C. Cir. 2008) (holding that no showing of prejudice was required to constitute waiver when the party had removed the case to federal court and sought summary judgment)). RTI also points out that, conversely, many American courts have “specifically rejected *Cabintree’s* ‘no prejudice’ rule.” (Appellee’s Br. at 7 (citing *Nicholas v. KBR Inc.*, 565 F.3d 904 (5th Cir. 2009) (declining to “go as far as the Seventh Circuit [in *Cabintree*]” and deciding to “continue to require a showing of prejudice even if there is substantial invocation of the process.”))).

The Court finds this American tension to be further evidence of the need to assess waiver on a case-by-case basis, and to encourage courts in Palau to view the two prongs—substantial use of the judicial process and prejudice to the nonmoving party—as existing on a spectrum. For example, a party seeking to compel arbitration could so invoke the judicial process as to make a particularized showing of prejudice unnecessary, as was the case in the *Cabintree*, while the same party could participate very little in the judicial process and nonetheless heavily prejudice the nonmoving party. An example of the latter would be a situation where a moving party obtained information from its very first discovery request that would have been unattainable in arbitration.

of arbitration. However, delay and the extent of the moving party’s trial oriented activity are material factors in assessing a plea of prejudice.” *Fraser*, 817 F.2d at 252. Third, as RTI points out in its response brief, “waiver of the right to compel arbitration is not to be inferred lightly and courts should ‘resolve any doubts about waiver of the right to arbitrate in favor of arbitration.’” (Appellee’s Br. at 6 (quoting 4 Am. Jur. 2d *Alternative Dispute Resolution* § 105)). Indeed, American courts have routinely held that the party asserting waiver bears a very “heavy burden of proof” to prove the elements of waiver. See *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002), as amended by 289 F.3d 615 (citing *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990)).

[8] Factors used to determine whether a party has been prejudiced are:

- (1) timeliness or lack thereof of a motion to compel arbitration;
- (2) the degree to which a party seeking to compel arbitration, or to stay court proceedings pending arbitration, has contested the merits of its opponent’s claims;
- (3) whether the party has informed its adversary of an intention to seek arbitration even if it has not yet filed a motion to stay district court proceedings;
- (4) extent of its non-merits practice;
- (5) its assent to trial court’s pretrial orders; and

(6) extent to which both parties have engaged in discovery.

4 Am. Jur. 2d *Alternative Dispute Resolution* § 107; *see also Cotton*, 4 F.3d at 179. As the trial court correctly noted in its Order, “[c]ommon among these factors is that each is related to the depth of the litigant’s involvement in the judicial process. Of them, courts often rely most heavily on the extent to which the party requesting arbitration engaged in discovery; if the parties have conducted little or no discovery, then less prejudice likely exists.” Civ. Act. No. 03-125, Order at 13 (Tr. Div. Jan. 29, 2010) (citing 4 Am. Jur. 2d *Alternative Dispute Resolution* § 107). Moreover, other pertinent factors determining the extent of prejudice include, “whether the party seeking arbitration made its request close to trial date, and whether that party filed a counterclaim concerning an otherwise arbitrable dispute without requesting arbitration.” *Id.* (citing *Sobremonte v. Superior Court*, 61 Cal. App. 4th 980, 992 (2d Dist. 1998)).

II. RTI did not waive its right to arbitrate

With these principles in mind, we turn now to our *de novo* review of the law as it applies to RTI’s conduct. Without question, the fact that nearly seven years have passed since the filing of the Complaint supports Haruo’s argument that the delay in requesting arbitration was excessive. On the other hand, the lion’s share of the delay was at the mutual agreement of the parties, and Haruo has failed to produce convincing evidence of actual prejudice, apart from the delay itself. The synthesized evaluation of the extent of the litigation to date and the extent of the

prejudice incurred by Haruo in this case reveals a relatively close question, in which both parties have convincing arguments. However, because courts should “resolve any doubts about waiver of the right to arbitrate in favor of arbitration,” we find that this close question ultimately favors RTI’s position. 4 Am. Jur. 2d *Alternative Dispute Resolution* § 105. Based on the following analysis, we affirm the trial court’s Order granting RTI’s motion to dismiss.

A. RTI did not substantially invoke the judicial process

In his opening brief, Haruo argues that RTI waived its right to compel arbitration by substantially invoking the judicial process. He does so simply by concluding that “[t]he nearly six-year delay in bringing the arbitration demand before the court is, in and of itself, extraordinary.” (Appellant’s Br. at 5.) Other than a string citation to two A.L.R. articles, Haruo offers no explication of the law discussed therein nor any argument as to why, in fact, the six-year delay is extraordinary.³ Haruo only suggests that RTI has offered no

³ After his assertion that a six-year delay is in and of itself extraordinary, Haruo’s citation reads verbatim, “See Annotations, Delay in Asserting Contractual Right to Arbitration as Precluding Enforcement Thereof, 25 A.L.R. 3d 1171; Defendant’s Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein, 98 A.L.R. 3d 767.” Notwithstanding that Haruo declined to point the Court to any of the purportedly persuasive law contained in these articles, Haruo neglected even to include a pinpoint page or an explanatory parenthetical to either citation, which could have at least outlined the relevant holdings mentioned therein.

explanation for its delay, even though it was fully aware of the arbitration provision in the Agreement at the time that it filed its Answer and Counterclaim.

[9] This is simply not enough. Although it is true that a delay of six-years looks to be almost prima facie excessive; that RTI was fully aware of the arbitration provision in the Agreement at the time it filed its Answer and Counterclaim; and that RTI filed its motion to dismiss a mere twenty-nine days before trial, upon closer inspection, the events that transpired are actually far less egregious. Foremost, even though the case spent the vast majority of the last six years dormant, it did so by mutual agreement of the parties. As RTI points out,

[w]ith the exception of one discovery request made in 2004 by Haruo, which by agreement of the parties was not answered until July 2008, the parties agreed not to take any action in this case based on a pending matter against Haruo filed by the Office of the Special Prosecutor. The Special Prosecutor dismissed his appeal in those matters in December 2007. The time between the complaint's filing and RTI's response and the dismissal of the Special Prosecutor's appeal cannot be held against RTI as delay.

(Appellee's Br. at 14 (internal citations omitted).). Indeed, Haruo does not dispute that the delay was by mutual agreement of the parties, and "where a party has chosen to save

litigation costs awaiting the outcome of a related case that party cannot now argue the delay was prejudicial." See *Thomas v. A.R. Baron & Co.*, 967 F. Supp. 785, 789 (S.D.N.Y. 1991). Thus, we agree with RTI that the actual delay in this case is more properly calculated from December 2007 to the time when RTI's motion to dismiss was filed—a total of about fifteen months. A delay of fifteen months is far less excessive than a delay of seven years. What is more, both parties acknowledge that RTI actually informed Haruo of its intent to arbitrate on or about July 11, 2008, around the same time that RTI answered Haruo's discovery requests and served its own discovery requests on Haruo. Thus, even though RTI ultimately filed its motion to dismiss one month before trial, Haruo had been on notice for over six months prior. RTI even encouraged Haruo not to respond to its discovery requests—and Haruo in fact did not respond—presumably because he knew of RTI's intent to compel arbitration.

Considering a fifteen-month delay instead of a seven-year delay, RTI directs the Court's attention to some compelling American case law, which supports the notion that it "is impossible to distinguish this fifteen month delay from periods of delay in cases where other courts have consistently ruled there was no waiver. (Appellee's Br. at 14 (citing *Shearson Lehman Hutton Inc. v. Wagoner*, 944 F.2d 114, 122 (2d Cir. 1991) (a delay of three years in raising an arbitration claim was insufficient to find waiver where no litigation on the merits of the case ever occurred); *Thyssen, Inc v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) (a delay of twenty months was insufficient to find waiver); *Thomas*, 967 F. Supp. at 789 (holding no waiver despite a year and a half

delay))). Foremost, this string cite of case law, which is complete with explanatory parentheticals that accurately represent the holdings of various cases bolstering RTI's position, and which convinces the Court that RTI's fifteen-month delay was much less than "extraordinary," sits in stark contrast to Haruo's conclusory string cite to two A.L.R. articles. Moreover, RTI points to the fact that whatever involvement the parties did have in this case centered around limited discovery and procedural motions practice. There was never *any*, let alone extensive, litigation on the merits, which many courts define as the "hallmark to finding waiver." (Appellee's Br. at 16-17 (citing *Stifel*, 924 F.2d at 158-59 (finding no waiver and stating that the mere use of the judicial process through pleadings and discovery did not amount to substantial litigation on the merits)).)

Haruo finally contends that, because RTI knew about the arbitration clause in the Agreement, it should have included arbitration as a counterclaim in its Answer some seven years ago. We agree with Haruo; however, the failure to do so is simply not fatal to RTI's motion to compel arbitration under the governing decisional law, which explains fairly clearly that failure to include arbitration as a counterclaim is not sufficient to establish waiver. *Fisher*, 791 F.2d at 698 (failure to raise arbitration as an affirmative defense is inadequate by itself to support a claim of waiver); *Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157, 158-59 (8th Cir. 1991) (finding no waiver even though movant failed to assert arbitration as an affirmative defense). Accordingly, despite the admittedly lengthy delay in this case, we find that the lion's share of it was at the mutual agreement of the parties, and that the fifteen-month portion

directly attributable to RTI is simply not enough to constitute a substantial invocation of the judicial process, especially where neither party ever litigated the merits of the case.

B. Haruo did not present evidence of actual prejudice

As we mentioned above, the evaluation of the extent of the litigation to date and the extent of prejudice to the nonmoving party often requires the Court to consider both prongs together, inasmuch as the two essentially begin blending together; thus, we addressed most of Haruo's "prejudice" arguments in the section above. However, two of these arguments are worth discussing separately.⁴

Haruo points first to the substantial additional expenses he would be forced to incur, including travel, legal, and arbitration costs, and second to the fact that the fundamental policy of arbitration—that of expediting the resolution of disputes—would

⁴ RTI contends that Haruo's assertions of prejudice were made for the first time on appeal and thus should not be credited. Although the Appellate Court will not consider issues on which the parties did not enter evidence before the trial court, *see Pierantozzi v. Ueki*, 12 ROP 169, 171 (2005), Palau law is silent as to the elements of an arbitration waiver argument, and, as RTI points out, there is a split in American law as to whether prejudice must be specifically pled or is instead implied in any argument asserting that the moving party substantially invoked the judicial process. Because Haruo clearly argued that RTI substantially invoked the judicial process, we will address the merits of Haruo's additional points regarding the prejudice he suffered from it.

be poorly served by allowing RTI to compel arbitration at such a late date. Although he concedes that he may have agreed to arbitration at the time he entered into the agreement, he claims that RTI's failure to timely demand the enforcement of that provision would substantially prejudice him now.

[10] Once again, ample law militates against his position. Foremost, as RTI points out, particularized assertions of prejudice must be accompanied by particularized evidence of costs and of the nonmoving party's financial inability to pay. *See Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (mere assertions of the increased costs associated with arbitration in a foreign location is insufficient to prove prejudice); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003). Apart from a series of conclusory assertions, Haruo has provided none. Second, even if this Court were to take Haruo at his word and accept that the costs associated with arbitration are indeed very high, the Agreement between Haruo and RTI still represents an arms-length contract between two sophisticated businesses / businesspeople, both of which held themselves out as capable of carrying on an international contractual relationship. As RTI correctly notes, "[t]hese clauses are standard fare" in international contracts. Haruo presumably had the opportunity to consider the conditions of the Agreement before signing it, and knew that he was dealing with a Japanese company that regularly conducts business there. To come now and assert prejudice as a result of travel and arbitration expenses that he could have just as easily contemplated before signing the agreement is

simply not enough to prove particularized prejudice here.

Finally, with respect to arbitration's policy of swift dispute resolution being poorly served by allowing RTI to compel arbitration at such a late date, we acknowledge that the fifteen month delay was certainly enough to initiate a controversy such as this one and has produced, as we mentioned, a very close case. However, the prevailing American case law, which takes into account all of the policy considerations underpinning arbitration, has spoken almost uniformly that delays such as this one are not sufficient to constitute waiver of arbitration—and thus, by definition, are not in derogation of arbitration's policy of swift dispute resolution. Because of this, we are forced to conclude that the prevailing case law actually recognizes at least two competing policies underlying arbitration—the first being the quick and efficient resolution of disputes and the second being the creation of increased certainty and contractual freedom in arms-length business transactions. Although these policies compete closely in this case, we ultimately agree with the majority American position that a delay of this length does not constitute waiver of arbitration.

CONCLUSION

Accordingly, for the reasons set forth above, the Order Granting RTI's Motion to Dismiss is AFFIRMED.

ABEL K. SUZUKY,
Appellant,

v.

MODESTO PETRUS,
Appellee.

CIVIL APPEAL NO. 10-004
Civil Action No. 09-050

Supreme Court, Appellate Division
Republic of Palau

Decided: July 22, 2010

[1] **Property:** Adverse Possession

A claimant under adverse possession need not seek out the true owner of the land to provide express notice of his claim to the land for the 20-year countdown to commence. The 20-year time-frame begins to run when the claimant gains possession of the land that is actual, open, visible, notorious, continuous, hostile, and under a claim of title or right.

[2] **Property:** Adverse Possession

The “under a claim of right” requirement of adverse possession imposes little—or no—actual additional condition on an adverse possessor’s claim beyond the otherwise-required “hostility.”

Counsel for Appellant: Pro se

Counsel for Appellee: Susan Kenney-Pfalzer

BEFORE: ARTHUR NGIRAKLSONG,
Chief Justice; ALEXANDRA F. FOSTER,
Associate Justice; HONORA E.

REMENGESAU RUDIMCH, Associate
Justice Pro Tem.

Appeal from the Trial Division, the Honorable
KATHLEEN M. SALII, Associate Justice,
presiding.

PER CURIAM:

Abel Suzuky appeals the Trial Division’s rejection of his adverse possession claim to land otherwise awarded to Modesto Petrus. Because the Trial Division’s analysis erred in calculating the commencement of the adverse possession statutory period, we vacate that portion of its decision and remand for further consideration.¹

BACKGROUND

This suit is rich in history, much of which is unnecessary for the purposes of the present appeal. We therefore condense our

¹ We note that the parties provided us with very little in the way of argument to review. The appellant spent more than half of his seven-and-a-half page pro se brief transcribing quotations from the record and the appellee’s response weighed in at a less-than-weighty two pages, leaving us with approximately five total pages of background, legal authority, and discussion from both parties. We do not mean to recount the length of the briefs as a reflection of their quality (although, to be sure, the appellant provided precious little in the way of measured argument to which the appellee could respond), but only to highlight the dearth of analysis before us. We have endeavored to—and in our view succeeded in—toeing the line between liberally construing the filings of a pro se litigant to achieve better justice and taking on the impermissible advocatory role of argument-creator.

retelling of this appeal's provenance to the points pertinent to our review. For a more storied account, see Civ. Act. No. 09-050, Decision at 1-5, (Tr. Div. Feb. 4, 2010).

The Trial Division below adjudicated ownership of Lot No. 028 A 10 on Cadastral Plat No. 028 A 00 in favor of appellee Petrus.² Not only did the 2010 Trial Division decision award the land to Petrus, it found that the land had in actuality already been awarded to Petrus in a 1982 Land Court decision that neglected to identify the plot by lot number on the cadastral plat.

Appellant Suzuky based his claim to the land on the theory of adverse possession, claiming that he entered the land in 1984 and farmed it continuously from 1985 until 2006. The Trial Division rejected this claim, finding that Suzuky had not yet met the statutory period required to achieve adverse possession because he did not notify Petrus (the true owner of the property) of his claim until 2006.

STANDARD OF REVIEW

We focus our attention on the lower court's conclusions of law, review of which are *de novo*. See, e.g., *Nakamura v. Uchelbang Clan*, 15 ROP 55, 57 (2008). The findings of facts below will not be disturbed except for clear error. See *id.*

DISCUSSION

In setting forth the basic law of adverse possession, we need not reinvent the wheel for it has turned many times before:

To acquire title by adverse possession, the claimant must show that the possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of title or right for twenty years. Where any one of these elements is lacking, adverse possession does not apply. A party claiming title by adverse possession bears the burden to affirmatively prove each element of adverse possession.

Children of Ngiramechelbang Ngeskesuk v. Brikul, 14 ROP 164, 166 (2007) (internal citations omitted).

The Trial Division disposed of Suzuky's adverse possession claim to the land with the following:

One of the requirements of adverse possession is that occupation of the land must be open and hostile for twenty years. See *Children of Ngiramechelbang Ngeskesuk v. Brikul*, 14 ROP 164, 166 (2007). There was nothing to put Plaintiff on notice that Suzuky was possessing the land and claiming title thereto until 2006 at the latest, which is well within the 20-year period. He has not established the elements of adverse

² The land in question, commonly known as *Ngedengir*, is located in Ngerkebesang in Koror State.

possession, and that argument fails.

Civ. Act. No. 09-050, Decision at 13, (Tr. Div. Feb. 4, 2010).

[1] The Trial Division, therefore, found that the adverse possession “clock” did not begin ticking until Suzuky, the adverse claimant, expressly communicated his intent to claim the land to Petrus, the true owner. This formulation is in error. The claimant need not seek out the true owner to provide notice of his claim to the land for the 20-year countdown to commence. The 20-year time-frame begins to run when the claimant gains possession of the land that is actual, open, visible, notorious, continuous, hostile, and under a claim of title or right. Nowhere has our case law imposed a “service of notice” requirement.³

[2] Indeed, as was the case here, an adverse possession claimant may not know the identity of the owner of the property for a portion—or the entire—statutory period and thus would be unable to expressly notify the

true owner of his intent to claim the land.⁴ It is the claimant’s open, visible, notorious, and hostile presence that should notify the true owner that the claimant is staking a claim to the land. See 3 Am. Jur. 2d *Adverse Possession* § 119 (“[I]t is not necessary to establish a claim of right or claim of ownership that possession be accompanied by an express declaration or claim of title; it is sufficient if the proof shows that the party in possession has acted so as to clearly indicate a claim of title.”). The “under a claim of right” requirement imposes little—or no—actual additional condition on an adverse possessor’s claim:

Terms such as “claim of right,” “claim of title,” and “claim of ownership,” when used in connection with adverse possession, have been defined as the intention of the claimant to appropriate and use the land to the exclusion of all others, irrespective of any semblance or shadow of actual

³ We have previously stated that “[t]he mere possession of land does not in and of itself show the possession is notorious or hostile.” *Children of Ngeskesuk*, 14 ROP at 167. To clarify, the *Children of Ngeskesuk* decision does not mandate “verbal or written notice” by an adverse claimant to the true owner to achieve adverse possession. As the opinion states, other acts of hostility—for instance, “physical indication [of the adverse claimant’s hostility under a claim of right] such as making improvements”—may raise a would-be adverse possessor’s claim to the requisite level of notoriousness and hostility. See *id.*

⁴ The Trial Division applied a stringent express notice requirement in this case—starting the statutory period only in 2006 when Suzuky gave oral notice of his claim personally to Petrus rather than when Suzuky’s claim to the land was filed with the Land Court in 2005. Such an express notice requirement would force a would-be adverse possessor to track down and serve notice on the true owner of the land on the first day of their adverse possession to maximize their potential to fulfill the 20-year time-frame. The purpose behind adverse possession—vesting title in the party who makes use of property to the exclusion of others—does not require such proactive antagonism on the part of the adverse claimant.

title or right. “Claim of right” also has been defined as the entry of an adverse claimant with an intent to claim and hold the land as the claimant’s own, to the exclusion of all others. Thus, the term “claim of right” means no more than the term “hostile;” and if possession is hostile, it is under a claim of right.

Id. § 118.

We do not have sufficient proof before us to determine whether Suzuky achieved possession of the land in question that was actual, open, visible, notorious, continuous, hostile, and under a claim of right for a period of 20 years. And, to be sure, it is the province of the Trial Division to make such determinations in the first instance. Our labor is only one of review. Having dispelled the apparent “express notice” requirement imposed by the Trial Division, we leave it to that able court to decide.

CONCLUSION

For the forgoing reasons, we VACATE and REMAND the Trial Division’s decision to the extent it denies Suzuky’s adverse possession claim. On remand, the Trial Division should, consistent with our opinion, re-adjudicate that issue.

**KYOKO APRIL,
Appellant,**

v.

**PALAU PUBLIC UTILITIES CORP.,
Appellee.**

CIVIL APPEAL NO. 10-014
Civil Action No. 06-048

Supreme Court, Appellate Division
Republic of Palau

Decided: August 16, 2010

[1] **Damages:** Punitive Damages

Governing decisional law in Palau states with relative uniformity that punitive damages should only be awarded for conduct impelled by a malicious motive or that can be considered outrageous because of the defendant’s reckless indifference to the rights of others.

[2] **Constitutional Law:** Due Process

Our reading of the governing law on violations of procedural due process indicates that the trial court’s determination of damages on remand requires it to assess whether the government actor was “justified” in taking the adverse action, i.e., to examine the substantive justifications behind the government’s adverse action—not solely the internal procedures it used to do so.

[3] **Constitutional Law:** Due Process

It is axiomatic that procedural due process requires both (1) notice and (2) an opportunity

to be heard. However, it is less widely known that a prerequisite to a procedural due process analysis is to determine whether the government actor followed its internal policies in depriving the litigant of life, liberty or property.

[4] **Constitutional Law:** Due Process

U.S. case law interpreting statutes like the Civil Rights Act and the Equal Access to Justice Act, which are designed to protect against due process violations, almost uniformly directs trial courts to inquire whether the adverse government actions are either substantively or substantially justified—specifically by examining the *actual* reasons for the termination.

Counsel for Appellant: Pro se

Counsel for Appellee: Oldiais Ngirakelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Judge, presiding.

PER CURIAM:

Appellant, Kyoko April (“April”), appeals a judgment entered by the Trial Division awarding only nominal damages for Palau Public Utilities Corporation’s (“PPUC’s”) violation of April’s right to procedural due process. For the reasons that follow, we AFFIRM in part and REVERSE in part the Judgment of the Trial Division and

REMAND this action for a determination as to whether PPUC’s deprivation of April’s procedural due process was justified under the circumstances.

BACKGROUND

As indicated by the briefs, this case is now on appeal for a second time. Thus, because the procedural history and factual background are adequately set forth in this Court’s Opinion in *April v. Palau Pub. Utils. Corp.*, 17 ROP 18 (2009), and because the issue appealed is limited to the trial court’s order on damages, we will only provide an abbreviated version of the relevant facts.

In our November 3, 2009 opinion in this case, we concluded that PPUC had violated April’s right to procedural due process because it did not provide her with a hearing prior to terminating her employment. Thus, we remanded the case and instructed the trial court to calculate the amount of damages due to April as a result of PPUC’s violation. To guide the trial court’s determination, we stated:

[d]amages for a due process violation should be calculated only to compensate a plaintiff for the affront of suffering a deprivation of process. Only if proper process would have resulted in April’s reinstatement should she be allowed to recover anything resembling back pay or compensation for her termination. If notice and an opportunity to be heard would have left her in the same

position employment-wise, nominal damages are likely appropriate.

April, 17 ROP at 22-23 (citing *Zinerman v. Burch*, 110 S. Ct. 975, 983 n.11 (1990) (“[I]n cases where the deprivation would have occurred anyway, and the lack of due process did not itself cause any injury (such as emotional distress), the plaintiff may recover only nominal damages.”)).

On remand, the parties submitted briefs on damages. Unsurprisingly, PPUC argued that April should only be entitled to nominal damages, whereas April sought compensatory damages in the amount of \$119,106.70, punitive damages in the amount of \$25,000, and reinstatement to her previous position. The trial court found that the evidence at trial “established with reasonable certainty the amount of compensatory damages in the amount of lost wages” of \$119,106.70 as of December 3, 2009. Nonetheless, the trial court found that nominal damages in the amount of One Dollar (\$1.00) were still appropriate. In doing so, it expressed that

[t]he Court is sympathetic to Plaintiff’s plight in light of the fact that she had been a model employee for over 10 years; however, the undisputed fact is that PPUC’s termination was found to be justified based on their internal rules, and this finding was affirmed by the Appellate Division. Accordingly, the outcome would be the same if there was no procedural due process

violation because PPUC would have terminated Plaintiff anyway. Even taking into consideration the evidence of Plaintiff’s long employment history with PPUC and her testimony that she was shocked and humiliated by the shabby way she was treated at the end of her employment, the Court finds no evidence of wither [sic] wilful or malicious conduct by PPUC that would merit an award of punitive damages in this case.

April, Civ. Act. No. 06-048, Order on Damages at 3 (Tr. Div. Mar. 6, 2010). This appeal followed.

STANDARD OF REVIEW

Where factual issues are not in dispute, due process issues are reviewed *de novo*. *Lewill Clan v. Edaruchei Clan*, 13 ROP 66 (2006).

DISCUSSION

April’s appeal is essentially two-fold. She begins by claiming “PPUC should be punished for its wrongdoing,” arguing, in her way, for an award of punitive damages as a result of PPUC’s violation of her procedural due process. Second, she claims that, if the Board had given her an opportunity to explain herself at a hearing, then it would have understood where she was “coming from,” and presumably chosen not to fire her.

[1] As to the first issue, PPUC rightly notes that April has failed to point to any

evidence at the trial or appellate level of wilful or malicious conduct. Governing decisional law in Palau states with relative uniformity that punitive damages should only be awarded for conduct impelled by a malicious motive or that can be considered “outrageous [] because of the defendant’s . . . reckless indifference to the rights of others.” *Robert v. Ikesakes*, 6 ROP Intrm. 234 (1997) (quoting Restatement (Second) of Torts § 908(2) (1977)). April has presented no evidence that rises to this standard. We therefore AFFIRM the trial court’s decision as to the inappropriateness of punitive damages.

However, with respect to April’s second argument, we have concerns about whether the trial court correctly followed our directions concerning compensatory damages on remand. We question if the trial court made a determination as to whether a hearing would have left April in the same position or whether it assumed—wrongly—that we had already made that determination.

[2] The trial court’s order on remand reads:

[T]he undisputed fact is that PPUC’s termination was found to be justified based on their internal rules, and this finding was affirmed by the Appellate Division. Accordingly, the outcome would be the same if there was no procedural due process violation because PPUC would have terminated Plaintiff anyway.

April, Civ. Act No. 06-048, Order on Damages at 3. The trial court’s determination begs the question: Would a hearing have resulted in April’s reinstatement? If the answer is yes, then the trial court should consider an award of back pay or compensation for her termination. If the answer is no, then nominal damages are likely appropriate. We fear that the trial court confused our prior determination that PPUC followed its own internal procedure with our direction for it to decide whether April would still have been fired if she had been provided a hearing. Our reading of the governing law indicates that the trial court’s determination on remand requires it to assess whether PPUC was “justified” in firing April, i.e., to examine the substantive justifications behind PPUC’s decision to fire her—not solely the internal procedures it used to do so.

[3] In the trial court’s original June 12, 2008 decision in this case, it concluded that, “[i]n complying with its own Personnel Manual regarding hiring and firing of employees, PPUC’s Board exercised its legitimate authority and oversight in deciding to terminate Plaintiff.” *April*, Civ. Act No. 06-048, Decision at 9. April appealed this conclusion, arguing that the governing statute, as well as PPUC’s Personnel Manual, granted firing authority only to the General Manager of PPUC; thus, because she had been fired by the Board, her termination had been improper. We affirmed the trial court’s conclusion, finding that PPUC had in fact conformed with its enumerated procedure for terminating employees. Specifically, we concluded that April’s termination at the hands of the Board—as opposed to at the hands of the General Manager—did not violate PPUC’s internal procedures for employee termination,

because, according to 37 PNC § 407(b), the General Manager can act only in accordance with the oversight of the Board. This oversight satisfied the statutory mandate that employees only be fired by the General Manager, insofar as the Board possessed oversight authority over managerial decisions.¹ However, we did not, in any portion of that Opinion, conclude that PPUC

was actually justified in its reasons for firing her—only that it followed its own internal procedures in doing so.

In reviewing the record in this case, we have found numerous times in which April, PPUC, and even the trial court itself, appear to conflate her demotion with her termination. PPUC demoted April, presumably, because of some perceived irregularities with her previous promotion. It terminated her, according to its own statements, because it believed April had violated an internal policy against making public statements against the company. Yet, April argues, if the Board had given her an opportunity to explain how she received her original promotion, it would not have fired her. This is clearly a conflation of her demotion with her termination, in that PPUC did not fire her over the promotion issue, but rather over the means in which she complained about it.

Likewise, PPUC argued that the trial division had upheld PPUC’s decision to terminate April when it held that

it cannot be overstated that the Board did not act arbitrarily in making the decision to terminate plaintiff. The Board’s decision was made after reviewing the recruitment process, including the GM’s decision to ask Plaintiff to apply for the position. The Board further sought the advice of their legal counsel before taking any action. The court therefore cannot say that Plaintiff’s termination was

¹ This determination was necessary because following internal procedures is a prerequisite to due process claims. *See April*, 17 ROP at 22 (“Under procedural due process a government actor must properly adhere to its own procedure in depriving a person of life, liberty, or property.”). It is axiomatic that procedural due process requires both (1) notice and (2) an opportunity to be heard. *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999); *see also Tolhurst v. Micronesian Occupational Center*, 6 TTR 296, 303 (1973). However, it is less widely known that a prerequisite to a procedural due process analysis is to determine whether the government actor followed its internal policies in depriving the litigant of life, liberty or property. In *Tolhurst*, for example, the court held that procedural due process required that the agency follow their internal regulations. Because the agency failed to follow its internal regulations, the court found a procedural due process violation. *Tolhurst*, 6 TTR at 300 (“The rule is generally recognized that when an administrative agency undertakes a personnel action in accordance with its regulations, even though it is not required by law to follow regulations, it must adhere to them.”). As we noted above, we agreed with the trial court and held that PPUC had in fact complied with the regulation requiring that only the General Manager could terminate April. However, this determination only satisfied the Court that PPUC’s conduct had conformed with their own internal procedures. We still found, upon further analysis, that PPUC’s failure to provide a hearing violated April’s right to procedural due process.

wrong or improper or without any justifiable basis.

(PPUC’s Supplemental Br. on Calculation of Damages at 1 (citing Decision)). This statement also belies a fundamental misunderstanding about the reasons for her termination. It seems to imply that April was fired because of irregularities in her promotion—not because of her violation of the internal rule against speaking publicly.

The trial court conflated her demotion and her termination in its Decision; PPUC relied on this conflation in its brief on damages; and the trial court appeared then to rely on PPUC’s brief to conclude that her termination was justified. This circularity may be at the root of the problem at hand.

Indeed, it is one thing for PPUC to have followed the right procedure, i.e., the correct person or entity did the actual firing, and it is another to conclude that PPUC was justified in concluding that April’s actions of contacting then-Delegate Mariur and then-President Remengesau to bemoan her demotion violated the internal personnel rule “prohibit[ing] employees from making public statements or displays unfavorable on the Company or its employees.” Whether April’s contact with these men was actually a “public statement” under PPUC’s internal personnel rules, or whether such can be said to reflect unfavorably on the Company—and, finally, whether PPUC was justified in terminating her—has yet to be reviewed by trial court.

The Supreme Court’s directive in *Carey v. Piphus*, 435 U.S. 247 (1978) suggests that just such a review is required in order for a trial court to award damages when

procedural due process rights have been violated. *Id.* at 258 (awarding damages for violation of procedural due process under 42 U.S.C. § 1983 (“Civil Rights Act”). In *Carey*, a student named Piphus was suspended from school without a hearing and sought actual and punitive damages in the amount of \$3,000. The Supreme Court stated that, on remand, if the trial court determined that the student’s suspension had been substantively justified, then only nominal damages for the due process violation would be appropriate. *Id.* at 266. The inverse, of course, would also be true, i.e., if the trial court determined that the suspension had *not* been justified, then it should consider Piphus’ claims for compensatory and punitive damages, including damages for the mental and emotional distress caused by the denial of due process itself. *Id.*

[4] The directive that trial courts inquire as to whether a government’s actions were substantively justified gives us some pause, in that it appears at first glance to substitute the court’s judgment for the judgment of an independent employer. However, U.S. case law interpreting statutes like the Civil Rights Act and the Equal Access to Justice Act, which are designed to protect against due process violations, almost uniformly directs trial courts to inquire whether the adverse government actions are either substantively or substantially justified—specifically by examining the *actual* reasons for the termination. *Cf. Lion Raisins, Inc. v. United States*, 57 Fed. Cl. 505, 513 (2003) (interpreting the substantial justification requirement for adverse government actions under the Equal Access to Justice Act and concluding that “[t]he phrase ‘substantially justified’ means ‘justified in substance or in

the main’—that is, justified to a degree that could satisfy a reasonable person”) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); see also *TGS Int’l. Inc. v. United States*, 983 F.2d 229, 229-30 (Fed. Cir. 1993); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (to determine substantial justification the trial court must “look at the entirety of the government’s conduct and make a judgment call whether the government’s overall position had a reasonable basis in both law and fact”); *Dalton v. Washington Dep’t of Corrs.*, 344 Fed. Appx. 300 (9th Cir. June 18, 2009) (trier of fact should determine not only whether the termination of a government employee would have occurred despite the employee’s protected speech, but also whether Government’s “justifications are legitimate or merely pretextual”).

Finally, the Court in *Carey* emphasized that “[p]rocedural due process rules are meant to protect persons not from the deprivation but from the mistaken or *unjustified* deprivation of life, liberty, or property.” *Carey* 435 U.S. at 258 (emphasis added). We have already determined that PPUC denied April the proper forum for a substantive evaluation of whether her deprivation of property was justified. It stands to reason then that the trial court must now step in to analyze whether PPUC was justified in firing her. Thus, in addition to the persuasive U.S. law, common sense and fairness dictate that a substantive determination must be made somewhere along the way; otherwise, the government simply gets a free pass. Thus, reading these cases in context leads us to conclude that, in this case, a substantive evaluation of the reasons

proffered by PPUC for April’s termination is still needed before a damages award can issue.

It is worth noting that the similar but distinct standards, i.e., substantively versus substantially justified, which are alternately used by the courts in *Carey* and *Lion Raisins*, are derived not only from the statutory language at issue in each case—the Civil Rights Act in *Carey* and the Equal Access to Justice Act in *Lion Raisins*—but also from the many years of decisional law interpreting that language. In this case, we interpret no statute nor any decisional law directly on point, inasmuch as we previously determined that April’s “right” to continued employment derives from PPUC’s own admission in its Answer. Accordingly, we have the freedom to adopt the standard that best accords with our own sense of fairness and procedural due process here.

In addition to the common sense approach adopted by *Carey*, we find persuasive our own decision in *Ministry of Justice v. Rechetuker*, 12 ROP 43 (2005), in which we interpreted the statutory language contained in 33 PNC §426 (b)(1)(2), which reads:

Any regular employee who is suspended for more than three working days, or dismissed or demoted, may bring an action for reinstatement and loss of pay in the Trial Division of the Supreme within 60 calendar days after written notice of the decision of the grievance panel on the government’s favor.

If the court finds that the reasons for the action are not *substantiated* in any material respect, or that the procedures required by law or regulation were not followed, the court shall order that the employee be reinstated in his position, without loss of pay and benefits. If the court finds that the reasons are *substantiated* or only partially substantiated, and that the proper procedures were followed, the court shall sustain the action of the management official, provided that the court may modify the action of the management official if it finds the circumstances of the case so require, and may thereupon order such disposition of the cases as it may deem just and proper.

33 PNC §426 (b)(1)(2) (emphasis added). In *Rechetuker*, we interpreted the term “substantiated” to indicate that a substantial evidence standard should be used in evaluating the grievance panel’s decision. As such, we noted, “[s]ubstantial evidence means more than a mere scintilla but less than a preponderance: it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 50 n.2 (Ngiraklsong, C.J., concurring) (citing *De La Fuente II v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003)).

With all of this in mind, we direct the trial court to examine the substantive justifications for April’s termination under the

substantial evidence standard, i.e., to examine PPUC’s justifications for firing April and to determine whether a reasonable person would accept such justifications as adequate to support April’s termination. Although doing so will likely be a task of some delicacy, it must be undertaken. If the trial court determines that PPUC was justified in relying on its personnel rule when it fired April, then only nominal damages will be appropriate.² If, however, the trial court determines that PPUC was unjustified in its reasons for firing April, she should be allowed to recover compensatory damages for her termination. Again, we acknowledge the difficulty in knowing how a hearing by PPUC over April’s termination would have played out in the past. That is why we expect the trial court to hold a surrogate hearing, per the directive in *Carey*, and on remand make a meaningful determination as to PPUC’s justifications for firing her.

CONCLUSION

For the reasons set forth above, we AFFIRM the trial court’s order as to the inappropriateness of punitive damages and REVERSE the trial court’s order awarding only nominal damages, because such was based upon a fundamental misunderstanding of the governing law. Accordingly, we REMAND this action for a determination as to whether PPUC’s deprivation of April’s procedural due process was justified under the circumstances. Only after such a

² Of course, if April provides satisfactory evidence of mental or emotional distress caused by the denial of procedural due process itself, then the trial court would be entitled to grant such relief as well.

determination has been made can the trial court issue a new order on the appropriate damages for the denial of April's procedural due process.

**ESTATE OF ADELBAI REMED,
Appellant,**

v.

**UCHELIOU CLAN,
Appellee.**

CIVIL APPEAL NO. 09-020
Civil Action Nos. 02-071, 03-213

Supreme Court, Appellate Division
Republic of Palau

Decided: August 17th, 2010

[1] **Torts:** Fraud

To demonstrate fraud where the defendant fails to disclose information (fraudulent concealment), plaintiff must demonstrate (1) a fiduciary, confidential, or similar relationship creating a duty to disclose; (2) actual concealment of a material fact, that is, one that defendant knows may justifiably induce the plaintiff to act or refrain from acting, with an intent to mislead another; and (3) justifiable reliance by the plaintiff to his or her detriment.

[2] **Torts:** Breach of Fiduciary Duty

A fiduciary relationship is one in which a person is under a duty to act for the benefit of another within the scope of the relationship.

[3] **Torts:** Breach of Fiduciary Duty

A fiduciary duty arises as a matter of law in certain formal relationships—such as attorney-client, partnership, or trustee-beneficiary—but it is not confined to these categories. Rather, the duty extends to all

relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be exercised by one party over another.

[4] **Torts:** Breach of Fiduciary Duty

Once a fiduciary or confidential relationship is established, it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction with due regard to the interests of the one reposing confidence, to make full and truthful disclosures of all material facts, and to refrain from abusing such confidence by obtaining any advantage to himself or herself at the expense of the confiding party. A fiduciary or one in a confidential relationship is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.

[5] **Torts:** Breach of Fiduciary Duty

Even when a relationship does not constitute a formal fiduciary relationship, the duty to speak or disclose information may arise based on the particular circumstances and factors such as the relationship between the parties, the relative knowledge of the parties, the materiality of the particular fact in question, or the parties' relative opportunity to ascertain that fact.

[6] **Torts:** Breach of Fiduciary Duty;
Custom: Title Holders

A clan's chief male titleholder owed the clan a fiduciary or confidential duty in managing the clan's property, where he had served in this capacity for many years, the clan reposed trust in his management, he possessed greater access to information than other clan

members, and he received information he knew to be material to the clan.

[7] **Appeal and Error:** Clear Error

Where there are two competing versions of the facts, each supported by admissible evidence, the court's choice between them cannot be clear error. The Appellate Division does not reweigh the evidence below, and whether it would reach the same conclusion upon hearing the evidence for the first time is unimportant. The Court's responsibility on appeal is to ensure that the lower court's factual findings are supported and valid.

Counsel for Appellant: John K. Rechucher

Counsel for Appellee: Moses Uludong

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; RICHARD H. BENSON, Part-time Associate Justice.

Appeal from the Trial Division, Honorable ALEXANDRA F. FOSTER, Associate Judge, presiding.

PER CURIAM:

The Estate of Adelbai Remed (hereinafter "the Estate") appeals the trial court's determination that Remed, as chief titleholder of his Clan, fraudulently concealed information from Clan members as a means of acquiring individual ownership to certain Clan-owned property. The trial court vacated two Determinations of Ownership concerning the disputed land and awarded the property to Ucheliou Clan. After considering the Estate's arguments, we find no error below.

BACKGROUND

This case concerns the proper ownership of three adjoining parcels of land in Airai: *Meketekt*, *Olsongeb*, and *Ngermeltel*. *Ngermeltel* is a taro patty; *Meketekt* is a sloping property nearby; and *Olsongeb*, nearest the water, is important to Ucheliou Clan because it is the chief male titleholder's mangrove channel and purportedly the point where members first arrived on the property. Ucheliou Clan now claims that Adelbai Remed fraudulently acquired individual title to this land, which it avers has belonged to the Clan for many years.

Adelbai Remed was born in 1912 as one of eleven children. Several of his siblings were adopted out to other families. Many years ago, Remed became Remesechau, Ucheliou Clan's chief male titleholder, and his sister, Swars Remed, was the female counterpart, or Dil-Remesechau, for a long time prior to her death.

In 1976, Remed sought to register the disputed property and attended its monumentation. In the filings, Remed combined the three lots and labeled them as solely "*Meketekt*."¹ Remed claimed the land on behalf of Ucheliou Clan, stating that the "Tochi Daicho Type of Ownership" was Ucheliou Clan; that he claimed ownership "as Ucheliou Clan Administer [sic] by Adelbai Remeschau;" and that he acquired the land as "senior rubak and under domain of my tittle

[sic]." The claim contains a handwritten sketch of the property.

Years went by, with Remed and others using the property and with little dispute or concern over its ownership. Several witnesses testified at trial that this property belonged to Ucheliou Clan and held special significance. Many also stated that Remed and other elder Clan members told them that this was so. Clan members also testified that they relied on Remed, as Remesechau, to manage Clan-owned property and any claims thereto, although other senior Clan members were required to consent or authorize certain transfers and conveyances. After Remed received notice of a monumentation or hearing concerning land potentially owned by the Clan, he would typically request one of his relatives to attend the proceeding.

On July 8, 1996, Adelbai Remed filed another Application for Land Registration for *Meketekt*—this time, however, as his own individual property. Contrary to the 1976 filing, he stated that he was the Tochi Daicho owner in his own right, rather than on behalf of Ucheliou Clan. When asked who would inherit the property, "Ucheliou Clan" was written and crossed out, replaced by "Adelbai Remed Family." For some reason, Remed checked the box corresponding with a claim for "Lineage" property, rather than "Clan" or "Individual." Remed signed the form, and his daughter, Ellen Adelbai, was also present for his signature.

Several Ucheliou Clan members testified that they had no knowledge of Remed's 1996 individual claim to *Meketekt* until after he was awarded ownership in April 2001. They claimed that the Land Court's

¹ For simplicity, the Court will refer to the three lots in question only as *Meketekt* for the remainder of this Opinion, unless specifically noted otherwise.

notices of the monumentation and hearing were served upon Remed only, and he said nothing to other Clan members. The Estate, however, through Ellen Adelbai, produced some evidence that Remed notified the Clan of his intent to pursue *Meketekt* as his individual property. Specifically, Ellen claimed that Remed held two family meetings, at which he was purportedly upset because certain Clan members had used part of the property as collateral for loans.

Remed's 1996 claim was monumented in 2000. Ellen Adelbai attended on Remed's behalf. Also present was Rosania Masters, a senior member of Ucheliou Clan. Masters testified that she was often enlisted to help Remed with land issues, including monumentations, but no one informed her of this one. She stated that she attended the monumentation because a friend and nearby landowner informed her that the Land Registration Officer was monumenting property that might affect her friend's claims. Knowing that her friend's land was near *Meketekt*, Masters decided to attend as well. She brought the 1976 record of Remed's claim, which the Land Registration Officer was also using for reference—she had never seen the 1996 claim. Masters stated that she did not think twice about Ellen Adelbai's presence at the proceeding, because she was another Clan member and was presumably there for Remed and on the Clan's behalf.

The Land Court held a hearing concerning the property on April 2, 2001. No one attended, and the Land Court therefore awarded the property to Remed as the sole claimant. Ucheliou Clan states that only then did it learn of what had transpired. It attempted to appeal the Land Court's decision,

but the Supreme Court rejected it because the Clan was not a party to the proceeding. The Clan thus filed this lawsuit, naming both Remed and the Land Court as parties,² alleging that Remed fraudulently obtained ownership of *Meketekt*, and seeking damages and return of the Clan's land.

The trial court granted summary judgment in favor of the Land Court, finding that it had complied with the relevant notice requirements for claims to *Meketekt*.³ Specifically, it served notice of the monumentation and hearing on the Clan by delivering it to Adelbai Remed, the Clan's chief male titleholder, as required by 35 PNC § 1309(b)(3)(C). The Land Court also posted notices of a Hearing, Monumentation, and Mediation Session at the appropriate locations, mailed them to overseas consular offices, and broadcast them on the radio. The court below therefore dismissed the Land Court as a party to the proceeding giving rise to this appeal.

The Clan's claim against Adelbai Remed⁴ proceeded to trial. The court received evidence from several witnesses on behalf of

² The Clan also included as defendants "Jane Does 1-3," planning to name them after additional discovery. The Clan never named the additional defendants.

³ The summary judgment decision in the Land Court's favor was issued by Justice Salii. The claims against the Estate of Adelbai Remed ultimately went to trial before Justice Foster, whose decision is the subject of this appeal.

⁴ Remed died on May 1, 2002, and the Estate of Adelbai Remed was substituted as a defendant.

Ucheliou Clan, as well as Ellen Adelbai on behalf the Estate. In its decision, the trial court first noted the discrepancies between the 1976 land registration documents and Adelbai Remed's 1996 claim to *Meketekt*, land which the court found to be important to Ucheliou Clan. The court then found that Clan members had no actual notice of Remed's 1996 claim, nor the hearing and monumentation. The court acknowledged Ellen Adelbai's testimony concerning the family meetings about the land, but it discredited at least portions of her version of events. All of the alleged attendees were either deceased or too old to testify at the time of trial, and despite the typical procedure of recording such meetings and notifying other strong Clan members, no one disclosed the information from these meetings to anyone, such as Rosania Masters (who often assisted with land issues) and Otobed Adelbai (who later became Remesechau). Thus, the court found that even if the meetings occurred, Remed did not divulge his intent to claim *Meketekt* as his own property, and not all senior strong members attended.

Having determined that no other Clan members were on notice of Remed's 1996 claim or the accompanying hearing and monumentation, the trial court analyzed the Clan's fraud claim. First, because Remed did not make an affirmative misrepresentation to the Clan members, the trial court invoked the doctrine of fraud by concealment, that is, Remed's failure to disclose material information which he was under a duty or obligation to disclose. The court determined that, as chief of Ucheliou Clan, Remed owed the other Clan members a fiduciary or confidential duty. Remed had long been responsible for managing Clan property, and

he typically signed claims for property on the Clan's behalf. In this instance, he filed the original 1976 documentation supporting Ucheliou Clan's claim to *Meketekt*, in which he stated that he was claiming as "Ucheliou Clan Administer by Adelbai Remeschau." The court found that the Clan trusted and relied upon its chief to manage its property in the Clan's best interest, a conclusion bolstered by the law permitting the Land Court to serve notice to a clan through its chief male and female titleholders. Other members testified that because of Remed's status as Remesechau there was no need to file a duplicate or competing claim; in fact, such conduct would be viewed as an objection or a challenge to Remed's authority. Finally, the court noted that Remed, as a direct function of his position as Remesechau, possessed greater information about the claim to *Meketekt*, and he knew that his failure to disclose his claim or the accompanying hearing would preclude the Clan from asserting its interests to the property or appearing before the Land Court. As a result, the trial court held that Remed owed the Clan a duty to disclose his individual claim, as well as the notice of monumentation and hearing.

Because Remed was under a duty to disclose, the trial court moved to the remaining elements of fraud. It found that the undisclosed information was material—had the Clan known, they would have acted. It also found that Remed intended to conceal the information, particularly given the inconsistencies between the 1976 and 1996 claims. Finally, the court concluded that the Clan's reliance upon Remed and its failure to investigate the status of *Meketekt* was justifiable and reasonable. He was their chief, and they were entitled to believe that he would

manage the Clan's property for the greater benefit of Ucheliou Clan. After all, he had been acting in that capacity for many years. No other senior members were notified or signed any document to transfer the property.

The trial court therefore found that Remed had acquired title to *Meketekt* as the result of fraud by concealment. It vacated the previous Determinations of Ownership and awarded new ones to Ucheliou Clan, with Otobed Adelbai as trustee. The Estate now appeals.

ANALYSIS

The Estate of Adelbai Remed raises a variety of arguments in its appeal, several of which are scattered multiple times throughout three broadly titled sections. Most assertions relate to the trial court's factual findings, which we review for clear error. *Sambal v. Ngiramolau*, 14 ROP 125, 126 (2007). Under this standard, we will not reverse the court's factual determination unless it lacks evidentiary support "such that no reasonable trier of fact could have reached the same conclusion." *Id.* The Estate raises at least one issue of law, which we review de novo. *Estate of Rechucher v. Seid*, 14 ROP 85, 88-89 (2007).

The Estate's primary contentions on appeal are that the trial court erred by finding (1) that Adelbai Remed, as Remesechau of Ucheliou Clan, owed the Clan a fiduciary duty; (2) that the members of Ucheliou Clan did not know about Remed's 1996 claim to *Meketekt* as his individual property; and (3) that Remed failed to disclose an unknown fact that he knew would induce the Clan to refrain from claiming its land. The Estate also makes

several cursory and undeveloped arguments, but we address the primary issues below.

I. Existence of a Duty to Disclose

The Estate's most prevalent argument is that Adelbai Remed had no duty or responsibility to inform the members of Ucheliou Clan about his 1996 claim and the accompanying monumentation and hearing. It contests the trial court's finding that Clan members reposed trust and confidence in Remed. It also avers that this is a question of Palauan custom, but the Clan did not present expert custom evidence. The Estate's positions are unavailing for multiple reasons.

[1] Ucheliou Clan claimed that Remed secured ownership of *Meketekt* by fraudulently concealing his individual claim, as well as the Land Court's notices of monumentation and hearing. As the trial court correctly noted, to demonstrate fraud where the defendant fails to disclose information (as opposed to an affirmative misstatement), the plaintiff must demonstrate (1) a fiduciary, confidential, or similar relationship creating a duty to disclose; (2) actual concealment of a material fact, that is, one that defendant knows may justifiably induce the plaintiff to act or refrain from acting, with an intent to mislead another; and (3) justifiable reliance by the plaintiff to his or her detriment. *See* Restatement (Second) of Torts §§ 525, 551 (1998); 37 Am. Jur. 2d *Fraud and Deceit* § 200 (2001).⁵ The Estate's challenge on appeal focuses primarily on the first element: whether Remed owed the Clan

⁵ In the absence of Palauan law, this Court refers to U.S. common law principles. 1 PNC § 303.

a duty to disclose information concerning his claim to *Meketekt*.

[2, 3] This Court has previously defined a fiduciary relationship as one in which a person is under a duty to act for the benefit of another within the scope of the relationship. *See Esebei v. Sadang*, 13 ROP 79, 82 (2006) (citing Black’s Law Dictionary, 1315 (8th ed. 2004)); *see also Isimang v. Arbedul*, 11 ROP 66, 74 (2004). A fiduciary duty arises as a matter of law in certain formal relationships—such as attorney-client, partnership, or trustee-beneficiary—but it is not confined to these categories. Rather, the duty “extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be exercised by one party over another.” 37 Am. Jur. 2d *Fraud and Deceit* § 32. “For purposes of fraud, a ‘legal duty’ may . . . arise when special confidence is placed in someone thereby giving that person a position of superiority and influence.” *Id.*

[4, 5] Once a fiduciary or confidential relationship is established, “it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction with due regard to the interests of the one reposing confidence, to make full and truthful disclosures of all material facts, and to refrain from abusing such confidence by obtaining any advantage to himself or herself at the expense of the confiding party.” *Id.* § 31; *see also id.* § 207. Even when a relationship does not constitute a formal fiduciary relationship, the duty to speak or disclose information may arise based on the particular circumstances and factors such as the relationship between the parties, the relative knowledge of the parties, the

materiality of the particular fact in question, or the parties’ relative opportunity to ascertain that fact. *See id.* § 204. A fiduciary or one in a confidential relationship “is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.” *Isimang*, 11 ROP at 74 (quoting Restatement (Second) of Torts § 874 (1979)).

Turning to this case, we find no error in the trial court’s conclusion that Adelbai Remed, then Remesechau of Ucheliou Clan, owed a duty to Clan members to disclose information concerning the disposition of *Meketekt*. Before addressing the evidence supporting the court’s finding, we note that counsel for the Estate, in three separate statements during closing argument, conceded that Remed owed the Clan’s members a fiduciary duty under Palauan custom because of his role as Remesechau. (Tr. at 157-58.) On the third occasion, the Court interjected and sought to clarify counsel’s position, asking: “[J]ust so I’m clear. You are not saying that it was his own private land anyway so he didn’t have a fiduciary duty to disclose. You are saying that he did have a fiduciary duty and he did disclose, is that correct?” (*Id.* at 158.) Counsel responded by saying, “Yes, yes. In a way, it is. I mean the Court is right. . . . What we are saying is that it is his land, if he didn’t bear the title Remesechau of the clan, he would claim it without notifying anybody. But because of the fact that he did, then he did have a duty to inform if he changed to apply or to claim for his personal interest or ownership in the land.” (*Id.*) In other words, the Estate’s position at trial was not that Adelbai Remed lacked a duty to disclose his individual claim to *Meketekt*, but rather that he fulfilled this duty by notifying the Clan’s members.

Nonetheless, the trial court's conclusion was appropriate in light of the facts of this case and the established relationship between a chief and the clan he or she represents. The record indicates that a fiduciary relationship existed concerning Remed's management of Clan-owned property, including those lands for which the Clan might have a claim. At a minimum—and whether dubbed a formal “fiduciary” relationship or some other “confidential” one—the circumstances of this case demonstrate that Remed had a duty not to use his position to acquire property to which the Clan has a legitimate claim, while withholding material information about the property's status.

Applying the principles listed above, no one disputes that Remed was Remesechau of Ucheliou Clan, nor is there any debate that he was responsible for managing Clan-owned property in the Clan's best interests. Remed monumented *Meketekt* in 1976, and several witnesses testified that he was typically responsible for filing claims for property claimed by the Clan. The members of Ucheliou Clan entrusted him to perform this role: Rosania Masters stated that filing such claims was Remed's “duty” and “responsibility,” (Tr. at 28); Kerungil Augustine testified that Remed, as chief, had the exclusive responsibility for this task, (*id.* at 47-48); and Otobed Adelbai, the current Remesechau, testified that Remed “was the head of Ucheliou clan so it was his responsibility to claim the lands for the clan,” (*id.* at 51). Even Adelbai Remed himself, in a letter to other members of Ucheliou Clan which was cited in the Estate's brief, asserted his control and dominion over land

management for the Clan. The Estate's brief states:

In that letter, Adelbai Remed told everyone that: I am the head of Ucheliou Clan and Telbadel Lineage with authority based on traditional customs of Palau and Airai. So, no land or property within or on any land owned by the clan can be given away or be sold without my consent. . . . My consent for transfer of lands, mortgage of lands, or sale of lands will be expressed in writing with my signature.

(Appellant's Br. at 17 (citing Estate Exh. K).)

[6] This evidence is more than sufficient to demonstrate that Remesechau Remed owed the Clan a fiduciary duty in managing the Clan's property. The members clearly reposed confidence and trust in Remed to act in their best interest. Remed voluntarily accepted this confidence and exercised authority over Ucheliou Clan property throughout his life. Several witnesses testified that they often deferred to Remed and, on occasion, declined to object to or challenge his authority out of respect. Rosania Masters testified that neither she nor any other member filed a claim to *Meketekt* because they knew of Remed's 1976 claim on the Clan's behalf, and they trusted him to pursue that claim. The Estate also asserts that Ucheliou Clan produced no customary evidence to support its allegation that Remed owed the Clan a fiduciary duty under Palauan custom. But a fiduciary or confidential relationship is a fact-sensitive inquiry turning on the relations between two

individuals at a given point in time for a particular subject. The testimony of several witnesses, the generally accepted role of a chief in Palauan society,⁶ as well as counsel's admission that Remed owed such a duty under Palauan custom, were sufficient to support the trial court's conclusion.

Additional circumstances also support the trial court's conclusion concerning Remed's duty to disclose. Remed had greater access to information than other clan members. *See, e.g.*, 37 Am. Jur. 2d *Fraud and Deceit* § 205. Remed also must have understood that if he did not notify clan members of his individual claim, the monumentation, or the hearing, they would not learn this information and would have no reason to believe that filing a competing claim

⁶ A chief's role in a clan's affairs—particularly concerning claims to disputed property—is evidenced by the Land Court's notice requirements for clans, which mandate that a notice of monumentation, mediation, or hearing be delivered to the clan's senior male and female titleholder. *See* 35 PNC § 1309(b)(3)(c).

The Estate originally named the Land Court as a party to this lawsuit, alleging that it failed to comply with the proper notice provisions, but the trial court resolved this claim on summary judgment. Despite a brief comment in its opening brief that § 1309(b)(3)(C) requires service to *both* the senior male and female titleholders, the Estate does not appear to appeal or contest the trial court's decision regarding the Land Court. The Estate does not name the Land Court as an appellant, nor has the Land Court been served with the Estate's briefs, motions, or other filings in this appeal. We therefore disregard the Estate's assertions concerning the propriety of the Land Court's notice.

was necessary. *See, e.g., id.* § 204. Therefore, given the relationship between Remed and Ucheliou Clan, the reliance and trust placed in Remed to act in the Clan's best interest, the disparity in information related to land claims, and the materiality of that undisclosed information, the trial court did not err in concluding that Remed had a duty to inform the Clan concerning claims to *Meketekt*.

II. Ucheliou Clan's Knowledge of Remed's 1996 Claim

The remainder of the Estate's various arguments relate to the trial court's factual determinations, which, as we stated above, we review for clear error. *Sambal*, 14 ROP at 126. The primary objection is that the evidence did not support the court's finding that other members of Ucheliou Clan were unaware of Remed's 1996 claim to *Meketekt*. For example, the Estate argues that (1) Remed notified the Clan of his individual claim and the Land Court's accompanying notices; (2) the Land Court issued the notice to him in his personal capacity, not as Remesechau, meaning he was not obligated to inform the Clan; (3) Remed treated *Meketekt* as his individual property throughout his life, without objection from Clan members; (4) Remed's 1996 individual claim was a matter of public record, it was advertised on the radio, and certain Clan members may have seen it in the Land Court's file; and (5) Rosania Masters should have been on notice of Remed's individual claim as the result of her presence at the monumentation. Thus, the Estate submits that Ucheliou Clan knew or should have known of Remed's 1996 individual claim.

[7] Each of these arguments was made by the Estate below, and the trial court rejected them. Where there are two competing version of the facts, each supported by admissible evidence, the court's choice between them cannot be clear error. *Id.* at 128. This Court does not reweigh the evidence below, and whether we would reach the same conclusion upon hearing the evidence for the first time is unimportant. *See id.* at 127. Our responsibility on appeal is to ensure that the lower court's factual findings are supported and valid, and we are satisfied that they are in this case.

First, Ucheliou Clan produced testimony that its members had no notice of Remed's 1996 individual claim to *Meketekt* until after the Land Court awarded title to Remed. Rosania Masters testified to this issue at length, stating that she was familiar with Remed's 1976 filing on Ucheliou Clan's behalf and that its members relied on Remed to pursue this claim. She also testified that other Clan members would have opposed Remed's claims if they had known that he was attempting to acquire the property himself. She obtained the 1976 claim before the monumentation and had no reason to know that Remed had filed a competing claim. Importantly, she expressly stated that neither she nor any other member of Ucheliou Clan was notified of the claim, the monumentation, or the hearing. (Tr. at 12.) She did not hear the radio announcement for the claim, nor see the notice posted at the property. (*Id.* at 24.) In addition to Masters's testimony, Kerungil Augustine testified that *Meketekt* is Ucheliou Clan property; that there was no meeting to discuss the land; and that she had no prior knowledge of Remed's 1996 claim. (*Id.* at 36.) Likewise, Otobed Adelbai, the current

Remesechau, testified that he had no knowledge of Remed's 1996 claim, nor any meetings in which clan members supposedly discussed these lands. (*Id.* at 52.)

The Estate certainly produced some evidence that Ucheliou Clan members may have known of Remed's 1996 claim. Ellen Adelbai testified about two meetings at which Remed informed some of the Clan's senior members about his intent to claim the property. (*Id.* at 101-04.) This evidence was undermined, however, by the fact that the attendees of these purported meetings are currently deceased or unavailable, and other members who would typically be involved were omitted from these alleged meetings. Furthermore, Ellen Adelbai acknowledged on cross-examination that several Clan members, including Remed's sister and the highest female titleholder, Swars Remed, notified Adelbai that he could not sell, transfer, or convey certain Clan property, (*id.* at 115-18), and that Remed "knew that . . . Ebas Ngiraloi, Olkeriil Saburo, Swars Remed, Dilubech Misech, Elchesel Matchiau have told him, that any property that is transferred is void, and property you sell is void and you are not to do any[thing] . . . unless you get our permission," (*id.* at 118). Despite the presence of some competing evidence, there was ample support for the trial court's findings.

The remainder of the Estate's arguments fail for the same reason. We have already held that Remed owed a duty to inform the Clan, and we have therefore resolved the Estate's assertion that the Land Court's notice to him was personal, rather than as the Clan's representative. That Remed may have treated the property as individual land throughout his life is inapposite to

whether he was required to notify the Clan of his individual claim and the legal proceedings related thereto. Personal use of Clan-owned land does not put the Clan on notice that the person using it intends to seek private ownership. Even accepting the Estate's averment concerning the land's use, as far as the Clan knew *Meketekt* was Clan-owned land to which Remed had *already* filed a claim on the Clan's behalf. As to the assertion that the claim's status as a public record, as well its advertisement on the radio and on the property, provided constructive notice, the testimony at trial was that no Clan member heard the announcement, saw the posting, or otherwise inquired about the land's status. Again, the trial court accepted the testimony that the Clan's members relied on Remed to manage the Clan's land claims. The mere fact that the claim was a public record is insufficient to demonstrate that the members had notice of it. We therefore reject the Estate's challenges.

III. Fraud Determination

Having determined that (1) Remed was under a duty to inform the Clan concerning claims to *Meketekt*, and (2) the Clan was not otherwise aware of Remed's claim, we find that the trial court did not err by concluding that Remed procured title to *Meketekt* through fraud by concealment. Once again, the elements of such a claim are (1) a fiduciary, confidential, or similar relationship creating a duty to disclose; (2) a failure to disclose a material fact, that is, a fact that defendant knows may justifiably induce the plaintiff to act or refrain from acting, with an intent to mislead; and (3) justifiable reliance by the plaintiff to his or her detriment. *See*

Restatement (Second) of Torts §§ 525, 551; 37 Am. Jur. 2d *Fraud and Deceit* § 200.

Remed owed the Clan a fiduciary or confidential relationship to Ucheliou Clan, at least concerning this claim to *Meketekt*. He failed to disclose his individual claim to that land, as well as information about the Land Court proceeding, and the evidence concerning the contrasting 1976 claim and Remed's intended disposition of the property supported the court's conclusion that his concealment was intentional. The information concealed was material—testimony indicated that the Clan deferred to Remed to manage Ucheliou Clan property and any claims thereto, and had the members known of his claim, they would have filed a competing claim on the Clan's behalf. This conduct was justifiable in that the Clan had no reason to question its reliance on Remed until learning that he had obtained *Meketekt*. The trial court's conclusion was therefore proper.

CONCLUSION

For the foregoing reasons, we AFFIRM.

**EVENCE BECHES and ET
DEVELOPMENT CORPORATION,
Appellants,**

v.

**CHRISTINA SUMOR,
Appellee.**

CIVIL APPEAL NO. 09-025
Civil Action No. 08-225

Supreme Court, Appellate Division
Republic of Palau

Decided: August 17, 2010

[1] **Appeal and Error:** Clear Error

A finding of fraud is a question of fact that we review for clear error. Under this standard, we will not reverse a factual determination unless it lacks evidentiary support such that no reasonable trier of fact could have reached the same conclusion.

[2] **Appeal and Error:** Clear Error

An appellate court's role on clear error review is not to re-weigh the evidence produced below, and any conclusion that this Court might have reached upon hearing the evidence for the first time is irrelevant. Where admissible evidence supports competing versions of the facts, the trial court's choice between them is not clear error.

[3] **Appeal and Error:** Briefs

Rule 28(a) requires a party to support asserted facts, including proper citations to the record below. The rule is clear and unambiguous,

and failure to comply permits the Court to disregard any factual arguments unsupported by cites to the record.

[4] **Property:** Deeds; **Torts:** Fraud

Where a deed is procured or induced by fraud, the fact that a deed otherwise complies with relevant legal formalities is immaterial. Fraud inducing one to execute a deed relates back to the inception of the deed and vitiates the entire transaction.

[5] **Torts:** Fraud

To prove fraud, a plaintiff must establish that defendant (1) made a fraudulent misrepresentation of a fact, opinion, or law, (2) with the purpose of inducing the plaintiff to act upon the representation, (3) that the plaintiff justifiably relied on the representation, and (4) was damaged as a result of that reliance.

[6] **Torts:** Fraud

A person's representation of his intention to do an act in the future may be fraudulent if he does not possess that intention at the time he declares it.

Counsel for Appellant: Carlos H. Salii

Counsel for Appellee: William L. Ridpath

BEFORE: LOURDES F. MATERNE,
Associate Justice; ALEXANDRA F.
FOSTER, Associate Justice; RICHARD H.
BENSON, Part-time Associate Justice.

Appeal from the Trial Division, Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Christina Sumor filed this action seeking to void her transfers of two properties to ET Development Corporation (“ET Corp.”), an entity she formed with Appellant, Evence Beches. Sumor alleged that Beches fraudulently induced her to convey her lands by falsely stating that he would also contribute certain property to the enterprise, to be held and managed for the lasting benefit of both parties and their descendants. The trial court found fraud, concluding that Beches never intended to convey any property to ET Corp. Rather, he sought control over Sumor’s land with the intent to profit unjustly therefrom. Beches now appeals. For the following reasons, we find no error in the trial court’s decision.

BACKGROUND

Christina Sumor and Evence Beches are first cousins, and they enjoyed a close relationship until this dispute arose. Their families originate from Kayangel, a state Beches represented in the House of Delegates from 1988 until 2000. Sumor, on the other hand, does not read English or Palauan, and she speaks only Palauan. Christina married Sumor Albis,¹ who had been previously married and had children with his first wife.

¹ For the remainder of this opinion, the Court will refer to each party by his or her last name. Thus, we will refer to Christina Sumor as “Sumor,” and her husband, Sumor Albis, as “Albis.”

Sumor and Albis lived in Echang, and Sumor stated that she relied on her husband to handle most business or financial decisions, calling him her “eyes, ears and mouth.” Beches remained close to the couple, stating that Albis was a man of integrity and was like an older brother.

Albis owned the two lands disputed in this case, both located in Ngerkebesang, Koror: *Ked*, a large hillside tract, and *Echol*, a smaller oceanfront property. At some time prior to this dispute, Albis conveyed *Ked* and *Echol* to Sumor to ensure that the lands passed to his children with Sumor, rather than those of his previous marriage.² Albis passed away in 2005.

In 1997, Beches and Sumor, with Albis’s assistance, agreed to form a corporation for the ownership and management of several properties. The circumstances surrounding the birth of ET Corp. are disputed and essential to this case, and we therefore describe them in detail.

ET Corp. was incorporated on July 11, 1997. The Articles of Incorporation name Evence Beches as president and Christina Sumor as vice president. They further provide that the company’s initial capitalization is \$50,000, comprising 1,000 shares of authorized stock at \$50.00 per share. Beches, his wife Emy, and Albis executed a stock

² According to Sumor’s counsel, Albis had taken similar actions to ensure that land in Sonsorol passed to the children of his first marriage.

affidavit on the same day.³ This document states that Beches owned 550 shares of ET Corp., whereas Sumor owned 450 shares. The affidavit provides that the subscription price for these shares “consists of cash and real property with a total value of \$50,000.00.” The parties never adequately explained why they chose to capitalize ET Corp. with a value of \$50,000. The affidavit then outlines the capital contributed by each shareholder, stating that Beches contributed “\$27,500.00 cash/land,” while Sumor contributed “\$22,500.00 land.” The affidavit is signed and notarized.

On the same day, July 11, 1997, Christina Sumor signed a warranty deed conveying *Ked* to ET Corp. According to the deed, the market value of *Ked* was \$38,000. In exchange for her land, she received 450 shares of ET Corp., valued at \$22,500. The deed attributes the remaining \$15,500 as consideration for 310 shares granted to Beches. The deed itself is ambiguous regarding the basis for Beches’s shares, saying only that Sumor conveyed property as payment for her shares and that she acknowledged certain payments, benefits, and

privileges from Beches. Neither party suggested that the valuation of *Ked* had any relation to its actual market value. Instead, Beches claimed that it was approximately three times bigger than *Echol*—which, as described below, the parties valued at \$12,000 based on Sumor’s alleged debt to Beches—so Beches tripled that amount to approximate *Echol*’s value (\$36,000) and rounded up to make the total of the two lands equal an even \$50,000.

Approximately eight months later, on March 13, 1998, Christina Sumor conveyed the second land, *Echol*, to ET Corp. The warranty deed states that *Echol* had a market value of \$12,000, and it again provides that the conveyance is in consideration for “payments made by Evence Beches for the above described lots, together with the benefits and privileges, the receipt of which Christina Sumor acknowledges.” Unlike the prior deed, this document is silent regarding any exchange for or allotment of ET Corp. stock. It appears that the parties attributed the entire contribution of *Echol* to Beches, meaning he acquired an additional 240 shares of ET Corp., valued at \$12,000.

As a result of these transactions Beches obtained 550 shares of ET Corp., the same amount listed in the original stock affidavit, while contributing neither money nor land. This gave Beches a majority and controlling interest in ET Corp., even though Sumor was the only one who contributed assets to the enterprise. The initial contributions, however, conflict with the stock affidavit’s statement that Beches contributed \$27,500 in “cash/land” as of July 11, 1997. To explain, Beches claimed that he provided financial assistance to Sumor and Albis over

³ According to section 2.5 of the Palau Corporate Regulations, a corporation must file an affidavit sworn to under penalty of perjury by the corporation’s president, secretary, and treasurer, as named in the articles of incorporation. The affidavit sets forth the number of authorized shares, their par value, the subscribers for the shares, the number of shares outstanding, the subscription price paid by each subscriber, and the amount of capital paid in by each subscriber. See ROP Corporate Regulations § 2.5. Christina Sumor was named as the vice president of ET Corp., and she was therefore not required to sign this affidavit.

the course of several years, including a recent payment of \$8,000 to help them pay a loan at Palau Bank, and an additional \$4,000 for other purposes. Beches averred that *Echol* was collateral for Sumor's \$8,000 debt at Palau Bank; that his assistance prevented foreclosure on the property; and that he was therefore *Echol's* "de facto" owner.⁴ Consequently, he claimed that the 240 shares he received for Sumor's contribution of *Echol* was repayment for the \$12,000 he previously gave her. Rather than credit that amount as a *portion* of *Echol's* value, Beches simply established it as the property's *entire* value. As for the \$15,500 of shares Beches obtained from Sumor's conveyance of *Ked*, he asserted that these were a repayment for his help in building a house in Kayangel for Sumor and Albis. Neither of these transactions were in writing or well-supported, and there was no evidence that Beches and Sumor ever entered into an actual agreement or exchange whereby Beches's alleged financial assistance would be repaid using Sumor's property. In the end, although Beches conveyed no land to ET Corp., his shares totaled \$27,500.

Christina Sumor expressed a much different version of the events leading up to ET Corp.'s incorporation. She denied any agreement permitting Beches to take shares of ET Corp. to repay money he previously

provided to Sumor and Albis, and she further disputed the extent of Beches's financial assistance. She stated that she and Beches agreed that she would convey *Ked* and *Echol* to ET Corp., while Beches would convey three lands in Kayangel: *Uchelangas*, *Kedesau*, and *Ngerbelas*. The two would then manage the properties as ET Corp.'s directors and officers in hopes of attaining the maximum benefit from the land and thereby providing for their children. Sumor kept her part of the bargain, conveying *Ked* to ET Corp. on July 11, 1997. As for *Echol*, she stated that Beches asked her months later to come to Koror from Kayangel to sign some documents for ET Corp. Despite uncertainty regarding the nature of the documents, she signed the warranty deed conveying *Echol* on March 13, 1998.

Little occurred concerning ET Corp. or its properties for several years. Beches continued to serve as the corporation's president. In 2004, he filed an Annual Report with the Attorney General's Office for the year 2003. In it Beches reported that ET Corp. owned property in Kayangel worth \$65,000. He also stated that ET Corp. had rental property in Kayangel, but he wrote "indefinite" regarding the value and term of the lease. Finally, Beches listed the value of ET Corp.'s property in Ngerkebesang as \$800,000, bringing the corporation's total assets to a staggering \$865,000. A marked discrepancy exists between the value of the Ngerkebesang property in 1998 and in 2003, and no evidence indicated that ET Corp. had ever owned or leased property in Kayangel. Beches executed the Annual Report before a notary public and under penalty of perjury.

According to Sumor, at some point in 2004 or 2005, her daughter told her that

⁴ Beches did not enter into any formal relationship with Palau Bank. He was not a cosigner on the loan from the Bank to Sumor and Albis, nor was any documentary evidence produced at trial that he otherwise acquired any interest, as security or otherwise, in *Echol*, or that his contribution was anything more than a gift. Beches claimed that it was a loan, but no document supports this contention.

Beches had not conveyed any property to ET Corp. and that the entity's sole assets were the Ngerkebesang properties *Ked* and *Echol*. This upset her greatly, and her relationship with Beches deteriorated rapidly. Sumor attempted to recover the properties from Beches out of court, with no success.

Beches, however, continued to operate as the head of the corporation. In 2008, Palau Ocean Resort, Inc. expressed interest in leasing a number of properties surrounding and including *Echol*. Separate counsel for Beches and Sumor participated in the initial negotiations for such a lease, despite the parties' internal dispute over the land. On April 18, 2008, counsel for both parties signed a memorandum of understanding, tentatively approving certain proposed lease terms. From this point forward, however, Beches acted alone on ET Corp.'s behalf, without board or shareholder approval. He executed an initial lease for *Echol*, payment for which was denied due to Palau Ocean Resort's lack of funds. Beches thereafter negotiated a second lease agreement for the substantially reduced rental rate of \$200,000—which he signed on the corporation's behalf *after* Sumor filed this suit. Beches received a check on ET Corp.'s behalf and, despite disbursing \$33,300 to himself and his wife, he gave Sumor only \$1,000.⁵ There was no evidence at trial that ET Corp.'s board of directors or shareholders ever approved or ratified the lease, and Sumor even claimed she never heard of or saw the final agreement.

⁵ The remaining proceeds of the lease *Echol* are in a bank account owned by ET Corp. On September 10, 2008, the parties to this case filed a stipulation stating that Beches would not make any further withdrawal from the account.

Based on the above events, Sumor sued Beches for fraud, forgery,⁶ failure of consideration, and breach of contract. This matter went to trial on April 8 and 9, 2009. The trial court first found that Beches induced Sumor to convey her properties through fraud.⁷ The court credited Sumor's testimony that Beches promised to convey land in Kayangel to ET Corp., and it found that Beches never intended to do any such thing. In addition to Sumor's testimony, the court cited statements by her daughter, Martul Scott, the stock affidavit's statement that Beches contributed "cash/land" (suggesting that Beches had agreed to convey property), and the 2003 Annual Report in which Beches swore that ET Corp. owned property in Kayangel worth \$65,000. The court concluded that Beches made his misrepresentations to induce Sumor to convey her lands to a corporation he could then control, seeking to benefit from commercial development of the properties. It also found that Sumor's reliance on Beches—a close and well-educated family friend—was justifiable, and that the fraud damaged Sumor because she relinquished her properties in exchange for a minority interest in ET Corp., whose only assets were her own land. The court went on to conclude that Beches's misrepresentations convinced Sumor to convey her land for far less than it was actually worth. Beches valued the properties

⁶ Sumor later withdrew her forgery allegation.

⁷ Before reaching the substantive claims, the trial court held that Sumor's action was not barred by the statute of limitation. Beches does not appeal this determination, and we do not discuss it further.

based solely on the debts he believed Sumor owed him, rather than their fair market value. Primary evidence of this finding was the \$200,000 lease agreement later obtained for renting *Echol* (which was a discounted price after Palau Ocean Resort's check failed to clear), in addition to Beches's sworn statement that the Koror land was worth \$800,000. The trial court went on to find that the amounts of money that Beches claimed to have paid to Sumor and Albis were not credible. The court questioned Beches about these payments and gave him the chance to support them with documentary evidence, but Beches was unable to do so.

The trial court then found a breach of contract based on the same findings. It determined that an enforceable agreement existed between Beches and Sumor, whereby each agreed to convey certain properties to ET Corp. Beches failed to fulfill his side of the bargain, to Sumor's detriment.

To remedy these wrongs, the trial court first declared the warranty deed to *Ked* void and rescinded, meaning title returned to Sumor in her individual capacity. The court considered *Echol* a more difficult proposition because it had already been leased to a third party. Rather than void the warranty deed conveying the land from Sumor to ET Corp., the trial court sought to give Sumor exclusive control over *Echol* and any accompanying proceeds. It accomplished this by removing Beches as an officer of ET Corp. and voiding his shares and ownership interest in the corporation. Finally, the court considered Beches's conduct sufficiently egregious as to warrant punitive damages in the amount of

\$40,000.⁸ Beches filed this appeal, and we consider his arguments below.

ANALYSIS

Beches alleges that the trial court made numerous mistakes below. Among them are that the warranty deeds conveying *Ked* and *Echol* complied with all relevant laws and must be recognized; that the trial court disregarded the extent of Beches's financial support to Sumor; that the method of valuing the properties was legitimately related to the amount of debt Sumor owed Beches; that the trial court ignored Sumor's contradictory testimony concerning her execution of certain documents; that the court erred by crediting Sumor's allegation that Beches agreed to convey lands in Kayangel; and, finally, that all of these circumstances compel a finding by this Court that the trial court clearly erred. Reading through the conclusory arguments in Beches's brief,⁹ it appears that he is ultimately

⁸ Beches does not appeal the trial court's remedies or the punitive damages award. His appeal focuses solely on the trial court's determination that the circumstances surrounding ET Corp.'s incorporation constituted fraud. This Court will confine its opinion accordingly.

⁹ The Court could not help but notice that the bulk of Beches's appellate brief corresponds nearly word-for-word with his written closing argument filed with the trial court. The Court has no quarrel with efficiency and utilizing a wheel already invented, and, because the Court presumes that Beches's counsel did not bill his client anew, it would commend counsel for saving his client additional fees. But to adopt wholesale the same legal arguments made below indicates that counsel did not tailor the brief to the appropriate issues on appeal, and the result is a smattering of

challenging the trial court's factual determination that Beches committed fraud.

[1, 2] A finding of fraud is a question of fact that we review for clear error. *See Arbedul v. Isimang*, 7 ROP Intrm. 200, 202 (1999); *see also* 37 Am. Jur. 2d *Fraud and Deceit* § 28 (2001). Under this standard, we will not reverse a factual determination unless it lacks evidentiary support “such that no reasonable trier of fact could have reached the same conclusion.” *Sambal v. Ngiramolau*, 14 ROP 125, 126 (2007). An appellate court's role is not to re-weigh the evidence produced below, and any conclusion that this Court might have reached upon hearing the evidence for the first time is irrelevant. *Id.* at 127. Where admissible evidence supports competing versions of the facts, the trial court's choice between them is not clear error. *Id.* at 128.

I. Beches's Statement of Facts

[3] Before reaching the merits of Beches's appeal, we first address the statement of facts in his brief. With a single exception (see Appellant's Br. at 10), Beches failed to include a pinpoint citation to the record in support of any of his asserted facts. He occasionally refers to documentary evidence, but the lack of citation to the witnesses' testimony—especially where there is no transcript of the proceedings—is inappropriate and contrary to Palau's Rules of Appellate Procedure. Rule 28(e) of the Rules of Appellate Procedure states:

factual arguments which are not all pertinent to the issues before this Court. At minimum, it indicates that Beches simply disagrees with the trial court's resolution of facts, rather than asserting any error of law.

References to the Record.

References to evidence must be followed by a pinpoint citation to the page, transcript line, or recording time in the record. Only clear abbreviations may be used. Any pinpoint citation to an audio recording must include the day, hour, minute, and second the testimony was offered. Factual arguments or references to the record not supported by such an adequately precise pinpoint citation may not be considered by the Appellate Division.

This rule is clear and unambiguous, and it permits this Court to disregard Beches's unsupported factual arguments—which is nearly all them. The Court finds this recourse appropriate in light of the violation of Rule 28(e), and it will not consider Beches's specific factual arguments. The Court therefore confines the remainder of its opinion reviewing the trial court's decision for clear error, that is, whether its findings and conclusions were adequately supported by the evidence. We admonish counsel in the future to cite and support all factual assertions or risk this Court disregarding them.

II. Validity of the Warranty Deed

[4] One additional argument requires brief discussion before turning to the trial court's fraud determination. Beches argues that the warranty deeds for *Ked* and *Echol* “were duly executed in compliance with the law,” and thus the “trial court has no authority to void them.” (Appellant's Br. at 15.) This

argument—as even a modicum of legal research would have revealed—is an incorrect statement of law. The trial court found that the warranty deeds in question were induced by Beches’s fraud; therefore whether the deeds themselves comply with legal formalities is immaterial. *See* 23 Am. Jur. 2d *Deeds* § 169 (2002) (stating that fraud inducing one to execute a deed “relates back to the inception of the deed and vitiates the entire transaction”); *see also* 37 Am. Jur. 2d *Fraud and Deceit* §§ 2, 358. Beches’s main contention is that he did not perpetrate a fraud, and it is to that issue that we now turn.

III. Fraud Determination

[5, 6] The trial court concluded that Beches induced Sumor to convey her properties through fraud. To prove fraud, a plaintiff must establish that the defendant (1) made a fraudulent misrepresentation of a fact, opinion, or law, (2) with the purpose of inducing the plaintiff to act upon the representation, (3) that the plaintiff justifiably relied on the representation, and (4) was damaged as a result of that reliance. *Arbedul*, 7 ROP Intrm. at 201 (citing Restatement (Second) of Torts § 525); *see also* *Isimang v. Arbedul*, 11 ROP 66, 74 (2004); *Republic of Palau v. Reklai*, 11 ROP 18, 22 (2004). A representation may be “fraudulent” if it is known to the maker to be false. *Arbedul*, 7 ROP Intrm. at 201. A person’s representation of his own intention to do an act may be fraudulent if he does not possess that intention at the time he declares it. *See* Restatement (Second) of Torts § 530(1) (1977); 37 Am. Jur. 2d *Fraud and Deceit* § 90. This is particularly true where one misrepresents facts inducing another to enter into an agreement. *See id.* § 2 (defining fraud in the inducement).

This Court finds no error in the trial court’s conclusion that Sumor met all four elements.¹⁰

A. Fraudulent Misrepresentation of Fact

The trial court found that Beches fraudulently stated that he would convey certain lands in Kayangel to ET Corp. in exchange for Sumor’s conveyance of her lands *Ked* and *Echol*. We therefore consider whether the evidence before the trial court supported this conclusion.

First, Sumor testified that Beches promised to convey Kayangel property to ET Corp. so that the entity could hold their lands for joint management and mutual benefit. She stated that at that time, the two were in a close familial relationship. Sumor contested Beches’s assertion that they agreed to exchange shares of ET Corp. as repayment for any debt she may have owed Beches. She

¹⁰ Neither party raised the burden of proving fraud, and the law in Palau on this point is unclear. *See Arbedul*, 7 ROP Intrm. at 201 (noting a disparity of opinion in U.S. common law and declining to determine the issue, which neither party raised on appeal). One Palauan trial court has held that a plaintiff must prove fraud by “clear and convincing evidence,” *see Foster v. Bucket Dredger S/S “Digger One,”* 7 ROP Intrm. 234, 241 n.12 (Tr. Div. 1997), although the decision is not binding on this Court. In this case, the trial court found that Sumor established fraud by “clear and convincing evidence,” meaning that it deemed the proof sufficient even under the greater standard. Because we find no error in the trial court’s decision under the stricter standard, we need not address the appropriate burden of proof in this case, nor is it prudent to do so where the parties neither raised nor briefed it.

stated that there was no such quid pro quo, and the only reason she conveyed her properties was that Beches made a similar promise. Sumor apparently expressed her version of the parties' agreement to her daughter, Martul Scott. Scott later attempted to acquire information about *Echol* and ET Corp. from Beches, but he would not oblige. Scott went to the Attorney General's office to obtain corporate documents for ET Corp., which revealed that the company's only assets were Sumor's lands *Ked* and *Echol*. This upset Sumor greatly, and she attempted to recover the two properties. This reaction is further evidence that Beches's version of the agreement did not accord with Sumor's intentions at the time they formed ET Corp.

Beches asserts that Sumor was an interested witness, in that she knew at the time she filed her complaint in this matter that *Echol* was to be leased for a substantial sum of money. He also claims that certain testimony was contradictory. These matters concern the credibility of the witnesses, which is solely the province of the trial judge. The trial court in this case determined that Sumor was a more credible witness than Beches, and it therefore accepted her version of the facts. This is the trial court's proper role as a finder of fact, and we find no error.

Second, and even more convincing than Sumor's own testimony, the documentary evidence suggested that Beches promised to convey additional lands to ET Corp. As the trial court noted, the stock affidavit, which was filed on July 11, 1997, stated that Beches received 550 shares for a contribution of "cash/land" worth \$27,500. On that date, he had contributed neither cash nor land. And, at that point, Sumor had not yet conveyed *Echol*,

making the basis for Beches's 550 shares even more tenuous. Beches claimed that his cash contributions were actually a portion of the value of Sumor's land, to which he believed he was entitled as repayment for his previous financial support to Sumor and Albis. The inclusion of "land" next to his name, however, supports Sumor's allegation that he expressed an intention to convey land to ET Corp. The most probative document, however, is ET Corp.'s 2003 Annual Report. Beches swore to the report on behalf of the company, and he stated that ET Corp. owned property in Kayangel worth \$65,000. He also indicated that ET Corp. had rental property in Kayangel, although the value and term is listed as "indefinite." Both of these assertions are blatantly false, and Beches could not present a convincing reason for including this misinformation. Whether he was attempting to conceal the actual status of ET Corp.'s assets from Sumor is uncertain, but the false report is at least probative evidence that Beches promised to contribute lands to ET Corp.

Additional evidence supporting the trial court's determination that Beches promised to convey lands in Kayangel to ET Corp. without an intent to actually do so include: Beches's inability to substantiate his allegations that he and Sumor agreed to offset her debt by crediting him with part of her contribution of *Echol* and *Ked*; the drastic undervaluation of *Echol*, evidenced primarily by the subsequent lease for \$200,000 and Beches's claim in the 2003 Annual Report that *Ked* and *Echol* were worth \$800,000; Beches's acknowledgment that he valued *Echol* at \$12,000 based solely on the amount he felt Sumor owed him, rather than on the fair market value; the fact that Beches became

the majority, controlling shareholder of ET Corp. despite contributing almost nothing to the enterprise; and his continued management of ET Corp. without regard to corporate formalities or notifying Sumor of his actions on ET Corp.'s behalf, even after Sumor filed this suit. As we stated above, if admissible evidence supports competing versions of the facts, the trial court is obligated to select between them, and it cannot clearly err in doing so. That is precisely the case here—there is evidence in the record to support the trial court's conclusion that Beches told Sumor that he would contribute certain lands to ET Corp. while lacking any intention of actually doing so.

B. Purpose of Inducing Sumor's Action

The trial court did not err in concluding that Beches misstated his intent to contribute property to ET Corp. to induce Sumor to act. Sumor testified that the only reason she agreed to transfer *Ked* and *Echol* is that Beches was also going to contribute property, and he would then help manage them to attain the greatest benefit for both parties and their children. The circumstances surrounding ET Corp.'s formation—resulting in Beches's controlling interest despite his failure to directly contribute property or money to the corporation—suggest that he devised a plan by which he would gain control of two valuable properties without any financial or capital outlay on his part. This evidence was sufficient to support the trial court's conclusion.

C. Justifiable Reliance

The trial court also did not err in finding Sumor's reliance on Beches's statement to be justifiable. The court cited their close family relationship, as well as the disparity in education and business sophistication. Sumor testified that Beches simply presented her with several papers for signature on a number of occasions, and there was some dispute below about the extent to which these documents were translated into Palauan. Even if Sumor was aware of the contents of the documents, as far as she was concerned Beches was also obligated to convey property to ET Corp. The stock affidavit and the Annual Report both indicated that this was the case. The trial court's finding on this issue is another finding of fact that we cannot conclude was clearly erroneous.

D. Damages

As the result of Beches's misstatement, Sumor ceded full ownership of *Ked* and *Echol* to ET Corp. In exchange, she received a mere 45% interest in that company, whose *only* assets were the lands previously belonging solely to her. What is more, even if the court accepted Beches's version of the events, Sumor conveyed her property in exchange for a value far less than it was really worth and essentially exchanged a property worth at least \$200,000 for relief from a \$12,000 debt. Although we are not ruling on the conscionability of such an agreement, it demonstrates the extent to which Sumor was harmed. Further, even had Sumor knowingly agreed to receive a mere minority interest in ET Corp., the evidence indicates that her expectation based on Beches's statements was that the corporation would own far more property than it actually did, making her 45%

interest much more valuable. The trial court did not err by finding that Sumor was damaged by Beches's fraud.

CONCLUSION

Beches lodges several challenges against the trial court's factual findings. We have not outlined each and every allegation here, but we have considered them all. In the end, the evidence before the trial court was sufficient to support its conclusion that Beches committed fraud. Beches sought to benefit from Sumor's property without capital contributions of his own, and he fraudulently induced her to convey *Ked* and *Echol* to ET Corp. for well below its fair market value. For these reasons, we AFFIRM.

**AIMELIIK STATE PUBLIC LANDS
AUTHORITY,
Appellant,**

v.

**KAZUYUKI RENGCHOL, through his
attorney-in-fact McVey Kazuyuki,
Appellee.**

CIVIL APPEAL NO. 09-029
Civil Action No. 09-001

Supreme Court, Appellate Division
Republic of Palau

Decided: August 20, 2010

[1] **Return of Public Lands:** Nature of Claim

A claim to superior title than a governmental entity claiming ownership of land is distinct from a return of public lands claim and thus need not abide by the return of public lands statutory deadline.

[2] **Land Commission/LCHO/Land Court:** Determinations of Ownership

Procedural deficiencies of an unappealed determination of ownership may be asserted on collateral attack.

[3] **Appeal and Error:** Preserving Issues

Arguments should not be raised for the first time on appeal.

[4] **Appeal and Error:** Preserving Issues

The Appellate Division only decides issues properly presented to it, including citation to relevant legal authority. Litigants may not, without proper support, recite a laundry list of alleged defects in a lower court’s opinion and leave it to the Appellate Division to undertake the research.

Counsel for Appellant: Moses Y. Uludong

Counsel for Appellee: Susan Kenney-Pfalzer

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Aimeliik State Public Lands Authority (“AIMSPLA”) appeals the Trial Division’s November 2, 2009 decision ordering the Land Court to issue Kazuyuki Rengchol and his siblings a new certificate of title to the land *Teruong*. The Trial Division’s decision found errors in the original determination of ownership of the land *Teruong* which eventually led to the issuance of a certificate of title reflecting an award of land to Rengchol and his siblings that was markedly smaller than the land they had sought to claim at an unopposed hearing in 1992. Finding AIMSPLA’s appellate arguments unconvincing, we affirm the decision of the Trial Division.

BACKGROUND

On April 15, 1992, Kazuyuki Rengchol (“Rengchol”) filed an Application for Land Registration on behalf of himself and his siblings (as children of Ngirur Rengchol) for the land known as *Teruong* with the Land Claims Hearing Office (“LCHO”). *Teruong* is located in Ngerkeai Hamlet in Aimeliik State. Rengchol walked the boundaries of *Teruong* with Aisamerael Samsel (the Land Registration Officer), Tadashi Sakuma (the Executive Director of Palau Public Lands Authority), and Luther Iyar (the Palau Public Lands Authority Realty Technician). Samsel sketched the boundaries of the land during that walk.

For some reason, the LCHO assigned a temporary lot number (143-10070) to Rengchol’s claim that corresponded to a completely different (although neighboring) parcel of land than the area he had monumented with Samsel and the other members of the Palau Public Lands Authority. No one else claimed ownership of *Teruong* and, on May 7, 1992, the LCHO held an uncontested hearing on Rengchol’s claim. Later that same day, the LCHO issued a Determination of Ownership for *Teruong* using the designation of Lot No. 143-10070 to Rengchol and his siblings. The Determination of Ownership did not state the area of the land or give any further description. At some point after the hearing but before the determination was issued, Samsel informed the hearing officers that the land discussed at the hearing (Lot No. 143-10070) was not the land that Rengchol was actually claiming—it was not the same land that he had walked and sketched with Rengchol. Despite this information, the determination issued.

The Determination of Ownership issued to Rengchol and his siblings referenced only the name *Teruong* and the Lot No. 143-10070. The determination of a neighboring parcel awarded the land of *Ngilukeu* (then designated as Lot No. 143-10071) to the family of Oiterong and Sariang. In 2003, members of Oiterong and Sariang's family pointed out to Rengchol and his siblings that the LCHO had switched the lot numbers on their determinations of ownership. An affidavit, signed by representatives of both families, was submitted to the Land Court stating that Oiterong and Sariang's family's land was *Ngilukeu*, Lot No. 143-10070, measuring 20,767 square meters and that Rengchol and his siblings' land was *Teruong*, Lot No. 143-10071, measuring 70,000 square meters. The two families requested that the Land Court issue correct certificates of title to each land.

The Land Court issued a Certificate of Title for *Teruong* to Rengchol and his siblings on July 13, 2004 listing the area of the land as only 14,181 square meters.¹ Rengchol, claiming that *Teruong* is actually a much larger tract of land (in accord with the 1992 monumentation), filed suit on January 6, 2009, for declaratory judgment and to quiet title.² The majority of the land claimed by

Rengchol was held as public land by AIMSPLA, but some portions had, in the intervening years, been adjudicated to private parties. After hearing the evidence at trial, the Trial Division found in Rengchol's favor, and, in a November 2, 2009 Decision and Judgment, declared a sizeable parcel of land to be the property of Rengchol and his siblings and ordered the preparation of a new certificate of title and map. *See* Civ. No. 09-001, Decision at 10 (Tr. Div. Nov. 2, 2009). Because Rengchol's action below proceeded only against AIMSPLA, the Trial Division only awarded land claimed by AIMSPLA to Rengchol—it did not award any land adjudicated to private individuals to Rengchol even if it fell within the boundaries of *Teruong*. *See id.* AIMSPLA appealed the Trial Division's decision, claiming that Rengchol has no legal rights to the land.

STANDARD OF REVIEW

We show deference to the Trial Division, as first-hand finder of fact, and will not disturb its factual findings unless we perceive a clear error. *See, e.g., Nakamura v. Uchelbang Clan*, 15 ROP 55, 57 (2008). We are not similarly disadvantaged in analyzing conclusions of law and therefore review such conclusions *de novo*. *See id.*

DISCUSSION

¹ A note in the Land Court file indicates that the award was limited by the amount of land that had previously been determined. Subsequently, in late 2005, Rengchol and his siblings sold 2,000 square meters of their land and thus a new certificate of title was issued on September 13, 2006, this time listing the size of their land as 12,181 square meters.

² Rengchol filed an Amended Complaint on January 28, 2009. The original complaint named

only Aimeliik State as a defendant, but AIMSPLA was subsequently joined upon Rengchol's motion. By stipulation, Aimeliik State was dismissed as a defendant before trial. *See* Civ. No. 09-001, Order Dismissing Pl.'s Compl. Against Def. Aimeliik State (Tr. Div. May 14, 2009).

AIMSPLA sets forth four arguments on appeal: (1) the time limitation of 35 PNC § 1304 bars Rengchol's claim to the land; (2) the unappealed 1992 Determination of Ownership bars Rengchol's claim to the land; (3) the award of the land to Rengchol impermissibly interferes with previous adjudications of portions of the land to private parties; and (4) Rengchol's claim to the land is barred by the doctrines of estoppel, waiver, and laches. We address each argument in turn.

I. The Preclusive Effect of 35 PNC § 1304 on Rengchol's Claim

[1] Claims under the "return of public lands" provision of the Palau Constitution and its enabling legislation are subject to a January 1, 1989 filing deadline. *See* 35 PNC § 1304(b)(2); *see also* ROP Const. art. XIII, § 10. This deadline is applicable only to land claims brought under 35 PNC § 1304(b) for the return of public land that was acquired "by previous occupying powers or their nationals prior to January 1, 1981, through force, coercion, fraud, or without just compensation or adequate consideration." 35 PNC § 1304(b)(1). Rengchol claims no land under this section; therefore the January 1, 1989 deadline is inapplicable. *See Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185 (2002) ("In *Carlos [v. Ngarchelong State Pub. Lands Auth.]*, 8 ROP Intrm. 270 (2001)], we distinguished between a claim for the return of public lands, which is governed by the provisions of 35 PNC § 1304 and which must have been filed no later than 1989, and a quiet title claim asserting that a private claimant has superior title to a piece of property than the governmental entity claiming ownership of it, which is not subject

to the same limitations period."); *Carlos v. Ngarchelong State Pub. Lands Auth.*, 8 ROP Intrm. 270, 272 (2001) ("Although Appellant did not file an Article XIII claim, he has not waived his right to assert he has title that is superior to the government.").

II. The Preclusive Effect of the 1992 Determination of Ownership on Rengchol's Claim

AIMSPLA argues that Rengchol and his siblings are bound by the 1992 Determination of Ownership—even if it was erroneous—because they did not appeal it. AIMSPLA cites three cases to support the proposition that an unappealed determination of ownership is final and conclusive as a matter of law. After considering these cases singularly and in combination, we are not persuaded to find in AIMSPLA's favor. We briefly discuss the circumstances of each cited decision.

In *Nakamura v. Isechal*, 10 ROP 134 (2003), the appellant sought to quiet title to a parcel of land. The appellant had not claimed the land at the formal hearing (allegedly because he had not received notice of the hearing) and had not appealed the Land Commission's determination of ownership. *See* 10 ROP at 135-36. Upon finding no procedural deficiency with the Land Commission's hearing or notice, we held that the appellant was bound by the unappealed determination of ownership. *See id.* at 136-38.

In *Idid Clan v. Koror State Pub. Lands Auth.*, 9 ROP 12, 13 (2001), the claimants to the land at the LCHO hearing included Idid Clan, Mariano Tellei, and Koror State Public

Lands Authority (“KSPLA”). After the LCHO awarded the land to KSPLA, only Idid Clan appealed the decision to the Trial Division. *See* 9 ROP at 13. The Trial Division vacated the determination and remanded the case back to the LCHO on the grounds that one of the LCHO panel members at the original hearing had a conflict of interest. *See id.* By order of the Land Court, only KSPLA and Idid Clan received notice of the re-hearing. *See id.* The Land Court re-awarded the land to KSPLA and Idid Clan again appealed. *See id.* Tellei motioned to intervene in KSPLA’s appeal (which we construed as a request to file an untimely appeal). *See id.* Tellei argued that he did not receive notice of the re-hearing and therefore was deprived of his right to state his claim. *See id.* We held that it was not erroneous for Tellei to be un-noticed and excluded from the re-hearing because reversals on appeal generally do not inure to the benefit of non-appealing parties. *See id.* at 13-14. In so ruling, we stated that claimants in land registration proceedings who do not appeal are bound by unappealed determinations. *See id.* at 14.

Lastly, AIMSPLA cites *Ngatpang State v. Amboi*, 7 ROP Intrm. 12 (1998), for support. After World War II, the residents of Ngatpang agreed not to file individual claims for their lands taken by the Japanese and instead agreed to have the land awarded at large to Ngatpang municipality and then split it up themselves. *See* 7 ROP Intrm. at 13. Ngatpang municipality was awarded the land through a 1959 Determination of Ownership. *See id.* In 1975, the Ngaimis (the traditional council of chiefs of Ngatpang) decided that it was time to re-distribute the land and hearings were held in 1982 to determine the individual

owners of the land. *See id.* After some waffling, the Ngaimis and the governor of Ngatpang State wrote a letter to the LCHO revoking Ngatpang’s claim to the land and asking the LCHO to distribute the land to individuals. *See id.* at 13-14. The LCHO determined that it had sufficient evidence from the 1982 hearings and commenced in determining the ownership of the land. *See id.* at 14. The LCHO issued determinations of ownership for 19 parcels of land in Ngatpang in 1989. *See id.* In 1993 the new governor of Ngatpang apparently disagreed with the previous governor’s decision to distribute the land to individuals and filed a lawsuit to have the determinations set aside, arguing that the 1959 Determination of Ownership conclusively awarded the land to the predecessor of Ngatpang State and that the LCHO had no jurisdiction to re-determine ownership in the land because the 1959 Determination of Ownership was not timely appealed. *See id.* The Trial Division upheld the 1989 individual determinations and we affirmed, stating that Ngatpang lost the right to complain about the 1989 determinations—other than to make a collateral attack on procedural deficiencies—when it failed to file a timely appeal to those determinations. *See id.* at 15-17.

[2] Unlike the three cases above, Rengchol’s complaint with the LCHO’s determination is based on a procedural deficiency—the lack of notice of the area of the land awarded in the 1992 Determination of Ownership.³ And, as we stated in *Ngatpang*

³ The three cases are also distinguishable on a purely factual level because, none of the appellants in those three cases—Nakamura,

State, procedural deficiencies of an unappealed determination of ownership may be asserted on collateral attack. *See Ngatpang State*, 7 ROP Intrm. at 16. It would be unfair to bar Rengchol from challenging the LCHO's determination when—through the error of the LCHO—he had no notice that what the LCHO awarded him was not the full extent of his claim until well after the 45-day period to appeal the LCHO's determination.

III. The Effect of the Trial Division's Decision on Land Already Adjudicated to Third Parties

AIMSPLA complains that the Trial Division's decision must be overturned because it awards land to Rengchol that has already been adjudicated to third parties by the Land Court (and, in at least one instance, affirmed by this Court). As Rengchol succinctly points out in response, the Trial Division's decision specifically orders the Land Court to "exclude any portions of *Teruong* that have been adjudicated as belonging to other private individuals" when issuing a new certificate of title to Rengchol and his siblings. Civ. No. 09-001, Decision at 10 (Tr. Div. Nov. 2, 2009). Therefore the Trial Division's decision presents no conflict

Tellei, and Ngatpang State—appeared at the Land Commission hearings they sought to appeal. Nakamura had never appeared before the Land Commission claiming that parcel of land, Tellei had not appeared at the re-hearing that was the subject of the appeal, and Ngatpang State had not appeared at the hearings after it repudiated its interest in the land to the LCHO. Rengchol did appear at the hearing before the LCHO for *Teruong* (in fact, he and his siblings were the *only* claimants).

with other judicial awards of land to parties who were not joined in the present dispute.

IV. The Effect of Estoppel, Waiver, and Laches on Rengchol's Claim

Without citation to any authority, AIMSPLA claims that the doctrines of estoppel, waiver, and laches each preclude Rengchol from bringing his current claim because Rengchol did not file a dispute to the 1992 Determination of Ownership until 2009. Rengchol responds that he was not put on notice of the LCHO's error until 2004 and his current lawsuit was filed well within the 20-year statute of limitations of 14 PNC § 402. Rengchol neglects to cite any authority for the proposition that a claims of estoppel, waiver, and laches are each overcome by a showing that the action was commenced within the statutory limitations period.⁴

[3] It is unclear to us whether any of the issues of estoppel, waiver, or laches were presented to the Trial Division for decision. Arguments should not be raised for the first time on appeal. *See, e.g., Nebre v. Uludong*, 15 ROP 15, 25 (2008) ("Generally, an issue that is not raised in the trial court is waived

⁴ Rengchol also neglects to provide analysis on why the 20-year statute of limitations applies rather than the 6 year "catch all" statute of limitations of 14 PNC § 405. Applying the 20-year statute of limitations, Rengchol's 2009 complaint would still be within the limitations period even if he had been put on notice of his injury in 1992. Or, applying the 6-year statute of limitations, Rengchol's complaint would be timely if the statute of limitations clock did not start ticking until 2004. Ultimately, we need not decide which limitations period applies in order to resolve the appeal.

and may not be raised on appeal. Therefore, the Appellate Division will not generally consider an issue unless the issue was first addressed by the trial court.” (citations omitted)). Although AIMSPLA listed estoppel, laches, and waiver as affirmative defenses when it entered the litigation (*see* Aimeliik State Pub. Lands Auth. Answer and Affirmative Defenses at 2), neither AIMSPLA’s Pre-Trial Statement nor the Trial Division’s decision make any mention of these defenses, (*see* Aimeliik State Pub. Lands Auth. Pre-Trial Statement). Without a primary decision on the issue by the lower court, we have nothing to review.⁵ AIMSPLA apparently wants us to make the initial decision on these issues, but such a request runs counter to our function as an appellate court.

[4] Furthermore, the Trial Division found that Rengchol was not on notice of the LCHO’s error until 2004. *See* Civ. No. 09-001, Decision at 7 (Tr. Div. Nov. 2, 2009) (“Because the [Determination of Ownership] issued on May 7, 1992, listed not only the incorrect number, but failed to indicate the size or area of the property, [Rengchol] was not aware of the mistake that was made until the Certificate of Title issued in 2004.”). The 5-year interim between Rengchol’s 2004 notice and his 2009 complaint does not appear to be overly lengthy. And, without citation to authority to guide us to a contrary conclusion—or even lay out the elementary law of estoppel, waiver, and laches—we will

not stray from our usual course of only deciding issues properly presented to us, which, of course, includes citation to relevant legal authority. *See Pacific Call Invs., Inc. v. Long*, 17 ROP 148, 156 n.11 (2010) (refusing to consider an inadequately briefed claim); *Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 164 (2006) (same); *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 50 (2006) (same). Litigants may not, without proper support, recite a laundry list of alleged defects in a lower court’s opinion and leave it to this Court to undertake the research.

CONCLUSION

Rengchol and his siblings had no reason to know of the LCHO’s mistake in the award of their land until 2004. It would be unjust to deny them ownership of their full property based on such a mistake. For the foregoing reasons, AIMSPLA’s appellate arguments fail and the decision of the Trial Division is AFFIRMED.

⁵ Nor has AIMSPLA pointed us to any indication in the record that it presented argument on estoppel, waiver, or laches in the lower court and the Trial Division refused to render a decision on those issues.

**NGIRAIRUNG ISAAC SOALADAOB,
DIRRAIRUNG ILEBRANG
SOALADAOB, SIAL KADIASANG,
and AUGUSTINO BLAILES,
Appellants,**

v.

**EBIL RA OTONG EREONG
REMELIIK, BECHES EVANGELISTO
ONGALIBANG, and OTONG CLAN,
Appellees.**

CIVIL APPEAL NO. 09-022
Civil Action No. 08-271

Supreme Court, Appellate Division
Republic of Palau

Decided: September 16, 2010

Counsel for Appellants: J. Roman Bedor

Counsel for Appellees: J. Uduch Sengebau
Senior

BEFORE: RICHARD H. BENSON, Part-
Time Associate Justice; C. QUAY POLLOI,
Associate Justice Pro Tem; ROSE MARY
SKEBONG, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable
ALEXANDRA F. FOSTER, Associate
Justice, presiding.

PER CURIAM:

Appellants Ngirairung Isaac Soaladaob
("Soaladaob"), Dirrairung Ilebrang Soaladaob
("Ilebrang"), Sial Kadiasang ("Sial"), and
Augustino Blailes ("Augustino") (collectively
"Appellants") appeal a July 7, 2009 Judgment

and Decision of the court regarding a dispute
in Otong Clan over two chief titles, known as
Beches and Ebil Ra Otong.¹ Specifically,
Appellants challenge the trial court's findings
that: (1) Appellee Ereong Remeliik
("Ereong") is Ebil Ra Otong of Otong Clan;
(2) Sial is not Ebil Ra Otong of Otong Clan;
(3) Ereong, as Ebil Ra Otong, had the
authority to appoint Appellee Evangelisto
Ongalibang ("Evangelisto") as Beches of
Otong Clan; (4) Sial did not have the
authority to appoint Augustino as Beches of
Otong Clan; (5) as between the Appellants
and Ereong and Evangelisto (collectively
"Appellees"), Appellees are the strong senior
members of Otong Clan; (6) according to
Palauan customary law, Augustino was
incorrectly nominated to the Klobak, because
he was not nominated by the true Ebil Ra
Otong; and (7) according to Palauan
customary law, Evangelisto's name was
correctly submitted to the Klobak. For the
reasons outlined below, we AFFIRM the
Judgment and Decision of the trial court.

**FACTUAL BACKGROUND AND
PROCEDURAL HISTORY**

The panoply of events, disagreements,
relationships, and debated family histories
comprising this dispute over clan titles is wide
and unwieldy. Having reviewed the parties'
briefs and the trial court's thirty-seven page
Judgment and Decision, thirty-five of which
are devoted to discussing its factual findings,
the Court is loathe simply to recount all of the

¹ Beches is the male chief title of Otong
Clan and the first-ranking chief of the Council of
Chiefs of Ulimang county, Ngaraard State. Ebil
Ra Otong is the female chief counterpart of
Beches

facts out of mere convention. Rather, we shall summarize the facts only as they relate to the arguments outlined in Appellants' opening brief, and proceed to a focused analysis of the issues.²

I. Origins of the Dispute

The genesis of this suit can be traced to February 8, 2008, the day that Beches Iluches ("Iluches"), the chief of Otong Clan of Ngaraard State, passed away. At his funeral, a dispute arose between two competing factions within Otong Clan over who should receive the dui off of the casket of the deceased Beches.³ Traditionally, the Ebil Ra Otong receives the dui as a symbol of the transfer of power from the deceased Beches. After receiving the dui, the Ebil Ra Otong is then charged with recommending a new male Beches to be appointed by the Klobak. On the day of the funeral, Ereong, believing herself to be the rightful Ebil Ra Otong, instructed a woman named Asaria Ongalibang ("Asaria") to receive the dui and bring it to her (Ereong was wheelchair bound at the time). At the same time, Sial instructed her daughter, Alfonsa, to receive the dui on her behalf. As the pallbearers carried the casket out of the bai, Feliciano and Augustino Blailes objected to Asaria receiving the dui on Ereong's behalf. The ensuing disagreement between the two factions caused tensions to rise to the point at which an embarrassing, verbal dispute

threatened to turn into a serious, physical conflict.

As chief of the neighboring Irung Clan and as a fifth-ranking chief in the Ulimang Klobak, Soaladaob convinced the parties to separate and attempted to mediate the dispute on the spot. Once it became clear that the parties could not come to a resolution, Soaladaob volunteered his mother, Ilebrang, whose clan title is Ebil Ra Irung, to hold the dui until the factions could come to an agreement. Although Ereong's faction protested, Ilebrang collected the dui and the funeral proceedings continued as planned.

After the funeral, the factions met independently to discuss whom they would nominate as Beches to the Ulimang Klobak. The members of Ereong's faction agreed to nominate Evangelisto as Beches. In doing so, they drafted a document, which was signed not only by Ereong, but also by many of the female ochell members of the clan, such as Etmachel Ongalibang, Tmur Omgalibang, and Asaria. On May 30, 2008, Ereong submitted this document, through her messengers, to the Ulimang Klobak, informing its members that she and the strong senior female members of the clan were appointing Evangelisto as Beches. Soaladaob, who is also a fifth-ranking chief in the Klobak under his chiefly title Ngirairung, received the nomination on behalf of the Klobak and thanked the messengers, telling them to return to Ereong and await an answer.

Around the same time, Sial's faction called a meeting of all Otong Clan members. Ereong's faction was invited to the meeting but refused to attend, either because they feared for their own safety—a result of the

² For a more robust account of the dispute, see Civ. Act. No. 08-271, Decision at 1-34 (Tr. Div. July 7, 2009).

³ In this instance and in many others, the dui was represented by a palm frond symbolizing the transfer of power between the parties.

fracas at the funeral—or because they refused to recognize Sial’s faction’s authority to call a meeting. At that meeting, many representatives of the Mid, Dermang, and Rois lineages of Otong Clan, including Sial and Adelina Blailes, decided to nominate Augustino as Beches. After this meeting, the members of this faction invited Soaladaob to Feliciano Blailes’ house for a follow-up meeting. At the follow-up meeting, Sial’s faction informed Soaladaob that Ereong’s faction had refused to attend the meeting and that, in their absence, the three other lineages of Otong had agreed to submit Augustino’s name to the Klobak. They submitted a document reflecting this decision to Soaladaob.

On June 30, 2008, at the next meeting of the Ulimang Klobak, Soaladaob presented the document nominating Augustino as Beches to the Klobak and indicated that he was doing so on behalf of the ourrot of Otong. Once again, the Klobak was faced with the same issue that caused the disagreement at the funeral, i.e., each faction believed it possessed the rightful Ebil Ra Otong and thus had the right to nominate the new Beches. The Klobak instructed Soaladaob to continue to try to mediate the dispute between the two factions and to return to the next monthly meeting with only one name.

Over the next few months, however, the factions grew increasingly impatient with one another and the attempted meditation failed. Finally, at the August 30, 2008 meeting, Soaladaob returned to the Klobak, this time with his mother, Ilebrang. Having agreed at the funeral to hold the dui until the dispute could be resolved, Ilebrang had become involved with Soaladaob in the many

failed mediation attempts over the past few months. Ilebrang informed the Klobak that she and Soaladaob could not mediate the dispute because Ereong’s faction had refused to participate. Thus, they were left with no choice but to meet only with Sial and accept her faction’s nomination of Augustino as Beches. Despite some chiefs in the Klobak objecting to Ilebrang’s suggestion to nominate Augustino, the Klobak was satisfied with Ilebrang’s testimony that Sial was the proper holder of the title, and thus had the power to nominate Augustino as Beches.

Knowing that Augustino would soon be appointed Beches of Otong Clan, Ereong and Evangelisto filed this lawsuit on September 26, 2008, requesting a temporary restraining order to stop Augustino’s blengur. The court denied the temporary restraining order and the blengur occurred on September 28, 2008, after which Augustino took his seat as Beches.

II. The Trial Court’s Decision

A. Ebil Ra Otong

After a lengthy trial, the court issued its Judgment and Decision on July 7, 2009, finding in favor of Ereong’s faction. The court began by acknowledging that both Ereong and Sial possessed cognizable claims to the title of Ebil Ra Otong; however, it ultimately credited Ereong’s testimony over Sial’s. First, the court noted that Ereong had lived on Otong Clan property, known as Ikesus, since 1999, and that she could trace her membership in Otong Clan through both her biological father, Demk, and her adoptive mother, Melengoes. Through Melengoes, the court found that she could trace her line to

Otong through women: Mororak to Irong to Isebong to Melengoes. Moreover, because Ereong was adopted by Melengoes, the court acknowledged that she is widely considered to be ideuekl ngalek and, as a result, possesses more authority and power in Otong Clan than her ulechell siblings, i.e., she can join the ourrot in discussing the issues of Otong Clan.⁴

The court also credited Ereong's testimony that many of her family members had held the title of Beches or of Ebil Ra Otong in generations past. Ereong not only traced her ancestry to the first Beches, Tumuchub, but also to her great-great-great uncle Ngirameltel (Mororak's brother) and to her great-great uncle Ngiraked (Irong's brother)—both of whom were Beches. Ereong's uncle Rengiil (Melengoes' brother) was also Beches from 1947 until his death in 1985. Melengoes, Ereong's mother, appointed Rengiil as Beches, who was followed by Ereong's adoptive brother Iluches Reksid (Melengoes' biological son). Iluches was Beches from 1985 until his death on February 8, 2008. As for those of Ereong's ancestors who held the title of Ebil Ra Otong, the court credited Ereong's testimony that her grandmother, Isebong, was Ebil Ra Otong, followed by her mother, Melengoes, who held the title until she died. The court also found that Melengoes' sister, Iwong, then appointed Taldil to bear the title Ebil Ra Otong. Even though Taldil was not related to Iwong or Ereong by blood, the court credited Ereong's testimony that Iwong had appointed her Ebil

Ra Otong out of gratitude for her loyalty to Beches Rengiil during a dispute for the Beches title with a member of Taldil's family. The court finally credited the portions of Ereong's testimony indicating that she herself had been Ebil Ra Otong since Taldil died in 2003, and that Tmur and Etmachel, along with Beches Iluches, had appointed her to the title. As further evidence of Ereong's status, the court observed that many of Ereong's family members were buried in the Otong Clan stone platform, including Iluches, Rengiil, Melengoes, Isebong, and Irong—and that it appeared that these persons did not need anyone else's consent to be buried there. Civ. Act. No. 08-271, Decision at 7.

Finally, the court highlighted the portion of Ereong's testimony in which she claimed to have appointed several men to Otong Clan chief titles, including Minor Olgellel and Robert Tochi, to chief titles in Otong Clan. The court found that she made these appointments before becoming Ebil Ra Otong, when she was simply considered a strong senior female member of the clan. Likewise, the court found that, after her appointment as Ebil Ra Otong, Ereong appointed Floriano Felix and Gibson Kanai to bear the Remedcheduch title, in part because Gibson Kanai corroborated Ereong's testimony regarding his own appointment to the title.

After discussing the above evidence, the court finally concluded that

Ereong is an 82-year-old woman whose standing is based on her adoption by Melengoes, an undoubtedly strong senior member of

⁴ The court similarly observed that Ereong's status as ideuekl ngalek does not make her stronger than the ochell members of Otong. Civ. Act. No. 08-271, Decision at 5 (citing Def.'s Ex. L, defining ideuekl ngalek).

Otong Clan. Her position as Ideuekl Ngalek allows her to join the ourrot of Otong, despite her ulechell birth. Further, she comes from a long line of powerful people. She can trace her ancestry to many of the Beches and Ebil Ra Otong, and many of her family members are buried at the Otong stone platform. She appointed several men to positions within Otong Clan, with no objections from the members of Otong, and she performed services for the Clan. Finally, she was appointed Ebil Ra Otong by strong senior members of Otong Clan, Tmur, Etmachel, and Beches Iluches.

Civ. Act. No. 08-271, Decision at 12.

In contrast, the court found that Sial knew little of her history to prove her standing in Otong. First, she could only trace her lineage back two generations, from Komesior to Imechei. The court similarly observed that Sial had testified repeatedly that her own mother and the rest of her family members had refused to tell her of her history. With respect to Sial's appointment as Ebil Ra Otong, the court noted that Sial admitted that no one had officially appointed her. Rather,

she had claimed to have automatically assumed the title when Ebil Ra Otong Taldil died and that she had immediately notified Ilebrang, a member of Irung Clan—not Otong Clan—and the two arranged to have a feast to celebrate. The court found this testimony to be incredible for two reasons. First, Ilebrang was not even a member of Otong Clan; thus, it seemed strange under Palauan custom to arrange a feast to celebrate appointment of a chief title in one clan with members of another clan. Second, unlike Ereong, Sial admitted that she had never appointed anyone to hold a title of Otong Clan other than Augustino.

Finally, the court discussed the May 17, 1999 Order in Civil Action 99-112, which concluded that Sial's family, unlike Ereong's family, needed permission of the Beches to bury their dead in Otong stone platform. Although no customary evidence was presented at trial as to this fact's ultimate significance, the court found it to be probative of the general notion that stronger members of the Clan would not need to ask permission to bury their dead in the stone platform. Finally, the court concluded that Sial's self-appointment to the title of Ebil Ra Otong and her blengur, which was hosted by an ourrot of another clan, were both implausible and problematic.

Based on these observations, the court ultimately credited Ereong's largely-unrebutted testimony, which was corroborated by related court documents, to find that Ereong is the proper Ebil Ra Otong of Otong Clan and that, conversely, Sial is not. Based on the evidence relating to the comparative merits of the family trees presented by Ereong and Sial, as well as Sial's faction having to ask permission to bury their dead in the stone

platform, the court further found that, as between Ereong's faction and Sial's faction, Ereong's faction represents the stronger, more senior members of Otong Clan.

B. Nomination of Beches

After finding that Ereong possesses a greater claim to the title Ebil Ra Otong than Sial, the court went on to describe the series of events surrounding Beches Iluches' funeral and the means by which both factions submitted their nominations for the Beches title to the Klobak. In doing so, the court ultimately concluded that, according to Palauan customary law, Evangelisto's name had been correctly submitted to the Klobak and, conversely, that Augustino had been incorrectly nominated, because he was not nominated by the proper Ebil Ra Otong.

As to the means by which Ereong's faction submitted Evangelisto's name to the Klobak, the court found it to be without customary defect. The court credited the customary expert, who testified that, after a chief dies, the female counterpart of the deceased chief and the strong female members of that clan should meet and select a new chief. Then, approximately 100 days after a chief dies, the name of the new chief should be submitted to the Klobak. The court found that Ereong's actions conformed to this customary mandate. Conversely, the court found the Klobak's inaction upon submission of Evangelisto's name to be a clear violation of Palauan custom. The court stated that "[w]hen asked what it means if no word is received by the female titleholder after a name is submitted, Reklai Ngirmang seemed baffled. He stated that it was not possible for no word to be sent. The Klobak must accept or

reject the appointment; either way they must communicate with the female title holder." Civ. Act. No. 08-271, Decision at 19.

As to the means by which Sial's faction submitted Augustino's name to the Klobak, the court found it to be defective on a number of fronts. First, the court found that Soaladaob's first presentation of Augustino's name to the Klobak was highly unusual. According to the customary expert, Reklai Ngirmang, a chief from a fifth-ranking clan cannot submit a name for the open spot of the first-ranking chief. The court also took note of Evangelisto's corroborating testimony that, in twenty-five years in the Klobak, he had never seen a chief of one clan present the name for the chief of another clan. Moreover, the court accepted the notion that, according to the expert, it is not customary for one of the chiefs within the Klobak to mediate a dispute for the chiefly title of another chief within the Klobak—rather, the mediator should be a strong member of the disputing clan.

Second, the court noted that Ilebrang's participation in Augustino's final nomination at the August 30, 2008 meeting also failed to conform to customary standards. The court credited the customary expert's testimony that Ilebrang's actions—that of coming to the bai and informing the Klobak that Augustino should bear the title—were improper primarily because Ilebrang was not even a member of Otong Clan. The court stated:

Reklai Ngirmang testified that a member of the clan should appear before the Klobak and announce the appointment, so that the Klobak could ask that clan member questions.

Ilebrang could not give the Beches title to anyone without first meeting with the strong senior members of the clan. Further, sisters of the deceased Beches were entitled to notice of any actions concerning the Beches title, since it was their property. None of that happened here, no notice, no meetings, and no representative of Otong Clan.

Civ. Act. No. 08-271, Decision at 32. The court further credited Ngirchau's testimony that the Klobak only agreed to the appointment of Augustino by Sial because he wrongly believed that Ilebrang was a member of Otong Clan.

Third and finally, despite the fact that members of the Klobak signed a document in November 2008, agreeing to the appointment of Augustino, the court noted that it was not signed by all the chiefs, including Evangelisto and the acting Beches Imrur Kanai. In doing so, the court credited the customary expert's testimony that a Klobak operates by consensus, "and the appointment of the first chief cannot be approved if the second ranking chief is not present and has not approved of the appointment. It is the responsibility of the third- and fourth-ranking chiefs to stay the matter until the second-ranking chief can be a party to the deliberations." Civ. Act. No. 08-271, Decision at 33.

After its lengthy recitation of its factual findings, the court finally proceeded to

its conclusions of law, in which it explicitly stated that "Ereong Remeliik is Ebil Ra Otong, and that she has the right to appoint Beches." Civ. Act. No. 08-271, Decision at 34. The court went on to conclude that the Klobak relied on faulty and incomplete information when it accepted Augustino as Beches. Although the court acknowledged that Augustino was currently Beches, it suggested that the Klobak hear from Ereong and Sial directly, and only then make its decision as to the proper Beches. This appeal followed.

STANDARD OF REVIEW

The court's findings of fact are reviewed for clear error. *Ongidobel v. Republic of Palau*, 9 ROP 63, 65 (2002). Under this standard, the factual determinations of the lower court will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion. *Dilubech Clan v. Ngaremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). When reviewing for clear error, if the Trial Division's findings of fact are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless the Appellate Division is left with a definite and firm conviction that a mistake has been committed." *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Conclusions of law are reviewed *de novo*. *Id.*; *Esebei v. Sadang*, 13 ROP 79, 81 (2006).

DISCUSSION

Appellants make the following three arguments on appeal: first, the court clearly

erred in finding that Ereong is the proper Ebil Ra Otong of Otong Clan; second, it clearly erred in finding that the Ulimang Klobak mistakenly accepted Augustino as Beches; and third, it clearly erred in finding that Appellees are the strong senior members of Otong Clan. As the trial court correctly noted at the outset of its Decision, the resolution of almost every facet of this case turns on whether Ereong has a greater claim to the title Ebil Ra Otong than Sial. Because of this issue's bellwether importance, we shall address it first and only then proceed to an analysis of Appellants' other arguments. Suffice it to say, based on the reasons outlined below, we affirm the court's July 7, 2009 Judgment and Decision.

I. The trial court's finding that Ereong is the proper Ebil Ra Otong is not clearly erroneous

Frankly, Appellants' argument here borders on the frivolous. Appellants' devotion of a mere one page of its brief to the issue that the trial court heralded as *the* linchpin issue of the entire dispute raises our suspicion that Appellants' strategy is simply to minimize time spent on a losing issue. What is more, Appellants wholly fail to address any of the competing evidence, which was presented by Ereong's faction at trial and upon which the trial court explained that it had relied in its Decision.

As noted above, the trial court received testimonial and documentary evidence from Ereong indicating that her standing in the clan was one of *ideuekl ngalek*, based on her adoption by Melengoes, who herself was an undoubtedly strong senior member of Otong Clan. Her position as *ideuekl ngalek* was described as allowing her

to join the ourrot of Otong, despite her *ulechell* birth. Appellants fail to address this important issue, other than to state in a conclusory fashion that Ereong is an *ulechell* member of Otong Clan. We know that Ereong was born as an *ulechell* member of the Otong Clan; however, much evidence was presented at trial to indicate that her adoption by Melengoes transforms her status into *ideuekl ngalek*. Appellants make no substantive arguments in this regard other than to state in a similarly conclusory way that Sial is an *ochell* member, and that *ochell* members must be given preference over *ulechell* members when being considered for clan titles. To say nothing of the fact that Sial's *ochell* status was clearly called into question by her failure to trace her lineage back further than two generations, Appellants simply fail to address Ereong's adoptive status under Melengoes.

Likewise, the court found that Ereong came from a long line of powerful people and could trace her ancestry to many of the Beches and Ebil Ra Otong. It discussed the evidence suggesting that many of Ereong's family members are buried at the Otong stone platform and that she had appointed several men to chiefly positions, with no objections from the members of Otong. Finally, the court found that she had been appointed Ebil Ra Otong by strong senior members of Otong Clan, including Tmur, Etmachel, and Beches Iluches. The court discussed this evidence at length, see Civ. Act. No. 08-271, Decision at 4-12, and found, in the end, that Ereong's claims resonated more than Sial's, which it found to be at best problematic. Appellants here make no attempt to discuss the insufficiency of Ereong's competing evidence, nor the trial court's error in crediting her

claims over theirs. Rather, they appear simply to repeat the arguments they made below. This is wholly unconvincing and, as we mentioned above, borderline frivolous. We affirm the trial court's Decision on this issue.

II. The trial court's finding that the Ulimang Klobak mistakenly accepted Augustino as Beches is not clearly erroneous

As we noted above and as the trial court stressed at the outset of its Decision, the resolution of almost every facet of this case turns on whether Ereong has a greater claim to the title Ebil Ra Otong than Sual. This issue is no exception. If Ereong is the proper Ebil Ra Otong, and if the Ulimang Klobak wrongly believed that Sual was the proper Ebil Ra Otong, then it follows that the Ulimang Klobak mistakenly accepted Augustino as Beches, insofar as Augustino was Sual's—not Ereong's—nominee for the position. Because we know from expert customary testimony that *only* the proper Ebil Ra Otong possesses the power to nominate a male title holder as Beches, then any nomination from someone who is, by definition, not the proper Ebil Ra Otong is defective from the start.

Despite this common sense logic, Appellants begin their brief with a quasi-legal argument, stating that the “Council of Chiefs of Ulimang, Rubekul a Ulimang, was not a party to the instant case. Since it was not a party to the instant case below, it was an error by the court below to rule that the decision of the Rubekul a Ulimang to accept appellant Augustino Blailes as their *‘friends’* Beches was based on the wrong reasons.”

(Appellants' Br. at 4.) In support of this contention, Appellants state that

Rule 19 of Rules of Civil Procedure requires Rubekul a Ulimang to be made a party in this case so that it can defend its decision and position from the attack made against it by the appellees Ereong Remeliik and Evangelisto, et al. The judgment of the court below is like convicting someone without charging him and without giving him an opportunity to defend himself, cross examine the witnesses of [sic] accuser and to challenge evidences [sic] against him.

(Appellants' Br. at 4.) Once again, however, Appellants' brief is sorely lacking in substance and citation to legal authority. Appellants fail to quote even the language of Rule 19 itself, much less attempt to show which section of Rule 19 is the most applicable here or why, for example, complete relief cannot be afforded in the Ulimang Klobak's absence.⁵

⁵ ROP R. Civ. P. 19 contains four sections and as many as eight subsections, all of which address different eventualities under the Rule. Presumably, Appellants mean to argue that complete relief cannot be afforded in the absence of joining the Ulimang Klobak as a party, yet amazingly fail to address the fact that all of the members of the Klobak, except for Chief Ngirudil, gave testimony either in court or by deposition. Appellees raise this counter-argument in their response and Appellants have failed to avail themselves of their right to reply.

Instead, Appellants simply reiterate that the Klobak met at the bai, accepted Augustino's appointment, and held a blengur, which was attended by almost all of the members of the Klobak. We know that this occurred, as did the trial court, which acknowledged in its Decision that Augustino is currently Beches. Once again, Appellants fail to address a number of pieces of critical evidence. For example, the court credited Ngirchau's testimony that, at the time of the meeting, he wrongly believed that Ilebrang was actually a member of Otong Clan and that she possessed the rights and responsibilities inherent in Clan membership. Appellants fail to address this testimony. The court went on to find, based on Ngirchau's testimony that the Klobak never verified Soaladaob's representations and that, if they had known that Soaladaob had not completed the task of mediation, they would have found another way to resolve the dispute. Appellants do not specifically address the sufficiency of this evidence or reasons why the court mistakenly relied on it.

This Court has previously refused to address arguments lacking sufficient support. See *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 50 (2006). In *Ngermeriil*, we stated emphatically that the "premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions argued by the parties before them. Thus, [appellate rules] require[] that the appellant's brief contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. *Id.* at 50 n.10 (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)

(quotations omitted)). "It is not the Court's duty to interpret this sort of broad sweeping argument, to conduct legal research for the parties, or to scour the record for any facts to which this argument might apply." *Idid Clan v. Demei*, 17 ROP 221, 229 n.4 (2010). Accordingly, apart from our brief discussion above, we refuse to consider Appellants' undeveloped Rule 19 argument. We affirm the trial court's Decision on this issue.

III. The trial court's finding that, as between the two factions, Appellees are the strong senior members of Otong Clan is not clearly erroneous

Once again, Appellants attempt simply to reargue their case below. Appellants begin by reasserting that Ereong is an ulehell member of Otong Clan, wholly failing to address the testimonial evidence indicating that her standing in the clan was one of ideuekl ngalek—a result of having been adopted by Melengoes, the previous Ebil Ra Otong. Likewise, Appellants contend that Sial is an ochell member and had a feast, which was attended by the female chiefs members of Rebiil.

Appellants conspicuously fail to address the fact that the trial court called into question Sial's ochell status because she could only trace her lineage back two generations, and that the "feast" appointing her to the title of Ebil Ra Otong was arranged by a female member of another clan. Furthermore, Appellants claim that Sial's ochell status is bolstered by the fact that her son, Max, is buried in the stone platform. However, they fail to address the conflicting testimony that her family had to ask permission from Beches Iluches (who himself

was in attendance at *Ereong's* feast for Ebil Ra Otong), in order to bury him there. (Appellee's Br. at 17 (citing Tr. Vol 1. at 93:24-28, stating that Max was buried there because "Tochi was still alive so he asked Beches Iluches to allow Max to be buried at the Otong stone platform."))

Appellants devote the next portion of their argument to the proposition that "[u]lechell is always a weak [sic] member than [sic] ochell member." (Appellants' Br. at 17.) Relying on the unproved assertion that Sial is in fact an ochell, Appellants assert that Ereong failed to establish the specific customs she is "relying on to make her a stronger member of the clan than appellant Siwal Kadiusang." (*Id.* (citing *Iderrech v. Ringang*, 9 ROP 158, 161 (2002) (holding that conclusions of law regarding custom must be supported by clear and convincing evidence)).) Appellants base this assertion on a misunderstanding of the trial court's conclusions. The trial court did not conclude that Ereong was ochell, or even that Ereong was ulechell and yet somehow more powerful than Sial. Rather, the trial court concluded that Ereong was ideuekl ngalek and, as a result, possesses more authority and power in Otong Clan than her ulechell siblings. The court also made pains to note that her status as ideuekl ngalek means that she is not stronger than the ochell members of Otong. Civ. Act. No. 08-271, Decision at 5 (citing Def.'s Ex. L, defining Ideuekl Ngalek). It based these conclusions upon a combination of Ereong's testimony, the testimony of those in her faction, and documentary evidence—proffered by Sial's faction no less—which described the status of ideuekl ngalek in detail. As a corollary, the court concluded that Sial, whatever her actual status, had simply failed

to prove her status as ochell, pointing specifically to the portions of her testimony in which she admitted that she did not know her family history. Civ. Act. No. 08-271, Decision at 8 (citing Tr. Vol. 2 at 503:21-24). The court also seemed troubled by Sial's self-appointment to the title of Ebil Ra Otong and the fact that her blengur was arranged by female members of another clan. Civ. Act. No. 08-271, Decision at 13. In the end, the trial court was faced with two competing testimonies. The court's decision to find Ereong's more credible cannot be said to be clearly erroneous.

The same can be said for Appellants' assertions that the court clearly erred in concluding that Augustino and his siblings are weaker members than Ereong and Evangelisto. Appellants claim Augustino and his siblings are ochell members through Rois Lineage, through their mother Leleng and through her mother Kerngel. (Appellants' Br. at 8 (citing Tr. Vol. III at 791:14-25).) Appellants claim that their parents performed service to Otong Clan, such as caring for Melengoes, the Ebil Ra Otong. Indeed, Appellants appear to try very hard to connect themselves to Ereong and her adopted mother Melengoes, stating "[a]ll of these services established a relationship between appellant Augustino Blailes and his siblings with appellee Ereong Remeliik and that relationship is a membership through Otong Clan." (Appellants' Br. at 15.) Appellants appear to be speaking out of both sides of their mouths. First, they insist that Ereong is an ulechell member and try to distinguish themselves as ochell members by comparison. At the same time, they provide a litany of services performed by themselves and their forebears to Melengoes, Ereong's mother, to

try to establish a link between their family and Ereong's, as a means of proving their ocell status. This bit of confused logic does little to help their case and, as Appellants provide little by way of explanation for the apparent contradiction, we decline to explore it further. Forced to choose between the testimony of these two factions, we cannot say that the trial court's finding that Appellees are the strong senior members of Otong Clan was clearly erroneous. We affirm the trial court's Decision on this issue.

CONCLUSION

For the reasons set forth above, the Judgment and Decision of the court is hereby AFFIRMED.

HARRY FRITZ,
Appellant,

v.

KOROR STATE PUBLIC LANDS
AUTHORITY,
Appellee.

CIVIL APPEAL NO. 10-012
LC/B 08-0582

Supreme Court, Appellate Division
Republic of Palau

Decided: September 21, 2010

[1] **Appeal and Error:** Filing Deadlines

Under ROP R. App. P. 26(c), when the Court requires something to be done within a specific time, such as the filing of an opening brief, it may enlarge that time in three specific situations, using three specific standards. If a litigant's *first* request to enlarge that time is made *before* the expiration of the specified time period, the court may enlarge the time for *good cause shown*. Any *successive* motions for enlargement will be granted only upon the showing of *extraordinary circumstances*. If a litigant makes a request *after* the expiration of the specified time period, the court may permit the filing only where the failure to file was the result of *excusable neglect*.

[2] **Appeal and Error:** Filing Deadlines

Good cause shall henceforth be treated as the most lenient of the three standards, requiring any legally satisfying and sufficient reason to show why a request should be granted. The leniency of this standard comports with its

application in instances, such as Rule 26(c), in which a litigant's *first* request for an extension is made before the expiration of the time period. It is common sense that a Court is more likely to grant a litigant's request if it is the litigant's first request, and it is made before a deadline has passed.

[3] **Appeal and Error: Filing Deadlines**

Once a litigant begins making successive requests for extensions of time prior to the deadline, however, the Court will begin assessing such requests under the *extraordinary circumstances* standard. The Court declines to set out a more specific definition here, but, suffice it to say, it requires something more than that which satisfies the good cause standard. The Court will assess each successive request, provided that the request occurs prior to the expiration of the deadline, with the underlying intent of Rule 26(c) in mind, that is, to prevent parties from the dilatory practice of requesting continuance after continuance and extension after extension.

[4] **Appeal and Error: Filing Deadlines**

Where a litigant requests an extension *after* the expiration of the time period or, even worse, where the Court is required to issue a show cause order to track down the party after the deadline has passed, the Court will apply the *excusable neglect* standard. For *excusable neglect*, we adopt the standard definition under prior decisional law, that is, counsel must establish something more than the normal (or even reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law.

Counsel for Appellant: Moses Uludong

Counsel for Appellee: J. Uduch Sengebau Senior

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, presiding.

PER CURIAM:

Before the Court is Appellant's motion for reconsideration, in which Appellant's counsel asks the Court to reconsider its August 17, 2010 dismissal of the above-styled appeal. In support of this motion, Appellant's counsel states that he mistakenly believed the final deadline to be August 13, 2010, and that, in any case, counsel had been "seriously ill and bedridden" during the first two weeks of August.

The Court has taken this opportunity to review the file in this matter, and in doing so, has uncovered the following. The Notice of Appeal was filed on April 2, 2010. The Court issued its first show cause order on July 5, 2010, because Appellant's counsel had failed to file the opening brief on time. On July 15, 2010, Appellant's counsel responded to the show cause order, in which he claimed that he was confused about the filing deadlines. He had inadvertently *not* filed two separate orders for written transcripts of the audio recordings and wrongly believed he had more time in which to file. Attached to his response were the unfiled orders, as well as the written transcript. The attached transcript failed to

meet a single one of the Court's specifications for written transcripts, even though the Court sent the specifications to Appellant's counsel on April 28, 2010. The transcript failed to include the name of the transcriber. It was neither numbered in the left-hand margin, nor properly double-spaced, nor composed in the correct font, nor even certified and notarized as a true and correct transcription of the proceedings in the Land Court below.

In its order of July 20, 2010, the Court specifically noted that Appellant's response was

dangerously close to insufficient for permitting this appeal to proceed. This Court should not have to remind attorneys of their obligations for pending cases or appeals. It is the attorney's duty to his or her client to remain apprised of all deadlines and to ensure that they are met. By issuing an order to show cause, the Court effectively provided Appellant—who had already missed the deadline for filing his brief—a second chance to demonstrate why the brief was late and proceed with the appeal. Instead Appellant cited only to "inadvertence," which would typically fall well short of just cause to revive his appeal. Nevertheless, the Court prefers to adjudicate disputes on their merits, and it does not wish to punish Appellant for the

dilatory or negligent conduct of his counsel.

At the close of this strongly-worded order, the Court set a clear deadline, **in bold print**, of Monday, August 9, 2010, and stated that Appellant's failure to file an opening brief by that date would result in dismissal, absent a showing of extraordinary circumstances. Despite the unequivocal wording of that order, August 9, 2010 came and went with no opening brief from Appellant, but, while this Court was in the process of assigning a panel to dismiss the case, Appellant filed the opening brief on August 12, 2010. Unsurprisingly, his opening brief made no mention of the late filing, nor attempted to show any extraordinary circumstances preventing him from filing on the clearly-designated due date. As a result of this total failure to follow the prior order, the Court dismissed the appeal and sanctioned Appellant's counsel for his failure to abide by the Court's previous orders.

On August 26, 2010, after the Court dismissed the appeal, Appellant's counsel filed a motion for extension of time to file a motion for reconsideration, citing illness as the reason for needing the extension. The Court granted the motion and gave Appellant's counsel until September 6, 2010, to file the motion for reconsideration. Amazingly, on September 7, 2010, Appellant's counsel filed yet another motion for extension of time to file his motion for reconsideration, citing illness and inability to work once again. The Court granted this motion and gave Appellant's counsel until September 15, 2010, to file. Finally, on September 15, 2010, Appellant's counsel filed his motion for reconsideration.

In this brief, two-page motion, Appellant's counsel simply states that he mistakenly believed the final deadline to be August 13, 2010, instead of August 9, 2010, and that, in any case, counsel had been "seriously ill and bedridden" during the first two weeks of August. To cite yet *another* instance of inadvertence, especially after the Court's strongly-worded order on July 20, 2010, in which the Court not only indicated that inadvertence would be insufficient in the future, but also clearly stated the deadline of August 9, 2010, simply strains credulity. Although the Court is sensitive to counsel's illness, it hesitates to consider illness, which does not require lengthy hospitalization or off-island treatment, as rising to the level of extraordinary circumstances. In any event, counsel did not attempt to argue that his illness caused him to calendar the due date incorrectly, nor did he argue that some other extraordinary circumstance caused the outright pattern of delay and inadvertence that has been Appellant's counsel's modus operandi since the Notice of Appeal was filed in April 2010. Instead, Appellant's counsel simply pleads for another chance for the case to be decided on its merits. This is sorely insufficient to satisfy the extraordinary circumstances standard that this Court uses to assess successive motions for enlargement of time under the rules. The Court acknowledges that the standards of good cause, excusable neglect, and extraordinary circumstances have been tossed around quite a bit in the motions in this case, and in prior cases. Suffice it to say, Appellant's repeated inadvertence fails to satisfy even the most lenient of these. Appellant's motion for reconsideration is hereby denied.

[1] Since now is as good a time as any to address this growing problem, the Court would like to clarify the various standards it imposes on late filings. Under ROP R. App. P. 26(c), when the Court requires something to be done within a specific time, such as the filing of an opening brief, it may enlarge that time in three specific situations, using three specific standards. If a litigant's *first* request to enlarge that time is made *before* the expiration of the specified time period, the court may enlarge the time for *good cause shown*. Any *successive* motions for enlargement will be granted only upon the showing of *extraordinary circumstances*. If a litigant makes a request *after* the expiration of the specified time period, the court may permit the filing only where the failure to file was the result of *excusable neglect*. See ROP R. App. P. 26(c).

This seems clear enough; however, many provisions in the Rules of Appellate and Civil Procedure—and interpretations of those rules in decisional law—treat good cause, excusable neglect, and extraordinary circumstances synonymously, or, at the very least, haphazardly. For example, under ROP R. App. P. 4(c), the trial court may extend the time for filing a notice of appeal for a period not to exceed thirty days, upon "a showing of excusable neglect or good cause." ROP R. App. P. 4(c). Since either one will apparently suffice, and since no definitions are given in Rule 4(c), subsequent court decisions interpreting this rule have apparently treated them as requiring the same showing. See *Masang v. Ngerkesouaol Hamlet*, 13 ROP 51 (2006) (interpreting Rule 4(c) and treating good cause and excusable neglect synonymously). Compare *Techekii Clan v. Paulus*, 1 ROP 514 (1988) ("[G]ood cause

shall not be deemed to exist unless the movant avers something more than the normal (or even the reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law.” (quoting *United States v. Raimondi*, 760 F.2d 460, 462 (2d Cir. 1985)), with *Tellei v. Ngirasechedui*, 5 ROP Intrm. 148, 150 (1995) (“In order to constitute *good cause or excusable neglect*, counsel must establish something ‘more than the normal (or even reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law.’” (emphasis added)). Still other cases equate excusable neglect, not with good cause, but with extraordinary circumstances. See *Ngirmang v. Oderiong*, 14 ROP 181, 182 (2007) (“To prove excusable neglect, a party must make a clear showing that the circumstances causing the delay were unique or extraordinary.”).

Doubtless, the Court has been semantically inconsistent to date. But common sense should prevail nonetheless. For future reference, however, the Court would submit the following as a judicial clarification of the standards it will impose going forward.

It is first important to note that good cause and excusable neglect are clearly different standards. Decisional law interpreting rules such as ROP R. Civ. P. 55(c) and ROP R. Civ. P. 60(b), suggests that the good cause standard is more lenient than the excusable neglect standard, and we are inclined to agree. See *Intercontinental Trading Corp. v. Johnsrud*, 1 ROP Intrm. 569 (1989). In *Johnsrud*, the Court stated:

The factors to be considered in determining whether a movant

has met the good cause standard of Rule 55(c) in setting aside a mere entry of default are similar, except that the standards are not as stringent as in a default judgment under Rule 60(b).

...

Appellants filed a motion to set aside under Rule 55(c) of the Republic of Palau Rules of Civil Procedure, asserting the default had been entered as a result of “mistake, inadvertence, and excusable neglect.” [Note: this is the standard under Rule 60(b)] The trial court applied the more lenient “good cause” standard of Rule 55(c) applicable to setting aside defaults, which gave appellants a better chance of prevailing.

Johnsrud, 1 ROP Intrm. at 572-73 (brackets added).

[2] Accordingly, *good cause* shall henceforth be treated as the most lenient of the three standards, requiring any legally satisfying and sufficient reason to show why a request should be granted. The leniency of this standard comports with its application in instances, such as Rule 26(c), in which a litigant’s *first* request for an extension is made before the expiration of the time period. It is common sense that a Court is more likely to grant a litigant’s request if it is the litigant’s first request, and it is made before a deadline has passed. Mere inadvertence, for example, may even sometimes satisfy good cause under

this definition, depending on the circumstances and the amount of time the request is made prior to the deadline. Other examples of good cause may include a conflicting trial setting or an unexpected sickness.

[3] Once a litigant begins making successive requests for extensions of time prior to the deadline, however, the Court will begin assessing such requests under the *extraordinary circumstances* standard. Black's Law Dictionary defines extraordinary circumstances as "a highly unusual set of facts that are not commonly associated with a particular thing or event." *Black's Law Dictionary* 260 (8th ed. 2004). The Court declines to set out a more specific definition here, but, suffice it to say, it requires something more than that which satisfies the good cause standard. The Court will assess each successive request, provided that the request occurs prior to the expiration of the deadline, with the underlying intent of Rule 26(c) in mind, that is, to prevent parties from the dilatory practice of requesting continuance after continuance and extension after extension.

[4] Finally, where a litigant requests an extension *after* the expiration of the time period or, even worse, where the Court is required to issue a show cause order to track down the party after the deadline has passed, the Court will apply the *excusable neglect* standard. As a side note, the Court recognizes that sometimes the wording of its orders indicates that, perhaps, it uses a good cause standard when it issues show cause orders to track down litigants. To the extent that the Court has done so in the past, let this order reflect the Court's intent for that confusing

language to stop. It is simply unfair—not to mention, in derogation of the rules—to subject a party, who has made a request for extension of time *within* the specified time period, to the same standard as a party who has simply done nothing and waited for the Court to issue a show cause order. This situation shall henceforth be uniformly scrutinized under the excusable neglect standard. For *excusable neglect*, we adopt the standard definition under prior decisional law, that is, counsel must establish something more than the normal (or even reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law. Mere inadvertence will not carry the day, but it is always within the Court's discretion to examine the situation and the reasons cited, and make a judgment call. It is worth noting that even Black's Law Dictionary excludes inadvertence from the standard, defining excusable neglect as "[a] failure—which the law will excuse—to take some proper step at a proper time (esp. in neglecting to answer a lawsuit) *not because of the party's own carelessness, inattention, or willful disregard* of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party." *Black's Law Dictionary* 1061 (8th ed. 2004) (emphasis added). The Court prefers to think along the lines of acts of God, like fires, floods, inexplicably inconsistent judgments, hospitalizations, and other such force majeure. It is not excusable neglect that an attorney fails to mind his or her own calendar. If that calendar is washed away in a hundred-year flood, then the Court may be convinced.

Although seemingly draconian, these rules are designed to expedite judicial

decision-making, raise the standard of advocacy in the Republic, and increase access to justice for all. They are clearly outlined in the Rules of Appellate and Civil Procedure and the Bar has been on notice of them for quite some time. We hope that the above discussion, while superfluous to the order at hand, helps to clarify the confusion.

In the matter of the determination of ownership of real property in Ngekeklau County of Ngaraard State depicted on BLS Worksheet Map No. 06E003 as Worksheet Lot No. 06E003-029 and formerly described as Tochi Daicho Lot No. 2122 listed under Vicentei and called *Idelui*,

**SANTOS BORJA,
Appellant.**

CIVIL APPEAL NO. 10-013
SP/E No. 10-001

Supreme Court, Appellate Division
Republic of Palau

Decided: September 24, 2010

[1] **Appeal and Error:** Standard of Review

Although a trial court's decision to reconsider a previous decision is ordinarily reviewed on appeal for abuse of discretion, lower courts are duty-bound to strike void judgment and therefore no discretion should be exercised.

[2] **Land Commission/LCHO/Land Court:** Reconsideration

The Land Court possesses no statutory or rule-based authority to reconsider its own decisions.

[3] **Judgments:** Void Judgments

The deprivation of a party's constitutional due process right to notice and an opportunity to be heard renders a court's judgment on that issue void.

[4] **Judgments:** Void Judgments

Void judgments are legally ineffective from inception and courts may exercise inherent authority beyond court rules in expunging them.

[5] **Courts:** Inherent Powers

The power to purge itself of a void judgment is included within a court’s bundle of inherent authority, including those judgments stemming from a plain usurpation of power constituting a violation of due process.

[6] **Land Commission/LCHO/Land Court:** Due Process

Determining ownership of a property without providing notice of the hearing to some of the claimants to the land deprives those claimants of their rights to due process under Article IV, section 6 of the Constitution.

[7] **Land Commission/LCHO/Land Court:** Reconsideration

The Land Court possesses the inherent authority to cancel a determination of ownership and certificate of title issued after holding a hearing for the land without providing notice to all of the claimants to the land.

[8] **Civil Procedure:** Sua Sponte Dismissals

A court’s decision to raise (or dispose of) an issue on its own motion, even where the ruling favors one party over another, does not inherently display that the court has stepped into an impermissible advocacy role.

[9] **Judgments:** Void Judgments

It is appropriate for a court to *sua sponte* cancel a void judgment upon providing the adversely-affected party notice and an opportunity to be heard in opposition.

Counsel for Appellant: J. Uduch Sengebau Senior

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; RICHARD H. BENSON, Part-Time Associate Justice.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Senior Judge, presiding.

PER CURIAM:

Appellant Santos Borja challenges the Land Court’s authority to *sua sponte* cancel its own previously-issued determination of ownership and certificate of title. Because, given the facts before us, the Land Court acted within its powers, we affirm the decision below. Pursuant to ROP R. App. P. 34(a), we deem oral argument unnecessary and therefore deny Borja’s request for oral argument.

BACKGROUND

Based on the information contained in the relevant Bureau of Lands and Surveys Attachment Calendar, it appeared to the Land Court that appellant Santos Borja was the sole claimant to the land commonly known as *Idelui* located in Ngekeklaou County of Ngaraard State bearing Worksheet Lot number 06 E 003-29 on Worksheet number 06 E 003.

The Land Court was in error: four other claimants also claimed *Idelui*.¹

Laboring under its mistake, the Land Court issued a Notice of Hearing for *Idelui* on September 25, 2008. This notice was issued only to Borja—none of the other four claimants were informed of the upcoming hearing. On October 9, 2008, the Land Court conducted the hearing for *Idelui* and only Borja appeared at the hearing to claim the land. The Land Court issued a determination of ownership for *Idelui* in favor of Borja on that same day followed by a certificate of title on December 23, 2008.

The Land Court Case Management Coordinator alerted the Land Court on January 15, 2010 that, in fact, Borja's claim to *Idelui* was contested and the other claimants had not been given notice of the hearing. The Land Court issued a *sua sponte* show-cause order three days later explaining the error and ordering Borja to show cause why the determination of ownership and certificate of title should not be voided. Borja filed a written response and appeared through counsel at the show cause hearing. In its Decision and Order, the Land Court declared Borja's determination of ownership and certificate of title void *ab initio*. See Land Ct. Case SP/E No. 10-001, Decision and Order (Land Ct. Mar. 8, 2010). The Land Court found it had inherent authority to reconsider its decision where a mistake led to its misapprehension of the number of claimants

resulting in a premature determination that may have prejudiced the other claimants and deprived them of due process of law.

Borja timely appealed the Land Court's voiding of his determination of ownership and certificate of title. Because none of the four un-noticed claimants participated in the Land Court's *sua sponte* proceedings, no appellees were named.

STANDARD OF REVIEW

[1] The extent to which a lower court possesses inherent authority to reconsider its prior orders is a question of law. Therefore, we review such rulings of the Land Court *de novo*. See, e.g., *Sumang v. Skibang Lineage*, 16 ROP 4, 5 (2008). Although a trial court's decision to reconsider a previous decision is ordinarily reviewed for abuse of discretion, lower courts are duty-bound to strike void judgments and therefore no exercise of discretion is warranted. See *Gibbons v. Cushnie*, 8 ROP Intrm. 3, 5 n.4 (1999) (“[W]here a judgment is void, the trial court has no discretion; it must grant relief.”).

DISCUSSION

Borja argues that, although the Land Court has some inherent authority to reconsider its own decisions, the Land Court cannot act *sua sponte* to invalidate an issued determination of ownership and certificate of title. Because none of the other claimants requested the invalidation, Borja argues that the Land Court impermissibly acted in an advocacy rule in *sua sponte* vacating his determination of ownership and certificate of title. Borja contends that, because the other claimants still retained the remedy of

¹ The reason for the confusion, as we understand it, is that Borja claimed *Idelui* under one Tochi Daicho number and the other four claimants claimed the same worksheet lot under a different Tochi Daicho number.

collaterally attacking his determination of ownership and certificate of title, no *sua sponte* reconsideration of the issue was necessary to safeguard justice.

[2] The Land Court possesses no statutory or rule-based authority to reconsider its own decisions. Our Rules of Civil Procedure do not apply to Land Court proceedings. *See* ROP R. Civ. P. 1(a) (“These rules govern procedure in all suits of a civil nature whether cognizable as cases at law or in equity in the Republic of Palau Supreme Court Trial Division, National Court, and in the Court of Common Pleas . . .”). Our Rules of Land Court Procedure provide no mechanism for review of a decision other than appeal. *See* ROP R. Land Ct. P. 16 (“Any claimant aggrieved by a Land Court determination of ownership may appeal such determination directly to the Appellate Division of the Supreme Court within thirty (30) days of service of the determination.”).

Looking beyond rule-based law, we have previously found an authority inherent in the Land Court to reconsider its own decisions to some degree:

[A] court has the inherent authority to reconsider its previous decision when there is an intervening change in the law, a discovery of new evidence that was previously unavailable, or a need to correct clear error or prevent manifest injustice due to the court’s misapprehension of the facts, a party’s position, or the controlling law.

Shmull v. Ngirirs Clan, 11 ROP 198, 202 (2004); *see also id.* (“Where, as here, a court misapprehends the evidence or commits an inadvertent mistake, that court historically has had the inherent authority to correct its own erroneous decision.”).

In *Shmull*, a clan representative filed a claim to land on behalf of the clan but at the hearing argued his own individual ownership of the land (despite never filing an individual claim to the land). *See id.* at 200. The Land Court awarded the land to the representative as individual property and, upon discovering what had happened, the clan moved for reconsideration. *See id.* On reconsideration and after a second hearing, the Land Court awarded the land to the clan and canceled the determination of ownership in favor of the clan representative as individual property. *See id.* The representative appealed, claiming that the Land Court lacked any authority to reconsider or cancel its own issued determinations of ownership. *See id.* at 201. Citing the “ancient doctrine of inherent authority,” we upheld the Land Court’s actions, finding that the Land Court possessed some inherent authority to reconsider the issuance of a determination of ownership. *See id.* at 202.

The Land Court below found Borja’s determination of ownership and certificate of title to be void *ab initio*. One source of reference for a lower court’s power to cancel a void decision is ROP R. Civ. P. 60(b)(4). This rule provides litigants the opportunity to move the lower court for reconsideration of a void decision:

On motion and upon such terms as are just, the court may

relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

...

(4) the judgment is void;

ROP R. Civ. P. 60(b)(4). In the context of this rule, we have stated that “[a] judgment is void only if the court that rendered the judgment lacked jurisdiction or where the court’s action amounted to a ‘plain usurpation of power constituting a violation of due process.’” *Ngerketiit Lineage v. Ngirarsaol*, 8 ROP Intrm. 126, 127 (2000) (quoting *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990)). This statement is in accord with prevailing United States law. *See* 46 Am. Jur. 2d *Judgments* § 29 (2006) (“A judgment can be void not only for lack of jurisdiction, but also where the court acts in a manner contrary to due process.”); 11 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2862 (2d ed. 1995) (same).

[3] The deprivation of a party’s constitutional due process right to notice and an opportunity to be heard renders a court’s judgment on that issue void. *See New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142-43 (5th Cir. 1996) (holding that lower court erred in not granting litigant’s Rule 60(b)(4) motion to vacate judgment based on voidness where the district court granted summary judgment against the litigant without notice of the summary judgment motion); *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448-50 (9th Cir. 1985) (holding that lower court erred in not granting litigant’s Rule 60(b)(4) motion to vacate an order based on voidness where the

litigant received inadequate notice of the hearing).

[4] Void judgments are said to be legally ineffective from inception. *See, e.g., United States v. Zima*, 766 F.2d 1153, 1159 (7th Cir. 1985) (“A void judgment is one which, from inception, was a complete nullity and without legal effect.”); *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984) (“A void judgment, as opposed to an erroneous one, is legally ineffective from inception.”). Courts may exercise inherent authority beyond court rules in expunging void judgments. *See* 47 Am. Jur. 2d *Judgments* § 701 (“In some jurisdictions, a motion for relief from a void order or judgment arises from the inherent powers of the court to expunge acts from its records, rather than from a court rule. Thus, motions to vacate void judgments need not satisfy the requirements of the relief-from-judgment rule.”).

[5] We have no trouble with the notion that, even in the absence of rule-based authority, the power to purge itself of void judgments is included in a lower court’s bundle of “inherent authority.”² Void judgments are nullities from their inception, and a court possesses the ability to expunge such nullities. And, in the context of this inherent authority, we see no reason to refrain from importing “a plain usurpation of power constituting a violation of due process” from

² We previously recognized this power in our statement that “a court has the inherent authority to reconsider its previous decision when there is . . . a need to correct clear error or prevent manifest injustice due to the court’s misapprehension of the facts, a party’s position, or the controlling law.” *Shmull*, 11 ROP at 202.

our ROP R. Civ. P. 60(b)(4) jurisprudence as a basis for a finding of voidness.³

[6, 7] Turning back to the case at hand, the Land Court determined the ownership of *Idelui* without providing notice of the hearing to four of the claimants to the land. This blatant deprivation of notice (and, by extension, inclusion in the hearing) amounts to a patent violation of the other claimants' rights to due process under Article IV, Section 6 of the Constitution. See, e.g., *April v. Palau Pub. Utils. Corp.*, 17 ROP 18, 22 (2009) ("The hallmark of procedural due process is the requirement that the government provide notice and an opportunity to be heard before depriving a person of life, liberty, or property."). Such a due process violation renders the Land Court's determination of ownership and subsequent certificate of title void.

The specific question posed by Borja on appeal is whether the Land Court could act *sua sponte* in canceling the determination of ownership and certificate of title. Under the ROP R. Civ. P. 60(b)(4), for instance, a party must motion for relief from a void judgment. United States authorities, however, have stated that a court may set aside a void judgment on its own motion. See 11 Wright, et al., *Federal Practice and Procedure* § 2862 ("Although the rule [60(b)(4)] requires a motion for relief from judgment, it has been held that the court on its own motion may set aside a void judgment provided notice has been given of its contemplated action and the

party adversely affected has been given an opportunity to be heard."); see also *Schuster v. Schuster*, 251 P.2d 631, 638 (Ariz. 1952) ("[T]he judgment being a nullity may be set aside by the court upon the motion of any interested party, or upon its own motion."); *Ballard Sav. & Loan Ass'n v. Linden*, 62 P.2d 1364, 1365 (Wash. 1936) ("There is no question but that a court has inherent power to purge its records of void judgments. It may do so of its own motion."). This *sua sponte* authority—unfound in court rules—derives from a court's inherent authority to purge its records of void judgments.

[8, 9] A court's decision to raise (or dispose of) an issue on its own motion, even where the ruling favors one party over another, does not inherently display that the court has stepped into an impermissible advocatory role. See, e.g., *Melekeok Gov't Bank Corp. v. Adelbai*, 13 ROP 183, 187 & n.5 (2006) (recognizing a trial court's power to grant summary judgment on a ground not raised by the moving party provided that the losing party's due process rights are protected); *Silmai v. Land Claims Hearing Office*, 3 ROP Intrm. 225, 227 (1992) ("A trial court may dismiss an action on the pleadings *sua sponte* provided the parties have had an opportunity to be heard."). The *sua sponte* nature of the Land Court's actions were appropriate because its determination of ownership was not merely voidable, but was wholly void. As a void determination, it lacked legal effect. Thus, upon providing Borja notice and an opportunity to be heard in opposition to protect his due process rights, the Land Court acted properly—and within its powers—in canceling the determination of ownership and certificate of title.

³ To prevent deciding issues not before us, we leave open for future consideration other potential bases of voidness sufficient to trigger a lower court's inherent power of reconsideration.

CONCLUSION

We AFFIRM the Land Court's Decision and Order canceling the determination of ownership and certificate of title in the proceeding below. The Land Court may proceed with its re-hearing and re-determination of ownership of *Idelui*.

**REPUBLIC OF PALAU,
Plaintiff,**

v.

**ELSON KATOSANG,
Defendant.**

CRIMINAL CASE NO. 09-162

Supreme Court, Trial Division
Republic of Palau

Decided: December 15, 2009

[1] **Criminal Law:** Competency to Stand Trial

If the court ascertains by preponderance of medical or other evidence that the defendant is so insane at the time of trial so as to be unable to understand the nature and consequences of the proceedings against him or properly assist in his own defense, it shall adjourn the trial and may order the defendant detained. *See* 18 PNC 901, 902.

[2] **Civil Commitment; Criminal Law:** Competency to Stand Trial

The court may hold one hearing to determine whether the defendant is insane at the time of trial under 18 PNC §§ 901, 902, and if so, whether the defendant should be restrained under Palau's civil commitment statute, 34 PNC § 531.

[3] **Civil Commitment**

The court may order a defendant civilly committed under 34 PNC § 531 upon a finding of clear and convincing evidence that

he is suffering from a mental illness that requires his commitment to the extent necessary for his own safety and that of the public.

[4] **Civil Commitment**

Periodic reporting is a logical and necessary extension to civil commitment to ensure that the defendant remains properly civilly committed according to the court's order.

ALEXANDRA F. FOSTER, Associate Justice:

PROCEDURAL BACKGROUND

On August 28, 2009, Senior Judge Rudimch issued an arrest warrant against Defendant Elson Katosang for an assault which occurred on August 26, 2009. Defendant was arraigned on September 1, 2009. As part of his release conditions, Defendant was ordered to "receive a mental health examination within two weeks (or not later than September 14, 2009)." Defendant was seen by Dr. Sylvia Wally on September 8, 2009,¹ and again by Dr. Jardine R. Davies Torno on October 21, 2009.² Dr. Wally concluded her report with the finding that Defendant "is manifesting symptoms of Anti-Social Personality Disorder vs. Borderline Personality Disorder and Prodromal Symptoms to Schizophrenia."³ A month and

¹ Dr. Wally's report was admitted into evidence as Republic Exh. 1a.

² Dr. Torno's report was admitted into evidence as Republic Exh. 1b.

³ Although not specifically noted in the report, Dr. Wally testified at the hearing on

a half later, Dr. Torno reported that the Defendant "is still not competent to go to trial," but "[p]atients [such as Defendant] who are maintained on medications have a good chance of going back to [their] usual level of functioning."

Based on these evaluations and reports, the Republic filed a motion for re-assignment to the Trial Division for a "commitment hearing." That same day, Senior Judge Rudimch signed a reassignment order. Upon the agreement of both parties, this matter was scheduled before this Court on November 23, 2009, for a commitment hearing. In preparation for the hearing, the Republic filed "Hearing Brief 34 PNC § 531" on November 17, 2009, and attached both doctors' reports. In the hearing brief, Defendant concedes that Defendant was found incompetent pursuant to 18 PNC § 902, and requests a hearing pursuant to 34 PNC § 531. On November 23, 2009, the Court heard from Katherine Masang and Drs. Torno and Wally.

The Court concludes that the law in Palau allows a court to hold one hearing to determine both whether a Defendant is competent to stand trial and whether a Defendant should be civilly committed. The Court will accede to the Republic's request to hold just one hearing, but reaches separate conclusions based on separate standards for first, finding Defendant incompetent to stand trial and second, civilly committing Defendant.

HEARING TESTIMONY

November 23, 2009, that Defendant was not competent to stand trial at the time she interviewed him.

The witnesses' testimony at the hearing was uncontested. The Court therefore adopts the testimony as its findings of fact.

Katherine Masang testified that on August 26, 2009, Defendant kicked Ms. Masang in the stomach as she was leaning over to pull out a flip-flop which was stuck in the front door of Dr. Roberts' Clinic. The kick was hard enough that it sent her backwards onto her back, and caused her to bang her head on the floor. The assault was unprovoked. She had not seen or heard Defendant before he kicked her. When she sat up, she saw Defendant running away and heard him swear at her. Ms. Masang's teenage son, who was at Ms. Masang's car in the parking lot of the Clinic, recognized him, and called out after him, but Defendant ran away and did not respond. Ms. Masang remembered last seeing Defendant about a year before this incident, when he came to her house with his parents. He came to apologize to Ms. Masang's brother for having hit her brother in the face with a rock.

After the assault, Ms. Masang's back was in pain, and she had a bump on her head from hitting her head on the hard floor. Her doctor diagnosed a "sprained spine." Ms. Masang also testified that she is now afraid and "apprehensive." She always looks over her shoulder. She always locks her car doors. And she is concerned for the safety of her children. Her eldest son's father lives not far from Defendant's parents in Idid.

From the date of the incident until today, Defendant has not bothered the victim or her family. Similarly, from the date of the assault on her brother to the assault on her,

Defendant had done nothing to bother her or her family.

Dr. Torno testified that he has seen Defendant once every two weeks since he drafted his October report. Dr. Torno could not assess whether Defendant was insane at the time of the offense, but he could opine that Defendant remains incompetent to stand trial, because he does not understand the charges against him, does not understand how to behave in court, and would be unable to understand court proceedings. Defendant also has significant problems with impulse control when he is off his medications. He suffers from delusions,⁴ and can harm others based on those delusions. Further, these delusions can only be treated with medication. The medication must be continued throughout Defendant's lifetime. If he stays on his medication, then the likelihood of a violent recurrence is minimal. Conversely, if he goes off his medications, the likelihood of a violent recurrence is "high." Also, if Defendant ingests non-prescribed drugs or alcohol, the likelihood of a violent recurrence increases significantly.

During his most recent meeting with Defendant, Dr. Torno noted that Defendant appeared to be in control of his impulses and was able to respond to his questions. When asked whether Defendant should be committed, Dr. Torno stated that Defendant is currently living with his family in a stable controlled situation, where his family closely supervises him and gives him his medication

⁴ Dr. Torno explained delusions to mean a fixed false belief, which is firmly held. Defendant will cleave to that belief no matter what, and attempting to challenge the belief is futile.

every night.⁵ Dr. Torno opined that this situation was best for Defendant. The next step, according to Dr. Torno, is for the Defendant to develop “insight,” an understanding of why he needs to take this medication.

Dr. Wally testified last. Although she saw Defendant first, in September 2009, it appears that Dr. Torno has taken over Defendant’s care.⁶ She confirmed that a pill could control Defendant’s irrational violence, and reiterated that, to avoid a recurrence, it was essential to maintain the medication in a stable, well-supervised environment. She agreed with Dr. Torno that Defendant should stay with his family, instead of being committed to the hospital. She noted that, in fact, the hospital did not have facilities to accommodate someone like Defendant. They would have nowhere to put Defendant if the Court did commit him to the hospital’s care.

In the hearing brief and again in closing, the Republic argued that Defendant posed a danger to the community, so the Court should find him insane and have him committed to the hospital or some other confined space. The Republic is concerned

that Defendant—who suffers from a lifelong mental health condition—would stop taking his pill and/or that family supervision might become lax leading Defendant to assault someone again.

Defendant argued that the Court should find Defendant insane and dismiss the criminal charges against him under 17 PNC § 105.⁷ Defendant’s counsel further urged the Court to maintain the *status quo*. Defendant is now living with his aunt and her husband in Ngerbeched. He moved from his parents’ house in Idid, because they lived near Katherine Masang’s ex-husband’s house, where Ms. Masang’s son would visit regularly. Defendant’s aunt and her husband, who live in Ngerbeched, supervise him closely, and he lives a very structured life. They ensure that he takes his pill nightly. At the time of the hearing, he was not attending Palau Community College, but he intended to resume his studies next semester.

LEGAL DISCUSSION

In their arguments, the parties conflate: (1) a finding that Defendant was insane at the time of the offense, which implicates the traditional rule in *M’Naghton*,⁸ along with 17

⁵ His medication consists of one pill, to be ingested nightly.

⁶ Actually, Dr. Wally testified that she had first seen Defendant in 2005 when his parents brought him to the hospital because Defendant had been suffering from sleeplessness along with agitation and irritability. It is unclear whether she prescribed medication to Defendant at that time., but it is clear that Defendant has not returned to the Behavioral Health Division of the Ministry of Health from 2005 until this incident in August, 2009.

⁷ 17 PNC § 105 is titled “Insanity as defense” and reads: “No person judged by competent medical authority to be insane can be convicted of any crime because of the presumption that such person cannot have criminal intent.”

⁸ *M’Naghten’s Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). Although the Republic argued that *M’Naghten* applies in this jurisdiction, this Court reaches no conclusion on that issue, except to point out that 18 PNC § 901 adopts a

PNC § 105 and 18 PNC § 901, with (2) competency at the time of trial, which implicates 18 PNC § 902, and (3) civil commitment, which implicates 34 PNC § 531. These are three different decisions, with three different standards, which require three different findings from the Court.

Besides brief references to *M'Naghton* and 17 PNC § 105 by counsel in opening and closing, neither side submitted evidence concerning Defendant's sanity or insanity at the time of the offense. In fact, the only evidence elicited on this issue came from Dr. Torno, who stated that he could render no opinion on Defendant's sanity at the time of the offense. Accordingly, the Court makes no decision as to whether Defendant was insane at the time of the offense and declines to dismiss the case on those grounds.

[1] As to insanity at the time of trial, the Republic presented sufficient evidence for the Court to find by a preponderance of the evidence⁹ that Defendant is not currently competent to stand trial. In other words, the Court finds that 18 PNC § 902 is triggered

similar standard.

⁹ The Court has found no case law in Palau on competency to stand trial. Accordingly, the Court turns to United States treatises and law. *See* 1 PNC § 303. Under 18 USC § 4241, the court should hold a hearing to determine by a preponderance of the evidence "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or properly assist in his own defense."

because "the accused is insane at the time of trial."¹⁰

¹⁰ 18 PNC § 902 reads: "Insanity at time of trial. If the court ascertains that the accused is insane at the time of trial, the court shall adjourn the trial and order the accused to be detained as in section 901 of this chapter."

[2] What happens next?¹¹ Section 902 refers the reader to 18 PNC § 901, which reads, “[i]f it is ascertained by the court upon

competent medical or other evidence that the accused at the time of committing the offense with which he is charged was so insane as not to know the nature and quality of his act, the court shall record a finding of such a fact and may make an order pursuant to section 531 of Title 34 of this Code.” 34 PNC § 531 is entitled “Commitment authorized; procedure” and explains that:

¹¹ In the United States what would happen next is further competency hearings. The United States federal system maintains a much lengthier competency process, which cannot be merged with civil commitment proceedings. *See* 18 USC §§ 4241-4247. The process requires an initial competency determination, to include a psychiatric or psychological examination and report, followed by a competency hearing. 18 USC §§ 4241, 4247. If defendant is found incompetent after the hearing, the prosecution would have him committed for not longer than four months “to determine whether there is a substantial probability that in the foreseeable future” defendant will become competent to stand trial. *Id.* § 4241(d). Thereafter, the court would receive a report concerning the probability of defendant’s gaining competency, and if the court determined that there was a substantial probability that the defendant would attain competency then he would remain hospitalized for a reasonable time to gain competency and then stand trial. *Id.* § 4241(d). The general rule underlying this structure is that defendant may be committed until competent to stand trial only if the doctors opine that the defendant stands a strong chance of attaining competency. If the court cannot make such a finding (based on the doctors’ opinion), it must either release the defendant or the state must institute separate civil commitment proceedings under 18 USC § 4246. Detaining defendant without a finding of foreseeable competency or civil commitment proceedings violates due process. *Jackson v. Indiana*, 406 U.S. 715 (1972).

(a) The Trial Division of the Supreme Court . . . may, after hearing, commit an insane person within its jurisdiction to any hospital in the Republic for the care and keeping of the insane, or if the court deems best, to a member of the insane person’s family lineage or clan, who may thereafter restrain the insane person to the extent necessary for his or her own safety and that of the public

34 PNC § 531 is Palau’s civil commitment statute.¹² The Court is aware of motions for civil commitment in Palau. *See*,

Here, the Republic asks the Court to jump directly to civil commitment without seeking additional testing to determine the likelihood of Defendant attaining competent. As discussed further above, it appears that under Palau’s statutory scheme such a leap is possible.

¹² Civil commitment under the United States federal system requires the hospital facility’s director to certify that defendant is suffering from a mental illness such that “his release would create substantial risk of bodily injury to another person or serious damage to property of another.” *See* 18 USC § 4246. After a hearing, the court would determine, by clear and convincing evidence, whether defendant presents such a risk. *Id.* The defendant would remain hospitalized until the hospital certified that defendant no longer presented such a risk, and then the court would determine whether, and upon what terms, defendant should be released. *Id.*

e.g., *In the Matter of Ngirutrong Gorey Kingya*, Civ. Act. No. 08-282; *In the Matter of Pablo Max*, Civ. Act. No. 05-194; *In the Matter of Marcellino Ulechong*, Civ. Act. Nos. 99-149, 99-156. It appears, however, that all of those cases were resolved short of actual commitment. The Court is unaware of a situation such as this one where the Republic asks the Court to find Defendant incompetent to stand trial and, at the same time, civilly commit the Defendant.¹³ It appears that 18 PNC §§ 901 and 902, along with 34 PNC § 531, allow the Court to conflate a finding that a criminal defendant is not competent to stand trial with a civil commitment, without holding separate hearings. (As discussed in footnotes 11 and 12, this procedure differs from its United States counterpart, where a finding of competency to stand trial is separate from civil commitment, and require separate hearings with different requirements and different standards.)

[3] The Court finds that the Republic has shown by clear and convincing evidence¹⁴ that Defendant is suffering from a mental illness that requires his commitment “to a member of [his] family lineage or clan, who may

¹³ Because the Republic is moving for commitment under 34 PNC § 531 in its brief, and spoke of civilly committing Defendant under 34 PNC § 531 both in opening and closing in this criminal case, the Court presumes that the Republic seeks to dismiss its criminal case, and move for civil commitment. The prosecution can only seek civil commitment *after* dismissing the criminal matter. The Court will proceed accordingly.

¹⁴ Since the standard is undefined in Palau, the Court again borrows the United States’ standard set out in 18 USC § 4246.

thereafter restrain the insane person to the extent necessary for his or her own safety and that of the public” under 34 PNC § 531(a). The Republic asks that Defendant be committed to the hospital. The Court finds that commitment to the hospital is neither legally mandated, nor administratively feasible. In the United States, most states require that a state consider the least restrictive alternatives to meet the individual’s needs and protect public safety before ordering involuntary in-patient commitment. 53 Am. Jur. 2d *Mentally Impaired Persons* § 20. It is unrefuted that Defendant has comported himself properly since the August 2009 incident. He has not approached or harassed Ms. Masang or her family; he has met regularly with a therapist, who is satisfied with his progress; he has ingested the necessary medication; his family has created a structured environment; and he has functioned within that environment. Both doctors testified that Defendant’s condition, although chronic, can be controlled by a nightly pill and a structured environment, and that Defendant would be best served in the care of his family. Also, practically-speaking, the Republic has nowhere to put the Defendant even if the Court ordered that he be committed to a hospital.

[4] In the United States, civil commitment requires regular reporting. 18 USC § 4247(e); *see also* 53 Am. Jur. 2d *Mentally Impaired Persons* § 25 (a defendant who is civilly committed is typically entitled to periodic reviews). Such a reporting requirement, although not specifically stated in Palau’s statute, is a logical and necessary extension to civil commitment to ensure that Defendant remains properly civilly committed according to this Order. Therefore, Defendant’s treating

physician at the Behavioral Health Division of the Ministry of Health will file an annual report with this Court, and provide a copy of the report to the Attorney General's Office and Defendant's counsel. The physician is to file his or her first report on November 1, 2010, and on the first of November each year, as long as Defendant is civilly committed.¹⁵

Further, the treating therapist should notify the Attorney General's Office if the therapist suspects that Defendant is no longer abiding by the requirements of civil commitment. In other words, if Defendant starts to display behavior which causes Defendant's treating therapist to believe that there is an increased likelihood of a violent recurrence, the therapist should notify the Attorney General's Office. The Attorney General's office, in turn, will decide whether to move to amend the terms of the civil commitment order.

Finally, under the United States scheme, civil commitment comes to an end upon a report of the director of the mental health facility that defendant no longer presents a risk of substantial bodily harm or serious property damage, and a court's determination whether and upon what terms to release the defendant. 18 USC § 4246. Palau's scheme provides for the court amending or terminating the civil commitment upon petition from Defendant's family member, notice to the Director of Behavioral Health Services and a hearing, 34 PNC §

¹⁵ If the first of November falls on a weekend or holiday the physician's report is due on the first work day after the first of November.

534,¹⁶ or "the doctor in charge of any hospital for the insane in the Republic" can terminate the commitment. 34 PNC § 535.¹⁷

CONCLUSION

The Court makes no finding concerning Defendant's sanity at the time the offense occurred, but the Court does find that Defendant is not competent to stand trial. The Court also finds that Defendant is suffering from a mental illness that requires his civil commitment "to a member of [his] family lineage or clan, who may thereafter restrain the insane person to the extent necessary for his or her own safety and that of the public." As part of civil commitment, the Court hereby dismisses the underlying assault and battery charge against Defendant in Criminal Action No. 09-162, but maintains the case to oversee Defendant's civil commitment.

¹⁶ If a family member petitions the Court to amend or terminate the commitment, the Court must notify the Behavioral Health Division and hold a hearing. 34 PNC § 534. Thereafter, the Court can "make such order for the release of the patient or his parole under limited supervision or under specific conditions if any, as it deems appropriate." *Id.*

¹⁷ Specifically, "the doctor in charge of any hospital for the insane in the Republic may discharge or parole on such conditions as he deems best any patient" upon a filing with the Clerk of Courts that the patient is (a) recovered, (b) in remission and not dangerous to himself or others and not likely to become a public charge or (c) being transferred to another mental health facility outside Palau. 34 PNC § 535.

While Defendant is civilly committed, Defendant may not harass Ms. Katherine Masang or her family. Defendant must meet regularly with a therapist from the Behavioral Health Division of the Bureau of Health, and comply with all of his therapist's directives (including ingestion of medication). Defendant's family is to create a structured environment for the Defendant, so that his potential for relapse remains low.

Further, Defendant's therapist at the Behavioral Health Division of the Bureau of Health will file annual reports, beginning November 1, 2010, which set out the Defendant's treatment, Defendant's compliance (or non-compliance) with the treatment, and whether, in the therapist's opinion, Defendant remains insane.

Finally, a family member can petition the Court to amend or terminate the commitment, or "the doctor in charge of any hospital of the insane"¹⁸ can discharge Defendant upon proper filing with the Clerk of Courts.

¹⁸ The Court reads this term to mean the head of the Behavioral Health Division.

**NGIRABRENGES OMELAU,
Plaintiff,**

v.

**REPUBLIC OF PALAU DIVISION OF
FISH AND WILDLIFE PROTECTION,
and KAMMEN CHIN, CHIEF OF FISH
AND WILDLIFE PROTECTION, in his
official capacity,
Defendants.**

CIVIL ACTION NO. 09-032

Supreme Court, Trial Division
Republic of Palau

Decided: December 23, 2009

[1] **Constitutional Law:** Due Process

When property seized by the government is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or the government has abandoned its investigation, the person from whom the property is seized is presumed to have a right to its return. Where the government fails to bring criminal proceedings of civil forfeiture proceedings against the property owner, it bears the burden of showing that it has a legitimate reason to retain the property.

ALEXANDRA F. FOSTER, Associate
Justice:

On February 16, 2009, Plaintiff Ngirabrenges Omelau filed a complaint seeking the return of 28 kesokes nets with attached floaters and sinkers and a net bag in its pre-seizure condition, or compensation for

unconstitutional deprivation, or damages for an intentional conversion of Plaintiff's property. In response, Defendants filed a motion to dismiss on March 9, 2009, and Plaintiff filed his response to that motion on March 20, 2009. On May 22, 2009, the Court denied in part and granted in part Defendants' motion to dismiss. Plaintiff's claim for the return of property survived, but his claims for compensation for unconstitutional deprivation and damages for intentional conversion were dismissed as claims barred by sovereign immunity. On June 2, 2009, Defendants filed an answer and counterclaimed for: (1) 29 separate violations of 27 PNC § 1204 (m) and (n), which each carry a fine of \$200,000; (2) forfeiture of the nets under 27 PNC § 1208(b)(3), because they were unlawful under 27 PNC § 1204 (m) and (n); and (3) an injunction for any future use of the nets under 27 PNC § 1209 (b)(5).¹ Defendants also sought costs and attorney fees, but set forth no basis for such an award. On June 25, Plaintiff answered the counterclaims with the affirmative defenses of laches, estoppel, statute of limitations, waiver and failure to state a claim upon which relief can be granted. The parties were unable to resolve their differences and this matter went to trial on December 14, 2009, with written closings filed on December 18, 2009. By the time of written closings, Plaintiff still sought return of the nets (including sinkers and floaters) or compensation, but the Republic had downgraded its demand to civil forfeiture of the illegal nets.

¹ 27 PNC § 1209(b)(5) does not exist. The Court assumes counsel means 27 PNC § 1208(b)(5).

The Court hereby issues its findings of the relevant facts and conclusions of law pursuant to ROP R.Civ.P. 52.

FINDINGS OF FACT

The Court finds that upon the advice of a local fisherman named Rechirei Bausoch and a manager from the Palau Fisherman's Association,² Plaintiff flew to the Philippines in 2000 to buy fishing gear from a specific vendor. He bought twelve sacks of floaters, 90 rolls of string and 89 rolls of mesh/fishing net. He bought the weights ("sinkers") in Palau. Plaintiff knew that the legal minimum mesh size was three inches,³ and so he had the Filipino vendor measure the net before he was bought it. He saw that the mesh of the net measured three inches.⁴ The vendor also pushed a pencil-like object with a diameter of three inches through the net. The nets cost about \$2,000 in the Philippines, but Plaintiff also had to shoulder the cost of transporting these items back to Palau—the only specific cost Plaintiff mentioned was \$85 bill for excess baggage. The weights cost \$2,500.

² Plaintiff's witness, Abby Rdialul, referred to the organization as the "Palau Federation of Fishing Association." Either way, it is an entity that sold fishing equipment in Palau.

³ In fact, Plaintiff testified that he had to retire his father's fishing nets because they were not in compliance with the three-inch requirement. Somewhat confusingly, Plaintiff testified that his father threw the nets out before he died in 1981. The law concerning mesh size was not passed until 1994, however.

⁴ Plaintiff measured the mesh of the net at trial. Measuring diagonally from one knot to the other, the net is barely three inches.

Finally, Plaintiff hired four Filipino workers to come to Palau and help him assemble the nets. He paid each worker \$250/month, and the four men were here for two months, all of which adds up to \$2,000 for the four workers. Although the workers had told him that they knew how to assemble nets, once they arrived here it became clear that they did not know how to make these nets, so he paid Rechirei \$2,000 to show the workers how to make kesokes nets.⁵ The nets varied from 150 to 250 feet in length. After they were assembled, Plaintiff fished with the nets for about three years until they were confiscated.

On September 10, 2004, the Division of Fish and Wildlife Protection (“DFW”) confiscated all 28 of Plaintiff’s kesokes nets, along with a bag. The DFW alleged that the nets’ mesh size was too small as it did not measure three inches diagonally. The DFW told that Plaintiff that his nets were the same size as Rdialul’s nets. The DFW has not returned the nets to Plaintiff, nor have they filed criminal charges or commenced civil forfeiture proceedings against Plaintiff.

Everyone appears to agree that Plaintiff’s nets were the same size as Rdialul’s nets. Rdialul’s nets were confiscated around the same time as Plaintiff’s nets. Rdialul had purchased his nets in Palau from Palau Fishing Authority, which ran a fishing gear store called Palau Federation of Fishing Association. (These are the same individuals who sent Plaintiff to their vendor in the Philippines, because the store had run out of kesokes nets.) Rdialul paid about \$3,000 for

his nets and \$75 for the net bag. Rdialul believed the mesh size of his nets met the legal requirement of three inches. He testified that although the mesh may expand or contract when wet, it returned to its original size when it dried. On September 12, 2003,⁶ DFW confiscated “twenty some” nets from Rdialul, because DFW alleged that the mesh size of Rdialul’s nets was less than three inches. Over four years later, on January 14, 2008, Rdialul filed a civil complaint against the Republic, the DFW, and DFW Chief Kammen Chin. On May 28, 2008, Justice Salii dismissed Plaintiff’s civil case because the Republic was prosecuting Rdialul for possession of unlawful kesokes nets in Criminal Action No. 08-073.⁷ On December 22, 2008, in a one page verdict in Criminal Action No. 08-073, Justice Materne found Rdialul not guilty of retaining possession of kesokes nets in violation of 17 PNC §§ 1204 and 1209 (a) “[f]or reasons stated in open court.”⁸ At trial in this case, Rdialul testified, that someone measured the nets in front of the judge and “found out that my nets were bigger than they originally thought.” Rdialul was not fined or imprisoned.⁹ Rdialul added that

⁵ Plaintiff has no receipts for his purchases in Palau, his purchases in the Philippines, or his payments to the workers or Rechirei.

⁶ The Court found this date in Chief Kammen Chin’s February 18, 2008, affidavit attached to the Republic’s motion to dismiss.

⁷ Justice Salii’s order dismissing the civil case is attached to Plaintiff’s complaint.

⁸ Justice Materne’s verdict is attached to Plaintiff’s complaint.

⁹ Confusion surrounds whether the civil or criminal case was filed first and which case actually went to trial. Rdialul thought that his civil case was pending, and that the criminal case preceded the civil case. Chin thought that no

others fish with nets the same size as his, and those nets have not been seized.¹⁰

After his nets were seized, Plaintiff heard a rumor that Eisenhower “Eisen” Meresbong was using some of his confiscated nets. Plaintiff went to visit Eisen. He saw Eisen’s nets and recognized them as his own. He recognized his nets by their telltale yellow string through the black net, along with Plaintiff’s sinkers and floaters. Plaintiff told Eisen those were his nets that had been confiscated by DFW. Eisen told Plaintiff that he measured the mesh size, found it to be three inches, and was fishing with the nets.¹¹ Plaintiff had his son take photographs of Eisen and Plaintiff with the nets.¹²

Eisenhower Meresbong agreed that he owned kesokes nets, but he testified that he bought his nets from the Philippines. After some prodding, he conceded that he had

criminal case had ever been filed against Rdialul, and that he testified in the Rdialul’s civil case. The Court takes this confusion as a reflection of the complexities of the law, and not as a reflection of the witnesses’ intelligence or memory.

¹⁰ He stated, however, that he had never seen Eisen or Aro fishing with similarly-sized kesokes nets. As will be discussed more thoroughly later in the decision, the DFW gave these individuals Plaintiff’s nets for agricultural purposes.

¹¹ Plaintiff’s statements to Eisen and Eisen’s responses were admitted not for the truth of the matter asserted, but as impeachment of Eisen.

¹² Black and white copies of five of those photographs were introduced as Plaintiff’s Exhibit 2. The nets are hanging like fishing nets. Floaters are visible in at least two of the photographs.

received nets from the DFW. He did not recognize the nets in the photographs (Plaintiff’s Ex. 2), but admitted that the nets he received from the DFW looked like the nets in the courtroom (Plaintiff’s Ex. 3 – two of Plaintiff’s nets which remain in the possession of the DFW). He testified that although the DFW nets have a three-inch mesh size, he could not use them for fishing because the nets were damaged; they were missing weights and floaters. DFW instructed him that he should only use the nets for agriculture, and he testified that he has followed those instructions.¹³

The DFW also gave some of Plaintiff’s nets to John “Aro” Remengesau for agricultural purposes. Remengesau requested and received some of Plaintiff’s nets, weights and floaters from the Subelek Farms, which the DFW ran. Remengesau did not know who originally owned the nets. He knew the nets were illegal mesh size because the mesh looked smaller than his legal gill nets, but he thought that they would work as a fence to keep the pigs out of his farm.¹⁴ He burned down the weights into smaller and longer sinkers for his gill nets. Originally, he testified that he did nothing with the floaters but then, when asked whether he could return the floaters, he testified that six of his gill nets

¹³ It seems fairly clear from Plaintiff’s photographs, and Meresbong’s demeanor and testimony at trial (e.g., he repaired the damaged nets by replacing the sinkers and floaters) that he is using these nets for fishing. Meresbong is not a party to this case, however, so the Court need not reach a decision as to whether he violated any laws.

¹⁴ Apparently, he ultimately did not use the nets for that purpose.

had been stolen and Plaintiff's floaters were with those nets. Aro paid nothing for the nets, weights and floaters.

Chief Kammen Chin testified that he had Plaintiff's nets seized because the mesh of the nets was too small. Chin has been measuring kesokes nets in the same manner ever since DFW started confiscating nets. He measures nets from the inside knot of the mesh hole to the other inside knot of the mesh hole. Chin testified that dictionaries define "mesh" as the open space between wires, chords or threads. Using the method of measuring the open space—and not the entire hole to include the netting itself—Chin showed the Court at trial that the mesh hole of Plaintiff's net measured about 2 3/4 inches. Chin used a demonstrative wooden fish, which measured three inches at its widest and tried to fit it through Plaintiff's nets. His attempts were unsuccessful. Plaintiff points out that the demonstrative wooden fish is about 1/4-inch in thickness and that thickness should be taken into account in setting the size of the fish. In other words, if one considers the thickness, the wooden fish was actually 3 1/2 inches.

Chin did not know how many nets were seized from Plaintiff, although he conceded that it could have been as many as 28. Apparently, there is no record of the number of nets seized. Plaintiff's Exhibit 1, the Receipt of Confiscated Property, which DFW gave Plaintiff when they confiscated his nets, reads: "1) 250 ft. each kesokes" and "2) Bkuro."¹⁵

¹⁵ Plaintiff testified that "Bkuro" is the net bag.

The preamble to the Receipt reads: "The following items have been seized by authority of the Division of Fish and Wildlife Protection because . . . such items are unlawful to possess. These items may be transferred to the custody of another agency for storage or as part of the investigation process."¹⁶ Chin testified that the seized nets were bulky and took up too much space in the office, so they were transferred from the Division of Fish and Wildlife to Subelek Farm, where there was more storage space. Chin headed up Subelek Farms until last year.

Chin conceded that only two of Plaintiff's nets remain in the DFW's custody today (Plaintiff's Ex. 3). When asked what happened to the other nets and the bag, Chin answered that they had been given to farmers such as Eisen and Aro and others whose names he did not remember. After receiving the green light from the Attorney General's office, Chin agreed to release the nets to these men, and presumably others, on the condition that the nets be used for farming and not fishing. Again, there is no record of who received nets, and how many were given to each recipient. Chin testified that he just told each recipient to "get what he needed." Chin contends that because the nets had been properly seized, the DFW could dispose of the nets as they wished.

Although the testimony is conflicting on whether Aro and Eisen, or workers at Subelek Farm, or both, removed the floaters

¹⁶ Despite many other entries, such as "Location of items at time of seizure," "Owners of items, if known" and a signature line for the "person from whom items were confiscated," nothing else has been filled out or signed.

and sinkers from the nets before Aro and Eisen could take the nets, what is clear is that Chin intended for the floaters and sinkers to be removed so that the nets would not be used for fishing. Chin relied exclusively on the recipient's word that the recipient would not replace the floaters and sinkers and continue fishing with these nets.

CONCLUSIONS OF LAW

According to Defendants the nets were seized as violations of 27 PNC § 1204 (m) and (n). Under the statute, "it shall be unlawful for any person to: . . . (m) fish . . . with a kesokes net with no bag portion or with the bag portion having a mesh size of less than three (3) inches measured diagonally; (n) retain possession of . . . a kesokes net having a mesh size of less than three (3) inches measured diagonally"

In its May 22, 2009, addressing Defendants' motion to dismiss, this Court held that the statute at issue in this case contemplated trial and conviction prior to forfeiture. 27 PNC § 1208(b)(3) (nets are "subject to forfeiture . . . upon conviction of a criminal violation pursuant to subsection 1209 (a)"). At the very least, the Republic should have sought civil forfeiture under 27 PNC § 1210. *Cf.* 27 PNC § 184 (civil forfeiture proceeding presumed in the context of seizure of foreign fishing vessel and fishing gear). Otherwise, how can a citizen contest the forfeiture of his nets if the Republic never files criminal charges or initiates a forfeiture proceeding? To keep the statute within constitutional bounds, the Court must read in a right to due process after a seizure of property. If there is no criminal trial or forfeiture proceeding, the Court must, at least,

hold a hearing for the return of the property, akin to a civil forfeiture hearing. *Cf.* ROP R. Crim. P. 41(e). At the hearing, the Court considered whether the Republic had the right to continued retention of the property, and, if not, whether the Republic should return the property to Plaintiff.

[1] When the movant seeks the return of property before the indictment or information, the movant bears the burden of showing that the seizure was illegal and that he is entitled to lawful possession of the property. *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987). However, "when the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or, as here, the government has abandoned its investigation, the burden of proof changes. The person from whom the property is seized is presumed to have a right to its return, and the government has the burden of demonstrating that it has a legitimate reason to retain the property." *Id.* In a case such as this one, where the delay is several years, the delay shifts the burden of proof to the Republic. *See Martinson*, 809 F.2d at 1369 n.5. Finally, "even if it is alleged that the property the movant seeks to have returned is no longer within the Government's possession, the district court has jurisdiction to determine whether such property has been in [the Government's] possession and whether [the Government] wrongfully disposed of such property." *United States v. Bein*, 214 F.3d 408, 411 (3d Cir. 2000).

Here, it has been over five years since the nets were seized. The statute of limitations have almost elapsed, *see* 14 PNC § 405 (six-year statute of limitations for civil cases), 17 PNC § 107 (six-year statute of

limitations for criminal cases), and Defendants had no intention of instituting criminal or civil proceedings of Plaintiff, except as counter-claims to Plaintiff's claims. The burden of proof therefore shifts to Defendants to show that "it has a legitimate reason to retain the property." Defendants' sole "legitimate reason" is their contention that the property is illegal. Defendants may be right, but it should not take Plaintiff hauling them into Court to prove that fact. Instead, Defendants have seen fit to parse out 26 of these purportedly illegal fishing nets,¹⁷ along with one bag, to others, based on an oral promise that the nets, and presumably the bag, would be used for agricultural purposes with absolutely no means of oversight to ensure that the nets are being put to legal use.

Since Defendants have produced no bag, the Court has no means of determining whether the bag mesh is less than three inches, as required by 27 PNC § 1204 (m). The Court finds, however, that the mesh size of Plaintiff's nets did not measure three inches according to DFW's measuring standards, and therefore Plaintiff was in violation of 27 PNC § 1204 (n). The DFW measures the nets diagonally from the interior of the knot to the interior of the knot. Measuring Plaintiff's net

¹⁷ Defendants hint that the Court should find fewer than 28 nets, because Plaintiff have not proven that 28 nets were seized. The Defendants did nothing to itemize the exact number of nets seized. It should not be on the Plaintiff to prove the number of nets seized. Plaintiff submitted the only scrap of paper to reflect the seizure of his nets, and the only thing written on that piece of paper is "250 ft. each kesokes" and one "Bkuro." Defendants' failure to itemize the seized items should inure to the benefit of Plaintiff, not Defendants.

(Plaintiff's Ex. 3) in that manner, Plaintiff's net is less than three inches diagonally.¹⁸

In his written closing, Plaintiff asks the Court to return all nets, floaters and sinkers in Defendants' possession, and reimburse Plaintiff for all missing nets, sinkers and floaters. Defendants, in closing, ask this Court to order forfeiture of the nets as "below legal mesh size," and "lay this matter finally to rest."

The Court has found that Plaintiff's nets were in violation of 27 PNC § 1204 (n), and therefore the DFW properly seized the nets. Since the Republic, through the DFW, has shown a willingness to release these nets to the public, however, the Court sees no reason why they should not be returned to Plaintiff. The nets in Exhibit 3 should be returned to Plaintiff, with floaters and sinkers removed so that the nets do not violate 27 PNC § 1204 (n). Further, Defendants are ordered to search Subelek Farm and all of the other depositories of seized property, and determine if any more of Plaintiff's nets,

¹⁸ The Court uses DFW's standard, since they are the Division empowered to enforce the Marine Protection Act of 1994, *see* Chief Chin's testimony and 27 PNC § 1208(b) ("the Bureau of Public Safety shall have primary enforcement responsibility"). Accordingly, the DFW's reasonable interpretation of the law must prevail. Here, DFW has reasonably—and repeatedly—measured mesh size from the inside of the net. Plaintiff, no doubt, believed that his nets were lawful, but his subjective belief is irrelevant in a strict liability case such as this one. *See Sugiyama v. Republic of Palau*, 9 ROP 5, 6 (2001) (noting that violation of 27 PNC § 1204 is a "regulatory offense" where subjective proof of intent is not required).

floaters and sinkers remain in the possession of DFW or any other law enforcement body by March 1, 2010. If any of Plaintiff's nets or portions of his nets (to include floaters and weights) remain in the possession of DFW or any other law enforcement body, Defendants will return those items to Plaintiff by March 16, 2010. The nets are returned with the understanding that Plaintiff cannot use them for fishing. He can, however, use the returned floaters and sinkers for fishing with legally-sized nets.¹⁹

CONCLUSION

Plaintiff's nets violate 27 PNC § 1204 (n), and therefore the DFW properly seized the nets. However, the Court finds that the Republic wrongfully seized the nets without then instituting criminal or civil proceedings.²⁰ Further, the Court finds that the Republic wrongfully disposed of the property without first effecting a valid seizure. Because the DFW violated Plaintiff's right to a hearing

and has released Plaintiff's nets to others in the community, the DFW is hereby ordered to return any nets or portions of nets in the Bureau of Public Safety's possession to Plaintiff in a manner which no longer violates 27 PNC § 1204 (n). (In other words, the DFW should remove all floaters and sinkers to ensure that the nets cannot be possessed and used for fishing purposes.) In return, Plaintiff is ordered not to fish with the nets, although he may use the legal floaters and sinkers for fishing.

The DFW and Attorney General's office are now on notice that, in the future, if the DFW seizes allegedly illegal property, DFW and the Attorney General's office must follow the law—they can either initiate civil forfeiture proceedings and/or institute criminal proceedings against those whose property was seized. They cannot, however, just seize the property and do nothing. Even more egregious is the seizure of property, and then parceling it out to others.

¹⁹ As detailed in the Court's May 2009 Order, even if the Court found that the nets were not in violation of the statute, the only remedy which the Court could order is the return of the nets still in Defendants' possession.

²⁰ At trial, Chin agreed that no one ever asked the courts if the nets were in violation of any laws, but he asserted that no one approached the courts because the DFW chose not to prosecute first-time offenders. Instead, the DFW just seized the nets as a warning. The Court understands that law enforcement officers must have some flexibility in their application of the laws. However, if they do opt to seize property, instead of just issuing a warning, they must follow through and either seek civil forfeiture or criminal prosecution.

**ROSALINDA ONGALIBANG, ELLENA
TELLEI, PETER NAPOLEON,
ANGELES TAKASHI, CLARINDA
ALEXANDER, OLYMPIA E.
REMENGESAU, and LAURINDA F.
MARIUR,
Plaintiffs,**

v.

**PALAU ADMINISTRATION CREDIT
UNION, LEO RULUKED, JOHN
KEBOU, ROSEMARY MERSAI,
YORANG MINER, EMIL RAMARUI,
KOKICH INGAS, and ALONZO
TELLEI,
Defendants.**

CIVIL ACTION NO. 07-064

Supreme Court, Trial Division
Republic of Palau

Decided: April 9, 2010

**[1] Corporations and Partnerships:
Derivative Actions**

Because the directors and officers owe fiduciary duties to the corporation, any wrongdoing or mismanagement that results in a breach of those duties constitutes direct harm to the corporate entity, not the individual shareholders. Therefore, the general rule is that a corporation is the proper party to sue for wrongs to itself through mismanagement of its affairs, official misconduct, or waste of its assets by its directors or officers.

**[2] Civil Procedure: Real Party in
Interest; Corporations and Partnerships:
Derivative Actions**

If the directors or officers of the corporation decline to file suit to redress harm to the corporation, a shareholder may initiate a derivative action on behalf of the corporation. The corporation, however, remains the real party in interest and any recovery obtained by the shareholder(s) goes to the corporation, not the individual shareholders.

**[3] Corporations and Partnerships:
Derivative Actions**

Key factors to the distinction between direct and derivative suits are (1) the party who suffered the alleged harm, i.e., the party to whom the wrongdoer owed the duty breached; and (2) the party who would receive the benefit of any recovery or other remedy.

**[4] Corporations and Partnerships:
Derivative Actions**

Rule 23.1 of the ROP Rules of Civil Procedure requires a shareholder-plaintiff to plead certain allegations when filing a derivative action. The plaintiff must allege that he or she was a shareholder or member at the time of the transaction of which the plaintiff complains. The plaintiff must also allege, with particularity, any efforts made to demand that the directors or officers take action on behalf of the corporation, as well as any such demand or request on other shareholders or members. If the directors refused to take action or if the plaintiff made no such demand, he or she must also allege with particularity the reasons for the directors' refusal or for the failure to make the demand. Rule 23.1 then states that the plaintiff must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the

corporation or association.” Finally, a complaint alleging a derivative cause of action must be verified.

[5] Corporations and Partnerships: Derivative Actions

The purpose of the heightened pleading requirements in Rule 23.1 of the ROP Rules of Civil Procedure is to ensure that the shareholder-plaintiff properly represents the best interests of the corporation. Consequently, courts typically apply Rule 23.1 strictly and take the “particularity” requirement of the pleadings seriously.

[6] Constitutional Law: Standing

The “shareholder-standing” or “prudential standing” rule is not a doctrine of a constitutional dimension. If there is no constitutional standing, a court must dismiss the suit, but nonconstitutional standing belongs to an intermediate class of cases in which a court may choose to raise the issue on its own and dismiss, but it is not obliged to do so.

ALEXANDRA F. FOSTER, Associate Justice:

Pursuant to the Court’s Order of March 31, 2010, the Court held a hearing on April 7, 2010, on whether this matter should have been brought as a derivative action under ROP R. Civ. P. 23.1 and, if so, what is the effect of Plaintiffs’ failure to bring this case under ROP R. Civ. P. 23.1.

Plaintiffs argued that this matter was properly brought as a direct action or, in the alternative, Plaintiffs should be granted leave

to file an amended complaint to comply with the pleading requirements of ROP R. Civ. P. 23.1. Counsel for Defendants Ruloked, Mersai and Kebou responded that it was clear Palau Administration Credit Union (“PACU”) should be treated as a corporation; it was clear that this matter should have been brought as a derivative action; and therefore the Court’s options were to dismiss this case without prejudice or allow Plaintiffs to amend their complaint and Defendants to amend their answer. Counsel for Defendants Remarui, Ingas, Miner and Tellei argued that this matter should be dismissed, because it would be unfair to Defendants to allow Plaintiffs to amend their complaint at this late juncture. Further, Defendants pointed to the inherent unfairness of drastically changing the posture of the litigation at this late stage in the proceedings. Defendants would have made different discovery requests, and filed different motions if they had known this was a derivative action.¹

Plaintiffs responded that it would be unfair to Plaintiffs to have this matter dismissed, since the Court—and not Defendants—raised the issue. Further, ROP R. Civ. P. 17 requires that Plaintiffs be granted an opportunity to amend their pleading before a matter is dismissed. Finally, Plaintiffs could face statute of limitations hurdles to litigation if this matter were dismissed at this time.

I. PACU Should Be Treated as a Corporation.

¹ Although not mentioned, any amendment to the complaint would likely include an exponential increase in damages sought which, in turn, would likely affect settlement discussions.

First, the Court must address whether PACU, as a duly incorporated credit union under the laws of Palau, is subject to the laws generally applicable to corporate entities, unless stated otherwise by the Palau National Code. Plaintiffs and Defendants assert that this is so, and the Court agrees.

According to the Corporate Regulations, promulgated by the Registrar of Corporations under 12 PNC § 122, a “credit union” is “a cooperative, non-profit association, incorporated in accordance with the provisions of Title 12 of the Palau National Code A credit union is authorized to issue shares of stock to its members and perform certain other services for them, in accordance with its charter and the laws of the Republic.” ROP Corporate Regulations, Chapter 7, pt. 1, § 1.4d. According to the authorizing legislation, the provisions of Title 12, Chapter 1 (governing corporations) apply to nonprofit as well as for-profit corporations. 12 PNC § 102. Furthermore, the Regulations consistently refer to a credit unions as a “corporation” and expressly state that a credit union incorporated under Chapter 7 “shall hereafter be subject to the provisions of these regulations except as otherwise herein provided.” *Id.* pt. 2, § 2.1.

Credit unions are subject to supervision by the Registrar of Corporations, *id.* § 2.8, are governed by a board of directors and must have an audit and credit committee, *id.* pt. 3, § 3.2, must hold regular shareholder (or member) meetings, *id.* § 3.3, and are subject to similar dissolution requirements to corporations, *id.* pt. 4, § 4.1.

PACU, as a non-profit credit union authorized, governed by, and chartered according to Palauan law, should be treated as a corporate entity for purposes of this case. No specific provision of the Palau National Code, or the Corporate Regulations passed thereunder, specifies otherwise. Finally, the parties themselves acknowledge that PACU should be treated as a corporation.

II. This Matter Should Have Been Brought as a Derivative Action.

A corporation is a business association that permits individuals to conduct business as a separate entity, with each shareholder’s liability limited to the amount of their investment in the corporation. *See* 18 Am. Jur. 2d *Corporations* §§ 1, 6; *see also* ROP Corporate Regulations, Chapter 1, pt. 5, § 5.3. A corporation typically is managed by a board of directors, which appoints officers to conduct the day-to-day business operations. A corporation is a distinct legal entity which comes into existence by charter from the Republic, with the authority to conduct business, make contracts, own property and land, and sue or be sued. 18 Am. Jur. 2d *Corporations* §§ 1, 2, 26, 44; *see also* ROP Corporate Regulations, Chapter 7, pt. 1, § 2.6 (including among the powers of a credit union the authority to make contracts, to sue and be sued, to purchase and hold property, to issue shares to its members, and to undertake other activities not inconsistent with the regulations). Consequently, any income or revenue belongs to the corporation, as does any loss or liability.

A natural corollary of a corporation’s status as a separate legal entity is that any harm or injury suffered by the corporation is

properly redressed by the corporation itself, not its individual shareholders. The corporation's power to sue on its own behalf provides the proper mechanism for recovering for wrongs against it, and any recovery returns to the corporate balance sheet. *See Massey v. Merrill Lynch & Co., Inc.*, 464 F.3d 642, 646 (7th Cir. 2006) (stating that a corporate injury means the claim "belongs to" the corporation, and "any resulting recovery flows to the corporate coffers").

This principle becomes a bit trickier when actions or omissions by the corporation's own directors or officers inflict the corporation's alleged injury. Directors and officers are fiduciaries who owe certain duties to the corporation, such as duties of care/prudence, to act with the "utmost good faith," *see* 10 Am. Jur. 2d *Banks and Financial Institutions* § 408, to use skill and diligence in managing the corporation's affairs, *id.* § 402, or to remain loyal in managing the corporation, 18B Am. Jur. 2d *Corporations* § 1460. It is settled that the directors and officers owe their fiduciary duties to the corporation, not to the shareholders individually. *Id.* § 1462.

[1] Because the directors and officers owe fiduciary duties to the corporation, any wrongdoing or mismanagement that results in a breach of those duties constitutes direct harm to the corporate entity, not the individual shareholders. No doubt, the shareholders may suffer harm—most commonly through a diminution in the value of their shares—but this injury is an indirect injury that derives from the harm to the corporation. Therefore, the general rule is that a corporation is "the proper party to sue for wrongs to itself through mismanagement of its affairs, official

misconduct, or waste of its assets by its directors or officers." *Id.*

[2] Of course, a corporation cannot simply head to the courthouse with a complaint in hand; someone must file a suit on its behalf. Like most business decisions, this authority resides first with the corporation's directors and officers. But if the directors or officers decline to file suit to redress harm to the corporation, shareholders have a recourse—a derivative action. In such a lawsuit, a shareholder may sue on behalf of the corporation rather than in an individual capacity. *See Tamakong v. Nakamura*, 1 ROP Intrm. 608, 610-11 (1989). The corporation, however, remains the real party in interest, and any recovery obtained by the shareholders goes to the corporation, not the individual shareholders. *Id.*; 19 Am. Jur. 2d *Corporations* § 1944; *see also Rawoof v. Texor Petroleum Comp., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008); *Massey*, 464 F.3d at 645; *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004).

[3] "[M]aintaining a clear distinction between direct and derivative actions keeps everything in its right place." *Massey*, 464 F.3d at 647. Although courts frame the inquiry in different terms, the key factors to the distinction between directive and derivative suits are (1) the party who suffered the alleged harm, i.e., the party to whom the wrongdoer owed the duty breached; and (2) the party who would receive the benefit of any recovery or other remedy. *See Tooley*, 845 A.2d at 1036, 1039; *see also* 19 Am. Jur. 2d *Corporations* § 1935 (noting that if the injury is incidental to or an indirect result of a direct injury to the corporation, it is derivative; if the shareholder's injury is separate and

distinct from the injury suffered by the corporation or arises from a special duty from the director to the shareholder, it is direct).

A shareholder may have a direct cause of action for the breach of a duty owed directly to the individual shareholder, rather than to the corporation, causing injury that is separate and distinct from that suffered by the corporation. 19 Am. Jur. 2d *Corporations* § 1938. In such a case, the shareholder may bring a direct, personal action against the directors or officers for personal harm, and any recovery flows directly to the shareholder-plaintiff. *Id.*; see also *Massey*, 464 F.3d at 645; *Tooley*, 845 A.2d at 1036. Although the injury for an individual suit must be distinct from the corporation's harm, courts have held that it "need not be unique to the stockholder; an injury may affect a substantial number of stockholders and still support a direct action if it is not incidental to an injury to the corporation." 19 Am. Jur. 2d *Corporations* § 1939. Examples of a direct shareholder cause of action are a director's fraud upon a shareholder, see *id.* § 1955; wrongful interference with a particular shareholder's right to vote; *id.* § 1958; the directors' refusal to permit a shareholder's right to inspect the corporate records; *id.*; where "a special contractual duty exists between the wrongdoer and the shareholder," *Rawoof*, 521 F.3d at 757; or where the directors mistreat certain, particular minority shareholders differently than other shareholders, see, e.g., *Virnich v. Vorwald*, 2009 WL 5173913, at *4 (W.D. Wis. Dec. 30, 2009).

On the other hand, a primary example of a wrong against the corporation, giving rise to a derivative action, is a breach of a fiduciary duty by a director or officer. Courts

have held that claims for an injury to corporate property or funds, including diversion or dissipation of corporate assets, waste of corporate assets, removal of corporate property from the corporation, or directorial mismanagement or self-dealing, "may be pursued as derivative actions, not as direct actions." *Id.* §§ 1956, 1958.

Having already determined that PACU is properly treated as a corporate entity under the law, the Court must assess whether the plaintiffs' complaint seeks damages for the directors' breach of a duty to the individual shareholders or to PACU itself. This case should have been filed as a shareholder-derivative action on behalf of PACU, rather than as a collection of individual suits seeking individual damages. The plaintiffs' allegations that the directors breached their fiduciary duties of care by mismanaging the credit union; making ill-advised lending determinations; failing to carry the required amount of reserves; violating the terms of the ROP Corporate Regulations and PACU's own articles of incorporation and by-laws; neglecting to remain well informed about PACU's operations; refusing to liquidate PACU even as it was spiraling toward insolvency; failing to make adequate efforts to collect on outstanding loans; and otherwise driving the credit union to failure *all* implicate duties owed by the directors to PACU. Plaintiffs have not alleged that the directors owed them any individual duties or that they otherwise maintained a special or contractual relationship.

Further, the harm allegedly caused by the defendants' conduct consists of lost corporate assets of PACU, such that each member's share (or account) is depleted or

entirely gone. This is harm suffered by PACU as an entity through alleged mismanagement, and each individual members' harm is *derivative* of that corporate injury. No plaintiff has asserted any individual injury. The Court does not mean that the plaintiffs have not been harmed. Their accounts at the credit union are now worthless. Nonetheless, their harm is the result of their membership in PACU, and the only way for them to sue on PACU's behalf is through a derivative lawsuit. This category of harms to the corporation includes precisely the type of injury the plaintiffs have alleged in this case, and we therefore turn to the implications of the distinction between the two claims.

III. Why the Distinction between Direct and Derivative Claims Matters.

The distinction between a direct and derivative claim is not an empty one, nor is it a mere technicality. Whereas a party has a right to sue for injury caused by an officer's or director's breach of duty owed directly to them, a shareholder has no vested or property right to bring a derivative action on behalf of a corporation. 19 Am. Jur. 2d *Corporations* § 1959. To obtain the authority to sue on the corporation's behalf, a shareholder must comply with certain substantive and procedural prerequisites, and the failure to do so may preclude the shareholder's suit or justify dismissal of the complaint. *Id.*

Courts, including the United States Supreme Court, have consistently and uniformly held that a claim for harm to a corporation may not be brought by individual shareholders directly, but instead must be brought as a derivative action on behalf of the corporation. *See* 18B Am. Jur. 2d

Corporations § 1583 (“The corporation is the proper party to sue for wrongs to itself through the mismanagement of its affairs, official misconduct, or waste of its assets by its directors or officers . . .”); 19 Am. Jur. 2d *Corporations* § 1937 (citing many cases for the proposition that, “[g]enerally, a person cannot pursue an individual cause of action . . . for wrongs or injuries to a corporation in which he or she holds stock, even if the stockholder suffers a harm that flows from the injury Such an action must be pursued by the corporation or by the shareholder in the form of a derivative action.”); *see also, e.g., Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (noting that shareholder standing rule “is a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation’s management has refused to pursue the same action for reasons other than good-faith business judgment”); *Rawoof*, 521 F.3d at 757; *Massey*, 464 F.3d at 648; *Lewis v. Chiles*, 719 F.2d 1044 (9th Cir. 1983); *Lewis v. Knutson*, 699 F.2d 230, 237-38 (5th Cir. 1983); *Virnich*, 2009 WL 5173913, at *3 (citing *Rose v. Schantz*, 56 Wis. 2d 222, 229-30 (1972)); *In re Veeco Instruments, Inc. Securities Litigation*, 434 F. Supp. 2d 267, 273 (S.D.N.Y. 2006); *Doltz v. Harris & Assocs.*, 280 F. Supp. 2d 377 (E.D. Pa. 2003); *Mathis v. ERA Franchise Systems, Inc.*, 25 So.3d 298 (Miss. 2009); *Tooley*, 845 A.2d at 1036.

Courts have applied this rule with equal force to banks and other financial institutions, a category encompassing credit unions. *See* 10 Am. Jur. 2d *Banks and Financial Institutions* § 405 (“A depositor or

creditor of a banking corporation cannot maintain at common law a personal action against the executive officers of a bank who have, by their mismanagement or negligence, committed a wrong against the bank to the consequent damage of such depositor or creditor.”); *id.* § 416 (same with regard to directors of a bank). Put quite simply, “[i]n an action for the loss of the funds of a bank through the negligent or wrongful management of the directors, the proper party plaintiff is the bank or its assignee or receiver, and, unless it plainly appears that a cause of action exists and the bank or its assignee refuses to bring the action, the stockholders or creditors cannot maintain an action therefor.” *Id.* § 425; *see also Save CU v. Columbia Community Credit Union*, 139 P.3d 386 (Wash. App. Div. 2006) (holding that members of a credit union do not have individual, direct causes of action against its directors or officers for injury against the credit union caused by their breach of fiduciary duties); *cf. Nat’l Temple Non-Profit Corp. v. Nat’l Temple Comm. Fed. Credit Union*, 603 F. Supp. 807 (E.D. Pa. 1985) (holding that the Federal Credit Union Act did not establish a private or direct cause of action for its members, and therefore, under general corporate common law, they did not have one).

It is clear, then, that a shareholder must meet the prerequisites for filing a derivative action before he or she may sue on the corporation’s behalf. *See generally* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 126 *et seq.* Although there are others,² the primary

² A plaintiff must also verify the complaint and demonstrate that the action is not a collusive

requirements for bringing a derivative action are (1) plaintiff must have been a shareholder at the time of the alleged wrongful conduct, as well as through the duration of the lawsuit, 19 Am. Jur. 2d *Corporations* § 2016; *see also Knutson*, 699 F.2d at 238; *Tooley*, 845 A.2d at 1036; (2) plaintiff must attempt to secure corporate action, i.e., make a demand on the directors, or aver that such a demand would have been futile; and (3) plaintiff must adequately represent other shareholders similarly situated, *see* ROP R. Civ. P. 23.1; 19 Am. Jur. 2d *Corporations* § 2034. In essence, the shareholder’s problem is one of standing, i.e., he or she is not the real party in interest or the one who suffered the direct injury.³ Some

one to confer jurisdiction on the court. *See* 7C Wright & Miller, *Federal Practice and Procedure: Civil* §§ 1827, 1830.

³ Shareholder standing is a separate doctrine than *constitutional* standing under U.S. law. *See Rawoof*, 521 F.3d 750. Constitutional standing stems from the U.S. Constitution’s case-or-controversy requirement, which mandates that a litigant establish (1) an injury in fact; (2) “a causal connection between the injury and the conduct complained of”; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As Plaintiffs pointed out at oral argument, Palau’s standing requirement is broader than the U.S. “case or controversy” requirement, based on the ROP Constitution’s grant of judicial power of “all matters in law and equity.” *See Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 103-05 (2004); *Republic of Palau v. Koshiba*, 8 ROP Intrm. 243 (2000). In any event, Plaintiffs in this case would have *constitutional* standing as a result of the indirect harm suffered as a result of the injury to PACU. *See Rawoof*, 521 F.3d at 756 (holding that shareholder-plaintiff met the minimum

courts refer to this principle as “shareholder standing,” *see, e.g., Virnich*, 2009 WL 5173913, at *3; others refer to it as “prudential standing,” *see, e.g., Franchise Tax Bd. of Cal.*, 493 U.S. at 336; and still others begin with Rule 17(a) of the Federal Rules of Civil Procedure and hold that the shareholder is not the real party in interest to bring the suit,⁴ *see, e.g., Rawoof*, 521 F.3d at 756. Whatever the terminology, it is clear that a shareholder who does not meet the prerequisites of filing a derivative action on behalf of the corporation cannot proceed with a direct claim. These prerequisites are not mere procedural technicalities; they are conditions precedent to the derivative action and are important substantive rules that limit the powers of individual shareholders to control corporate litigation. 19 Am. Jur. 2d *Corporations* §§ 1961, 1963.

IV. Plaintiffs Have Not Met Certain Pleading Requirements Under ROP Rule of Civil Procedure 23.1.

[4] Rule 23.1 of the ROP Rules of Civil Procedure, which tracks Rule 23.1 of the United States Federal Rules of Civil

requirements for constitutional standing). The question presented by the shareholder-standing doctrine, however, is one of prudential standing or, stated another way, the shareholder’s right to sue on behalf of the corporate entity.

⁴ Rule 17(a) states that “[e]very action shall be prosecuted in the name of the real party in interest.” This typically requires that a complaint be brought in the name of the party to whom that claim “belongs” and who is entitled to enforce the right. *See Rawoof*, 521 F.3d at 756. This portion of Rule 17(a) of Palau’s Rules of Civil Procedure is identical to Federal Rule of Civil Procedure 17.

Procedure, requires a shareholder-plaintiff to plead certain allegations when filing a derivative action. The plaintiff must allege that he or she was a shareholder or member at the time of the transaction of which the plaintiff complains. ROP R. Civ. P. 23.1(1).⁵ The plaintiff must also allege, with particularity, any efforts made to demand that the directors or officers take action on behalf of the corporation, as well as any such demand or request on other shareholders or members. ROP R. Civ. P. 23.1(2). If the directors refused to take action or if the plaintiff made no such demand, he or she must also allege—again with particularity—the reasons for the directors’ refusal or for the failure to make the demand. Rule 23.1 then states that the plaintiff must “fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.” *Id.* Finally, a complaint alleging a derivative cause of action must be verified. *Id.*

[5] The purpose of the heightened pleading requirements in Rule 23.1 is to ensure that the shareholder-plaintiff properly represents the best interests of the corporation. Derivative suits, although important to protect the best interests of a corporation and its shareholders, are not favored, and should be a

⁵ The plaintiff in a derivative action must also be a shareholder at the time of commencement of the action. 19 Am. Jur. 2d *Corporations* § 2016; *see also Knutson*, 699 F.2d at 238. Although Rule 23.1 does not state this requirement expressly, it is implied from the Rule’s requirement that a derivative action may be “brought by one or more shareholders or members to enforce a right of a corporation.” 19 Am. Jur. 2d *Corporations* § 2016 (citing *Schilling v. Belcher*, 582 F.2d 995 (5th Cir. 1978)).

“last resort” to enforce a corporation’s rights. 19 Am. Jur. 2d *Corporations* § 1945. Consequently, courts typically apply Rule 23.1 strictly and take the “particularity” requirement of the pleadings seriously. *See id.* § 2104. The most important requirement in adhering to the purposes of Rule 23.1 is the demand requirement, which has been described as “more than a pleading requirement; it is a substantive right of the shareholder and the directors.” *Id.* § 1963. Therefore, Rule 23.1 also demands that a litigant allege with particularity that a demand upon the directors or officers would have been futile. *Id.* § 1967 (“To excuse a demand on the directors in a derivative action, the shareholder’s complaint must contain particularized allegations that support the application of the excuse.”). After all, Rule 23.1 is designed to assure the Court that an individual shareholder has proper authority to sue on behalf of the entire corporation, and these matters are at the heart of the plaintiff’s ability to maintain such an action. *Id.* § 1963.

[6] Despite the importance of the pleading requirements in Rule 23.1—and the substantive principles they reflect—the “shareholder-standing” or “prudential standing” rule, as this court mentioned above, is not a doctrine of a constitutional dimension.⁶ Whereas a plaintiff’s failure to establish *constitutional* standing to raise a claim in a court of law may be raised by the court or a party at any time during a proceeding and may not be waived, a plaintiff’s failure to comply with the strict requirements in Rule 23.1 do not strip a court of jurisdiction. *See Rawoof*, 521 F.3d at 756-57. If there is no constitutional standing, a

court must dismiss the suit, *see Gibbons*, 11 ROP at 105 (noting that “the Court has a separate and independent duty to assure that the plaintiff has standing to sue”), but nonconstitutional standing belongs to an “intermediate class of cases in which a court” may choose to raise the issue on its own and dismiss, but it is not obliged to do so. *Rawoof*, 521 F.3d at 757 (quoting *MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 745 (7th Cir. 2007)).

V. Plaintiffs Will be Granted Leave to Amend Their Complaint To Meet The Pleading Requirements.

The facts and circumstances of this particular case merit a finding that Plaintiffs should be allowed to amend their complaint to meet the technical requirements of Rule 23.1. First, Plaintiffs’ complaint and subsequent evidence adduced at trial likely satisfies the underlying factual prerequisites for filing a derivative action. Second, this is not a case where defendants raised the shareholder-standing issue in a motion to dismiss or even a summary judgment motion.⁷ Rather, this

⁷ As a general principle, a litigant waives an issue unless it is timely raised. When a defendant has a defense to a claim for relief in a pleading, he or she may present the defense in a responsive pleading or a motion under Rule 12 of the ROP Rules of Civil Procedure. Failure to raise certain defenses, such as personal jurisdiction and improper venue, must be raised either in or before a responsive pleading, *see* ROP R. Civ. P. 12(b), but a defense that the plaintiff failed to state a claim upon which relief can be granted may be made in any subsequent pleading “or at the trial on the merits,” ROP R. Civ. P. 12(h)(2). If defendants did not notice the shareholder standing issue before filing their

⁶ *See supra* note 3.

case went to trial, and a lengthy one at that. All parties no doubt expended substantial resources in litigating this matter. The parties proceeded as though Plaintiffs' claims were appropriate, and only through this Court's additional research was this issue uncovered. Third, Plaintiffs may be prohibited from re-filing their action by the statute of limitations if the Court were to dismiss the case, even without prejudice. Fourth, as far as this Court can tell, except for a glancing discussion in *Tamakong*, 1 ROP Intrm. at 610-11, there has been no reported decision in Palau concerning the shareholder-standing doctrine or even discussing the requirements for a shareholder-derivative action. Fifth, it appears Rule 17(a) mandates that Plaintiffs be given time to cure this problem. See 6A Wright, et al., *Federal Practice and Procedure: Civil* § 1555 (Rule 17A motion is liberally construed to effect justice, even when the statute of limitations has run). Specifically, the rule requires that "[n]o action . . . be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection" for Plaintiffs to

responsive pleading or a Rule 12 motion to dismiss, they also could have filed a motion for summary judgment under Rule 56. Cf. *Rawoof*, 521 F.3d 750 (determining the shareholder-standing issue in a motion for summary judgment). Defendants did none of these. A party opposing a derivative action may use any of the pleading and motion provisions available under the federal rules, and "[l]ike Rule 12(b) motions in other actions, a motion to dismiss for failure to comply with the requirements of Rule 23.1 must be timely or it will be waived." 7C Wright & Miller, *Federal Practice and Procedure: Civil* § 1836, at 162. Defendants have therefore waived any right they may have to require strict enforcement of the rules.

amend their filing to reflect the real party in interest. Most importantly, the Court is satisfied that the purposes for requiring a shareholder to have standing to sue on behalf of a corporation (and therefore the reasons for the requirements of Rule 23.1) would not be undermined if the Court allowed Plaintiffs to amend their complaint.

The Court therefore holds that Plaintiffs should have brought a derivative action on PACU's behalf. Plaintiffs are not entitled to individual recovery for harm to PACU caused by its directors and officers. Plaintiffs did not characterize their claims in these terms, however, meaning that they did not comply with Rule 23.1. Under normal circumstances, this would merit dismissal of the case without prejudice, permitting Plaintiffs the opportunity to re-file their claims in a proper fashion. For the reasons detailed above, these are not normal circumstances, however. Accordingly, Plaintiffs' oral motion to amend their complaint is granted. Plaintiffs have 20 days, or until April 29, to amend their complaint, and Defendants will have 20 days thereafter to respond.

