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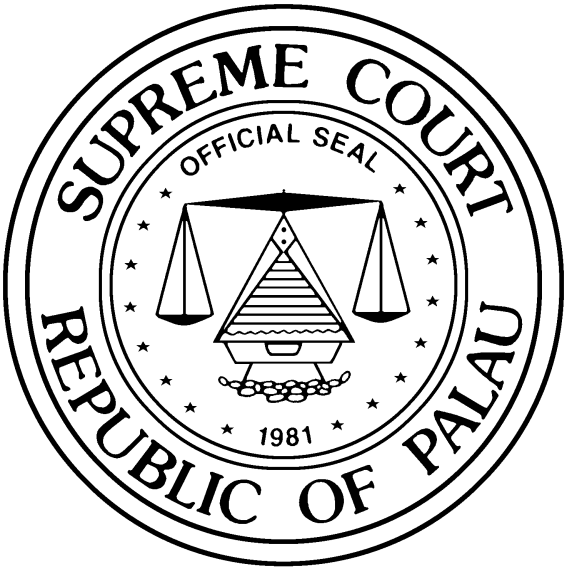

Consisting of Cases Determined by the

THE SUPREME COURT OF THE REPUBLIC OF PALAU

APPELLATE DIVISION

with Selected Trial Division and Land Court Decisions

Published by the Republic of Palau Supreme Court

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GOVERNOR KANGICHI UCHAU and PELELIU STATE GOVERNMENT, Appellants,

v.

ANDRES NAPOLEON, HENCE SOWARD, NIXON SOLANG, CASINO ROBAT, SIMPSON ELBELAU, CARSON KODEP, FERLY MTOCHED, and HARLAN NICHOLAS Appellees.

CIVIL APPEAL NO. 10-038
Civil Action No. 10-042

Supreme Court, Appellate Division
Republic of Palau

Decided: October 7, 2011[1]

[1] Constitutional Law: Freedom of Expression

When a public employer fires or threatens to fire an employee based solely on that employee's personal political beliefs, the employer impairs the employee's fundamental right to freedom of expression. Relatedly, if the retention of one's public job rests on his coerced affiliation with or support of a candidate or group, the consequences for expression and belief are the same.

[2] Constitutional Law: Freedom of Expression

A plaintiff may succeed on a political patronage dismissal claim if he proves that he was dismissed from his public job based solely on his personal political affiliations or beliefs. This is a question of fact and may include expressions of support or non-support for a particular candidate or group. If the plaintiff makes the required showing, the burden shifts to the hiring authority to demonstrate that political affiliation or belief is an appropriate requirement for the effective performance of the public job at issue. This is also a question of fact based on the duties inherent to the position.

[3] Constitutional Law: Freedom of Expression

The fact that a plaintiff was an at-will public employee and could be terminated for many permissible reasons is irrelevant if that employee establishes that he was terminated based solely on the exercise of a constitutionally protected right.

[4] Constitutional Law: Equal Protection; **Constitutional Law:** Freedom of Expression;

Where appellees' equal protection claim rests entirely on their free expression claim, an equal protection analysis is not necessary and may be dismissed.

Counsel for Appellants: Salvador Remoket
Counsel for Appellees: J. Roman Bedor

[1] Upon review of the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

BEFORE: KATHLEEN M. SALII, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; RICHARD H. BENSON, Part-Time Associate Justice.

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

PER CURIAM:

Appellants Governor Kangichi Uchau and the Peleliu State Government (PSG) appeal the judgment of the Trial Division in favor of Appellees Andres Napoleon, Hence Sowad, Nixon Solang, Casino Robat, Simpson Elbelau, Carson Kodep, Ferly Mtoched, and Harlan Nicholas on their wrongful termination claims. For the reasons set forth below, we **VACATE** the decision and judgment of the trial court and **REMAND** the matter to the trial court for further proceedings.

BACKGROUND

The following facts are largely uncontested.

Governor Uchau first prevailed in a special election in mid-2009 to fill out the term of Governor Jackson Ngiraingas, who left office for a position with the national government. In December 2009, another gubernatorial election was held in which Uchau defeated Dr. Caleb Otto. At that time, all of the Appellees were employees of PSG. Andres Napoleon was employed as a Peleliu State Ranger from January 2004 through January 2010. Hence Sowad was employed from 1992 through January 2010 as a builder and boat captain. Casino Robat was employed from 2005 to January 2010 as a public works employee. Simpson Elbelau was employed from 1996 through January 2010 as a boat crew member. Carson Kodep was a member of the boat crew and grounds crew from 1998 through January 2010. Nixon Solang was employed as a ranger for approximately two years prior to January 2010. Ferly Mtoched was employed from 2004 through January 2010 as a boat crew member and road crew member. And Harlan Nicholas was employed from 2008 to January 2010 in the Public Works Department. While some of the Appellees believed they were "permanent" employees of PSG, this was not indicated on any personnel documentation, and no laws or regulations protect PSG employees.[2]

Following the December 2009 election, Uchau summoned all PSG employees to a meeting where he announced that if any of the employees did not "support" him, they should leave. No one, including the Appellees, left the meeting, and Uchau congratulated them for their support. On January 1, 2010, Uchau was sworn in as governor. On January 4, 2010, Uchau again gathered the PSG employees and told them that if they did not support him during the election, did not come to his campaign headquarters, or did not vote for him, they should leave because they no longer have a job with PSG. The employees were then told to go to Uchau's office where his secretary would inform them if they still had a job.

The employees proceeded to Uchau's office. There they were each informed if

[2] In fact, each Appellee's Personnel Action Form indicates that they are "semi-permanent," though no definition of "semi-permanent" was established at trial.

Uchau had signed their Personnel Action Form (PAF). The Appellees were informed that Uchau did not approve their PAFs and they were no longer employed by PSG. New employees took over the Appellees' jobs that same day.

After their termination, the Appellees banded together and wrote a letter to Uchau on January 14, 2010, requesting reinstatement. Uchau responded on January 18, 2010, commending them on exercising their right to vote, and refusing to reconsider his position. He stated in the letter that "I approved and signed only the applications of the persons I believed we can work together in the 3 years of my tenure."

The Appellees then turned to the Peleliu State Legislature for support. The Legislature formed a Special Committee to investigate the allegations. The Committee interviewed the Appellees and heard from Uchau. On February 11, 2010, the Committee issued a report concluding that "it is clear beyond any doubt that [Appellees] were terminated and discharged from their employment with the State Government because they did not vote or support Governor Kangichi Uchau in the last general election." That day, the Legislature also adopted a resolution requesting that Uchau immediately reinstate the Appellees.

Uchau refused to honor the Legislature's request and the Appellees filed suit. The Appellees presented six claims: (1) violation of constitutional right to free expression; (2) violation of the constitutional right to vote; (3) violation of due process rights; (4) violation of the Voting Rights Act; (5) breach of employment contract; and (6) violation of the constitutional right to equal protection. Following a two day trial, the trial court issued its decision and judgment finding in favor of the Appellees with regard to their freedom of expression and equal protection claims. The court rejected the Appellees' remaining claims. This appeal followed.

STANDARD OF REVIEW

The trial court's findings of fact are reviewed for clear error. *Sun Ye Chin Fan v. Pacifica Dev. Corp.*, 16 ROP 56, 59 (2008) (citing *Ongidobel v. Republic of Palau*, 9 ROP 63, 65 (2002)). The appellate court will not reweigh the evidence, test credibility of witnesses, or draw inferences from the evidence. *Nakamura v. Uchelbang Clan*, 15 ROP 55, 57 (2008) (quoting *Omenged v. United Micronesia Dev. Auth.*, 8 ROP Intrm. 232, 233 (2000). "'Under the clear error standard, the lower court will be reversed only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.'" *Id.* (quoting *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002)). The trial court's conclusions of law are reviewed de novo. *Id.*

ANALYSIS

I. Freedom of Expression

The Appellants argue that the trial court erred by concluding that Uchau's actions in firing the Appellees violated the Appellees' right to freedom of expression. According to the Appellants, the Appellees were employed "at will" and could be terminated at any time for any reason. Moreover, the Appellants contend that Uchau did not interfere with the

Appellees' right to vote leading up to the election and therefore the Appellants could not have infringed on the Appellees' free expression rights.

The trial court assessed this claim under the analysis set forth in *April v. Palau Public Utilities Corp.*, 17 ROP 18 (2009). In *April*, the plaintiff, an employee of a public corporation, claimed that her right to freedom of expression was violated after she was fired for allegedly making public statements unfavorable to the company. In determining whether the defendants' actions under the circumstances violated the plaintiff's right to free expression under Article IV, Section 2 of the Constitution, we looked to U.S. case law on point. We concluded that when a public employee speaks as a private citizen (and not as an agent of the government), the employer may be restricted in regulating the employee's expression. And, absent a powerful justification, punishing an employee for expressing herself on a matter of public concern violates that employee's constitutional right to free expression.

Here, the court below found that anonymous voting and political support (or non-support) qualified as "expression" for constitutional purposes. It also concluded that such expression falls under the mantle of "political speech" and is on a matter of public concern. Because the Appellees were fired based on their political speech as private citizens, and because the Appellants failed to present a powerful justification for their actions, the trial court concluded that the Appellants violated the Appellees' rights under Article IV, Section 2 of the Constitution.

While we do not fault the trial court for trying to square the facts of this case with our recent precedent, we believe that a more straightforward analysis is appropriate. The Appellees' claims, as articulated in their complaint and developed at trial, are based on allegations that they were fired not because they spoke out on the gubernatorial election, but because they did not support the winning candidate, Uchau. Such allegations are otherwise known as political patronage dismissals, which infringe on an employee's right to freedom of expression inasmuch as an employee retains his right to express (or not express) his personal political views[3] at the risk of losing his job.

Upon review of the record, we believe that the allegations and facts in this case fall neatly into the analysis of political patronage dismissals set forth by the U.S. Supreme Court in *Elrod v. Burns*, 96 S. Ct. 2673 (1976), *Branti v. Finkel*, 100 S. Ct. 1287, 1294-95 (1980), and their progeny, and that this analysis is proper to employ in Palau. Palau courts may look to U.S. case law for guidance, especially those cases interpreting identical or similar constitutional provisions. *See Yano v. Kadoi*, 3 ROP Intrm. 174, 181 n.1 (1992); *see also April*, 17 ROP at 23-24. Therefore, to clarify the law and provide proper precedent, we rely on our "independent power to identify and apply the proper construction of governing law," even if not raised by the parties. *See Ongalibang v. Republic of Palau*, 8 ROP Intrm. 219, 220 n.2 (2000) (quoting *Kamen v. Kemper Fin. Servs.,*

[3] The term "political" in this context does not mean affiliation with a particular party or group. It refers simply to personal views on government, policy, and leadership.

Inc., 111 S. Ct. 1711, 1718 (1991)).

Article IV, Section 2 of the Palau Constitution provides, in relevant part, that "[t]he government shall take no action to deny or impair the freedom of expression." The freedom of expression includes the right to be free of coerced expression—a right to silence. *See Riley v. Nat. Fed'n of the Blind*, 108 S. Ct. 2667, 2677 (1988) (noting that in the context of protected speech, the difference between compelled speech and compelled silence is without constitutional significance). At the heart of the freedom of expression is the belief that the government shall not prescribe public opinion, and that competition of ideas and open debate on public issues benefit the Republic. *See generally Wong v. Nakamura*, 4 ROP Intrm. 364, 372 (Tr. Div. 1994) (noting that the fundamental guarantees secured by Article IV, Section 2 of the Palau Constitution, including the freedom of expression, "rest on the idea that more speech, not enforced silence will benefit the people and the Republic"); *Elrod v. Burns*, 96 S. Ct. 2673, 2682 (1976) (plurality opinion) (noting that competition of ideas and governmental policies is at the core of the electoral process).

To frame the issue, we note that there is no right to public employment. The government may provide a benefit, such as a job, or take one away for any number of reasons. Concerns arise when the provision or denial of a benefit requires sacrifices to constitutional freedoms. As we stated in *April*, public employers are not generally permitted to force employees to surrender fundamental rights, such as the freedom of expression, as a condition of their employment. *April*, 17 ROP at 23; *see also O'Hare Truck Serv. v. City of Northlake*, 116 S. Ct. 2353, 2356 (1996) ("A State may not condition public employment on an employee's exercise of his or her First Amendment rights.").

[1] Yet when a public employer fires or threatens to fire an employee based solely on that employee's personal political beliefs, the employer impairs the employee's fundamental right to freedom of expression. *See Branti v. Finkel*, 100 S. Ct. 1287, 1294-95 (1980); *Elrod*, 96 S. Ct. 2673; *see also O'Hare Truck Serv*., 116 S. Ct. at 2356 ("If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." (citation omitted)). Relatedly, if the retention of one's public job rests on his coerced affiliation with or support of a candidate or group, the consequences for expression and belief are the same.

Political patronage dismissals are not uncommon or unique, and though they infringe of an public employee's constitutional rights, such infringements may be permissible under certain circumstances. For instance, if an employee's private political beliefs would interfere with the discharge of his public duties, the government's interest in effectiveness and efficiency may outweigh the employee's right to free expression. *See Branti*, 100 S. Ct. at 1294; *see also Pleva v. Norquist*, 195 F.3d 905, 911 (7th Cir. 1999) ("Political affiliation is an appropriate criterion for public employment when the effective operation of government would be compromised by requiring the public official to retain a potential political enemy in a position of responsibility." (quoting *Warzon v. Drew*, 60 F.3d 1234, 1240 (7th Cir. 1995)).

"Ultimately, the defendant bears the burden in establishing that a plaintiff's position falls within the exception to the general prohibition on patronage dismissals." *Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 354 (7th Cir. 2005) (discussing U.S. Supreme Court's analysis of political patronage dismissals in *Branti v. Finkel*, 100 S. Ct. 1287, and *Elrod v. Burns*, 96 S. Ct. 2673).

[2] With this background, we hold that a plaintiff may succeed on a political patronage dismissal claim if he proves that he was dismissed from his public job based solely on his personal political affiliations or beliefs. This is a question of fact and may include expressions of support or non-support for a particular candidate or group. If the plaintiff makes the required showing, the burden shifts to the hiring authority to demonstrate that political affiliation or belief is an appropriate requirement for the effective performance of the public job at issue. *See Branti,* 100 S. Ct. at 1295; *Lane v. City of LaFollette*, 490 F.3d 410, 419 (6th Cir. 2007). This is also a question of fact based on the duties inherent to the position. *Lane*, 490 F.3d at 419. Relevant inquiries include whether the nature of the position requires political judgment, advice on the implementation of broad goals, or policy making—merely ministerial positions with little discretion and little input on public policy often fall outside this exemption. *See, e.g., Branti*, 100 S. Ct. at 1294-95 (noting that it is not always easy to tell if a position is one in which political or candidate affiliation is a legitimate factor, and providing examples).

Though we have modified the analysis, we are still able to clear up some of the issues presented in this appeal. First, we reject the Appellants' challenge to the trial court's finding that Uchau fired the Appellees. According to the Appellants, the Appellees' positions with PSG somehow ended around the time that Uchau was sworn in, and he merely refused to rehire them. The trial court acknowledged the Appellants' argument on this point and disagreed. It noted that the Appellees testified that they never tendered resignations and that no previous governor had sought resignations or asked them to reapply for their jobs. In addition former governor Hinao Soalablai testified that in his experience, PSG employees did not have to reapply for their positions following an election. The Appellants point to nothing in the record that requires a finding in their favor, and inasmuch as there is evidence to support the trial court's findings of fact on this point, they will not be disturbed.

[3] Next, we reject the Appellants argument that because the Appellees were employed at will, they could be terminated at any time, for any reason. As discussed above, the fact that a plaintiff was an at-will public employee and could be terminated for many permissible reasons is irrelevant if that employee establishes that he was terminated based solely on the exercise of a constitutionally protected right. *See e.g., Lane*, 490 F.3d at 419 (noting that the U.S. Supreme Court has "squarely rejected" the argument that because plaintiff served at the pleasure of the hiring authority, he can be dismissed for any reason and cannot be heard to complain that termination violated his constitutional rights); *see also O'Hare Truck Serv.*, 116 S. Ct. at 2361 ("Government officials may indeed terminate at-will relationships . . . without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not

expressing, specific political views . . . .").

The Appellants also allege that "the court below erred when held [sic] that Appellees [sic] relationship to Dr. Otto is protected right [sic] and erred when it found Appellants liable on theory [sic] that Appellees did not raise." However, the trial court did not conclude that the Appellees' relationship to Otto was a "protected right" and it is otherwise unclear how the Appellants' assert reversible error on this point. The court engaged in a thorough discussion of the factors leading to the Appellees' termination. And, the Appellees alleged in their complaint that they were punished based on their political expression. For instance, the facts and arguments included in the complaint indicate that the Appellees were fired for voting for Otto, not voting for Uchau, and generally for exercising their constitutional rights. The Appellees further developed their arguments in their Motion for Summary Judgment, in which they contended that they were terminated from their positions because "they exercised their constitutional rights to vote and for free speech." The Appellants' argument that the trial court based its conclusions on issues never raised by the Appellees is therefore rejected.

However, while we reject the various grounds for reversal argued by the Appellants in their brief, we nonetheless remand the matter to the trial court for further proceedings. As noted, the Appellees' claims are best assessed as political patronage dismissals rather than private speech on a matter of public concern. The Appellants therefore must have the opportunity to rebut the Appellees' claims in light of this holding.[4]

II. Equal Protection

The Appellants also disagree generally with the trial court's conclusion that the Appellees' equal protection rights were violated when Uchau fired them based on their failure to support his campaign and their relationship to his opponent. Article IV, Section 5 provides in relevant part that "[e]very person shall be equal under the law and shall be entitled to equal protection," and that "[t]he government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation."

On this point, the Appellees argued to the trial court that Uchau fired them for voting for Otto while retaining those employees that supported his campaign. They further argued that Uchau's decision to fire them for supporting Otto constituted discrimination based on "belief." The trial court assessed the claim by considering whether there was a rational relationship between the action taken and the objective. The court found that Uchau's objective in firing the Appellees was to purge the state government of employees who did not campaign for him, and that no rational basis existed for terminating the Appellees based on their political viewpoints.

[4] Upon review, we conclude that because the Appellees' equal protection claim rests entirely on their free expression claim, an equal protection analysis is not necessary. As

[4] The record in this case is ample. We leave it to the trial court to determine what proceedings may be necessary to resolve this matter on remand.

noted, the allegations giving rise to the Appellees' equal protection claim are identical to those giving rise to their freedom of expression claim. In essence, the Appellees contend that their equal protection rights were violated because they were punished based on their private political beliefs. As discussed, Article IV, Section 2 protects individuals against unconstitutional discrimination based on political beliefs and association. This claim may therefore be dismissed. *See Pagan v. Calderon*, 448 F.3d 16, 36-37 (1st Cir. 2006) (noting that allegation of discrimination based on political views and activities are not equal protection claims, but First Amendment claims); *Nestor Colon Medina & Sucesores v. Custodio,* 964 F.2d 32, 45 (1st Cir. 1992) (finding that in case alleging discrimination based on political views, there is no basis for considering equal protection claim that overlapped entirely with free speech claim).

CONCLUSION

For the reasons discussed above, we conclude that the Appellees may succeed on their claim that their rights to free expression under Article IV, Section 2 of the Constitution were violated if they can demonstrate that they were fired based solely on their personal political beliefs. This may include the decision to support or not support a particular political candidate. The Appellants should be given the opportunity to rebut the Appellees' freedom of expression claim by proving that the Appellees' personal political views are appropriate requirements for the effective performance of their public jobs. Moreover, we conclude that the Appellees' claim that their rights to equal protection under Article IV, Section 5 of the Constitution were violated overlaps entirely with their free expression claim and may be dismissed. Accordingly, we **VACATE** the decision and judgment of the trial court and **REMAND** this matter to the trial court for further proceedings.

ESTATE OF NOBOR KING,
Appellant,

v.

TERUO RENGULBAI, KUKONG FRITZ, AUGUSTINE MESEBLUU, and ANNA MELTEL,
Appellees.

CIVIL APPEAL NO. 10-040
Civil Action No. 06-204

Supreme Court, Appellate Division
Republic of Palau

Decided: October 7, 2011

[1] Custom: Judicial 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] Custom: Proof of Custom

The existence of a Palauan custom is a matter of fact that must be proved by clear and convincing evidence.

[3] Custom: Proof of Custom

Matters of custom must be resolved on the record of each case.

[4] **Custom:** Expert Testimony

The trial court is entitled to give greater weight to one expert over another.

Counsel for Appellant: Raynold B. Oilouch
Counsel for Appellees Teruo Rengulbai & Kukong Fritz: Roman Bedor
Counsel for Appellees Augustine Mesebeluu & Anna Meltel: Siegfried Nakamura

BEFORE: KATHERINE A. MARAMAN, Part-Time Associate Justice; RICHARD H. BENSON, Part-Time Associate Justice; and C. QUAY POLLOI, Associate Justice Pro Tem.

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

PER CURIAM:

Appellant, the Estate of Nobor King (the Estate), seeks review of the Trial Division's Decision and Judgment. The court held that Ngeskesuk Clan's transfer of 30,000 square meters of its land to Nobor King was invalid, entering a judgment that his Estate is entitled to restitution from Ngeskesuk Clan in the form of attorney fees and pre-judgment and post-judgment interest. For the following reasons, we affirm the Trial Division.

BACKGROUND

This case addresses the validity of the transfer of a 30,000 square-meter portion of Cadastral Lot 054 R 01 (Homestead Lot 168), located in Ngesias Hamlet, Peleliu State. Ngeskesuk Clan owns Cadastral Lot 054 R 01, and this appeal focuses mainly on the Trial

Division's finding of Palauan custom as to the alienation of land from Ngeskesuk Clan.

In May of 1993, Nobor King filed a quiet title action as Obak ra Mengelang of Ngeskesuk Clan for the entirety of Cadastral Lot 054 R 01. Ronald Rdechor, as ochell of the clan, hired counsel. In deciding to file suit and hire counsel, King consulted with members of Kebui Lineage even though Ngeskesuk Clan is comprised of three unrelated lineages, Kebui, Medaliwal, and Roisbeluu. During the course of the quiet title proceeding, Kebui Lineage had difficulty paying the attorney fees. In the end, King agreed to pay the attorney fees, in exchange for a 30,000 square-meter portion of Cadastral Lot 054 R 01 if Ngeskesuk Clan was awarded the land. Only the ochell members of Kebui Lineage were involved in this oral agreement.

On October 13, 1997, the Trial Division awarded Cadastral Lot 054 R 01 to Ngeskesuk Clan. That decision was affirmed in 2000, and a certificate of title was issued to Ngeskesuk Clan in 2004. On May 14, 2005, King and the ochell of Kebui Lineage signed the deed of transfer for the 30,000 square-meter portion of the lot promised in exchange for the legal fees. They did not consult with or seek approval from members of Medaliwal or Roisbeluu Lineages before signing the deed.

In September 2006, King filed a quiet title action for the 30,000 square meters, and Medaliwal and Roisbeluu Lineages both objected to the transfer on the ground that the strong senior members of two of Ngeskesuk Clan's lineages did not agree to the transfer. Teruo Rengulbai and Kukong Fritz represented Medaliwal Lineage, and Augustine Mesebeluu and Anna Meltel represented Roisbeluu Lineage. The Trial Division of the Supreme Court held a trial on April 27, 28, and 29, and May 3, 4, and 10, 2010, hearing testimony from several witnesses, including two expert witnesses on Palauan custom–Wataru Elbelau for the Estate and Kazumoto Rengulbai for Medaliwal Lineage.

In its Decision, the court made findings as to the strong senior members of each lineage. First the court addressed Kebui Lineage. After hearing testimony of Teruo Nobou, it concluded that Nobor King, the current Bilung Sumiko Joseph, the current Obak ra Mengelang Susong Smau, and others are ochell of Kebui Lineage and Ngeskesuk Clan.

Then the court turned to Medaliwal Lineage, agreeing with Lorenzo Edward's testimony that their great-great grandmother Ebud was adopted by the last remaining members of Medaliwal Lineage. Edward testified that they were therefore ochell by adoption, admitting that if there were blood-born ochell, they would have a higher status than ochell through adoption. The court held that regardless of the adoption, Fritz and Rengulbai were strong senior members of Medaliwal Lineage.

Finally, the court addressed Roisbeluu Lineage. It credited the testimony of Fanny Ngiruos Blunt and Sandy Ngiruos Rengechel's testimony that Edboy is ochell and Augustine Mesebeluu and Anna Meltel are strong senior ulechell members of Roisbeluu Lineage.

Having resolved the identities of the

strong senior members of each lineage, the court turned to the issue of how Ngeskesuk Clan may transfer property under Palauan custom. First, the court noted that Ngeskesuk Clan is comprised of three lineages that are not blood related, and that they each came to Ngeskesuk Clan at different times. The court concluded that there are strong senior members of Ngeskesuk Clan who are not from Kebui Lineage but who must approve land transfers, relying on Haruo Esang's testimony that he is not of Kebui Lineage but holds the title of Ngeskesuk, the seventh-ranking chief in Ngesias hamlet, and represents Ngeskesuk Clan to other clans. He stated that in the past when he has refused to approve a sale of land, that sale did not proceed.

Then the court evaluated the expert testimony. The Estate's expert, Wataru Elbelau, stated that if only one lineage of a clan has ochell members, those ochell can agree to sell land, and the other lineages would simply not be represented in the land transfer. However, Medaliwal Lineage's expert, Kazumoto Rengulbai, offered more persuasive testimony that each lineage has strong senior members that represent their lineage, and they can be either ochell, ulechell, or terreuoal. According to Kazumoto, the strong senior members of each lineage had to confer and agree to transfer clan land, especially in instances where lineages of a clan are not related by blood.

The court concluded that Kazumoto's testimony provided clear and convincing evidence of Palauan custom. It acknowledged both experts were inconsistent in their testimony regarding the proper Palauan custom, but it concluded that Wataru's testimony regarding custom was too difficult to accept because it would permit transfer of land without any input from lineages of a clan, even though those lineages have strong senior members and are not near extinction.

The Trial Division thus held that Palauan custom requires that "each lineage from Ngeskesuk Clan designate its strong senior members, and those strong senior members, as representatives of Kebui, Medaliwal, and Roisbeluu, must confer and agree to the transfer of clan land before that transfer can be effective." Applying that custom, the court held that the deed was invalid because the strong senior members of Medaliwal and Roisbeluu Lineages did not approve the transfer. To avoid unjust enrichment, the court awarded the Estate restitution from Ngeskesuk Clan because the clan received the benefit of the attorney fees King paid. Specifically, it directed Ngeskesuk Clan to pay the Estate $14,276 and 3% pre-judgment interest and 9% post-judgment interest. This appeal followed.

STANDARD OF REVIEW

[1] We review the trial court's conclusions of law *de novo*. *Wong v. Obichang*, 16 ROP 209, 212 (2009). The trial court's finding of fact is reviewed under the clearly erroneous standard. *Idid Clan v. Olngeband Lineage*, 12 ROP 111, 115 (2005). 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. *Roberts v. Ha*, 13 ROP 67, 70 (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).

DISCUSSION

The Estate brings six issues on appeal: (1) whether the court erred in its customary finding that to transfer clan land (a) each lineage in the clan must consent to the transfer, (b) each lineage must designate its strong senior members who must consent to the transfer, and (c) all the strong senior members of each lineage must consent to the transfer; (2) whether the court erred in finding Teruo Rengulbai and Kukong Fritz to be strong senior members of Ngeskesuk Clan; (3) whether the court erred in finding Augustine Mesebeluu and Anna Meltel to be senior strong members of Ngeskesuk Clan; (4) whether Appellees are estopped from challenging the conveyance to Nobor King; (5) whether Nobor King is entitled to the land under the principle of restitution; and (6) whether Appellees should pay the legal fees of the Estate.[1]

I. Customary Law Findings

The Estate first takes issue with the Trial Division's finding as to Palauan custom. It lists several reasons why the Trial Division's conclusion was wrong, but its position ignores the well-established principle that determinations of Palauan custom vary depending on the facts of each case.

First, the Estate argues that there is a "generally recognized and accepted custom" that the strong senior members of a clan must approve a land transfer, not that strong senior members of each lineage must consent to convey clan land. The Estate incorrectly argues that the Trial Division simply "decided to create new custom" relating to land transfer.

[2, 3] The existence of a Palauan custom is a matter of fact that must be proved by clear and convincing evidence. *Arbedul v. Emaudiong*, 7 ROP Intrm. 108, 110 (2006). Thus, the outcome of each case is determined by its own record. *Id.*; *see Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, (2006). Although one court may hold that strong senior members of a clan must approve a land transfer, this Court has noted that "other requirements may be found to exist under custom." *Arbedul*, 7 ROP Intrm. at 110.

Nevertheless, the Estate cites numerous cases for the proposition that only strong senior members of a clan need to approve a land transfer. Although each case included a general reference to this Palauan custom, none of them involved a clan whose lineages are unrelated by blood and thus they are inapplicable. *See Obak v. Bandaril*, 7 ROP Intrm 254 (Tr. Div. 1998) (addressing a transfer of land jointly owned among individuals, not clan or lineage ownership); *Remoket v. Omrekongel Clan*, 5 ROP Intrm, 225, 230 (1996) (resolving who receives shares of rental proceeds from leasing clan land, and making findings of fact as to who the strong senior members of the clan were in the process); *Arbedul v. Diaz*, 9 ROP 218 (Tr. Div. 1989) (discussing removal of clan titles); *Risong v. Iderrech*, 4 TTR 459, 464 (Tr. Div. 1969) (dealing with clan title where two clans

[1] The Estate filed its opening brief on May 31, 2011, a day late, without filing a motion for extension of time providing good cause for the delay. We may dismiss this appeal pursuant to ROP R. App. P. 31(c), but given that Appellees did not take issue with the delay and it was only one day late, we will not dismiss this appeal.

involved all the same people and thus only one membership).

As these cases are factually distinguishable, the court's decision not to blindly accept that general proposition was proper. The court acknowledged Ngeskesuk Clan's unique structure, where the lineages comprising the clan are not blood related, and relied upon the evidence at trial to determine custom. Although Wataru testified for the Estate on direct examination that the rule is that strong senior members of a clan must approve a land transfer, he admitted during cross examination that strong members, not necessarily ochell, of each lineage had to meet and agree to a sale of land. Conversely, Kazumoto testified that strong senior of each lineage should agree on land transfers when the lineages are not blood-related, but during cross examination, he acknowledged the general rule that the strong senior members of a clan agree upon land transfers.

The court noted these inconsistencies in the testimony but concluded that there was clear and convincing evidence that the custom based on this set of facts is that each lineage from Ngeskesuk Clan designates strong senior members who meet and confer regarding land transfers. As there is evidence to support this conclusion, we see no error.

The Estate erroneously contends that the Trial Division's conclusion regarding Palauan custom ignores the different ranking and strengths of each lineage within a clan. Its position is that Kebui Lineage is much stronger than Medaliwal and Roisbeluu Lineages, and so approval from the strong senior members was sufficient to transfer clan lands. To find an error in the court's reasoning, the Estate points to Kazumoto's testimony where he acknowledged that within a clan ulechell members are weaker than ochell members, and that terreuoal members are the weakest members of the clan. According to the Estate, the court misapplied this testimony when it concluded that strong senior members of Medaliwal and Roisbeluu Lineages are also strong senior members of Ngeskesuk Clan.

Contrary to the Estate's position, the trial court acknowledged the differences between ochell, ulechell, and terreuoal clan members, and that one's status within a lineage may be different than status within a clan. It did not conclude that the strong senior members of Medaliwal and Roisbeluu lineages are strong senior members of Ngeskesuk Clan. Rather, it concluded that Ngeskesuk Clan–unique in the sense that its lineages are not blood related–must have approval by strong senior members of each lineage to transfer land. It reached this conclusion after weighing competing expert testimony, and we see no justification to disturb this finding. *Saka v. Rubasch*, 11 ROP 137, 141 (2004) (stating that the Appellate Court "is in no position to second-guess the trial court, who saw and heard both experts testify, in choosing to credit one over the other"). Thus, the court's conclusion did not ignore status within lineages or clans; it simply concluded that a custom exists as to Ngeskesuk Clan that differs from other clans.

Next, the Estate takes issue with the trial court's customary conclusion that each lineage should "designate" its strong senior members. It argues that the use of the term "designate" shows that the court ignored the generally accepted custom that clan members

obtain seniority and strength based on their status and service, but we do not interpret this comment as changing who are the strong senior members of a lineage. In arguing that the court's use of the term "designate" turned status in a lineage into a democratic process, the Estate reads more into this term than the court made explicit in its Decision. Use of the word "designate" does not mean that members decide who is an is not a strong senior member of a lineage. Had that meaning been the court's intention, its evaluation of who the strong senior members of each lineage of Ngeskesuk Clan would have differed. We see no clear error in the court's use of the term designate.

In its final attack on the court's finding on Palauan custom, the Estate cites several pages of Kazumoto's testimony to show that the court's reliance on the testimony was clearly erroneous. It seeks to show that he was inconsistent and unreliable, including his statement agreeing that an ulechell member of Ngeskesuk Clan is weaker than an ochell member, and that status is assigned at birth and cannot change. The Estate argues that this is inconsistent with his testimony on direct and re-direct that senior members of each lineage must consent to land transfers, and it goes as far as stating that he committed perjury.

[4] Kazumoto's testimony may have included inconsistencies, but the court's decision to credit his testimony over Wataru's was not clearly erroneous. First and foremost, as we have already noted, the trial court is entitled to give greater weight to one expert over another. *Saka*, 11 ROP at 141(stating that the Appellate Court "is in no position to second-guess the trial court, who saw and heard both experts testify, in choosing to credit one over the other"). In evaluating both experts, the court acknowledged Kazumoto's inconsistencies, but it was also faced with Wataru's inconsistent testimony–a fact the Estate ignores. The Trial Division therefore chose between two versions of inconsistent testimony. Given that the court noted the inconsistencies, justified its reliance on Kazumoto's testimony, and was in the best position to evaluate the credibility of these witnesses, we find no clear error. Despite all of the Estate's arguments taking issue with the trial court's conclusion as to Palauan custom, we affirm the trial court's finding of Palauan custom.

II. The Clan Status of Rengulbai and Fritz

The Estate's second issue on appeal is whether the court erred when it found that Teruo Rengulbai and Kukong Fritz are strong senior members of Ngeskesuk Clan, and that their consent is required to transfer clan land. As the Estate's argument mischaracterizes the court's conclusion, and the court's conclusion is not clearly erroneous, we disagree.

The court did not conclude that Rengulbai and Fritz were strong senior members of Ngeskesuk Clan. Rather, the Trial Division explicitly stated that "Medaliwal Lineage considers Fritz and Rengulbai strong senior members of Medaliwal Lineage." No where in the initial Decision, or subsequent Judgment and Decision awarding attorney fees did the court state that Fritz or Rengulbai are strong senior members of Ngeskesuk Clan. Thus, the Estate misreads the court's conclusion as to Rengulbai and Fritz.

The Estate contends that the court erred in concluding that Fritz and Rengulbai are ochell members of Medaliwal Lineage because the evidence showed that they were ulechell members of Medaliwal Lineage. It points to Edward's testimony in support, citing his testimony that his ancestor Ebud had been an ulechell member of Medaliwal Lineage by birth, but rose to the level of ochell when he was adopted to a woman named Rirai. Edward also admitted that if there were ochell members of Medaliwal Lineage, he would not be as strong as them, and that because of Ngeskesuk Clan's history, ulechell members have risen to ochell status. The Estate argues that this testimony was wrong because of both experts' testimony that status never changes.

The Estate again mischaracterizes the court's conclusion and fails to find an error. Rather than directly addressing the court's conclusion that Fritz and Rengulbai are strong senior members of Medaliwal Lineage, it criticizes Edward's testimony about ochell versus ulechell status, an issue unrelated to the court's ultimate conclusion about strong senior members of the lineage. The court's conclusion was not reliant on Edward's testimony about a change in status; it actually made no finding on that piece of testimony. Instead, the court credited Edward's testimony tracing Fritz and Rengulbai's ancestry to show that they are strong senior members of Medaliwal Lineage. The court did not conclude that they were ochell, only that they are strong senior member of Medaliwal Lineage. There is no evidence contradicting this conclusion, so we find no error.

III. The Clan Status of Mesebeluu and Meltel

The same is true of the Estate's third argument, that the trial court erred in finding that Augustine Mesebeluu and Anna Meltel are strong senor members of Ngeskesuk Clan whose consent is required to transfer clan land. Again, the Estate mischaracterizes the Trial Division's conclusion, and fails to find a clear error.

To be clear, the Trial Division concluded that there are "strong senior members of Roisbeluu Lineage, including Augustine Mesebeluu and Anna Meltel." It never concluded that they were strong senior members of Ngeskesuk Clan. What is more, the Estate does not point to any testimony or evidence that these individuals are not strong senior members of Roisbeluu Lineage. It states outright that it "has no problem with Augustine and Anna being senior strong members of Roisbeluu Lineag," and then merely reargues its earlier position that all the lineages do not need to agree to the transfer of clan land. The Estate re-reviews all the facts showing that Kebui Lineage is the dominant lineage, listing examples of land transfers that took place without approval of strong senior members of Medaliwal and Roisbeluu Lineages.

This argument fails for the primary reason that the court did not conclude that Augustine and Anna were strong senior members of Ngeskesuk Clan. Moreover, the Estate's argument is flawed because the trial court took into account Kebui Lineage's power and prior transfers. The court noted the evidence that land had been transferred in the past, but did not find it persuasive, reasoning

that the absence of objections to the past transfers does not validate the transfer at hand.

IV. The Clan Status of Edboy

The Estate also contends that the court's comment about Edboy as the remaining ochell of Roisbeluu Lineage was clearly erroneous. According to the Estate, because Edboy did not object to the land transfer, he waived the right to object to the transfer. Yet as the Estate does not explain how this comment somehow led to a clearly erroneous outcome. The court's statement about Edboy was simply a comment; it did not affect its holding that the strong senior members of Roisbeluu Lineage had to approve the transfer of Ngeskesuk Clan land. As it points to no clear error in the court's analysis, the Estate's argument as to Augustine and Anna fails.

The Estate then proceeds to argue that all of the Appellees may not challenge Ngeskesuk Clan's land transfer due to judicial estoppel. However, the Estate did not present this argument at trial. As a party may not raise new legal theories on appeal for the first time, we will not address this argument. *Ulechong v. Morrico Equipment Co.*, 13 ROP 98, 100 (2006).

V. King's Entitlement to Restitution

The Estate's fifth argument is that Nobor King was entitled to the land through principles of restitution. Restitution is determined by "(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the other party's property has been increased in value or his other interests advanced." Restatement (Second) of Contracts § 371. According to the Estate, the legal fees and interest awarded by the trial court did not take into account the risk Nobor undertook in providing the attorney fees.

We disagree for two reasons. The Trial Division determined that the appropriate form of restitution to award the Estate of King was the amount paid in attorney fees, plus pre-judgment and post-judgment interest. It based this decision on the principle that Ngeskesuk Clan benefitted in that amount. The Estate of King presents no authority to support the argument that the land was the appropriate form of restitution.

Second, the Estate's argument that the court did not take Nobor King's risk into account is not the proper measure of restitution. In awarding restitution, the proper focus is not the damage to the plaintiff, but the benefit obtained by the defendant. That is exactly the approach the court took here in awarding the Estate exactly what it received–the attorney fees. We therefore see no error in the form of restitution.

VI. Ngeskesuk's Obligation to Pay Legal Fees

Finally, the Estate contends that the Trial Division erred in requiring Ngeskesuk Clan to pay the Estate's legal fees. Its position is that the Appellees herein should be responsible for the legal fees, and the Trial Division did not have the authority to award the restitution because Ngeskesuk Clan was not a party to the proceedings. As Ngeskesuk Clan was a part of the proceedings, we disagree and affirm the trial court.

The Trial Division rightly concluded that Ngeskesuk Clan was unjustly enriched, and that the clan should be responsible for paying the attorney fees and interest to the Estate. The Estate filed an action to quiet title to the 30,000 square-meters that Ngeskesuk Clan allegedly conveyed to Nobor King. A notice was issued informing the public that "any person claiming to be a senior strong member of Ngeskesuk Clan of Peleliu" who has the right to challenge the transfer should file a claim or objection with the Court. Ngeskesuk Clan was therefore involved in the proceeding. *See* 65 Am. Jur. 2d Quieting Title § 63 ("Parties who should be joined . . . include all those who appear of record to have a possible claim or interest in the property or all those who may have a substantial interest in the property and who will be materially affected by the decree."). As a result of the proceeding, Ngeskesuk Clan retained the land, and the court permissibly required the clan to pay restitution because it received the benefit of the land and should pay for the fees in exchange. *See* Restatement (Second) of Contracts § 369. We affirm the trial court on this ground as well.

CONCLUSION

The Estate of Nobor King has not convinced us that the Trial Division committed a reversible error. We therefore **AFFIRM** the Trial Division's Decision and Judgment.

KAZUYUKI RENGCHOL and SECUNDINA OITERONG AZUMA,
Appellants,

v.

UCHELKEIUKL CLAN
Appellee.

CIVIL APPEAL NOS. 10-018 & 10-024
LC/M 01-745

Supreme Court, Appellate Division
Republic of Palau

Decided: October 7, 2011[1]

[1] Appeal and Error: Record

That the adverse party's counsel is unavailable to assist in the correction of record due to hospitalization does not dispense with the requirements of Rule 10(e) of the ROP Rules of Appellate Procedure regarding correction of record.

[2] Appeal and Error: Record

A request that the Appellate Division remand the case to the Land Court for hearing is not among the procedures for correction of record under Rule 10(e) of the ROP Rules of Appellate Procedure.

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

[3] Appeal and Error: Credibility Determination

This Court will not reweigh evidence or reassess the credibility of witnesses.

Counsel for Appellant Rengchol: Raynold. Oilouch
Counsel for Appellant Azuma: Rachel Dimitruk
Counsel for Appellee: Moses Uludong

BEFORE: KATHLEEN M. SALII; 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:

Appellants Kazuyuki Rengchol and Secundina Oiterong Azuma each appeal the Land Court's April 22, 2010, Determination of Ownership. Appellant Rengchol seeks a remand of the case to the Land Court for hearing because the audio recording and transcript are incomplete. Appellant Azuma challenges the Land Court's award of Lot No. 03M011-001A-1, located in Ngerkeai Hamlet, Aimeliik State, to Appellee Uchelkeiukl Clan. As to Appellant Rengchol's request for remand, we **DENY**. As to Appellant Azuma's appeal, we find that the Land Court's determination is not clearly erroneous and therefore **AFFIRM**.

BACKGROUND

This appeal involves competing claims to the ownership of properties located in Ngerkeai Hamlet, Airai State. The names of the lands claimed by the parties on appeal are *Edeched* , *Bailianged* , and *Techiir* .[2] Uchelkeiukl Clan claims *Edeched*, Secundina O. Azuma claims *Techiir*, and Kazuyuki Rengchol claims *Bailianged*. After a survey of the Bureau of Lands and Survey (BLS) showed that there was a boundary overlap of all the lots claimed, the Land Court ordered the matter to mediation. When no settlement resulted from this mediation, the Land Court held a hearing on the matter on November 16-20, 2009.

Uchelkeiukl Clan presented several witnesses in support of its claim. Dirrengechel Sariang Timulch testified that the land known as *Edeched* is a property of Uchelkeiukl Clain since time immemorial and members of the Clan have used the land since. She testified that Ngirngemelas, a member of the Clan, lived on the land before and after the war, and later when he was given the traditional chief title Secharmidal, he moved to *Kloublai* at lower Ngerkeai.[3] She further testified that when she was about eight years old she attended school near Hamaichi and walked the land many times before the war. Dirrengechel testified further that *Techiir* is a mesei owned by the Clan, which was

[2] The original matter before the Land Court involved more land and parties than those to this appeal. The facts related to those lands and parties are omitted for the purposes of this appeal.

[3] This section of Dirrengechel's testimony is not contained in the transcript. It is adopted from the Land Court's determination.

cultivated by Brobesong[4] and his wife Ucheliou but never became their individual property.

Ongelibel N. Obakebau[5] is a member of Uchelkeiukl Clan, has lived in Aimeliik State all her life, and knows that *Edeched* is owned by the Clan. She testified that she used to walk by *Edeched* with her mother and would pick pineapple from the farm belonging to Ngirngemelas, who was a member of Uchelkeiukl Clan, and lived on the land with his wife. Obakebau testified that *Edeched* shares a boundary with *Lemolen* where the tank is at the East, *Olbatel* at the West, and *Techiir* at the South, all of which are owned by the Clan. She testified that *Techiir* is a mesei owned by the Clan, which was cultivated by Besong, a member of the Clan, and his wife, but that it was never conveyed to him as his individual property.

Abina Etpison, a member of the Clan, testified that he was appointed in 1976 to represent the Clan in all its land matters and that he personally monumented *Edeched* for the Clan. He testified that the last people to live on this land were the three former holders of the traditional chief title Rengulbai of Uchelkeiukl Clan, namely: Ocheraol, Oukalsol, and Besokel. Etpison testified further that *Techiir*, a lkul a dui for Secharmidal, is a mesei owned by the Clan, and Besong bore the traditional chief title Secharmidal and cultivated *Techiir* with his wife.

Appellant Rengchol filed his claim for ownership of *Bailianged* on behalf of Ngirur D. Rengchol's children. He testified that this land belonged to Ucheliou Clan, and Mesemong, who bore the traditional chief title Rurcherudel of Ucheliou Clan, gave it to his daughter Ngirur. He testified that the land is surrounded by other land, including *Techiir* and *Edeched*, owned by individuals. Appellant Rengchol's brother, Bob Ngirchebab Rengchol, who bears the traditional chief title Rurcherudel ra Ucheliou, testified that only those who have lived in Aimeliik all their lives know the land named *Bailianged*, and that unlike him, none of the claimants who testified in the matter have lived in Aimeliik all their lives. He testified that *Bailianged* is located in Ngerkeai and shares a common boundary with *Techiir*, a land owned by Ucheliou Clan and conveyed to Brobesong as his individual property.

Appellant Secundina O. Azuma filed her claim for individual ownership of Lot No. 03M011-001A-1, a land known as *Techiir*. She testified that *Techiir* has a mesei, dry land, and a small stream. She testified that this land was owned by Brobesong and his wife Ucheliou. She testified that when they could not pay her back after she helped them purchase a boat engine, they gave her *Techiir* as her individual property. She testified that Brobesong told her that he inherited the land from his father. She further testified that she has not used the land since the bequest.

Following the hearing, the Land Court made the following relevant findings of fact

[4] Brobesong is referred to interchangeably as Brobesong or Besong throughout the transcript and the Land Court's determination. The Court will refer to him as Brobesong.

[5] Obakebau's testimony is not contained in the transcript. The facts contained herein are adopted from the Land Court's determination.

based on a preponderance of the available credible evidence:

> 1. The claimed lands– *Edeched*, *Bailianged*, and *Techiir* –are located in Ngerkeai Hamlet, Aimeliik State.
>
> 2. Three former bearers of the chief title Rengulbai from Uchelkeiukl Clan, namely Ocheraol, Oukalsol, and Besokel, lived on *Edeched*.
>
> 3. Ngirngemelas, a member of Uchelkeiukl Clan, also lived on *Edeched* before and after the war.
>
> 4. The "bukl" or hill, where the water tank is situated, was used by the Ngerkeai warriors (Ngarachisau) as a look-out point. No one had resided on this bukl.
>
> 5. There is no land in Aimeliik State known as *Bailianged*.
>
> 6. Techiir is a mesei owned by Uchelkeiukl Clan and was cultivated by Brobesong, a member of the Clan, and his wife Ucheliou.
>
> 7. *Techiir* was not conveyed to Brobesong as his individual property.
>
> 8. Brobesong and his siblings were given land and a Palauan money pursuant to Palauan custom after the death of their father.
>
> 9. Most people who farmed *Edeched* were either members, or related to members, of Uchelkeiukl Clan.

Case No. LC/M 01-745, slip op. at 9-10 (Apr. 22, 2010).

In its conclusions of law, the Land Court ultimately determined that Uchelkeiukl Clan owns in fee simple the land known as *Edeched*, Worksheet Lot Nos. 03M011-001A, 03M011-001A-1, 03M011-001B, 03M011-002, 03M011-002A, 03M011-003, 03M011-004A, 03M011-004A-1, 03M011-004A-2, 03M011-004B, as shown on BLS Worksheet No. 06M001-B, located in Ngerkeai Hamlet, Aimeliik State. The court found the testimony of Dirrengechel, Obakerbau, and Etpison credible evidence of Uchelkeiukl Clan's ownership of *Edeched*. As to Rengchol's claim of ownership of *Bailianged*, the court repeatedly stated that Rengchol and his mother's inaction to protect their alleged ownership interest in the land from government interference is strong evidence that they did not own the land. Finally, as to Azuma's claim of ownership of *Techiir*, the court reached two conclusions: (1) Ucheliou had no authority to sell *Techiir* to Azuma because there was no evidence that Brobesong ever conveyed the land to his wife, and (2) Brobesong had no authority to sell *Techiir* to Azuma because *Techiir* was owned by Uchelkeiukl Clan and was never conveyed to Brobesong as his personal property. Appellants Rengchol and Azuma now appeal

the Land Court's determination.

STANDARD OF REVIEW

Appellant Azuma 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). Where there are two permissible views of the evidence, the court's choice between them cannot be clearly erroneous. *Ngirmang v. Oderiong*, 14 ROP 152, 153 (2007). We review the land court's conclusions of law *de novo*. *Sechedui Lineage*, 14 ROP at 170.

DISCUSSION

Appellant Rengchol argues that the case should be remanded to the Land Court for hearing because the audio recording and transcript are incomplete, and therefore the Court cannot meaningfully review the Land Court's determination. Appellant Azuma argues that the Land Court clearly erred in determining that Uchelkeiukl Clan owns Lot No. 03M001-001A-1 because there was insufficient evidence to support that finding.

I. Appellant Rengchol is Not Entitled to a Rehearing

ROP R. App. P. Rule 10(e) provides the procedure for correction of the record, including when a transcript is incomplete:

> If any party considers that the record assembled by the Clerk of Courts is inaccurate or incomplete in any important respect, he or she shall notify the other parties of the alleged error or omission and endeavor to secure written agreement as to what correction or addition should be made in the record. [] If the parties cannot agree upon such correction or addition, the party claiming the error shall arrange with the trial judge for a hearing and shall notify the other parties of the time and place. Any party unable to be present or represented may submit views in writing at or before that time. After giving all parties an opportunity to be heard, the trial judge will correct or add to the record as the facts warrant and will notify each party. If any party still feels that the record, as amended by agreement of the parties or by the trial judge, is incorrect or incomplete in any important aspect, he or she may by written motion, supported by affidavits, request the Appellate Division to make further change, specifying particularly the change desired.

In his opening brief, Appellant Rengchol states that he wishes to challenge the testimony of Appellees' witnesses; however, the audio recording of their

testimony is incomplete and therefore the transcript also is incomplete. Appellant Rengchol asserts that he was unable to reconstruct the lost testimony because Appellees' counsel was unavailable due to hospitalization.

[1, 2] Appellant Rengchol's argument that he is entitled to a remand of the case to reconstruct testimony is without merit. Rule 10(e) sets forth the procedure for reconstructing testimony, and Appellant has not satisfied its requirements. First, Appellant Rengchol provides no indication that he attempted to comply with Rule 10(e). Further, although, Appellees' counsel may have been unavailable due to hospitalization at some point before Appellant Rengchol filed his brief on March 8, 2011, he has not been hospitalized during the entire time that this matter has been on appeal. Appellee's counsel filed a motion for enlargement of time to file responses on March 30, 2011, which the Court granted and set the deadline for April 29, 2011. Then, Appellee's counsel was again hospitalized, so Appellee was granted a further enlargement to file its responses. During the nearly two months that elapsed between the filing of Appellant Rengchol's opening brief and Appellee's response, Appellant could have made attempts to reconstruct the record with Appellee's counsel in accordance with the procedures of Rule 10(e). The Rules do not prohibit Appellant Rengchol from attempting to complete the transcript without Appellee or after Appellant has submitted his opening brief. He had an opportunity to demonstrate his compliance with Rule 10(e) by filing a motion with the Land Court or a reply brief or other paper with this Court. Indeed, Appellant Rengchol did nothing. Second, Appellant Rengchol's requested relief is procedurally defective because remanding the matter to the Land Court for hearing is not among the procedures listed in Rule 10(e) for correction of record. Accordingly, Appellant Rengchol's request for a remand to the Land Court for hearing is **DENIED**.

II. The Land Court Did Not Commit Clear Error in Determining that Azuma Does Not Own *Techiir*.

Appellant Azuma contends that the Land Court clearly erred in determining that Azuma does not own *Techiir*. Although Appellant Azuma phrases her question presented as a challenge to the sufficiency of evidence to support the Land Court's determination, the substance of her argument is focused on the court's credibility determinations. Specifically, Appellant Azuma argues that the Land Court erred in crediting testimony of Uchelkeiukl Clan witnesses over that of Rurcherudel Bob Rengchol, Demei Obak, Skeras Ucherrengos, and Dirrai Rengchol. In support, Appellant Azuma points to Bob Rengchol's lifelong residency in Aimeliik State and his familiarity with the land at issue, as well as her own confrontation of Besechel about the use of the property. Conversely, Appellant Azuma claims Uchelkeiukl Clan witnesses were not lifelong residents of Ngerkeai Hamlet or Aimeliik State and were therefore not as familiar with the land; Abina Etpison's testimony was discredited during the hearing; and the Clan failed to take any action when Besechel was using *Techiir*.

[3] The Land Court did not commit clear error in crediting the testimony of Uchelkeiukl Clan witnesses. A review of the record

supports the Land Court's factual findings. Dirrengechel Sariang Timulch and Abina Etpison testified consistently with each other that *Techiir* is a mesei owned by the Clan and that Brobesong, a member of the Clan, cultivated the land with his wife but was never conveyed the land as his individual property.[6] After observing the witnesses and examining the evidence, the Land Court chose to discount Appellant Azuma's evidence and credit the testimony of Uchelkeiukl Clan's witnesses and accept its version of the events. This Court will not reweigh the evidence or reassess the credibility of witnesses. *Ebilklou Lineage v. Blesoch*, 11 ROP 142, 144 (2004).

Appellant Azuma's attempts to discredit Uchelkeiukl Clan's witnesses are unavailing. Contrary to her contention, at least one of the Clan's witnesses that the Land Court found credible (Obakebau) was a lifelong resident of Aimeliik.[7] And although Abina Etpison may not have been a lifelong resident of the state, for 31 years he was Uchelkeiukl Clan's representative for all land matters and personally monumented *Edeched* for the Clan. Appellant Azuma also questions Sariang's knowledge of the physical areas of *Edeched* and *Techiir* because it is based on her memory from when she was eight years old. However, Sariang's description of *Techiir* as a taro patch and an area down below *Edeched* is consistent with Abina Etpison's description of the land. Appellant Azuma further contends that Abina Etpison's testimony was discredited by his admission of having filed a claim for lands he knew were not owned by Uchelkeiukl Clan. Although such testimony may cause concern for a fact-finder, it is not the duty of the appellate court to test the credibility of witnesses, but rather to defer to the lower court's credibility determination. *Palau Pub. Lands Auth. v. Tab Lineage* , 11 ROP 161, 165 (2004). Both parties presented evidence and testimony in support of their claims, and the Land Court's finding was not so unreasonable that a reasonable trier of fact could not have reached the same conclusion. *Remeskang v. West*, 10 ROP 27, 29 (2002).

Finally, Appellant Azuma's evidence that Brobesong owned *Techiir* is not so conclusive as to cause this Court to be left with a definite and firm conviction that an error has been made. She relies on the testimony of Demei Obak, Skeras Ucherrengos, and Dirrai Rengchol, none of whom expressly testified that Brobesong once owned the land. Obak testified that *Techiir* was "Senna's land," however, this statement alone does not establish that Brobesong owned the land and had authority to convey it to Azuma. Ucherrengos testified that he had heard that Brobesong owned land but that he did not know if it was *Techiir*. There is nothing in Ucherrengos's testimony connecting Brobesong to *Techiir*. Finally, Dirrai Rengchol[8] merely confirmed, like

[6] The Land Court also credited the testimony of Ongelibel N. Obakebau, which was consistent with Dirrengechel and Etpison's testimony. However, Obakebau's testimony is not contained in the transcript for this Court to review.

[7] This fact is based on the Land Court's determination and not on the transcript. *See supra* n.3.

[8] During Abina Etpison's testimony, he reiterated what Dirrai, his mother, testified during the first hearing and during an earlier discussion he had with her. Dirrai's testimony is among those missing from the transcript.

Obak, Azuma's purchase of *Techiir,* and not that Brobesong actually owned the land or how he came to own it. Accordingly, it was not clear error for the Land Court to determine that Uchelkeiukl Clan, not Appellant Azuma, owns *Techiir*.

CONCLUSION

For the reasons set forth above, we **DENY** Appellant Rengchol's request for remand and hearing, and **AFFIRM** the Land Court's determination as to Appellant Azuma's claim.

PALAU PUBLIC LANDS AUTHORITY,
Appellant,

v.

KOROR STATE PUBLIC LANDS AUTHORITY, KOROR STATE GOVERNMENT,
Appellees.

CIVIL APPEAL NO. 11-020
Civil Action No. 08-228

Supreme Court, Appellate Division
Republic of Palau

Decided: October 7, 2011

[1] **Agency:** Apparent Authority

As there is no case law on point in Palau concerning whether public officers may act with apparent authority, the Court adopts the relevant principles of law set forth in the Restatement (Third) of Agency respecting governmental actors.

[2] **Agency:** Apparent Authority

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

[3] **Agency:** Apparent Authority

The doctrine of apparent authority generally does not apply to sovereigns and entities that have been created by sovereigns to achieve

governmental ends. In other words, the rule that an agent can bind his or her principal by acts within apparent authority has been held not to apply to public officers.

[4] Agency: Apparent Authority

The rationale for the rule that the doctrine of apparent authority does not apply to the government or its officers is that a sovereign has the exclusive ability to prescribe what its creations and its agents may do; third parties who deal with national governments, quasi-governmental entities, states, counties, and municipalities take the risk of error regarding the agent's authority to a greater degree than do third parties dealing through agents with nongovernmental principals. Still, this exception is subject to a few qualifications.

Counsel for Appellant: David W. Shipper
Counsel for Koror State Goernment: Mark P. Doran
Counsel for Koror State Public Lands Authority: Mark Jesperson

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:

This appeal concerns whether the trial court erred in applying the doctrine of apparent authority as the basis for dismissing a complaint seeking declaratory judgment and injunctive relief.

On August 12, 2008, Plaintiff-Appellant Palau Public Lands Authority (PPLA) filed a complaint seeking declaratory judgment and injunctive relief against Defendants-Appellees Koror State Public Lands Authority (KSPLA) and Koror State Government (KSG) to invalidate a 2001 Amendment to a land transfer agreement and stop KSPLA from developing a piece of property in Meyuns. The trial court granted KSG's motion to dismiss PPLA's complaint under ROP R. Civ. P. 12(b)(6) on the basis that PPLA's Chairman had the apparent authority to bind PPLA when he signed the 2001 Amendment. PPLA appealed the trial court's dismissal of the complaint. This Court dismissed the appeal on the basis that the trial court's order was without prejudice and was therefore not a final judgment appealable to the Appellate Division. On May 11, 2011, the trial court dismissed the case with prejudice with the consent of the parties. PPLA now appeals the trial court's dismissal of the complaint. The parties did not request oral argument, and we will decide the case on the briefs in accord with our appellate rules. *See* ROP R. App. P. 34(a). For the reasons below, we **REVERSE** the trial court's Order granting KSG's motion to dismiss PPLA's Complaint.

BACKGROUND

The facts and allegations, as presented by PPLA in its Complaint and attachments to the complaint, are accepted as true. In February 1997, the Republic of Palau (ROP), PPLA, KSPLA, and KSG entered into a land settlement agreement (the 1997 Agreement) to resolve pending disputes over various

properties in Koror State, including the property in Meyuns, which is the subject of this litigation. Signatories to the 1997 Agreement included President Kuniwo Nakamura for ROP, Chairman Tadashi Sakuma for PPLA, Acting State Executive Administrator Alexander Merep for KSG, and Chairman Yutaka Gibbons for KSPLA. An Assistant Attorney General, along with legal counsel for PPLA and KSPLA, "approved [the agreement] as to form and legality" by signing. In December 2000 and January 2001, the same parties[1] signed an amendment to the 1997 Agreement, including an amendment to the litigated Meyuns property (the 2001 Amendment). The 2001 Amendment decreased the amount of land designated for ROP's use as Meyuns Elementary School. The 2001 Amendment was filed with the Clerk of Courts on January 4, 2001. There is no record of PPLA Board meeting minutes that approve Chairman Sakuma's actions. In reliance upon the 2001 Amendment, KSPLA has been conducting surveys of the property "for the purposes of subdivision" and "has placed padlocks on buildings and storage containers" on the property.

On August 12, 2008, PPLA filed a complaint seeking a declaratory injunction and declaratory relief against KSPLA and KSG to invalidate the 2001 Amendment and to stop KSPLA from developing a piece of property in Meyuns.

On October 9, 2008, KSG filed a motion to dismiss, asserting several grounds: failure to state a claim upon which relief may be granted, ROP R. Civ. P. 12(b)(6), lack of subject matter jurisdiction, ROP R. Civ. P. 12(b)(1), and failure to join an indispensable party under Rule 19, ROP R. Civ. P. 12(b)(7).[2] On October 10, 2008, KSPLA filed an answer to PPLA's Complaint. On January 23, 2009, PPLA filed an opposition to KSG's motion to dismiss.[3] On January 31, 2009, KSG filed a reply to PPLA's opposition to the motion to dismiss, and KSPLA filed its notice of joinder to KSG's reply. To avoid premature dismissal without affording PPLA the opportunity to respond to the Court's concerns, which were not raised in the original briefing, the Court held a hearing on February 16, 2010 and heard from counsel for PPLA, KSG and KSPLA on the issue of Chairman Tadashi Sakuma's apparent authority to bind PPLA.

The trial court granted KSG's motion to dismiss under ROP R. Civ. P. 12(b)(6) on the basis that PPLA failed to state a claim

[1] Again, President Kuniwo Nakamura signed for ROP and Chairman Tadashi Sakuma signed for PPLA. Governor John Gibbons signed for KSG and Acting Chairman Ermans Ngiraelbaed signed for KSPLA. No counsel signed the 2001 Amendment.

[2] KSG also alleged that the complaint was barred by the statute of limitations, 14 PNC §§ 401 *et seq.,* and that PPLA had no standing to bring this action.

[3] Originally, KSPLA filed a "response" and PPLA filed an "objection to Defendant KSG's motion to dismiss and [an] answer to KSPLA's response." As the trial court noted, no Civil Rule requires or allows for an answer to a response where KSPLA filed no counterclaims. Accordingly, the trial court properly treated KSPLA's "response" as an "answer" and PPLA's "answer to KSPLA's response" as part of PPLA's opposition to KSG's motion to dismiss.

upon which relief may be granted because PPLA's Chairman had apparent authority to bind PPLA when he signed the 2001 Amendment.[4] The court reasoned that PPLA placed its agent, Chairman Sakuma, in a position which caused third parties, namely KSPLA and KSG, to reasonably believe that PPLA consented to Chairman Sakuma's exercise of authority when he signed the 2001 Amendment. Because Chairman Sakuma had the apparent authority to bind PPLA, and KSPLA and KSG properly relied upon Chairman Sakuma's apparent authority to act, the trial court concluded that PPLA could not argue that it should not be bound by the contract because it failed to comply with its own internal regulations back in 2000 and 2001.

On March 1, 2010, PPLA filed a motion for reconsideration, seeking to introduce new evidence to prove that KSPLA had knowledge that Chairman Sakuma did not have PPLA Board approval to bind PPLA. The evidence PPLA sought to introduce was a January 31, 1997 letter from then-ROP President Kuniwo Nakamura and then-KSPLA Director Rechucher Alex Merep to Chief Justice Ngiraklsong regarding another case, *Wenty v. KSG, et al.* , Civil Action No. 70-93, raising the issue of whether a former PPLA Board Chairman had the authority to bind PPLA without the consent of the Board (*Wenty* letter). On March 22, 2010, the trial court denied the motion for reconsideration, explaining that it would not consider the *Wenty* letter because it would convert the matter into a motion for summary judgment. The trial court further stated in a footnote that the *Wenty* letter would not change the court's analysis.

STANDARD OF REVIEW

The Appellate Court reviews *de novo* the trial court's granting of a motion to dismiss. *Giraked v. Estate of Rechucher*, 12 ROP 133, 145 (2005). In reviewing a motion to dismiss, all allegations in the complaint are accepted as true, and this Court is left to determine whether those allegations are sufficient to justify relief. *Id.* A complaint should not be dismissed unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Taro v. ROP*, 12 ROP 175, 177 (Tr. Div. 2004).

DISCUSSION

PPLA presents two arguments on appeal. First, PPLA argues that the trial court improperly ruled that the doctrine of apparent authority bars its recovery in this action because PPLA is a public entity to which the doctrine of apparent authority does not apply. Second, PPLA contends that even if the doctrine of apparent authority applies to public entities, it does not apply here because of Appellees' actual knowledge of the limits and extent of Chairman Sakuma's authority.

In their brief in opposition, KSPLA and KSG do not address PPLA's appellate arguments and instead address issues not discussed by the trial court's dismissal order.

[4] Although KSG included ROP R. Civ. P. 12(b)(6) as one of the stated grounds for its motion to dismiss, KSG did not raise the argument of apparent authority as the rationale for dismissing the complaint for failure to state a claim upon which relief may be granted.

KSPLA and KSG first argue that PPLA did not overcome the presumption that Chairman Sakuma's signature on the 2001 Amendment was valid. Second, they argue that the complaint is barred by the statute of limitations. Third, they contend that PPLA does not have standing to maintain the action.

[1-4] As there is no case law on point in Palau concerning whether public officers may act with apparent authority,[5] the Court adopts the relevant principles of law set forth in the Restatement (Third) of Agency respecting governmental actors.[6] "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) of Agency § 2.03 (2006). However, "[t]he doctrine of apparent authority generally does not apply to sovereigns and entities that have been created by sovereigns to achieve governmental ends." *Id.* at § 2.03, cmt. g. In other words, "[t]he rule that an agent can bind his or her principal by acts within apparent authority has been held not to apply to public officers." 63 Am. Jur. 2d Public Officers and Employees § 233 (2009). The rationale for the rule that the doctrine of apparent authority does not apply to the government or its officers is that "a sovereign has the exclusive ability to prescribe what its creations and its agents may do; third parties who deal with national governments, quasi-governmental entities, states, counties, and municipalities take the risk of error regarding the agent's

[5] In its order, the trial court cited two cases regarding the doctrine of apparent authority that do not apply to the present case because those cases concern private entities and PPLA is a public entity. *See Ngirachemoi v. Ingais*, 12 ROP 127 (2005) (applying doctrine of apparent authority to an individual); *Klsong v. Orak*, 7 ROP Intrm. 184 (1999) (applying doctrine of apparent authority to employee of Public Utilities Corporation). Although *Klsong*, concerning a public utility, presents a closer case to the one at bar than *Ngirachemoi*, concerning an individual, it is still distinguishable from the present case. In *Klsong*, this Court held that an employee of Public Utilities Corporation ("PUC") was an agent of PUC on the basis of apparent authority or agency by estoppel because the employee's supervisor's statement that the employee was the messenger of PUC was a manifestation that he had the authority to represent PUC. *Klsong*, 7 ROP Intrm. at 187. Although PUC is a public utility created by statute, PUC is a public corporation subject to the corporate laws of the Republic, 37 PNC § 403, whereas PPLA is a recognized governmental entity. *See infra* n.6. Also, the PUC employee was not a government officer provided for by statute like the Chairman of PPLA. Thus, the holding in *Klsong* that the PUC employee was an apparent agent of PUC is inapplicable here.

[6] PPLA is a government agency, and this Court has determined that in certain circumstances, PPLA may utilize any defenses generally available to the government. *Palau Pub. Lands Auth. v. Salvador*, 8 ROP Intrm. 73, 74 n.1 (1999) (finding that one cannot assert an adverse possession claim against the government, including PPLA) (citing 35 PNC § 201 *et seq.*); see also *ROP v. Airai State Pub. Lands Auth.*, 9 ROP 201, 206 (2002) (recognizing that public lands authorities are governmental in nature). The PPLA Board is entrusted with holding in trust public lands for all Palauans. 35 PNC § 210(c). By extension, the Chairman of PPLA is a public officer because his or her office is provided for by statute, 35 PNC § 206, and is an office within a governmental entity.

authority to a greater degree than do third parties dealing through agents with nongovernmental principals." Restatement (Third) of Agency § 2.03, cmt. g. Still, this exception is subject to a few qualifications:

> First, a sovereign may waive its right to be bound only by actually authorized acts. Second, if the sovereign benefitted through the third party's performance, in some jurisdictions a third party may recover the value it has conferred on the sovereign if the sovereign would otherwise be unjustly enriched. Third, in some jurisdictions estoppel is available against a sovereign or an entity created by a sovereign. More narrowly, some states estop municipal corporations from defending on the basis of an agent's lack of authority when substantial injustice would otherwise be the consequence.

Id.

As PPLA properly argues on appeal, because PPLA is a governmental entity and Chairman Sakuma is a public officer, the doctrine of apparent authority does not apply in this case. And the three circumstances under which a court may consider allowing Chairman Sakuma's act of signing the 2001 Amendment to bind PPLA do not apply here. First, PPLA would have had to waive its right to be bound only by authorized acts. This qualification does not apply here because neither party has asserted that PPLA has waived this right. Second, PPLA would have had to benefit from Chairman Sakuma's act of signing the 2001 Amendment. This qualification also does not apply here because Chairman Sakuma's signing of the 2001 Amendment has resulted in a detriment to PPLA. PPLA brought this complaint against KSPLA and KSG to declare the 2001 Amendment null and void and to enjoin KSPLA's development of the Meyuns property. Indeed, had PPLA benefitted from Chairman Sakuma's actions, it may not have brought this action at all. Finally, the court may estop PPLA from defending on the basis of Chairman Sakuma's lack of authority when substantial injustice may occur to KSPLA and KSG. However, KSPLA and KSG have not shown that they will face substantial injury if they are unable to develop the Meyuns property at this time. None of the qualifications that permit a court to subject PPLA to the doctrine of apparent authority exist here. Thus, because PPLA is a public entity and Chairman Sakuma is a public officer, the doctrine of apparent authority does not apply here to bind PPLA to the 2001 Amendment.

To find that PPLA is bound to the 2001 Amendment, it must be on the basis of Chairman Sakuma's actual authority to sign the document. *See* Restatement (Third) of Agency § 2.03, cmt. g ("a sovereign has the exclusive ability to prescribe what its creations and its agents may do"). However, because the trial court did not have any information concerning Chairman Sakuma's actual authority in 2001 and did not make a determination in this regard, we are unable to do so now.

CONCLUSION

Accordingly, we **REVERSE** the trial court's order granting KSG's motion to dismiss and **REMAND** the case for further proceedings not inconsistent with this Opinion.

SIKONG NGIRAKESAU and MOSES NGIRASWEI,
Appellants,

v.

ONGELAKEL LINEAGE and CHILDREN OF REHUHER,
Appellees.

CIVIL APPEAL NO. 10-037
LC/E 07-0472
LC/E 07-0473
LC/E 07-0507

Supreme Court, Appellate Division
Republic of Palau

Decided: November 11, 2011

[1] Land Commission/LCHO/Land Court: Claims

The Land Court must choose among claimants that appear before it.

[2] Land Commission/LCHO/Land Court: Claims

The reasoning from *Marsil v. Telungalk re Iterkerkill*, 15 ROP 33 (2008) permits a court to consider the testimony from the hearing to determine whether a party is actually a claimant.

[3] Appeal and Error: Harmless Error

If an error has no practical impact, it is harmless.

[4] Land Commission/LCHO/Land Court: Reconsideration

The Land Court has the inherent authority to correct its own mistakes.

[5] Appeal and Error: Preserving Issues

If the statute of frauds defense is not asserted at the trial court level, it is waived.

[6] Appeal and Error: Basis of appeal.

The appellant, not the court, must search the record for errors.

[7] Property: Deeds

A purchaser cannot buy what a seller does not own.

[8] Courts: Stipulations

Courts have broad discretion in determining whether to enforce stipulations. A stipulation may be binding on the parties, but it is not binding on the court.

Counsel for Ngirakesau: Salvador Remoket
Counsel for Ngiraswei: Raynold B. Oilouch
Counsel for Children of Rehuher: J. Uduch Sengebau Senior, Esq.

BEFORE: ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

Appeal from the Land Court, the Honorable C. Quay Polloi, Senior Judge, presiding.

PER CURIAM:

Appellants Sikong Ngirakesau and Moses Ngiraswei seek review of the Land Court's August 31, 2010 Decision and Order. Both Appellants take issue with the determination that Tochi Daicho Lot 226 consists of Worksheet Lot 2005E004-072B and is owned by Ongelakel Lineage, and Tochi Daicho Lot 233 consists of Worksheet Lot Nos. 2005E004-071, 072A, and 073 and is owned by the Children of Rehuher. For the following reasons, we affirm the Land Court's Decision.[1]

BACKGROUND

This appeal concerns the ownership of land located in Choll County of Ngaraard State known as *Derngas*. The claimants to this land were as follows: Sikong Ngirakesau claimed *Derngas* as Tochi Daicho Lot 227, corresponding to land identified as Worksheet Lot Nos. 2005E004-072A, 2005E004-072B, part of 2005E004-071, and 2005E004-073. Moses Ngiraswei claimed *Derngas* as Tochi Daicho Lot 226, corresponding to land identified as Worksheet Lot Nos. 2005E004-072A and 2005E004-072B. Olabeluu Rekewis Imedob for Ongelakel Lineage, represented by Riosang Salvador, claimed Tochi Daicho Lot 226, corresponding to land identified as Worksheet Lot Nos. 2005E004-072A and 2005E004-072B. Maria Rehuher for the Children of Rehuher claimed Tochi

[1] Appellants request oral argument. After reviewing the briefs and record, the Court finds this case appropriate for submission without oral argument. ROP R. Civ. P. 34(a) ("The Appellate Division on its own motion may order a case submitted on briefs without oral argument.").

Daicho Lot 233, corresponding to the land identified as Worksheet Lot Nos. 2005E004-071, 2005E004-072A, 2005E004-072B, and 2005E004-073.

On October 25, 2007, the Land Court held a hearing on Tochi Daicho Lot 227 in LC/E 07-0472. Judge Rdechor presided over that hearing. At the conclusion, Judge Rdechor stated that a determination of ownership of *Derngas* would be issued to Ngirakesau. When he reached this conclusion, Judge Rdechor was unaware of other claimants to the same worksheet lot numbers, but identified by other Tochi Daicho lots. Judge Rdechor realized that separate cases, LC/E 07-0473 and LC/E 07-0507, made competing claims to two worksheet lots (2005E004-072A and 2005E004-072B) in Ngirakesau's claim. Upon realizing this mistake, Judge Rdechor did not issue the determination and order in LC/E 07-0472 as earlier promised. Subsequently, these matters were transferred to Senior Judge Polloi. Judge Polloi held a status conference for all three cases and consolidated them, setting the hearing for August 19, 2010.

After the hearing, the Land Court addressed the boundaries of Tochi Daicho Lots 226, 227, and 233. First, the court addressed Ngirakesau's claim to Tochi Daicho Lot 227, and rejected his position that Tochi Daicho Lot 227 corresponded to Worksheet Lot Nos. 2005E004-073, 072A, and 072B. The court found that the worksheet lots together added up to about three times the size of Tochi Daicho Lot 227. The court reasoned that it was likely Tochi Daicho Lot 227 was not located within these worksheet lots because (1) those worksheet lots corresponded more closely in size with Tochi Daicho lots 226 and 233, while (2) Tochi Daicho Lot 227 corresponded more closely in size to neighboring Worksheet Lot No. 2005E004-064.

The court then turned to Tochi Daicho Lot 226, which lists Rekewis Imedob as owner. It held that Tochi Daicho Lot 226 corresponded to Worksheet Lot No. 2005E004-072B. The court rejected Ngiraswei and Salvador's position that Tochi Daicho Lot 226 consisted of Worksheet Lot Nos. 2005E004-072A and 072B because the size of Tochi Daicho Lot 226 matched more closely with just Worksheet Lot No. 2005E004-072B.

Finally, as to Tochi Daicho Lot 233, the court noted that one worksheet lot claimed by the Children of Rehuher was also claimed by those claiming Rekewis's Tochi Daicho Lot 226, namely, Worksheet Lot No. 2005E004-072A. However, the court concluded that Worksheet Lot No. 2005E004-072A should be part of Tochi Daicho Lot 233 because Tochi Daicho Lot 233 is comprised of 25,752 square meters, and the worksheet lots, claimed by Maria Rehuher, including Worksheet Lot No. 2005E004-072A, is 25,722 square meters, only a thirty square meter difference from the original size of Tochi Daicho Lot 233. Tochi Daicho Lot 226 is comprised of 4,363 square meters, and Worksheet Lot No. 2005E004-072B is 3,574 square meters, a 789 square meter difference. If the court added 2005E004-072A, the difference would balloon to 1,034 square meters. The court therefore decided to limit Tochi Daicho Lot 226 to Worksheet Lot No. 2005E004-072B.

Having resolved the boundary issues,

the court turned to who is the proper owner of Tochi Daicho Lot 226, and concluded that Riosang Salvador's claim for Ongelakel Lineage prevailed over Ngiraswei's claim. Tochi Daicho Lot 226 is listed under Rekewis Imedob. Rekewis Imedob has since died. Ngiraswei claimed Tochi Daicho Lot 226 because Renguul Rekewis, Rekewis Imedob's son, deeded his interest to Ngiraswei. According to Ngiraswei, Renguul Rekewis properly passed on the property as the rightful heir of Rekewis Imedob. Ngiraswei's claim ran counter to Riosang Salvador's claim for Ongelakel Lineage. Salvador countered that the property originally belonged to the lineage and Rekewis acted as trustee for the lineage when his name was recorded during the Tochi Daicho process. Salvador and Techebui Naito, Rekewis's cousin, both testified that Rekewis Imedob conveyed the property to Ongelakel Lineage on his deathbed in 1991.

The court held that Ongelakel Lineage's claim prevailed. It based its conclusion on testimony that Rekewis's property was not given out at his *eldecheduch* since it had been transferred to the lineage during his lifetime; that Rekewis executed a Power of Attorney in 1989 naming not his son Renguul but his cousins Merraoch, Imekedong, Merii, and Techebui as his representatives; and the fact that Rekewis filled out a claim form in 1990 stating that he wanted "to release the property to Ongelakel Clan as it was originally owned."

The court was unpersuaded by testimony that Rekewis gave the property to his son Renguul. If he had intended to do so, why would he file a claim for Ongelakel Lineage? Although Rekewis Imedob could have executed a written deed to transfer ownership, the court speculated that Rekewis may not have known about this procedure. The court found Rekewis's actions of naming his cousins, and not his son, in his Power of Attorney, and filing for Tochi Daicho Lot 226 on behalf of Ongelakel Lineage, corroborated by Salvador's and Naito's testimony, convincing. Because Rekewis Imedob conveyed the land before his death, the court held that the land should be registered to Ongelakel Lineage.

As to Tochi Daicho Lot 233, the court held that a determination of ownership should issue to the Children of Rehuher. The court reasoned that the dispute regarding Tochi Daicho Lots 226 and 233 related only to their proper boundaries, no one else claimed Tochi Daicho Lot 233, and no one disputed the Children of Rehuher's claim.

Ultimately, the Land Court concluded that Tochi Daicho Lot 226 consists of Worksheet Lot No. 2005E004-072B, and is owned by Ongelakel Lineage; and Tochi Daicho Lot 223 consists of Worksheet Lot Nos. 2005E004-071, 072A, and 073, and is owned by the Children of Rehuher; and Tochi Daicho Lot 227 did not consist of any of the worksheet lots at issue in the litigation. This appeal followed.

STANDARD OF REVIEW

We review the Land Court's findings of fact under the clearly erroneous standard. *Aribuk v. Rebluud*, 11 ROP 224, 225 (2004). Under this standard, reversal is warranted "only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Palau Pub. Lands Auth. v. Tab*

Lineage, 11 ROP 161, 165 (2004) (citation omitted). It is not clear error for the Land Court to give greater weight to certain evidence so long as one view of the evidence supports the fact finder's decision. *Remeskang v. West*, 10 ROP 27, 29 (2002).

DISCUSSION

Ngirakesau and Ngiraswei present one common argument. We resolve this issue first and then turn to their independent arguments. Both Appellants contend that the Land Court committed clear error in awarding Tochi Daicho Lot 226, consisting of Worksheet Lot No. 2205E004-072B, to Ongelakel Lineage. They contend that Ongelakel Lineage was not a claimant in the proceedings because Rekewis Imedob's claim states the following: "I want to release the property to Ongelakel Clan as it was originally owned and to place it under tenancy in common of Merraoch, Imekedong, Merii and Techebui." According to Ngirakesau and Ngiraswei, because Ongelakel Lineage was not listed as a claimant, the Land Court erred in awarding it the land. Ngiraswei also points out that in Salvador's testimony, he repeatedly stated that he was claiming on behalf of Ongelakel Clan, not Ongelakel Lineage. This distinction between clan and lineage is not reversible error in this case.

[1, 2] The Land Court must choose among claimants that appear before it. *Rusiang Lineage v. Techemang*, 12 ROP 7, 9 (2004). Riosang Salvador represented Rekewis Imedob's claim, described in the claim form as for "Ongelakel Clan," but the Land Court issued the determination of ownership to "Ongelakel Lineage." This difference does not constitute reversible error for two reasons. The reasoning from *Marsil v. Telungalk re Iterkerkill*, 15 ROP 33 (2008) permits us to consider the testimony from the hearing to determine whether Ongelakel Lineage was actually a claimant. In *Marsil*, a claim was filed on behalf of the children of Otuu, but the Land Court awarded the land to Iterkerkill Lineage. *Id.* at 34. The Appellate Division upheld this decision despite the inconsistency because the testimony supporting the claim indicated that the land belonged to the entire lineage, not just the children. *Id.*

Ngiraswei argues that *Marsil* is distinguishable because in that case the witnesses stated that they claimed for the lineage, not just for the children. He claims that no one made a claim for Ongelakel Lineage during the hearing, citing several references to Ongelakel Clan as the claimant. However, a review of the entirety of the hearing transcript reveals that parties supporting the claim did not consistently refer to Ongelakel Clan, they also referenced Ongelakel Lineage, the family of Ongelakel, or simply Ongelakel. Further, no witness stated that the claimant was not Ongelakel Lineage. We therefore see no reason to distinguish the reasoning in *Marsil* and find no clear error.

[3] Moreover, any error would be harmless. Appellant has not argued or presented evidence that the award to Ongelakel Lineage rather than Ongelakel Clan gave land to the wrong people. Had the owners not been the same, members of Ongelakel Clan would have appealed the decision to correct that mistake. They made no such appeal. Because any error has no practical impact, it is harmless. *See West v. Ongalek ra Iyong*, 15 ROP 4, 8 (2007).

Ngirakesau's second argument is that the Land Court committed clear error in holding another hearing in August 2010 after the October 25, 2007 hearing held by Judge Rdechor. Ngirakesau's position is that the October 25, 2007 hearing resulted in a "judgment or determination of ownership" that the Land Court should not have subsequently changed. This argument fails.

[4] The Land Court has the inherent authority to correct its own mistakes. *Shmull v. Ngirirs Clan*, 11 ROP 198, 202 (2004). That is exactly what happened in the August 31, 2010 order by Senior Judge Polloi. As noted, this matter concerns three different cases where the claims to different Tochi Daicho lots corresponded to overlapping worksheet lot numbers. Understandably, this complicated scenario resulted in confusion. Although Judge Rdechor did state that Ngirakesau would prevail at the end of the hearing for LC/E 07-0472 on October 25, 2007, he was unaware of the overlapping claims at that time. When Judge Rdechor realized this mistake, he did not issue the determination and order as promised. Instead, the Land Court correctly consolidated the three cases involving claims to Tochi Daicho Lots 226, 227, and 233 with the overlapping worksheet lots for a subsequent hearing. It was up to Ngirakesau to prove his claim at that hearing, but he failed.

The Land Court's decision noted this issue, and considered the claims to all the Tochi Daicho lot numbers corresponding to all of the worksheet lots at the same time. The hearing provided a complete review of the claims to the land, and is an excellent example of the Land Court's exercise of its inherent authority to correct its mistakes. Thus, the August 2010 hearing did not cause reversible error, and Ngirakesau's argument fails.

Ngiraswei appeals on three additional grounds: (1) the Land Court erred in awarding Ongelakel Lineage land when the evidence did not show that Rekewis transferred the land to the lineage; (2) the Land Court erred in failing to award ownership to him as the purchaser of land from Rekewis' son, Renguul; and (3) the Land Court erred in not awarding a portion of Worksheet Lot No. 2005E004-072A to Ngiraswei pursuant to his stipulation with the Children of Rehuher.

First, Ngiraswei contends that the Land Court erred in concluding that Rekewis transferred the land to Ongelakel Lineage. His position is that Rekewis's behavior exhibited only an intent to convey, not an actual conveyance. And even if he did convey the land, the oral conveyance violated the statute of frauds. We disagree and affirm the Land Court's conclusion that the conveyance occurred.

The Land Court's decision that Rekewis actually conveyed the property was not clearly erroneous. The court was persuaded that a conveyance took place based on the designations in Rekewis's Power of Attorney, his 1990 claim on behalf of Ongelakel Clan – not for himself or his son – and the corroborating testimony of witnesses. It concluded that the evidence that Rekewis transferred the land to Ongelakel Lineage was more convincing than the testimony that Rekewis transferred the property to his son. If Rekewis intended the property to pass to his son, it would not make sense for him to file a claim on behalf of Ongelakel Clan. The court had discretion to give greater weight to some

testimony than others, and thus the decision will not be overturned as clearly erroneous. *See Remeskang*, 10 ROP at 29.

Turning to the statute of frauds argument, Ngiraswei argues that the transfer is not valid because Rekewis did not reduce it to writing. 39 PNC § 501 provides the following:

> (a) Except for a lease for a term not exceeding one year, no estate or interest in real property, and no trust or power over or concerning real property, or in any manner relating thereto, can be created, granted, assigned, transferred, or declared, otherwise than:
>
> (1) By operation of law; or
>
> (2) By a deed of conveyance or other instrument in writing signed by the person creating, granting, assigning, transferring, surrendering, or declaring the same, or by his lawful agent under written authority, and executed with such formalities as are required by law.

[5, 6] If the statute of frauds defense is not asserted at the trial court level, it is waived. *Estate of Remeskang v. Eberdong*, 14 ROP 106, 109 (2007). Although Ngiraswei argues that he presented the statute of frauds defense during his closing argument, he provides no reference to the record and the Land Court's decision did not note the statute of frauds argument. The appellant, not the court, must search the record for errors. *Ngetchab Lineage v. Klewei*, 16 ROP 219, 220-21 (2009). As Ngiraswei failed to provide citations or support to bolster his argument, we are unconvinced that he raised the issue at the hearing, and consider it waived.

[7] Second, Ngiraswei contends that because there was no actual transfer, he should receive the property because he purchased it from Rekewis's son. Since the Land Court did not err in finding that the transfer occurred, this argument is not viable because "a purchaser cannot buy what a seller does not own." *Aguon v. Aguon*, 5 ROP Intrm. 122, 126 (1995); *see Estate of Rudimch v. Kayangel State Gov''t*, 9 ROP 275, 278 (Tr. Div. 2001) ("[O]ne cannot convey what one does not own.").

[8] Finally, Ngiraswei argues that the Land Court erred in not awarding a portion of Worksheet Lot No. 2005E002-072A to him pursuant to the stipulation he entered into with the Children of Rehuher. The Land Court noted this stipulation but chose not to enforce it:

> Maria Rehuher, who claims Rehuher's Tochi Daicho lot 233, stipulated with Moses Ngiraswei that they would split worksheet lot 2005E004-072A in half. Those claiming for Ongelakel Lineage were not part of that stipulation. Although this Court could have enforced the stipulation, it is not bound by it.

Courts have broad discretion in determining

whether to enforce stipulations. "[A] stipulation may be binding on the parties, but it is not binding on the court." *Western Caroline Trading Co. v. Kloulechad*, 15 ROP 127, 129 (2007). The Land Court acknowledged the stipulation but exercised its discretion in deciding not to enforce it. We see no abuse of discretion there.

CONCLUSION

Neither Appellant has shown that the Land Court's Decision and Order erred. For the foregoing reasons, the Land Court's Decision is **AFFIRMED**.

MODESTO PETRUS,
Appellant,

v.

ABEL SUZUKY,
Appellee.

CIVIL APPEAL NO. 10-044
Civil Action No. 09-50

Supreme Court, Appellate Division
Republic of Palau

Decided: November 23, 2011

[1] **Appeal and Error**: Standard of Review; **Property:** Adverse Possession

Common law adverse possession presents a mixed question of law and fact. The lower court's conclusions of law are reviewed de novo, while the lower court's factual conclusions are reviewed using the clearly erroneous standard. Findings 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 that conclusion.

[2] **Property**: Adverse Possession

The elements of adverse possession must be established by clear proofs of acts and conduct fit to put a person of ordinary prudence, and particularly the true owner, on notice that the estate in question is actually, visibly, and exclusively held by a claimant in antagonistic purpose.

[3] Property: Adverse Possession

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.

[4] Property: Adverse Possession

The party seeking title by adverse possession bears the burden to prove affirmatively each element of the doctrine

[5] Property: Adverse Possession

Possession is hostile if the party seeking title holds and claims the property as his or her own, whether by mistake or willfully.

[6] Property: Adverse Possession

Possession is visible if it is so obvious that the true owner is presumed to know of it.

[7] Property: Adverse Possession

Possession is exclusive where the party seeking title over the land shows an exclusive dominion over it and an appropriation of the land to his or her own use and benefit.

[8] Property: Adverse Possession

Possession is notorious when a claim of ownership 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, including notice both to the record owner and to the public.

Counsel for Appellant: Ronald Ledgerwood
Counsel for Appellee: Pro se

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

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

PER CURIAM:

Modesto Petrus appeals the Trial Division's October 26, 2010, award of land known as Ngedengir located in Ngerkebesang, just above the junction of the main road and the turnoff to the Cliffside Hotel and Echang Hamlet, in Koror State. Appellee Abel K. Suzuky filed no opposition. We are not persuaded by Petrus' arguments and accordingly, we affirm the Trial Division.[1]

BACKGROUND

The issue of this appeal is whether Suzuky may claim title to Ngedengir under the doctrine of adverse possession. We provide a limited factual background here and refer curious readers to the "more storied account" of the facts presented in the Trial Division Decision, Civ. No. 09-050, at 1-5 (Feb. 4, 2010). The land at issue is Lot No. 028 A 10

[1] Petrus requests oral argument. After reviewing the briefs and record, the Court finds this case appropriate for submission without oral argument. ROP R. Civ. P. 34(a) ("The Appellate Division on its own motion may order a case submitted on briefs without oral argument.").

on Cadastral Plat No. 028 A 00 (Lot No. 028 A 10). The disputed land is adjacent to land that Suzuky purchased in 1984.

Suzuky's theory of recovery has been, and continues to be, that he entered the disputed land in 1984, made physical improvements to it through farming, and farmed continuously until 2006. On July 6, 2005, the Bureau of Lands and Surveys issued a Notice of Monumentation; Suzuky was one of the claimants. Petrus filed an action with the Trial Division to quiet title to Lot No. 028 A 10. Suzuky and several others claimed ownership of this lot. The Trial Division found that Petrus was the rightful owner of Lot No. 028 A 10 and that Suzuky did not meet the twenty-year statutory period required for successful adverse possession claims because he did not notify Petrus of his claim until 2006. Suzuky appealed.

We concluded that adverse possession does not require "service of notice" and thus Suzuky was not required to notify Petrus of his presence on the land. *Suzuky v. Petrus*, 17 ROP 244, 246-47 (2010). We reversed and remanded on the issue of whether Suzuky achieved possession of the land through actions that were actual, open, visible, notorious, continuous, hostile, and under a claim of right for twenty years. Id. at 247.

On remand, the Trial Division found that Suzuky's "clearing and planting on the land was not done covertly" and that he had met the requirements for an adverse possession claim. Petrus now appeals, arguing the Trial Division applied the wrong standard to the adverse possession claim; the Trial Division failed to "recognize and consider legal presumptions in Petrus' favor; and the Trial Division failed to recognize that the adverse possession period was tolled by Petrus' original claim to the land."

STANDARD OF REVIEW

[1, 2] Common law adverse possession presents a mixed question of law and fact. Seventh Day Adventist Mission of Palau, Inc. v. Elsau Clan, 11 ROP 191, 193 (2004). The lower court's conclusions of law are reviewed de novo. *Nakamura v. Uchelbang Clan*, 15 ROP 55, 57 (2008). Factual findings of the lower court are reviewed using the clearly erroneous standard. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). Under this standard, the findings 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 that conclusion. Id.

ANALYSIS

[2-4] Petrus appeals the Trial Division's award to Suzuky of that portion of Lot No. 028 A 10 that he occupies by virtue of adverse possession. Generally, "[t]he elements of adverse possession must be established by clear proofs of acts and conduct fit to put [a] person of ordinary prudence, and particularly the true owner, on notice that [the] estate in question is actually, visibly, and exclusively held by a claimant in antagonistic purpose." 3 Am. Jur. 2d Adverse Possession § 296 (2002). 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 v. Matsutaro*, 13 ROP 22, 25 (2005). A party claiming title by adverse possession bears the

burden to prove affirmatively each element of adverse possession. *Seventh Day Adventist Mission*, 11 ROP at 193-94.

I. Elements of Adverse Possession

In our earlier opinion, we stated that there was insufficient evidence as to whether Suzuky established the requirements necessary for an adverse possession claim. We found that Suzuky was not required to give notice to the true owner and remanded to determine whether Suzuky met the elements to acquire parts of Ngedengir by adverse possession. *Suzuky*, 17 ROP at 246-47.

Petrus argues that there is conflicting evidence about whether he granted Suzuky permission to build a right-of-way on Petrus' land. Petrus argues that several elements of the adverse possession doctrine, such as visibility, exclusivity, and whether possession is open and notorious, have not been met.[2] We examine each below.

A. Hostile Possession

[5] "The requirement for adverse possession that the possession be hostile does not require ill will or malice, but an assertion of ownership adverse to that of the true owner and all others. Possession is hostile if the possessor holds and claims the property as his or her own, whether by mistake or willfully." 3 Am. Jur. 2d Adverse Possession § 43 (2002). "It is not mere occupancy or possession that must be known to the true owner to establish title by adverse possession, but an occupancy that is in opposition to the owner's rights and in defiance of, or inconsistent with, legal title." *Children of Ngiramechelbang Ngeskesuk v. Brikul*, 14 ROP 164, 166-67 (2007) (internal citations omitted). "The mere possession of land does not in and of itself show the possession is notorious or hostile . . . . There must be some additional act or circumstance indicating that the use is hostile to the owner's rights." Id. (internal citations omitted).

In his brief, Petrus argues that the evidence was not "clear and convincing" that Suzuky acted in a hostile way because Petrus granted Suzuky permission to use his land. The evidence showed that Petrus granted Suzuky permission to build a right-of-way but not to do anything else. Any action Suzuky took outside of Petrus' permission would be hostile.

Petrus testified that Suzuky sought permission to build a right-of-way to Suzuky's property and that Petrus granted permission and also forbade Suzuky from building a house or farming. This evidence satisfies the hostile requirement, because Suzuky farmed in direct opposition to the admonition from Petrus. Suzuky testified that he did not ask Petrus for permission to build an access road,

[2] Petrus argues that the Trial Division failed to apply the clear and convincing evidence standard when considering Suzuky's adverse possession claim. Petrus points to the Trial Division's first decision, in which it purported to apply a preponderance standard. But the decision on appeal here contains no such reference. Upon our review of the record, we are satisfied that the court applied the correct standard. *United States v. Morton*, 957 F.2d 577, 581 (8th Cir. 1992) ("[H]aving reviewed the [trial court's] transcript, we conclude the district court's findings would have been the same under the [higher] standard. Thus, the district court's factfinding satisfied due process.")

but that he instead asked Francisco Gibbons, the son of a defendant not party to this appeal, for permission to build a right-of-way. Suzuky also testified that he was shown the boundaries of his land, and he inquired with the Land Commission as to who owns Lot No. 028 A 10. He was told the land was unclaimed.

Petrus argues that there was "as much evidence supporting that Suzuky's use of the land was permissive as there was otherwise." Although there is a dispute as to whom Suzuky asked for permission to build a road to his property, there is no dispute that Suzuky's actions of clearing, planting, erecting a pigpen, and using the land as a parking lot were and are hostile to the true owner of Ngedengir. Suzuky began clearing a portion of Lot 028 A 10 in 1985. He planted mangos, coconuts, lemon or lime trees, and betel nut trees. He burned down some of the trees that he planted and planted new ones. He has farmed the land continuously for twenty years. In the late 1980s, he erected a pigpen and raised pigs before they were outlawed in 1990. Today, he continues to maintain the trees he planted. He also uses the land as a parking lot.

The facts of this case stand in stark contrast to Children of Ngiramechelbang Ngeskesuk, which Petrus cites for the proposition that Suzuky's actions are insufficient to meet the hostile element. There, we held that the parties seeking title through adverse possession had not committed any "additional act or circumstance indicating that the use is hostile to the owner's rights." *Children of Ngiramechelbang Ngeskesuk*, 14 ROP at 167. We concluded that the appellees had "numerous opportunities . . . to either claim the land or demonstrate the adverse nature of [their] occupancy" but they gave "no verbal or written notice to the [rightful owner] nor did they make any physical indication such as making improvements." Id.

Here, Suzuky made numerous physical improvements to the land, which demonstrates the adverse nature of his occupancy. Based on this evidence, we conclude that Suzuky has satisfied the hostile element of the adverse possession statute and that the Trial Division applied the correct evidentiary standard.

B. Visibility

[6] Petrus argues that the Trial Division's decision should be set aside because there is no evidence the possession was visible or open to the common observer such that "the owner or an agent, on visiting the premises, might readily see that the owner's rights are being invaded." 3 Am. Jur. 2d Adverse Possession § 63 (2002). "Possession is visible if it is so obvious that the true owner is presumed to know of it." *Id.*

Petrus argues that the Trial Division erred in finding that the plants and trees are visible from the road. Petrus also argues that he had no knowledge of Suzuky's use of or planting on the land at issue. Whether the public could see the trees from the road leading to the property is of little import. The issue is whether the "common observer" (and the owner) would be able to see, upon visiting the premises, that, over the course of twenty years, someone had cleared part of Petrus' land, had planted several types of trees, had built and then razed a pigpen, and later was using the land as a parking lot. The overwhelming evidence indicates that the

common observer would have seen such visible, physical changes to the land had they visited the property at issue. Each of Suzuky's activities would put the true owner on notice regarding his use of the property. We hold that the evidence is sufficient to meet the visibility requirement.

C. Exclusivity

[7] Petrus also contends that there is insufficient evidence to meet the "exclusivity" element of the doctrine of adverse possession. " 'Exclusive possession' means that the claimant must show an exclusive dominion over the land and an appropriation of it to his or her own use and benefit." 3 Am. Jur. 2d Adverse Possession § 67 (2002).

Petrus presented evidence that he gave permission for two women to farm the land. However, there is no evidence that the women were farming Suzuky's portion of the land, a fact that would, if established, destroy exclusivity. Suzuky testified that the women were not farming on the portion of the property that he was farming. Therefore, Suzuky has proved exclusive possession. The Court affirms the Trial Division's finding that Suzuky has met the exclusivity element of the adverse possession doctrine.

D. Open & Notorious Possession

[8] Finally, Petrus argues that the Trial Division erred in finding that Suzuky proved his possession was open and notorious. The words "open and notorious" mean "that an adverse claim of ownership must be 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, including notice both to the record owner and to the public." 3 Am. Jur. 2d Adverse Possession § 63 (2002).

Petrus argues that the Trial Division rewarded Suzuky for "masking his adverse possession claim from 1985 to 2006." Moreover, Petrus emphasizes that "it is the legal owner's knowledge, either actual or imputable, of another's possession of lands that is required for adverse possession." We agree with the Trial Division's finding that knowledge of the physical changes to the property, which were visible to the common observer, would be imputed to the legal owner. Suzuky's actions on the property were and are sufficient to put the legal owner and the public on notice of his actions. To find otherwise would mean that an owner could prevail as long as he never visited his property. Therefore, we determine that Suzuky has satisfied the open and notorious element of the adverse possession doctrine. Because Suzuky proved all the elements of adverse possession by clear and convincing evidence, we affirm the Trial Division's conclusion to that effect.

II. Presumptions in Petrus's Favor

Petrus correctly notes that he is entitled to several presumptions because he is the legal owner of the land, and he argues that Suzuky has not rebutted the presumptions of his ownership. Petrus argues that Suzuky cannot merely take possession of the land but must instead "rebut the legal presumptions in favor of Petrus." Suzuky has acted as though he were the true legal owner of the land. He has satisfied, through clear and convincing evidence discussed above, the elements of the doctrine of adverse possession. We affirm the

Trial Division's conclusion that Suzuky has rebutted the presumptions that Petrus owns the land through the doctrine of adverse possession.

III. Tolling

Finally, Petrus argues that the applicable statute of limitations in adverse possession is tolled because Petrus "did not learn that someone else was claiming his land until 2006." Petrus cites to *Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 17, 21 n.5 (1998) for the proposition that filing claims with the Land Commission is sufficient to toll the statue of limitations. In Lulk Clan, the statute was tolled because the appellees there filed claims with the Land Commission instead of with the court. *Id*. at 21. We held that filing claims with the Land Commission was sufficient to toll the statute.

Petrus appears to argue that because the Land Commission rendered its adjudication awarding the land at issue to Petrus in 1982, the statute was tolled until 2006. This is because Petrus was waiting for his certificate of title on the land and he was doing all that was expected to perfect his claim while he waited. Petrus argues that he was entitled to notice of any subsequent legal proceedings involving the land.

We affirm the determination by the Trial Division that the statutory period was not tolled. As discussed above, Suzuky took decisive steps to clear and farm the land at issue. His actions were sufficient to provide notice to the true owner. Petrus should have seen, well before 2006, that someone was clearing, planting trees, raising livestock, and making a parking lot on his land. Petrus cannot seek relief from the entire statutory period simply because he was waiting for the certificate of title from the Land Commission. Accordingly, we hold that the statute of limitations was not tolled and affirm the Trial Division's conclusion.

CONCLUSION

We hold that the findings of the Trial Division were not clearly erroneous and its legal conclusions were correct. Appellee Suzuky has properly claimed the land in question under the doctrine of adverse possession. Accordingly, we **AFFIRM** the Trial Division's award of land to Abel Suzuky.

HOKKONS BAULES,
Appellant,

v.

NGIRAMERIANG YOU KUARTEL,
Appellee.

CIVIL APPEAL NO. 11-013
Civil Action No. 03-195

Supreme Court, Appellate Division
Republic of Palau

Decided: January 16, 2012

[1] Appeal and Error: Interlocutory Appeals

An order is final and appealable when there is no further judicial action required to determine the rights of parties. However, there are exceptions to the "final judgment" rule.

[2] Appeal and Error: Interlocutory Appeals

An Order in Aid of Judgment does not qualify for an exemption under the final judgment rule and is simply not appealable.

[3] Appeal and Error: Frivolous Appeal

Under Rule 38 of the Appellate Rules of Procedure, the Court may issue sanctions against the appellant if the result of the appeal is obvious, and the Court has no jurisdiction over the frivolous appeal.

Counsel for Appellant: Mark P. Doran
Counsel for Appellees: Rachel Dimitruk

BEFORE: KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

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

PER CURIAM:

This appeal concerns Defendant Hokkons Baules's residence and presence on Meriang Clan lands located in the Meriang-Desekel area of Ngerbeched. Baules appeals the Trial Division's Order in Aid of Judgment. The Order sought to effect a judgment from 2004 enjoining Baules from occupying or using Meriang Clan lands. Because we lack jurisdiction to hear an appeal of this interim order issued by the Trial Division, we dismiss the appeal. Additionally, because the appeal is frivolous, we award court costs and reasonable attorney's fees to Appellees.

BACKGROUND

In 1990, the Land Claims Hearing Office determined that Meriang Clan owns Cadastral Lot Nos. 40636 and 41046, the property upon which Baules resides.[1] *In re Meriang*, 12-PL-05, at 12 (April 26, 1990). In 2004, a number of Meriang Clan members, including current Appellees, sought a

[1] Despite inconsistent identification of the land at issue in the parties' briefs, the parties do not dispute that Baules's residence is located on Meriang Clan lands. Baules's main argument on appeal is whether the Meriang Clan owned the land upon which he lives in 2004, when the Trial Division found that Meriang Clan owned the land and ordered Baules off of the land.

declaration concerning Baules's position in the Clan and sought to enjoin Baules from living on the land without their consent or permission. The parties went to trial, and the Trial Division issued a judgment concluding that "[a]ny occupation or use of Meriang Clan lands by the Baules defendants must be approved by the strong senior members of the Clan." *Kuartel v. Baules*, Civ. Act. No. 03-195, at 1 (Nov. 26, 2004). Baules did not appeal the Trial Division's Order.

Starting in 2006, Appellees, who are members of the Meriang Clan, filed numerous motions for orders in aid of judgment and to show cause, and sought sanctions and other relief against Baules because he continued to live on Meriang Clan lands. On April 20, 2010, the trial court held a hearing on Appellees' motion for an order to show cause, but no order was forthcoming. On November 4, 2010, Appellees filed a renewed motion for an order in aid of judgment.

On April 13, 2011, the Trial Division issued the Order in Aid of Judgment. The Order sought to effect the 2004 judgment. The Court found that it was "uncontroverted that a judgment was entered enjoining [D]efendant from occupying or using Meriang Clan lands, that [D]efendant was served with the court's judgment and is well aware that he is enjoined from occupying clan lands."

The Court also held that Baules had continued to occupy clan lands for five years, in violation of the Court's judgment, and that the Appellees had proven all elements of contempt of court. However, the Trial Division reserved its contempt finding to give Baules thirty days to vacate Meriang Clan lands and warned that failure to comply with the Court's directive would result in reinstatement of the finding of contempt. On July 22, 2011, Baules appealed the Trial Division's Order.

Baules argues that Meriang Clan did not own the land at issue when the Trial Division ordered him off the land and that he is now entitled to relitigate the issue of whether he was given permission to live on the land. Appellees have filed a combined response brief. They argue that the Court has no jurisdiction over this appeal; that Baules's appeal relies on an inaccurate version of the facts; and that Baules's defense has been waived. Appellees also seek sanctions against Baules for filing this appeal.

JURISDICTION

[1] We have jurisdiction over orders that are final. *Ueda v. Ngiwal State*, 7 ROP Intrm. 132, 133 (1998). An order is final and appealable "[w]hen there is no further judicial action required to determine the rights of parties." *Feichtinger v. Udui*, 16 ROP 173, 175 (2009). Of course, as discussed below and as we have long recognized, there are exceptions to the "final judgment" rule. *ROP v. Black Micro Corp.,* 7 ROP Intrm. 46, 47 (1998). Orders with an impact on "real world events" such that the outcome cannot be easily undone after judgment may, in certain circumstances, be appealable. *Id.*[2]

Baules argues that he has a right to appeal the Order in Aid of Judgment because

[2] For example, an order granting or denying a request for a preliminary injunction is immediately appealable because we recognize its impact on real world events. *ROP v. Black Micro Corp.,* 7 ROP Intrm. 46, 47 (1998). *See also Olikong v. Salii*, 1 ROP Intrm. 406, 411 (1987).

otherwise he "would be required to vacate his residence before he could file an appeal" and would suffer "irreparable harm." Baules offers no additional argument in favor of jurisdiction, other than to urge the Court to "allow for an immediate appeal of an order with a significant impact on real world events." Appellees argue that further judicial action must be taken because Meriang Clan seeks financial compensation from Baules for his "unauthorized and continued presence on Meriang Clan lands." Moreover, Appellees argue that unresolved questions exist as to whether Baules will be held in contempt and ordered to pay sanctions.

[2] We agree with Appellees. While true that we have held that the final order rule is "flexible enough to allow for immediate appeal" of an order with significant impact on real world events, *Feichtinger*, 16 ROP at 174, this is not an appeal of the 2004 Order. This is an appeal from a 2011 order issued in aid of a judgment from 2004. The order does not qualify for an exception to the final judgment rule. As discussed below, the Order in Aid of Judgment is simply not appealable.

In *Feichtinger*, we held that although a stipulated judgment was not a final order, we had jurisdiction to hear the appeal because the Trial Division had decided "there can be no further judicial action with regard to the claims against Appellee." 16 ROP at 175. Here, however, the April 13, 2011, Order leaves open several questions. The Trial Division explicitly reserved its ruling on contempt.[3] Further, the Trial Division left open the possibility of imposing sanctions. Accordingly, the Order in Aid of Judgment does not dispose of all of the issues in this case and cannot be considered a final appealable judgment.

We also are convinced by Appellees' argument that the Order in Aid of Judgment is ministerial and therefore not an appealable final order. Action to enforce an earlier judgment is almost always ministerial and not appealable. *See Powell v. Georgia-Pacific Corp.,* 90 F.3d 283, 284 (8th Cir. 1996) ("The disbursement order [directing court clerk to disburse funds pursuant to earlier court order] . . . is merely a 'housekeeping' order, and we have repeatedly held that 'the mere retention of jurisdiction for future ministerial orders does not withhold the finality required to make a previous order appealable."). Here, the 2011 Order enforced the original Trial Division judgment enjoining Baules from occupying or using Meriang Clan land without permission. As in *Powell*, the Order in Aid of Judgment was a housekeeping order enforcing a judgment from seven years ago. It cannot be appealed to this Court.

Accordingly, having found that we lack jurisdiction, we **DISMISS** the appeal.

SANCTIONS

Appellees seek damages, including attorney's fees, because they believe this appeal is frivolous under Rule of Appellate Procedure 38. That Rule provides that if the Appellate Division determines an appeal is frivolous, it may award just damages, including attorney's fees. ROP R. App. P. 38.

[3] As Appellees correctly argue, even if the Trial Division had found Baules in contempt, the general rule is that "a finding of civil contempt is not reviewable on interlocutory appeal." *U.S. v. Gonzales*, 531 F.3d 1198, 1202 (10th Cir. 2008) (internal citation omitted).

Courts in the United States have interpreted the analogue to this rule, United States Federal Rule of Appellate Procedure 38, to mean that "an appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit." *Wilcox v. Comm'r of Internal Revenue*, 848 F.2d 1007, 1009 (9th Cir. 1988).

[3] Here, we find that the result of the appeal is obvious: we have no jurisdiction to hear an appeal of this order in aid of judgment, clearly a ministerial interlocutory order. The appeal is frivolous. We therefore **ORDER** Baules to pay sanctions in the form of attorney's fees for the work performed on this appeal. Moreover, we note that Rule of Appellate Procedure 39 provides that "if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court." ROP R. App. P. 39. Accordingly, we also **ORDER** Baules to pay Appellees' costs for this appeal.

Appellees' counsel shall file a motion for attorney's fees and court costs within fourteen days of issuance of this Opinion. Baules may file a response within fourteen days of the filing of Appellees' motion for attorney's fees and costs. The Court will then issue an order directing Baules to pay Appellees' counsel's reasonable fees and court costs.

ORAKIBLAI CLAN, BLIUB CLAN, SOWEI CLAN, NGERBUUCH CLAN, OCHEDARUCHEI CLAN, NGEUDEL CLAN, OKEDERAOL CLAN, BOSAOL CLAN, SECHEDUI CLAN, NGERUOSECH CLAN, IBELKUNGEL CLAN and UES PEDRO through her representative UCHERBELAU ABEL K. SUZUKI,
Appellants,

v.

GOVERNMENT OF THE UNITED STATES OF AMERICA and GOVERNMENT OF JAPAN,
Appellees.

CIVIL APPEAL 11-003
Civil Action No. 09-251

Supreme Court, Appellate Division
Republic of Palau

Decided: January 17, 2012

[1] **Courts**: Judges

The Chief Justice is the administrative head of the judicial system. Inherent in this authority is the ability to create the three-judge panels to hear appeals.

[2] **Courts**: Judges

The assignment of judges to an appellant panel is not a proceeding but a ministerial task. It is administrative, not judicial, and does not rise to the level of a proceeding.

[3] Appeal and Error: Filing Deadlines

There is no due process violation by denying a motion for extension of time. Under Palau's appellate rules of procedure, the court in its discretion may order the period for filing deadlines enlarged. Each request is carefully reviewed on its own merits for cause before it is granted, or denied.

Counsel for Appellants: Brian Sers Nicholas, Yukiwo Dengokl
Counsel for Appellees: William Ripdath, Mariano Carlos

BEFORE: ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellants argue that, in issuing its opinion in this case with the panel as constituted and without oral argument, the Judiciary violated Appellants' rights under Palau's Constitution, the Code of Judicial Conduct, and the Rules of Appellate Procedure.

Appellants seek a hearing to request three types of relief. First, they ask that the present appellate panel members[1] recuse themselves from serving on the panel. Second, they request that the Appellate Division's January 17, 2012 opinion be vacated. Third, they request a new appellate panel to hear oral arguments. Appellees have filed no response. Upon careful examination of the brief submitted in support of this motion, Appellants' motion is denied.

MOTION TO RECUSE THE PRESENT APPELLATE PANEL

Appellants argue that the present appellate panel should recuse itself. The original panel consisted of Associate Justices Salii, Materne, and Foster. In April 2011, Appellants filed a motion to disqualify Justice Salii, which was granted. That same month, Justice Materne was removed from the panel by order of the Chief Justice.

Appellants argue that because the Chief Justice acted as the trial judge, he should have disqualified himself from "any proceeding" relating to this case, including the decision to remove Associate Justice Materne from the appellate panel. Appellants believe the Chief Justice's actions created an appearance of impartiality, bias, and prejudice, in violation of Canon 2 (impartiality). Appellants also raise an equal protection argument arising from Justice Foster's April 28, 2011, order denying their request for additional time to file Reply Briefs. Finally, Appellants argue that their due process rights

[1] The motion is unclear as to whether Appellants seek to replace only Justice Foster or whether more than one panel member should be replaced. *See* ("This Court can still empanel a neutral and impartial Appellate Panel with the remaining 'untainted' Associate Justice to hear this case anew."); *see also* ("[A] new Appellate Panel that is perceived by the general public to be fair and impartial is warranted and mandated to hear oral arguments and consider this matter anew.").

were violated when the Court denied their requests for oral argument.

I. Composition of Panel

[1] The Chief Justice is the administrative head of the judicial system. Palau Const., art. X, § 12. Inherent in this authority is the ability to create the three-judge panels to hear appeals. *Id.* at § 2. The Chief Justice may appoint judges to serve on appellate panels based on a number of considerations consistent with the Code of Judicial Conduct.

[2] Appellants are correct that, pursuant to Canon 2 of the Code of Judicial Conduct, a judge shall disqualify himself or herself in "any proceeding" in which it may appear to the reasonable observer that the judge cannot decide the matter impartially, including where "the judge's ruling in a lower court is the subject matter of review." But they are incorrect in arguing that Canon 2 prohibited the trial judge here, the Chief Justice, from assigning justices to an appellate panel. The assignment of judges to an appellant panel is not a proceeding but a ministerial task. It is administrative, not judicial, and does not rise to the level of a proceeding. Accordingly, the Chief Justice acted within his authority in removing a panel member and appointing a new one.

II. Enlargement of Time

Appellants also raise a due process argument regarding enlargement of time. Appellees requested and received additional time to file responsive briefs. Appellants also requested additional time to file their replies, citing as justifications a felony jury trial scheduled to begin after the deadline for filing the replies and the speed of mail service from Palau. Appellants claim that they were "entitled to have their request for enlargement of time to file their Reply Briefs herein considered in the same manner in all respects and no different than that of Associate Justice Foster's considerations of similar requests made by the United States and Japan."

A single justice may entertain a motion under ROP R. App. P. 27(c). Justice Foster, acting as the single justice to entertain the motion, found "no good cause" to grant the requested enlargement of time. Specifically, Justice Foster concluded that any delay in receiving mail was unlikely in the Internet age, particularly since Appellants' counsel had local counsel and appeared to have a way to receive briefs electronically. She also found that no conflict existed between Appellants' counsel's trial and the tentative deadline for filing the reply briefs since the deadline preceded trial. Moreover, the motion was premature because Appellees might have sought additional extensions in the interim.

[3] Justice Foster did not exceed her authority in denying the motion to enlarge time. In essence, Appellants argue that they have a right to an enlargement of time if their opponents received one. This is not the standard. Under ROP R. App. P. 26(c), the court "in its discretion may . . . for good cause shown order the period enlarged if the first request is made before the expiration of the period originally prescribed." Each request for enlargement of time is carefully reviewed on its own merits for cause before it is granted, or denied.

Appellants sought reconsideration of this decision, but the court denied the motion

because it did not point out with specificity the matters that were overlooked or misapprehended by the court.

III. Request for Oral Argument

Appellants also believe they should have been granted an opportunity to present oral arguments to the Court. ROP R. App. P. 34(a) governs requests for oral argument as well as the time and place for oral argument. Oral argument is not automatic. Appellants cite *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999), to argue that due process requires an opportunity to be heard. However, filing written briefs affords the parties the opportunity to be heard. *Id.* "[P]rocedural due process does not entitle a litigant to a hearing on every motion." *Id. Ngerketiit Lineage* provides no assistance to Appellants and in fact supports the Court's right to deny the requested oral argument.

Accordingly, Appellants' motion seeking recusal of the Appellate Panel is **DENIED**.

MOTION TO VACATE THE JANUARY 17, 2012, ORDER

Appellants argue that because the appellate panel was neither fair nor impartial, the Opinion that the panel issued must be reversed and vacated. Neither the Constitution, nor the Rules of Appellate Procedure have been violated by members of the Judiciary. Accordingly, the motion to vacate the January 17, 2012, Opinion is **DENIED**.

MOTION FOR A NEW APPELLATE PANEL TO HEAR ORAL ARGUMENTS

Appellants argue that because the panel was neither fair nor impartial, the Court can still "empanel a neutral and impartial Appellate Panel with the remaining 'untainted' Associate Justice to hear this case anew." Again, because Appellants have failed to show the panel acted inappropriately, we deny this motion.[2] Accordingly, Appellants' Motion for a Hearing is **DENIED**.

[2] This is not the forum for addressing potential violations of the Code of Judicial Conduct. If Appellants believe that one or more of the justices on this panel have violated the Code of Judicial Conduct, Appellants should follow the procedures set out in Canon 7 of the Code.

CORDINO SOALABLAI,
Appellant,

v.

PASQUALA SWEI and HOKKONS BAULES,
Appellees.

CIVIL APPEAL NO. 11-006
Civil Action Nos. 07-163 & 08-253

Supreme Court, Appellate Division
Republic of Palau

Decided: February 3, 2012

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

Section 301(b) does not require that a court choose a lineage to receive an intestate decedent's estate. A lineage claimant in a probate proceeding must make a showing that it was both (1) a "maternal or paternal lineage to whom the deceased was related by birth or adoption" and (2) "actively and primarily responsible for the deceased prior to his death."

Counsel for Appellant: Raynold B. Oilouch
Counsel for Swei: Oldiais Ngiraikelau
Counsel for Baules: Salvador Remoket

BEFORE: KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

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

Cordino Soalablai appeals the Trial Division's award in probate of certain properties to Pasquala Swei and Hokkons Baules.[1] The only issue on appeal is whether the trial court properly determined that the intestacy statute, 25 PNC § 301(b), did not apply to the estate of Father Felix Yaoch. We affirm the Trial Division's order.

BACKGROUND

Father Yaoch, a Roman Catholic priest, died without a will and without issue. Throughout his life, as a member of the Jesuit Order, Father Yaoch's worldly comforts were provided by the Catholic Church, the Society of Jesuits, and the Catholic Mission here in Palau. Upon entering the priesthood, Father Yaoch "severed" normal ties with his family in order to fulfill his calling. Around 2001, his health began to deteriorate, and he was hospitalized in the Philippines. Among those who visited and stayed with him during his sickness was Appellant, Cordino Soalablai, a relative of Father Yaoch. Father Yaoch died in the Philippines on December 17, 2002. Members of the Catholic Mission went to the Philippines to make arrangements to have Father Yaoch's body brought back to Palau. Upon returning to Palau, the Catholic Mission was also responsible for planning and putting on Father Yaoch's funeral. However, Soalablai and other members of his lineage, the Lineage of Kesiil, contributed $2,000.00 to the funeral.

[1] Specifically, Soalablai seeks ownership of (1) a portion of the land known as *M'ngai* in Meyuns Hamlet, which was awarded to Swei, (2) a house located on land known as *Ngatbelau* in Ngerbeched Hamlet, awarded to Baules, and (3) land known as *Ngerimel* in Ngeruluobel Hamlet, also awarded to Baules.

On September 3, 2008, Soalablai petitioned the trial court to probate Father Yaoch's estate and to transfer the estate to the Lineage of Kesiil. Appellees Pasquala Swei and Hokkons Baules also filed claims. Soalablai argued that his claim should prevail under the intestacy statute, among other reasons. Swei and Baules contended that the statute was inapplicable because the Lineage of Kesiil was not "actively and primarily responsible" for Father Yaoch before his death. 25 PNC § 301(b). The Trial Division agreed that the intestacy statute did not apply and, therefore, applied Palauan custom. Concluding that custom dictated that Swei and Baules prevail, the court awarded the currently disputed properties to them.[2]

STANDARD OF REVIEW

We review the legal conclusions of the Trial Division de novo and its findings of fact for clear error. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

25 PNC § 301(b) provides, in relevant part, that:

> If the owner of fee simple land dies without issue and no will has been made . . . or if such lands were acquired by means other than as a bona fide purchaser for value, then the land in question shall 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 his death.

The trial court determined that neither the Lineage of Kesiil, nor any other lineage, was "actively and primarily responsible" for Father Yaoch before his death. It pointed to the financial support and care provided by the Catholic Church as evidence that no lineage met the statutory requirements. Soalablai argues that this was legal error because it amounts to the conclusion that because the Catholic Church provided support, no lineage may qualify as "actively and primarily responsible" for Father Yaoch.

This argument reads too much into the Trial Division's decision. The trial court did not hold that the Catholic Church's support of Father Yaoch precluded a determination that some lineage was qualified under the intestacy statute. Instead, the court simply pointed out that the Catholic Church, as a factual matter, was responsible for Father Yaoch, and no lineage shared that responsibility.

[1] Section 301(b) does not require that a court choose a lineage to receive an intestate decedent's estate. In *Delbirt v. Ruluked*, 10 ROP 41, 43 (2003), we held that it was inappropriate for the Land Court to choose a claimant to receive the distribution if that claimant did not meet the statutory qualifications, even if no better claimant was before the Land Court. We concluded that the statute applies only if a qualified lineage exists and has filed a claim. *Id.* We stated, "the statute is . . . not satisfied by a showing that an individual or individuals cared for the

[2] Appellant does not contend here that he should have prevailed based on custom.

deceased prior to his death." *Id.* Although that case involved individual claimants rather than an individual purporting to act on behalf of a lineage, like Soalablai, the same principle applies here. A lineage claimant in a probate proceeding must make a showing that it was both (1) a "maternal or paternal lineage to whom the deceased was related by birth or adoption" and (2) "actively and primarily responsible for the deceased prior to his death." 25 PNC § 301(b). Soalablai failed to satisfy the second prong.

Finally, Soalablai suggests that, because he and others from the Lineage of Kesiil visited Father Yaoch before his death and helped finance the funeral, the trial court erred in its factual conclusion that the Lineage was not "actively and primarily responsible" for Father Yaoch. However, our inquiry into the trial court's factual findings is merely to ascertain whether its determination was clear error. *Roman Tmetuchl Family Trust*, 8 ROP Intrm. at 318. Given the limited scope of Soalablai's care for Father Yaoch and the fact that an overwhelming majority of his support came from the Church, the Trial Division's finding that the Lineage of Kesiil was not "actively and primarily responsible" for Father Yaoch was not clear error.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the Trial Division.

FLAVIAN CARLOS, MOHAMED YOUSUF, ANGELES YANGILMAU, and FLORENTINE YANGILMAU,
Appellants,

v.

MARIANO CARLOS and JUANITA CARLOS,
Appellee.

CIVIL APPEAL NO. 10-032
Civil Action Nos. 09-204, 09-284, and 09-288

Supreme Court, Appellate Division
Republic of Palau

Decided: February 6, 2012

[1] Appeal and Error: Clear Error

As long as the court's findings are based on admissible evidence that could lead a reasonable trier of fact to the same result, we will not disturb those findings.

[2] Torts: Respondeat Superior

An employer is vicariously liable for the torts of his employee committed within the scope of the employee's employment. This liability extends even to acts not specifically commanded by the employer. As long as the employee's actions were reasonably related to the duties of his employment, and not for the exclusive benefit of a third party or himself, then the employer is liable.

[3] Property: Proof of Ownership

Although Juanita cultivated the crops, Mariano's ownership of the land carries with it a presumption of ownership of the crops.

[4] Civil Procedure: Res Judicata

Res judicata generally bars a subsequent claim that concerns any issue actually litigated and determined by an earlier final judgment between the same parties.

[5] Civil Procedure: Res Judicata

Res Judicata may apply even if the issue was not actually litigated, but merely ought to have been litigated.

[5] Civil Procedure: Res Judicata

Res Judicata may apply even if the issue was not actually litigated, but merely ought to have been litigated.

[6] Civil Procedure: Res Judicata

Claim preclusion applies with equal force to a party's privies.

[7] Civil Procedure: Res Judicata

A prerequisite to a proper res judicata defense is that an issue was or ought to have been litigated and decided in favor of the party invoking res judicata.

[8] Property: Servitudes

Legal title is not exclusive with other property interests in land. Rights and obligations that run with the land create land-use arrangements that remain intact despite changes in ownership.

[9] Equity: Estoppel

Equitable estoppel precludes a person from denying or asserting anything to the contrary of that which has been established as the truth by his own representations.

Counsel for Yangilmaus: J. Uduch Sengebau Senior
Counsel for Carlos and Yousuf: Yukiwo P. Dengokl
Counsel for Appellees: William L. Ridpath

BEFORE: LOURDES F. MATERNE, Associate Justice; C. QUAY POLLOI, Associate Justice Pro Tem; RICHARD H. BENSON, Part-Time Associate Justice.

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

PER CURIAM:

Flavian Carlos, Angeles Yangilmau, and Florentine Yangilmau[1] appeal the Trial Division's decision in this trespass case stemming from competing gardens on a portion of Tochi Daicho Lot 1590 (Lot 1590) above the Echang road.

BACKGROUND

A prerequisite to a discussion of this matter is an explanation of earlier litigation

[1] We refer to parties with last names in common by their first names. Mohamed Yousuf was formerly party to this appeal but is no longer pursuing it.

concerning the land in Echang. Civil Action No. 354-93 began in 1993 as a quiet title action over several lots in Echang. After an initial trial, the court concluded that the heirs of Borja owned the land, including Lot 1590, and that the ownership rights were "subject to the rights of all persons who have or had a family or lineage member who resided in Echang in 1962 to reside and use land in Echang without disturbance." Judgment, *Dalton v. Choi Engineering Corp.*, Civ. Action No. 354-93 (Tr. Div. Apr. 15, 1997). The latter conclusion was based on the Echang Land Settlement Act of 1962 (Settlement Act), which provides, in relevant part, that then-residents of Echang and their heirs would be allowed to peacefully use the land "for an indefinite period in the future."

In the first of three appeals, we reversed in part and remanded for determination of who possessed legal title to Lot 1590 and other lots. *Heirs of Drairoro v. Dalton*, 7 ROP Intrm. 162, 168 (1999). But we affirmed the trial court's determination that "all of the land in question located within Echang is subject to a use right residing in the residents of Echang as of 1962 and their decedents." *Id.* Florentine was a party to Civil Action 354-93, and, upon remand and during interrogatories, he stated that he had "no interest" in Lot 1590. Ultimately, pursuant to a quitclaim deed issued as compensation for his legal services, Mariano Carlos was adjudged the owner of a portion of Lot 1590, including the area above the Echang road, which is the subject of the present litigation. Order, *Dalton v. Choi Engineering Corp.*, Civil Action No. 354-93, at 6 (July 28, 2004).

The history of the present dispute is laid out in substantial detail in the final decision of the Trial Division below. We recite only the facts that are salient for the purpose of this appeal. In spite of Mariano's legal title to the land, several other individuals began or continued to farm the land. The Yangilmaus went so far as to obtain a temporary restraining order to prevent Mariano and his wife, Juanita Carlos, from entering or fencing in the land. They contended that the land was part of their lot, which borders Lot 1590. Juanita found vegetables, including taro plants, in her garden uprooted. Mohamed Yousuf, Flavian's employee hired to farm the land, admitted to removing some of the vegetables and to planting several mahogany, betel nut, coconut, and noni trees on the property.

Mariano, but not Juanita, sued the Yangilmaus, Yousuf, Flavian, and others for trespass and damage to his property. Yousuf testified that he was told to farm the land by his employers. Flavian denied that he ever ordered Yousuf to farm on Lot 1590. The Yangilmaus claimed a right to enter and farm Lot 1590 by virtue of their long tenure farming in the area and based on their dispute of the boundary line between Lot 1590 and their adjoining lot.

Juanita testified at trial and estimated that her uprooted vegetables were worth about $265. Mariano testified that it would cost between $800 and $1200 to uproot and remove the trees from the somewhat remote lot. None of the Defendants presented any contrary evidence regarding the amount or apportionment of damages among them.

The Trial Division found in favor of Mariano. The court rejected the Yangilmaus' claim to a use right to the land because it determined that the earlier case, Civil Action 354-93, was preclusive as to Mariano's ownership. In the body of its decision, the court further stated that the Defendants were jointly and severally liable to Juanita for the loss of her plants. However, in the judgment, the court awarded $157 to Mariano for the uprooted vegetables. Angeles, Flavian, and Yousef were held jointly and severally liable for the removal of the trees, for which Mariano was awarded $1,000.

Flavian and the Yangilmaus appealed. Flavian tenders three arguments on appeal: (1) it was error for the Trial Division to find Flavian liable for Yousuf's trespass; (2) it was error for the Trial Division to award Mariano damages for the uprooting of Juanita's vegetables; (3) and it was clear error for the Trial Division to hold Flavian and the other Defendants jointly and severally liable for the tree removal. The Yangilmaus make only one contention: that they have a right to farm Lot 1590 pursuant to the Settlement Act.

STANDARD OF REVIEW

[1] We review findings of fact from the Trial Division for clear error. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Interm. 317, 318 (2001). As long as the court's findings are based on admissible evidence that could lead a "reasonable trier of fact" to the same result, we will not disturb those findings. *Id.* We review legal conclusions de novo. *Id.*

ANALYSIS

I. Flavian's Vicarious Liability for Yousuf's Tort

Flavian concedes that Yousuf was his employee when he uprooted plants on Mariano's land. Nonetheless, Flavian contends that he should not have been held liable for Yousuf's torts because he did not direct Yousuf to uproot the plants.

[2] The basic rule of respondeat superior is that an employer is vicariously liable for the torts of his employee committed within the scope of the employee's employment. Restatement (Second) of Agency § 219 (1993). Even though the notion that the "servant" is a mere appendage of his "master" has fallen by the wayside, employers remain "responsible for the mistakes, the errors of judgment and the frailties of those working under [their] direction and for [their] benefit," just as they stand to "gain from the intelligent cooperation" of their employees. *Id.* cmt. a. This liability extends even to acts not specifically commanded by the employer. As long as the employee's actions were reasonably related to the duties of his employment, and not for the exclusive benefit of a third party or himself, then the employer is liable. *See* Restatement (Second) Agency § 219 cmt. c.; *see also Obak v. Tulop*, 6 TTR 240, 243 (1973) (holding that employer was not liable for employee's "frolic").

Although Flavian may never have explicitly directed Yousuf to uproot Mariano and Juanita's plants, Yousuf's torts were within the ambit of his employment. As the trial court found, and as Flavian now admits, Yousuf was listed as Flavian's employee in

Division of Labor records, and Flavian paid Yousuf to farm. During his employment, Yousuf uprooted Mariano and Juanita's plants and planted trees that later needed to be removed. Yousuf's activities were plainly within the scope of his employment and not a mere frolic for his own benefit. Thus, the Trial Division properly held Flavian liable for Yousuf's torts.

II. Damages Awarded for Juanita's Taro Plants

Flavian argues it was inappropriate for the trial court to award Mariano $157 in damages in Civil Action 09-284 for Juanita's uprooted taro plants and her labor. Juanita was not a plaintiff in Civil Action 09-284 or 09-204, and nowhere in Civil Action 09-288 (in which she was a defendant and counter-claimant) did Juanita allege trespass or damages stemming from the uprooting of her plants.

[3] Although most of the trial testimony focused on the damages incurred by Juanita, ultimately the land was owned by Mariano. It was his legal interest that was violated when Yousuf, and vicariously Flavian, trespassed and uprooted the taro. Although Juanita cultivated the crops, Mariano's ownership of the land carries with it a presumption of ownership of the crops. *See State v. Bailey*, 152 S.W.3d 890, 892 (Mo. App. W.D. 2005); 21A Am. Jur. 2d Crops § 8 (2008). That presumption survives when the owner's spouse is the primary farmer on the land. Indeed, courts may hold the owner criminally liable for illegally cultivated crops, even if his spouse does most of the farming. *Bailey*, 152 S.W.3d at 892 (holding that a husband could not disavow crops cultivated by his wife on the land); 21A Am. Jur. 2d Crops § 10. By the same logic, the owner of the land may claim damages arising from the interference with crops grown on his land.

In the body of its decision, the Trial Division stated that Juanita suffered the injury and stated that Defendants were "liable to Juanita Carlos." But in the judgment, which is the primary source of our review, the court correctly awarded damages to Mariano, the Plaintiff in Civil Action 09-284 and the owner of the land. Given the evidence presented by Juanita and Mariano, the Trial Division's award of $157 to Mariano was not error.

III. Damages Awarded for Tree Removal

Flavian also contends that it was clear error for the court to award $1,000 to Mariano for tree removal because some of the trees to be removed from the property may have been planted before Yousuf began farming. Yousuf testified that he planted fifteen or sixteen trees that survived. Mariano testified that it would cost him about $800 to $1,200 to remove twenty offending trees from his property. Neither Flavian nor any other defendant presented evidence disputing Mariano's sworn testimony. The court determined that Flavian and the Yangilmaus were jointly and severally liable for the cost of the tree removal.

A majority of the trees that must be removed were planted by Yousuf. It was, thus, not unreasonable for the court to assess $1,000 in damages for tree removal. Even if some of the trees were planted prior to Yousuf's trespass, Mariano must still undertake more elaborate removal procedures in order to extricate the offending trees planted by Yousuf. As he testified, the noni

trees in particular, due to their extensive root system, will require extra effort to remove.

Flavian suggests that the court was required to determine each Defendant's liability for particular trees and to assess the cost for the removal of each tree. Such a determination was unnecessary. The fixed cost of equipment and the combined cost of labor would be difficult, if not impossible, to disaggregate among trees and between Defendants. Flavian cites no authority whatsoever to support his claim that the court was required to perform such an apportionment of damages. Thus, it was reasonable for the Trial Division to hold Flavian and the Yangilmaus jointly and severally liable for the removal of the trees and to award $1,000 to Mariano for their extirpation. *See Roman Tmetuchl Family Trust*, 8 ROP Interm. at 318.

IV. Role of the 1962 Echang Land Settlement Agreement

The Yangilmaus' only argument on appeal is that the trial court ignored the Settlement Agreement, which they claim gave them use rights to portions of Lot 1590. In response, Mariano contends that the Yangilmaus are barred, by res judicata, equitable estoppel, or waiver, from claiming an interest in Lot 1590.

Whether res judicata is applicable turns on Civil Action No. 354-93, the quiet title action in which the Trial Division determined that Mariano had legal title to Lot 1590 and that Florentine did not have "exclusive ownership" to any portion of Lot 1590. This purportedly preclusive action did not hold that Florentine had no use right to Lot 1590, and, indeed, suggests to the contrary that portions of Lot 1590 are be subject to the Settlement Act's use rights.

[4-6] Res judicata generally bars a subsequent claim that concerns "any issue actually litigated and determined" by an earlier final judgment between the same parties. Restatement (2d) of Judgments § 17 (1992). It may apply even if the issue was not actually litigated, but merely ought to have been litigated. *Ngerketiit Lineage v. Tmetuchl*, 8 ROP 122, 123 (2000) (holding that a claim that "could have, and should have, been raised" in earlier proceedings is barred in later proceedings). Claim preclusion applies with equal force to a party's privies. *Estate of Tmetuchl v. Siksei*, 14 ROP 129, 131 (2007). The Trial Division found that the issue of use rights should have been raised in the earlier litigation and, thus, res judicata barred their assertion in this action.

[7] A prerequisite to a proper res judicata defense is that an issue was or ought to have been litigated and decided in favor of the party invoking res judicata. Restatement (2d) of Judgments § 17. Civil Action 354-93 was lengthy, contentious, and crowded. Use rights were at issue only prior to the first of three appeals. The only judgment from that case concerning use rights actually favored the Yangilmaus: the Trial Division found, and we affirmed in the first appeal, that certain Echang residents have use rights to the land. *See Heirs of Drairoro*, 7 ROP Intrm. at 168. Upon remand, the only issue was legal title, *id.*, and the post-remand litigation appears to have focused almost exclusively on ascertaining legal title. Title is distinct from use rights and other servitudes. Title is the "formal legal right of ownership of property."

Black's Law Dictionary 1485 (6th ed. 1990).

[8] However, legal title is not exclusive with other property interests in land. "Rights and obligations that run with the land . . . create land-use arrangements that remain intact despite changes in ownership." Restatement (3d) of Property: Servitudes § 1.1 (1998); *see also Heirs of Drairoro*, 7 ROP Intrm. at 168. Thus, while there may be some other reason that the Yangilmaus' use rights have extinguished, the determination that Mariano has legal title did not do so. This is not a case in which the Yangilmaus ought to have further litigated their use rights. *See Ngerketiit Lineage v. Tmetuchl*, 8 ROP at 123.

[9] Based on similar logic, Mariano's argument for equitable estoppel must fail. Equitable estoppel "precludes a person from denying or asserting anything to the contrary of that which has . . . been established as the truth by his own . . . representations." *Kerradel v. Besebes*, 8 ROP Interm. 104, 105 (2000) (quotation omitted). Mariano contends that Florentine's concession during interrogatories in Civil Action 354-93, that he had "no interest" in the land, bars him from now claiming a use right. But the context of the interrogatories, which arose during the post-remand portion of the litigation, makes clear that equitable estoppel is inapplicable. The use rights had already been affirmed; the only issue before the court was legal title. We are loath to find, in such a situation, that Florentine's statement that he had "no interest" in the land relinquished any use right whatsoever that he may have been entitled to under the earlier judgment in the very same case. Thus, Florentine's "concession" does not bar him from asserting a use right.

Finally, Mariano posits that the issue of Settlement Act use rights was not properly before the trial court below and is therefore waived. *See, e.g., Tulop v. Palau Election Comm'n*, 12 ROP 100, 106 (2005). This is simply incorrect. In both their pretrial statement and during closing arguments, the Yangilmaus invoked their use rights to the land. Further, the Trial Division considered the issue explicitly.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division as to its judgment against Flavian. Because the Trial Division erred in its determination that the judgment in Civil Action 354-93 precludes the Yangilmaus' claim to a use right to portions of Lot 1590, we **REVERSE** the judgment against the Yangilmaus and **REMAND** for proceedings consistent with this Opinion. We further **DENY** Mariano's request for legal fees from the Yangilmaus for filing a frivolous appeal.

NGARNGEDCHIBEL and IDID CLAN,
Appellants,

v.

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NOS. 10-047 & 11-002
LC/B 09-0128
LC/B 09-0129
LC/B 09-0130
LC/B 09-0131
LC/B 09-0132
LC/B 09-0133
LC/B 09-0134

Supreme Court, Appellate Division
Republic of Palau BEFORE:

Decided: February 23, 2012

[1] Return of Public Lands: Burden of Proof

A land authority has no obligation to press its claim before the court; it need not even appear in court for it to retain lands it owns over the claims of private parties.

[2] Appeal and Error: Preserving Issues

This Court has consistently held that arguments raised for the first time on appeal are deemed waived.

[3] Return of Public Lands: Burden of Proof

Had the Land Court concluded that PPLA was the proper public owner rather than KSPLA, it could have made that determination without the participation of PPLA as a party. Contrary to *Rusiang Lineage*, which concerned private parties, cases involving claims to publicly-owned lands do not require the Land Court to limit its determination to the parties before it. As we stated in *Masang*, because the burden is on the private claimants, if no claimant satisfies § 1304(b)'s requirements, the land will simply remain with the land authority, whether the authority is a party to the proceedings or not.

Counsel for Ngarngedchibel: Raynold Oilouch
Counsel for Idid Clan: Salvador Remoket
Counsel for Koror State Pub. Lands Auth.: J. Uduch Sengebau Senior

ARTHUR NGIRAKLSONG, Chief Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; RICHARD H. BENSON, Part-Time Associate Justice.

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

PER CURIAM:

Appellants Ngarngedchibel and Idid Clan appeal the determination by the Land Court that certain lots in Medalaii Hamlet, Koror, are owned by the Koror State Public Lands Authority (KSPLA). Ngarngedchibel, the Council of Chiefs for Ngerbeched, contends that it should be awarded title to the lots by default because the true owner of the land is the Palau Public Lands Authority (PPLA), which was not party to the dispute below. Idid Clan argues that it is the true owner of the land, and that the Land Court

clearly erred in its determination to the contrary. We reject both Appellants' arguments and affirm.

BACKGROUND

This case concerns Bureau of Lands and Surveys ("BLS") lots designated 2006 B12-002, 2006 B 12-003, 2006 B 12-004, 2006 B 12-005, 2006 B 12-006, and 2006 B 12-006A. The land was registered in the Tochi Daicho as owned by the Japanese government and, during the occupation, was used as the site for a hospital. It later became the site of Micronesian Occupational College ("MOC") and is now the site of Palau Community College ("PCC").

On June 14, 2010, the Land Court began an ownership hearing, and several claimants argued that the land should be returned to private ownership. Among them were Ngarngedchibel and Idid Clan, each of which presented evidence during the hearing. KSPLA also participated in the hearing, contending that the land should remain public.

Ngarngedchibel claimed that it has owned the PCC lots since time immemorial. Ngircholsuchel Paul Reklai, a spokesperson for Ngarngedchibel, testified that the land became part of Ngerbeched as a gift from Koror. According to him, Ngerkebesang was waging war on Koror when the Ngerbeched people came to Koror's rescue. As thanks, the Ibedul presented Ngerbeched with the lands that are now the subject of this dispute. Ngircholsuchel Reklai's testimony was corroborated by a chant, a recording of which was submitted as evidence, and by two additional witnesses who provided the same history. Ngarngedchibel also presented testimony that the land was taken prior to the Japanese period and later used for a hospital.

As part of Idid Clan's case, Bilung Gloria Salii testified to the relationship between her family and the land. Her great-grandmother was a Chuukese woman who was stranded near Idid Clan lands during the Spanish period. She was pregnant and left behind by an English ship. Idid Clan took her in. She died giving birth to Bilung Ngerdokou, Bilung Salii's grandmother. She was buried at Idid Clan's odesongel, on the land where the PCC administration building now sits. The birth of Bilung Ngerdokou and the death of the Chuukese woman occurred during the Spanish period. Bilung Salii also testified that westerners took the land, though she was not certain during which period or by which foreign power.

Idid Clan also submitted a copy of another Land Court decision, *In re Land Known as Iengid Located in Medalaii Hamlet, Koror State*, Civ. Action No. 00-206 (Sup. Ct. Tr. Div. Nov. 14, 2002) (*Iengid*). In *Iengid*, the Land Court concluded that land located on the current site of PCC belonged to Ibai Clan. *Iengid*, at 1, 7. Idid Clan was party to the dispute in *Iengid*, but it did not prevail. *Id.* at 4. During the proceedings in that case, Bilung Salii acknowledged that some of the land on what is now PCC's campus was given to Ibai Clan. *Id.* at 4. Relying on evidence provided by Ibai, which showed Ibai Clan's claim "reaching all the way to the road," the court determined that Ibai had the better claim vis-a-vis Idid Clan. *Id.* at 4-5. During the proceedings below in the present case, Bilung Salii testified that Idid Clan did not give any of the presently disputed lands to Ibai Clan.

During its case, KSPLA submitted several quitclaim deeds. The first was between the Trust Territory government and PPLA dated July 24, 1979. The 1979 deed ceded all public land to PPLA with several exceptions. Among the exceptions was the MOC (now PCC) land. PPLA quitclaimed the same land, excluding the MOC land, to KSPLA on May 14, 1980. On March 10, 1982, PPLA executed yet another quitclaim deed ceding some of the formerly excepted land to KSPLA, but again excluding the MOC land. This deed also contains language suggesting that once the Trust Territory transferred title of remaining public lands to the national government, such lands would transfer to KSPLA.

On June 17, 2010, the last day of the hearing, PPLA attempted to intervene in the proceedings. PPLA argued that its interests were not represented by any other party. Although it contended that it did not receive notice, it is clear from the record that, as early as 2006, PPLA was notified that monumentation of the PCC land was underway.

In its final order, the Land Court awarded ownership of the lands to KSPLA.[1] The court rejected Ngarngedchibel's claim because it failed to prove that the land belonged to Ngerbeched at the time of the taking by a foreign power. While the court concluded that Idid Clan "owned the lands at some time in the past," it noted that there was little or no evidence to support the contention that Idid Clan owned the land immediately prior to its taking. Pointing to the *Iengid* case, the court reasoned that Idid Clan may have given up the disputed land to Ibai, as it did with the *Iengid* lands. Although the court found Bilung Salii's testimony credible, it noted that her testimony suggested that one of the four saus of the Idid Clan, rather than the clan itself, owned some of the lands. Further, the court noted, Bilung Salii could not recall with specificity when or by whom the lands were taken. Thus, the court rejected Idid Clan's claim, and declared KSPLA the rightful owner.

In the same order, the court rejected PPLA's motion to intervene. Because PPLA was notified of the monumentation and did not attempt to intervene in the proceedings until mere hours before their conclusion, the court denied the motion. PPLA is not party to this appeal and did not attempt to appeal the Land Court's decision. Idid Clan and Ngarngedchibel now appeal the determination that the lands belong to KSPLA.

STANDARD OF REVIEW

We review the factual determinations of the Land Court for clear error and its legal conclusions de novo. *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93 (2006). We will not substitute our view of the evidence for the Land Court's. Thus, in order to prevail, Appellants must show that no reasonable trier of fact could have reached the same conclusion based on the evidence presented to the Land Court. *Sungino v. Blaluk*, 13 ROP 134, 136 (2006).

ANALYSIS

A claimant seeking return of public land must show:

[1] One parcel, not subject to this appeal, was awarded to the Roman Tmetuchl Family Trust

> (1) that the land became part of the public land . . . as a result of the acquisition by previous occupying powers or their nationals prior to January 1, 1981, through force, coercion, fraud, or without just compensation or adequate consideration, and
>
> (2) that prior to the acquisition the land was owned by the citizen or citizens or that the citizen or citizens are the proper heirs to the land . . . .

35 PNC § 1304(b).

[1] Under § 1304(b), a claimant bears the burden before the Land Court. "At all times, the burden of proof remains on the claimants, not the governmental land authority, to establish, by a preponderance of the evidence, that they satisfy the requirement of the statute." *Ngiratrang*, 13 ROP at 93-94. A land authority has no obligation to press its claim before the court; it need not even appear in court for it to retain lands it controls over the claims of private parties. *See Masang v. Ngirmang*, 9 ROP 215, 216-17 (2002) (concluding the land authority did not participate in the court proceedings but remained owner of the land by virtue of private claimants' failure to satisfy their burden).

I. Ngarngedchibel's Claim

Rather than arguing that it met its burden before the Land Court, Ngarngedchibel attempts to persuade us that it should win by default. In its brief, Ngarngedchibel admits that the land is likely public and states that "PPLA would have easily prevailed in the ownership of the PCC site." But, Ngarngedchibel contends, PPLA was not a claimant, and this Court has held in the past that the Land Court may not award land to a non-claimant. *Rusiang Lineage v. Techemang*, 12 ROP 7, 9 (2004) (concerning a land dispute between private parties). Therefore, Ngarngedchibel argues that it should be relieved of its burden and be awarded the land.[2] However, the *Rusiang* case concerned a land dispute between private parties and is not applicable here.

The record suggests the possibility that PPLA, rather than KSPLA, ought to be the public administrator of the lands in dispute. There was no evidence presented that PPLA ceded the land to KSPLA. The quitclaim deeds all appear to exclude the MOC land, and PPLA's attempt to intervene below suggests that it may have some remaining interest in the land separate from KSPLA's. But PPLA is not a party to this appeal, and we do not reach the merits of Ngarngedchibel's argument because, as we explain below, it was waived.

[2] At no point during Ngarngedchibel's presentation did it argue that KSPLA was an improper claimant to make the case for public ownership of the PCC lands. Indeed, other than PPLA in its motion to intervene, no one during the proceedings below suggested that the land was owned by PPLA rather than KSPLA. "This Court has consistently held

[2] When it filed its brief, Ngarngedchibel was the only appellant. Ngarngedchibel does not explain in reply why its claim should prevail over Idid Clan's.

that arguments raised for the first time on appeal are deemed waived." *Rechucher v. Palau*, 12 ROP 51, 54 (2005).

The prudence of our forfeiture rule is illustrated in this case. PPLA could have appealed the denial of its motion to intervene, but it elected not to for reasons unknown to the Court. Because PPLA was never a party to the proceedings below, the Land Court did not have the opportunity to carefully consider the relative merits of KSPLA's and PPLA's assertions of ownership of the PCC land. If Ngarngedchibel believed that it was relieved of its burden of proof because PPLA was not a party, it should have flagged the issue for the Land Court. Failure to raise an argument below deprives the Land Court of the opportunity to adjudicate an issue in the first instance and frustrates our ability to review that court's decision for clear error. Thus, we conclude that Ngarngedchibel's argument was forfeited.

[3] We note that, had the Land Court concluded that PPLA was the proper public owner rather than KSPLA, it could have made that determination without the participation of PPLA as a party. Contrary to *Rusiang Lineage*, which concerned private parties, cases involving claims to public lands do not require the Land Court to limit its determination to the parties before it. As we stated in *Masang*, because the burden is on the private claimants, if no claimant satisfies § 1304(b)'s requirements, the land will simply remain with the land authority, whether the authority is a party to the proceedings or not. 9 ROP at 216-17. But, as we cautioned in *Masang*, without the participation of the land authority at trial, its interests might not be fully vindicated by the adversarial process. *Id.* at 218. PPLA's failure to timely intervene in the proceedings prevented it from presenting its case. Its interests may not have been fully vindicated before the Land Court, but because it did not appeal the denial of its motion to intervene, we do not consider the relative merits of PPLA's claim as compared to KSPLA's.

II. Idid Clan's Claim

Idid Clan points to three alleged errors in the Land Court's ruling. First, Idid Clan argues that there was no evidence to support the Land Court's finding that Idid Clan did not own the lands immediately prior to their acquisition by a foreign government. Second, Idid Clan contends that the Land Court's assumption that clans and lineages are distinct was error. Finally, Idid Clan suggests that KSPLA did not have a proper claim to the land and should not have been awarded title.

The Land Court concluded that Idid Clan did not satisfy its burden to prove the statutory requirement of § 1304(b)(1). The court relied in part on the *Iengid* case to conclude that Idid Clan may have conveyed its lands to Ibai. In *Iengid*, a copy of which Idid Clan presented to the court as evidence, Ibai Clan prevailed over Idid Clan because Idid Clan "acknowledged" through Bilung Gloria Salii, that "part of the land had been given out to Ibai." *Iegnid*, at 4. The Land Court noted that there was no evidence that Idid retained the land in this matter. Additionally, the Land Court pointed to Idid Clan's lack of evidence concerning the taking of the land. Indeed, Bilung Salii was unable to provide any details regarding when or by whom the lands were taken—details the court could expect to be forthcoming if Idid was the owner at the time

of taking. *See Estate of Ngiramechelbang v. Ngardmau State Pub. Lands Auth.*, 12 ROP 148, 150 (2005) (affirming the Land Court when private claimant seeking return of public land "provided the court with no details about who took the land or how the land was taken, other than to state that the land was taken without compensation"). As the court pointed out, "Idid presented no evidence regarding the circumstances under which the land became public land." The burden of proof was on Idid to present such evidence. Given that Idid had the burden of proof and failed to show by the preponderance of the evidence that it owned the land immediately prior to taking, the Land Court's conclusion was not clear error. *See Sungino*, 13 ROP at 136.

Idid Clan's second argument, that the Land Court erred in assuming clans and lineages are distinct, is also unpersuasive. The Land Court merely expressed the "general view" that lineage- and clan-owned lands are separate. It thus rejected Idid's contention that a claim to a portion of the property by the Omtilou Lineage, a lineage of Idid Clan, supported Idid Clan's claim to the land. The Land Court acknowledged that some clans view lineages as non-distinct, but stated that Idid Clan made no showing that such was the case as between the Idid Clan and the Omtilou lineage. Because Idid Clan had the burden of proof and presented no evidence on the matter, it was not clear error for the Land Court to conclude that the clan and lineage were separate entities.

Finally, Idid Clan's third argument fails for the same reason Ngarngchibel's similar claim fails: it was waived. At no point during the proceedings below did Idid Clan contend that KSPLA, by virtue of the 1982 quitclaim deed's omissions, could not be awarded the land. Again, while it may be unclear whether PPLA or KSPLA has the best case for title to the land, such confusion does not relieve Idid of its burden to prove the merits of its own claim.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Land Court's determination that neither Ngarngchibel nor Idid Clan met its burden under 35 PNC § 1304(b).

THE REPUBLIC OF PALAU, JOHNSON TORIBIONG, in his official capacity as the President of the Republic of Palau, THE BUREAU OF IMMIGRATION, and JENKINS MARIUR, in his official capacity as the Director of the Bureau of Immigration, Appellants,

v.

BERNADETTE CARREON, on behalf of herself and others similarly situated, Appellee.

CIVIL APPEAL NO. 11-010
Civil Action No. 10-158

Supreme Court, Appellate Division
Republic of Palau

Decided: March 30, 2012

[1] Appeal and Error: Standard of Review

On *de novo* review of a grant of summary judgment, we may affirm the Trial Division on any basis supported by the record.

[2] Constitutional Law: Equal Protection

A plaintiff alleging a violation of the equal protection guarantee must show that a law treats her differently than other similarly situated individuals. If such disparate treatment is based on a protected classification, the burden shifts to the Government to show that the law advances its interests. The burden the Government bears depends on the level of scrutiny applicable to the classification.

[3] Constitutional Law: Equal Protection

If the only difference between the two disparately treated groups is a protected classification, the disadvantaged group may raise an equal protection claim. The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group.

[4] Constitutional Law: Equal Protection

Equal protection is a fundamental right in and of itself. Article IV of the Palau Constitution enumerates fundamental rights afforded all individuals. Among these rights is the equal protection guarantee of § 5.

[5] Constitutional Law: Equal Protection

Intermediate scrutiny places the burden on the government to show that a discriminatory law is substantially related to an important state interest.

[6] Constitutional Law: Interpretation

Given the ambiguity of the phrase "place of origin" and the lack of Palauan case law, we look to the structure and history of § 5 to determine the intent of the drafters.

[7] Constitutional Law: Equal Protection

Therefore, both the structure and history of § 5 suggest that "place of origin" should be read broadly.

[8] Constitutional Law: Interpretation; **United States:** Precedential Value of United States Law

On Constitutional matters, we may look to analogous United States law for guidance. However, we are "not bound to mechanically embrace United States case law" and may freely "adopt the rationale set forth if we find it persuasive."

[9] Constitutional Law: Equal Protection

The framers of § 5 sought to create a broad rule against discrimination, and their later inclusion of an exception for Palauan citizenship strongly suggests that citizenship is a protected category.

[10] Constitutional Law: Equal Protection

Citizenship is so often coterminous with ancestry or race that to deny the relationship between the two is simply disingenuous. This relationship renders citizenship discrimination inherently invidious.

[11] Constitutional Law: Equal Protection

We conclude that intermediate scrutiny is the appropriate level of review for laws in the area of immigration and foreign affairs that distinguish among individuals based on citizenship.

[12] Constitutional Law: Equal Protection

The United States and Palau Constitutions are not identical in terms of their equal protection guarantees. Unlike its United States counterpart, the Palau Equal Protection Section explicitly limits the conduct of the national government—allowing "no action" that violates the fundamental right to equal protection. Palau Const. art IV, §5. Although an equal protection guarantee has been imposed on the United States federal government by implication based on the Fifth Amendment's Due Process Clause, there is no textual basis in the United States Constitution for doing so. Thus, though the United States Supreme Court had little difficulty eschewing the equal protection limitation on federal immigration policy, we are more constrained by the text of our Constitution.

[13] Constitutional Law: Equal Protection

Further, as discussed above, the Equal Protection Section of the Palau Constitution explicitly limits the ability of the national government to discriminate based on a protected classification, unlike the Equal Protection Clause of the United States Constitution. This difference in Constitutional text and approach militates against uncritical incorporation of United States constitutional jurisprudence on discrimination.

[14] Constitutional Law: Foreign Affairs

Our Constitution imbues the legislature and the executive with power over immigration and foreign affairs.

[15] Constitutional Law: Equal Protection

Intermediate scrutiny lies between the extremes of rational basis review and strict scrutiny.

[16] Constitutional Law: Equal Protection**; Constitutional Law:** Foreign Affairs

When a law is passed or promulgated pursuant to the immigration or foreign relations power, the Government must show that such law is substantially related to an important government interest.

[17] Taxes

A charge issued by the government is a regulatory fee rather than a tax if: (1) a regulatory agency assesses the fee, (2) the agency places the money in a special fund, and (3) the money is not used for a general purpose but rather to defray the expenses generated by enforcement and administration of the regulation.

[18] Constitutional Law: Separation of Powers; **Constitutional Law:** Taxation

The thrust of Art. IX, § 5, cl. 1, is that the OEK alone will have the power to make laws for the collection of general revenue. For the President or an agency within the Executive to do so, absent express delegation, violates not only the Taxation Clause, but basic principles of separation of power.

Counsel for Appellants: Ernestine Rengiil and G. Patrick Civille
Counsel for Appellees: David W. Shipper

BEFORE: KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

The Republic of Palau and other government defendants appeal the determination by the Trial Division that the Regulation Amending the *Immigration Regulations, 2006 Version* (Amended Regulation or § 706) is unconstitutional. The trial court held that the Amended Regulation (1) violates the Palau Constitution's Equal Protection Section insofar as it excludes non-citizens from the United States, the Federated States of Micronesia (FSM), and the Republic of the Marshall Islands (RMI) from its registration requirements, *see* Palau Const. art IV, § 5; and (2) violates the Constitution's requirement that taxes be levied by the Olbiil Era Kelulau (OEK), *see* Palau Const. Art. IX, § 5. The Republic appeals both holdings. We reverse in part and affirm in part.

BACKGROUND

On June 16, 2010, the Office of the President promulgated the Amended Regulation, which added § 706 to the 2006 Immigration Regulations. The amendment provides, in relevant part:

> Section 706. Annual Alien Registration.
>
> (a) [E]ach August of every year . . . every alien present in the Republic at any time during the first seven (7) calendar days of August . . . shall, during the month of

> August . . . register with the Director of the Bureau of Immigration or his designee. . . . For the purposes of this section, "alien" means a person who is not a citizen of Palau, excluding the aliens enumerated below.
> . . .
>
> (b) Registration shall be at a place and on a form designated by the Director. The form shall require the alien to state his or her full name and any aliases, date of birth or age, physical and mailing addresses in the Republic, telephone numbers, and current immigration status, and to submit satisfactory proof thereof. . . .
>
> (c) The following aliens shall be exempt from registration hereunder:
> . . .
> 2. Aliens who are citizens of the United States; Federated States of Micronesia; and the Republic of the Marshall Islands;
> . . .
>
> (d) There shall be paid to the Director for registration a fee of twenty-five dollars ($25.00) per alien.
>
> (e) Any alien who fails to register as provided above . . . in addition to any other penalties provided by law or regulation, shall be subject to a fine of five dollars ($5.00) per day for each day that the alien is in the Republic without having registered or been registered.

According to Appellant President Johnson Toribiong, the law was passed for several reasons. First, data indicated that "there are more foreign workers employed in Palau than there are Palauans, and that there are fewer Palauans living in Palau now" than in 2005. The President contended in his affidavit that this problem was exacerbated by lax enforcement of immigration laws. A presidential task force investigation revealed that many foreign workers currently in Palau are undocumented and are not being taxed.

Second, the President cited Palau's relationship with the United States as a basis for the law. According to President Toribiong, a senior United States official told him that "Palau must rectify its growing reliance on cheap foreign labor if Palau expects the United States to continue providing it with economic assistance." Additionally, President Toribiong stated that other confidential briefings with United States officials revealed "potential security threats" in Palau stemming from lax immigration enforcement. Thus, according to the President, the Amended Regulation was promulgated in part in order to ensure Palau's relationship with the United States under the Compact of Free Association (the Compact).

The President then explained the exception to § 706 for citizens of FSM, RMI,

and the United States. He said that "such citizens are not causing . . . any of the problems outlined" earlier in his affidavit. Additionally, he noted the "cultural and/or political relationship" among Palau, the United States, FSM, and RMI, which, for example, is the basis for special visas for citizens from those countries. President Toribiong again invoked the Compact, stating that Palau has treaty obligations to the United States under § 142 of the Compact.

Finally, the President opined that the $25.00 fee "is neither excessive nor disproportional" and was "calculated to recover the Republic's cost of implementing and enforcing the Regulation."

Bernadette Carreon filed a complaint, on behalf of herself and other non-citizens affected by § 706, against President Toribiong, the Republic of Palau, Director of the Bureau of Immigration Jenkins Mariur, and the Bureau of Immigration (collectively "the Government" or "the Republic"). She claimed that (1) § 706 violates the Equal Protection Section of the Palau Constitution by discriminating among non-citizens on the basis of place of origin; (2) § 706 is arbitrary and capricious and in violation of the Due Process Clause of the Constitution; (3) the $25 registration fee is an unconstitutional tax because it was not levied by the OEK as required by Art. IX, § 5; (4) the promulgation of § 706 usurped legislative power in violation of separation of powers principles; and (5) the amendment violated Palau's administrative rule-making procedures.

At the Trial Division's behest, both parties filed cross motions for summary judgment. The court granted both Carreon's and the Republic's motions in part. With respect to Carreon's equal protection claim, the Trial Division held that § 706 discriminates on the basis of national origin, that such discrimination is subject to strict scrutiny, and that § 706 does not satisfy strict scrutiny. Decision and Order, *Carreon v. ROP*, No. 10-158, slip op. at 14 (Tr. Div. Feb. 22, 2011). The court also held that the $25 "fee" is an unconstitutional tax. *Id.* at 22. However, the court rejected Plaintiffs' argument that the promulgation of § 706 usurped legislative power or violated administrative procedures. *Id.* at 23. The Trial Division did not rule on the due process claim because Plaintiffs succeeded on the equal protection claim.

The Government timely appealed. On appeal, it argues that the Trial Division erred in granting summary judgment on the equal protection and unconstitutional tax claims.

STANDARD OF REVIEW

[1] We review a Trial Division order granting summary judgment *de novo*, *Senate v. Nakamura*, 8 ROP Intrm. 190, 192 (2000), and consider all evidence presented and inferences therefrom "in the light most favorable to the non-moving party," *Mesubed v. ROP*, 10 ROP 62, 64 (2003). On *de novo* review of a grant of summary judgment, we may affirm the Trial Division on any basis supported by the record. *See* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 2716 (3 ed. 1998); *see also Shell Co. v. Los Frailes Serv. Station*, 605 F.3d 10, 24 (1st Cir. 2010).

ANALYSIS

I. Equal Protection

Article IV of the Palau Constitution enumerates fundamental rights. Specifically, Article IV, §5 of the Palau Constitution provides in relevant part:

> Every person shall be equal under the law and shall be entitled to equal protection. The government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens . . . .

[2] A plaintiff alleging a violation of this section must show that a law treats her differently than other similarly situated individuals. If such disparate treatment is based on a protected classification, the burden shifts to the Government to show that the law advances its interests. The burden the Government bears depends on the level of scrutiny applicable to the classification.

Appellees argue that the Amended Regulation discriminates on the basis of citizenship, a protected classification, and is thus subject to heightened scrutiny under § 5.[1]

[1] The parties and case law also refer to citizenship discrimination as "alienage" discrimination. We use the terms interchangeably. This form of discrimination is distinct, under the Palau Constitution, from permissible discrimination on the basis of Palauan citizenship. See Palau Const. art IV, § 5

A. Appellee's Claim is Cognizable

At the outset, we address two of Appellants' threshold claims. The Republic contends that Appellees' equal protection claim must fail because non-citizens from the unexempted countries are not "similarly situated" to those from the FSM, RMI, and the United States. Appellants further argue that Appellees must show that they were denied equal protection with respect to a fundamental right in order to raise a claim under that section.

[3] To maintain an equal protection claim, a plaintiff must show that she is in a class of people similarly situated to a group that is treated differently under the law. Thus, "equal protection does not require identical treatment of persons who are not similarly situated." *Ngerur v. Sup. Ct. of the ROP*, 4 ROP Intrm. 134, 137 (1994). In *Ngerur*, we rejected an equal protection claim alleging that individuals arrested without a warrant were treated differently from those arrested with a warrant. *Id.* The Court reasoned that the Equal Protection Section was not offended because the two comparative groups were not similarly situated. *Id.* If the only difference between the two groups is a protected classification, however, the disadvantaged group may raise an equal protection claim. The Ninth Circuit put it succinctly: "[t]he goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (quotation omitted).

The Republic contends that the Compact and other laws create a valid

distinction between citizens of the United States and former Trust Territories on the one hand and all other nationalities on the other. However, § 706 and the laws cited by the Republic, draw distinctions based on citizenship, the very classification Appellees argue is suspect. But for their privilege as citizens of the FSM, RMI, and United States, individuals from those countries would be subject to the same laws as all other non-citizens. In other words, these privileged non-citizens are the "control group." *See Freeman*, 68 F.3d at 1187. In all other meaningful respects, non-citizens in Palau are similarly situated. The Compact and the historical relationship among the Trust Territories may provide the basis for an argument that the discriminatory treatment is justified, but it does not render Appellees' equal protection claim uncognizable.

[4] Appellants' second argument, that Appellees must show the denial of a fundamental right in addition to a denial of equal protection, also fails. Equal protection is a fundamental right in and of itself. Article IV of the Palau Constitution enumerates fundamental rights afforded all individuals. Among these rights is the equal protection guarantee of § 5. By its plain language the Equal Protection Section allows "no action" that discriminates on the basis of a protected classification. ROP Const. art IV, § 5. Yet the Republic argues that the Equal Protection Section applies only to unequal treatment implicating another fundamental right. This novel contention is based on a misreading of the Trial Division's decision in *Perrin v. Remengesau*, 11 ROP 266 (Tr. Div. 2004). *Perrin*'s analysis focused almost exclusively on the Due Process Section of Article IV and the burden placed on a government employee attempting to raise a due process claim for wrongful termination. *Id.* at 267-70. In support of its holding, *Perrin* cited primarily cases concerning due process and mentioned equal protection cases only in passing. *Id.* at 269-70 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577-78, 92 S. Ct. 2701, 2709 (1972) and *Randall v. Buena Vista Cnty. Hosp.*, 75 F. Supp. 2d 946, 954-55 (N.D. Iowa 1999)). Finally, as Appellees point out, *Perrin* makes clear that strict scrutiny is appropriate whenever "constitutional rights have been violated *or when governmental action creates 'suspect' classifications, such as those based on race or national origin*." *Perrin*, 11 ROP at 269 (emphasis added).

The plain language of § 5 makes equal protection a fundamental right. *Perrin* did not hold otherwise. Appellees need not show a violation of an *additional* fundamental right in order to raise their equal protection claim.

2. Citizenship is a protected classification.

[5] In determining whether a law violates the Equal Protection Section, we must determine the appropriate level of judicial scrutiny. This Court has applied two levels of review in evaluating whether a law is unconstitutional under § 5. *Perrin*, 11 ROP at 269. In cases implicating a suspect classification, such as race, we have applied strict scrutiny. *Id.* Under this level of review, the burden is on the government to show that a discriminatory law is narrowly tailored to meet a compelling governmental interest. The Trial Division concluded and Appellees argue that this is the appropriate level of review in cases involving discrimination based on citizenship. Alternatively, in cases that do not

concern a suspect classification, we apply rational basis review. *Id.* Under this highly deferential standard, we will uphold a law unless a plaintiff is able to show that it is not reasonably related to a legitimate state interest. *Id.* Appellants contend that only rational basis review is required. Finally, although this Court has never done so, courts in the United States apply intermediate scrutiny to some suspect classifications. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197-99, 97 S. Ct. 451, 457 (1976) (applying intermediate scrutiny and holding unconstitutional an Oklahoma law restricting eighteen- to twenty-year-old men from drinking alcohol but permitting women in the same age group to do so); *see also* Erwin Chemerinsky, *Constitutional Law Principles and Policies* 529 (1997). Intermediate scrutiny places the burden on the government to show that a discriminatory law is substantially related to an important state interest. *Id.*

The appropriate level of judicial scrutiny turns, in part, on whether citizenship is a suspect classification. *See Perrin*, 11 ROP at 269. Section 5 enumerates several protected categories, including "sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens." Appellees argue that "place of origin" includes citizenship; the Republic counters that the phrase is narrow and limited to ethnicity or ancestry.

The Constitution does not define "place of origin." In the absence of an express definition of a word in the Constitution, we first attempt to determine whether the word has a plain and obvious meaning. *See Yano v. Kadoi*, 3 ROP Intrm. 174, 182-83 (1992). As articulated at oral argument by counsel for the Republic, the plain meaning of "place of origin" is simply "where [someone] is from." This definition, rather than providing clarity, illustrates the ambiguity of the phrase. Depending on the context, where someone is from may be where someone lives (e.g., "I am from Airai."); it may be a foreign country of which the person is a citizen (e.g., "I am from the Philippines."); or it may be the country from which someone's ancestors came (e.g., "My ancestors came from China."). Thus, "place of origin" is ambiguous.

The Appellate Division has never determined the meaning of "place of origin."[2] But the Trial Division has, on at least one occasion, discussed the phrase. In *Governor of Kayangel v. Wilter*, the Trial Division stated a hypothetical: "allegations of action taken to discriminate against one state [of Palau], if proven, would be unconstitutional 'place of origin' discrimination." 1 ROP Intrm. 206, 211 (1985). This speculative dicta from the Trial Division, while afforded some weight, does not control our analysis. Further, even if "place of origin" includes one's state of residence within Palau, such an

[2] Appellants appeal to *Yano*, 3 ROP Intrm. at 183-88, for the proposition that citizenship is not included in the phrase "place of origin," and laws discriminating based on citizenship are subject only to rational basis review. *Yano* contains no such holding. In *Yano*, the issue was whether the term "population" for reapportioning of voting districts meant "citizen population." *Id.* at 184. This Court looked to § 5, which explicitly allows laws that favor citizens, to determine that "population" was meant to exclude non-citizens. *Id.* at 184-85. *Yano* says nothing about the meaning of "place of origin" or the permissibility of discrimination among groups of non-citizens based on their country of citizenship.

interpretation does not exclude a broader understanding of the phrase including ancestry or citizenship.

[6, 7] Given the ambiguity of the phrase and the lack of Palauan case law, we next look to the structure and history of § 5 to determine the intent of the drafters. *See Tellames v. Congressional Reapportionment Comm'n*, 8 ROP Intrm. 142, 144 (2000). One indicator of intended meaning is the exception for preferential treatment of Palauan citizens. Generally, the exclusion of one implies the inclusion of others. If discriminatory treatment in favor of Palauan citizens is explicitly allowed, this suggests that other forms of citizenship discrimination are forbidden; otherwise, the exception is unnecessary. Additionally, although sparse, there is some relevant drafting history from the first Constitutional Convention. The committee that submitted the first draft of § 5 included the list of protected categories and stated that it sought "to include all bases of discrimination." Comm. on Civ. Liberties & Fundamental Rights, Standing Committee Report 11 6-7 (Feb. 20, 1979). Only later was the exception for discrimination in favor of Palauan citizens added. The version of the amendment that was ultimately adopted contained the same list of protected categories. Therefore, both the structure and history of § 5 suggest that "place of origin" should be read broadly.

[8] The Republic urges this Court to turn, in the absence of Palauan case law, to United States law. On Constitutional matters, we may look to analogous United States law for guidance. *Yano*, 3 ROP Intrm. at 189. However, we are "not bound to mechanically embrace United States case law" and may freely "adopt the rationale set forth if we find it persuasive." *Id.* at 184.

Appellants rely primarily on *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88, 94 S. Ct. 334, 336 (1973), in which the United States Supreme Court interpreted the phrase "national origin" to mean "the country where a person was born, or, more broadly, the country from which his or her ancestors came." However, *Espinoza* was not a case of constitutional interpretation. There, the Court sought to determine whether Title VII of the Civil Rights Act of 1964 prohibited discrimination in favor of United States citizens by private employers. *See* 42 U.S.C. § 2000e-2(a)(1). In reaching its conclusion, the Court relied heavily on the legislative history of Title VII, which contained strong indicators that Congress did not intend to prohibit citizenship discrimination. *Id.* at 89. Justice Douglas vigorously dissented from the Court's conclusion. *Id.* at 96 (Douglas, J., dissenting). To him, citizenship was too bound up with ancestry to disaggregate the two. He stated, "[a]lienage results from one condition only: being born outside" the nation. *Id.* Thus, "discrimination on the basis of alienage *always* has the effect of discrimination based on national origin." *Id.* at 97 (emphasis in original).

Espinoza did not address the question of whether the Equal Protection Clause of the United States Constitution prohibited discrimination based on citizenship. When the United States Supreme Court did reach that issue, it concluded that citizenship was a protected category. *Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971). State laws examined in *Graham* conditioned welfare eligibility on citizenship,

excluding resident non-citizens. *Id.* at 366. The Court held that "[c]lassifications based on alienage, like those based on nationality or race, are inherently suspect" and subject to strict scrutiny analysis.[3] *Id.* at 372. Earlier, in *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 420, 68 S.Ct. 1138, 1143 (1948), the Court suggested the same conclusion when it rejected a California law that denied Japanese nationals fishing licenses. As the Court stated in that case, the Equal Protection Clause protects "'all persons' against state legislation bearing unequally upon them either because of alienage or color." *Id.*

[9, 10] The dissent in *Espinoza* and the logic in *Graham* are more persuasive than the *Espinoza* majority. First, *Espinoza*'s conclusion, based as it was on the legislative history of an American statute, is simply inapplicable to our task of interpreting the Palau Constitution. The framers of § 5 sought to create a broad rule against discrimination, and their later inclusion of an exception for Palauan citizenship strongly suggests that citizenship is a protected category. Further, *Espinoza* interpreted the phrase "national origin" not "place of origin." Finally, as Justice Douglas concluded, citizenship is so often coterminous with ancestry or race that to deny the relationship between the two is simply disingenuous.[4] This relationship renders citizenship discrimination inherently invidious. *Graham*, 403 U.S. at 376.

We determine that the phrase "place of origin" includes citizenship as well as ancestry, and, thus, citizenship is a suspect classification. Our conclusion is based primarily on the broad intent of the framers of § 5 and the structure of § 5. This conclusion is also consistent with the body of American law we find most persuasive and applicable.

3. Intermediate scrutiny applies to citizenship discrimination in the area of immigration or foreign affairs.

[11] Generally, if a law discriminates based on a suspect classification, we apply strict scrutiny. *Perrin*, 11 ROP at 269. However, Appellants' most forceful and persuasive argument is that, even if a law implicates a classification enumerated in § 5, this Court should apply only rational basis review because immigration laws and edicts must be insulated from judicial review. While we depart from the Trial Division and agree that some deference is due, we decline the Republic's invitation to abdicate completely our duty to ensure that immigration laws passed or promulgated comport with the Palau Constitution, *see* Palau Const. art. X, §§ 1, 5 (describing the judicial power). We conclude that intermediate scrutiny is the appropriate

[3] In holding that states could not discriminate on the basis of citizenship, the Court also noted that the federal government was subject to different rules by virtue of its foreign policy powers. *Graham*, 403 U.S. at 377-78. This distinction is discussed further in the next section, but is tangential to the purpose of determining whether § 5 protects individuals discriminated against on the basis of citizenship.

[4] This understanding of "place of origin" is consonant with the concepts of ancestry and citizenship found elsewhere in the Palau Constitution. Article III defines the parameters of Palauan citizenship. In order to be a Palauan citizen, one must be of some Palauan ancestry or have been a citizen under the Trust Territory. Palau Const. art. III, §§ 1, 4.

level of review for laws in the area of immigration and foreign affairs that distinguish among individuals based on citizenship.

The Republic argues that discrimination based on citizenship is a sovereign prerogative to be exercised by the national government in its pursuit of foreign policy goals. This is generally consistent with the laws of the United States, but such deference has not been adopted in Palau. The crux of this issue is whether the primacy of fundamental rights enumerated in the Palau Constitution must yield to the President's ability to engage in foreign policy as he sees fit.

[12] Again, the Republic relies on American law in the absence of Palauan law on the matter. However, the United States and Palau Constitutions are not identical in terms of their equal protection guarantees. Unlike its United States counterpart, the Palau Equal Protection Section explicitly limits the conduct of the national government—allowing "no action" that violates the fundamental right to equal protection. Palau Const. art IV, §5. Although an equal protection guarantee has been imposed on the United States federal government by implication based on the Fifth Amendment's Due Process Clause, there is no textual basis in the United States Constitution for doing so. Thus, though the United States Supreme Court had little difficulty eschewing the equal protection limitation on federal immigration policy, we are more constrained by the text of our Constitution.

While the Equal Protection Clause of the United States Constitution protects non-citizens from *state* discrimination based on their country of citizenship, *see Graham*, 403 U.S. at 372, the Supreme Court of the United States has permitted such discrimination by the *federal* government. The Court carved out the federal immigration exception because such discrimination is viewed as part and parcel of the foreign relations power. As such, the Supreme Court determined that it must defer to the political branches on immigration matters.

The United States Supreme Court first deferred and permitted federal discrimination in a case concerning Chinese nationals. In *Ping v. United States* (the Chinese Exclusion Case), 130 U.S. 581 (1889), the Court considered the validity of the Chinese Exclusion Act, which was "in effect an expulsion from the country of Chinese laborers." *Id.* at 589. The Court concluded that the Act was not subject to judicial review because Congress had plenary power over matters of immigration. *Id.* at 603-04. In reaching this conclusion, the Court reasoned that a sovereign nation must have complete control over its own territory because "[i]f it could not exclude aliens, it would be to that extent subject to the control of another power." *Id.* at 604. Thus, in a later case in which a Chinese national challenged his deportation, the Court held that federal treatment of aliens raised questions that the court was not competent to address. *Ting v. United States*, 149 U.S. 698, 713, 13 S. Ct. 1016, 1022 (1893). This logic was extended to include outright racial discrimination in the name of immigration policy: "Congress may exclude aliens of a particular race from the United States . . . without judicial intervention." *Yamataya v. Fisher*, 189 U.S. 86, 97, 23 S. Ct. 611, 613 (1903).

This body of early American case law takes as a given that an "essential attribute[] of sovereignty" is the ability of the national government to control non-citizens within the nation's borders. *Ping*, 130 U.S. at 607. However, this tenet of American immigration law has not been adopted by all other sovereign nations. Germany, for example, "has not viewed national sovereignty as requiring a power over migration unfettered by constitutional limitations or judicial review." Gerald L. Neuman, *Immigration and Judicial Rev. in the Fed. Rep. of Germany*, 23 N.Y.U. J. Int'l L. & Pol. 35, 36 (1990). Indeed, scholars on American law have leveled the criticism that, far from being an inherent aspect of a sovereign nation, judicial refusal to enforce the civil rights of non-citizens is aberrant in light of international law and norms. *See, e.g.,* Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 Asian L.J. 13, 33-35 (2003); Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 Yale L.J. 2335, 2345 (1991).

In spite of their tenuous foundation, the Chinese Exclusion Case and its progeny have become the foundation for the United States courts' approach to immigration. The United States Supreme Court itself acknowledged that the principles espoused in the early immigration cases were out of place in the mid-twentieth century, which heralded expansion of due process and equal protection jurisprudence. The Court noted that "were we writing on a clean slate, . . . the Due Process clause [would] qualif[y] the scope of political discretion heretofore recognized as belonging to Congress in regulating the . . . deportation of aliens . . . . But the slate is not clean." *Galvan v. Press*, 347 U.S. 522, 530-31, 74 S. Ct. 737, 742-43 (1954) (allowing the deportation of a non-citizen due to his Communist beliefs even though he had resided legally in the United States for thirty-six years). The Court ultimately determined that it was bound by *Yamataya* and other early cases involving the deportation of non-citizens from Asian countries. *Id.* at 531-32.

Thus, even after the dictates of the Fourteenth Amendment were incorporated into Fifth Amendment jurisprudence and applied to the federal government, United States courts have continued to defer to the federal government when it discriminates based on citizenship. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883 (1976); *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979). *Mathews* upheld a length-of-residency requirement imposed on non-citizens seeking social security benefits. 426 U.S. at 69. The United States Supreme Court reiterated the logic of the Chinese Exclusion Case and held that Congress may decide which "guests" with whom to share America's "bounty." *Id.* at 80. Even though the question in that case did not involve national security, the Court held that because foreign relations *might* be implicated, the matter was best left to the political branches. *Id.* at 81.

In *Narenji*, the Circuit Court of Appeals for the District of Columbia upheld heightened procedures involving Iranian nationals and concluded that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive." *Id.* at 747. The court stated that "any policy toward aliens is . . . interwoven

with . . . foreign relations, the war power, and . . . matters . . . exclusively entrusted to the political branches [and] largely immune from judicial inquiry or interference." *Id.* at 748 (quotation omitted). In *Rajah*, the Second Circuit similarly concluded that the right to expel aliens is a political one and that national security justified increased scrutiny of individuals from predominantly Muslim countries. 544 F.3d at 438-39.

The century of case law from the Chinese Exclusion Case to War on Terror cases, such as *Rajah*, has been widely criticized. Judicial deference and the political branches' plenary power in immigration are seen by some scholars as end-runs around constitutional protections including due process, freedom of speech and religion, and equal protection. *See* Saito, *supra* at 24; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 861 (1987). Compounding the problem, a policy of rational basis review can set the stage for more direct restrictions on access to the courts, such as jurisdiction-stripping laws. Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. Mem. L. Rev. 295, 298 (1999). Judicial deference, then, may create a situation in which there is little to no judicial check on abuses of non-citizens. As one scholar put it, judicial deference on matters of immigration "must be seen as an invitation to [the political branches] to act capriciously without significant concern for the legitimate interest of resident aliens." Chemerinsky, *Constitutional Law*, *supra* at 622 (quoting Professor Gerald Rosberg).

Jurists, as well as scholars, have pointed out the dangers of rational basis review in the immigration context. Justice Douglas, in two spirited dissents, lamented unchecked "molest[ation] by the government" of non-citizens, *Galvan*, 347 U.S. at 534, and stated that judicial deference to discrimination is "inconsistent with the philosophy of constitutional law which we have developed," *Harisiades v. Shaughnessy*, 342 U.S. 580, 598, 72 S. Ct. 512, 523 (1952) (Douglas, J., dissenting). In *Narenji*, in a dissent from denial of rehearing en banc, Chief Judge Wright, writing for several appellate judges, highlighted the importance of judicial review: "the question [of whether the Executive may target Iranian nationals for investigation] requires close scrutiny, and [the] answer must reflect careful consideration of fine, and often difficult, questions of value." *Narenji v. Civiletti*, 617 F.2d 754, 755 (D.C. Cir. 1979) (Wright, J., dissenting from denial of review en banc) (quotation omitted).

The decision whether to adopt the United States courts' deference on immigration is no doubt a difficult question of value. *Id.* The Republic argues that the Executive must have the flexibility to respond to security threats and diplomatic necessities by changing policies with respect to particular nationals residing in Palau. It refers to the decision in the trial court as "judicial second-guessing and policy-making." Numerous immigration laws favor citizens of particular countries, usually the United States, and the Government implies that these laws may be important to cementing Palau's relationship with the United States and former Trust Territories.

On the other side of the scale, Appellees point to the ability of unchecked political actors to abuse subsets of non-citizens, a politically powerless and often economically vulnerable group.[5] They cite United States case law, not as precedent but as a cautionary tale. Judicial deference in the United States has resulted in closing the courthouse doors to Chinese and Japanese nationals seeking to avoid deportation, Iranian students facing heightened scrutiny by authorities, and residents from predominantly Muslim countries, all of whom contended that their deportations or heightened surveillance were the result solely of their race or religion. *See Ping*, 130 U.S. 581; *Narenji*, 617 F.2d 745; *Rajah*, 544 F.3d 427.

[13, 14] Further, as discussed above, the Equal Protection Section of the Palau Constitution explicitly limits the ability of the national government to discriminate based on a protected classification, unlike the Equal Protection Clause of the United States Constitution. This difference in Constitutional text and approach militates against uncritical incorporation of United States constitutional jurisprudence on discrimination. However, our Constitution, like the United States', imbues the legislature and the executive with power over immigration and foreign affairs. *See* Palau Const. art. VIII, § 7, cl. 2 & art. IX, § 5, cl. 4. And the judicial branch must not lightly intrude on areas entrusted to the political branches.

Thus, neither rational basis review nor strict scrutiny is appropriate. Either test would exact too high a price, on either the separation of powers or the civil liberties of non-citizens. In light of the competing constitutional imperatives implicated in this case, we conclude that intermediate scrutiny is appropriate.

[15] Intermediate scrutiny lies "between the[] extremes of rational basis review and strict scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In the United States, intermediate scrutiny is applied to classifications based on sex and legitimacy. In *Craig v. Boren*, the Court considered an Oklahoma statute that set the drinking age at twenty-one for men and eighteen for women. 429 U.S. at 197. The Court had previously heightened its scrutiny of sex-based classifications because of the pervasiveness and perniciousness of sex-based discrimination in the United States. *See Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973). In *Craig*, Oklahoma proffered statistical evidence indicating that young men were significantly more likely than young women to drink and drive. 429 U.S. at 200-03. However, the Court applied intermediate scrutiny to determine that, in spite of such evidence, "the relationship between gender and traffic safety was far too tenuous to satisfy [the] requirement that the gender-based difference be substantially related to the achievement of the statutory objective." *Id.* at 204.

Clearly, the rationale for and danger of discrimination against women is not perfectly analogous to discrimination based on citizenship. Yet in the immigration context, intermediate scrutiny provides a sound middle road between rational basis review and strict

[5] Indeed, as *Yano* explains, political actors in Palau have "absolutely no duty to respond to the needs and aspirations" of non-citizen non-voters. *Yano*, 3 ROP Intrm. at 187.

scrutiny. It acknowledges that there are some legitimate and important, if not compelling, interests that justify differential treatment of groups of non-citizens. However, intermediate scrutiny starts from the assumption that such discrimination is invidious, providing stronger protection for a politically vulnerable group.

[16] When a law is passed or promulgated pursuant to the immigration or foreign relations power, the Government must show that such law is substantially related to an important government interest. If the Government is able to show that the challenged aspects of the law are each substantially related to a legitimate foreign policy goal, for example, such a showing should suffice to meet the important government interest prong. Further, the Government need not show that the challenged law is the *only* means to accomplish the important objective but must show that it is substantially tailored to achieve the important interest. A law that discriminates based on citizenship and only tangentially relates to an important government interest is unconstitutional.

Intermediate scrutiny best balances the text of the Equal Protection Section, which prohibits any action in violation of its guarantee, against the powers granted in the same document to the OEK and the President to create immigration laws and conduct foreign affairs as they see fit. [6] The Trial Division applied strict scrutiny to the evidence before it. Thus, we must reverse and remand for further findings and conclusions regarding whether the Republic has met its burden to show that § 706 and its exception are substantially related to an important government interest.

II. The $25.00 charge is an unconstitutional tax.

The Palau Constitution provides that only the OEK may levy a tax. Palau Const. art. IX, §5, cl. 1. The Trial Division determined that the $25.00 "fee" provided for in § 706 was unconstitutional because the charge constituted a tax, and it was levied by the President rather than the OEK. We have never considered the factors that distinguish an unconstitutional tax from a permissible fee. The Trial Division and the parties turned to United States law for guidance.

[17] Appellants rely on a case arising out of Hawaii, which, like Palau, has a constitutional provision reserving the power to tax for the legislature. *Hawaii Insurers Council v. Lingle*, 201 P.3d 564, 572 (Haw. 2008) ("The power of taxation is essentially a legislative power." (quotation omitted)). *Lingle* considered whether assessments issued by the state's insurance regulatory agency were, in reality, taxes. *Id.* at 567. The Hawaii legislature delegated to the commissioner of the agency the power to "make assessments against insurers" and established criteria for doing so. *Id.* at 568. It also set up a special fund to receive the revenue collected by the insurance

[6] Appellees contend that the Executive is entitled to no deference because the OEK is given power over immigration in the Palau Constitution. However, the Executive has primary power over foreign relations, which is closely intertwined with immigration law. Provided he does not act in contravention of an act of the OEK, we afford the President's actions on immigration similar deference to that we give legislative acts in the area.

commissioner. *Id.* at 567. *Lingle*, adopting a test applied in a different context by the First Circuit, determined that a charge issued by the government is a regulatory fee rather than a tax if:

> (1) a regulatory agency assesses the fee, (2) the agency places the money in a special fund, and (3) the money is not used for a general purpose but rather to defray the expenses generated [by enforcement and administration of the regulation].

Id. at 578 (quoting *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 686 (1st Cir. 1992)). Although *Lingle* held that the assessments passed this test, the court determined that the transfer of money from a special assessments fund to the general fund amounted to an unconstitutional violation of separation of powers. *Id.* at 582.

Appellants would have this Court adopt a less stringent test. Specifically, the Republic argues that the charge should be considered a fee as long as it is assessed by a regulating entity and "bears some relation to the costs associated with the enforcement or regulatory duties of the agency, and not whether it is actually held in a special fund or actually used for the specific regulatory and/or enforcement purposes." The Republic purports to base its test on *San Juan Cellular*, which described a "spectrum," along which charges by the government may be closer to a pure tax or a pure fee. 967 F.2d at 685-86. But *San Juan Cellular* is the very case on which *Lingle* relied to create a concrete test; the factors that determined the outcome in *San Juan Cellular* became the elements in *Lingle*. *Lingle*, 201 P.3d at 578. Additionally, *San Juan Cellular* was not attempting to determine whether a particular charge was constitutional; instead, it was considering whether a particular charge was a tax or a fee to determine the applicability of a federal statute. *San Juan Cellular*, 967 F.2d at 686-87. Finally, and most importantly, the Republic's test would require a charge only to "bear some relation" to the administrative duties. It is difficult to imagine how this would preserve the separation of powers protected by Art. IX, § 5.

Appellants also argue that the *Lingle* test is inappropriate for Palau and, thus, that a modified version should be deployed. They contend that the second and third prongs "cannot be applied literally under Palau law" because the Palau Constitution requires non-tax revenue be deposited into the National Treasury, and therefore an agency cannot set up a special fund. Palau Const. art. XII, § 1. However, this rule is not unique to Palau. Indeed, in both Hawaii and Puerto Rico, the jurisdictions involved in *Lingle* and *San Juan Cellular*, all funds collected by any government agency must be deposited into the general treasury fund, unless the legislature sets up an alternative fund. *See* Haw. Rev. Stat. § 37-52.3 (Only the legislature may set up a special fund.); P.R. Laws Ann. tit. 3, § 283f(a)-(b) (Treasury Department collects "all public funds . . . no matter what their source" and then may place money in a special fund if it is already "allotted by law."). Similarly, in Palau, although Article XI requires that funds be deposited in the Treasury, the OEK has provided, within the Treasury, ear-marked funds for specific types of revenue. *See, e.g.,* 8 PNC § 112 (Airport Trust Fund); 9 PNCA §

201 (Palau Agricultural Fund); 22 PNC § 117 (Palauan Educational Textbook Development and Sales Fund).

[18] Although Appellants lament that *Lingle* would require OEK action every time an agency administers a fee, this restriction is precisely what the Constitution requires. The thrust of Art. IX, § 5, cl. 1, is that the OEK alone will have the power to make laws for the collection of general revenue. For the President or an agency within the Executive to do so, absent express delegation, violates not only the Taxation Clause, but basic principles of separation of power. *See Lingle*, 201 P.3d at 582-83 (discussing distinct legislative and executive roles in the taxation process). Accordingly, we adopt the test used in *Lingle* to determine whether a charge by the government is a regulatory fee or an unconstitutional tax.

Applying the *Lingle* test, it is apparent that the "fee" levied by § 706 is an unconstitutional tax. The charge likely passes muster under the first factor. Although *Lingle* uses the term "agency," the President in this case was delegated the authority to issue immigration regulations.[7] *See* 13 PNC § 1002(b). Thus, § 706 satisfies the first factor. However, the President's affidavit, even when viewed in the most favorable light, does not support the inference that the money collected will be placed in an ear-marked fund or used to enforce or administer § 706. Although the *Lingle* test is not a strict conjunctive test, the second and third factors are indicators of whether the OEK's power to tax has been intruded upon by the Executive. President Toribiong's affidavit was the only evidence presented by the government to show that the fee satisfied the *Lingle* test. His affidavit states that the President determined "that this fee is neither excessive nor disproportional" and was "calculated to recover the Republic's costs of implementing and enforcing the Regulation." In determining the amount of the fee, the President "also considered other fees charged by the Republic in relation to immigration matters," such as "the fee to renew various visas." However, Appellants provided no evidence that the funds collected would be deposited into a separate fund and segregated from money used for general appropriations. Because there is no genuine issue of material fact as to the second or third *Lingle* prong, we determine that § 706's "fee" is an unconstitutional tax.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division's conclusion that § 706(d) is an unconstitutional tax. We **REVERSE** the Trial Division's determination regarding § 706(c)(II) and **REMAND** on this issue alone for proceedings consistent with this Opinion

[7] The President does not cite any specific grant of authority from the OEK giving him the authority to levy a fee. Even if he were explicitly given that authority, if the money generated were transferred to the general fund for general use, it might still violate the *Lingle* test. *Lingle*, 201 P.3d at 582-83 (explaining that such an action blurs the lines between the branches and constitutes a violation of the separation of powers).

REPUBLIC OF PALAU,
Plaintiff,

v.

EMIROSE NIRO,
Defendant.

CRIMINAL CASE NO. 12-003

Court of Common Pleas
Republic of Palau

Decided: May 2, 2012

[1] Criminal Law: Information

In order for the Republic to maintain charges against a defendant, it must have probable cause to support the conclusion that an offense was committed by the defendant.

[2] Criminal Law: Information

Probability, and not a prima facie showing of criminal activity, is the standard of probable cause. Therefore, an affidavit is sufficient when it demonstrates in some trustworthy fashion the likelihood that an offense has been committed.

[3] Criminal Law: Information

18 PNC § 208 requires that a court be persuaded that probable cause is present and, as the *Gibbons* court established, a court need only find that trustworthy evidence would support a reasonable person's conclusion that the crime was committed by the defendant.

[4] Criminal Law: Driving Under the Influence

The slight impairment standard is the appropriate metric for gauging whether someone is "under the influence."

[5] Criminal Law: Driving Under the Influence

Generally, the "under the influence" of alcohol element is satisfied by a showing that an individual is affected to a noticeable or perceptible degree. Although it is not necessary for the government to prove that the defendant was drunk when driving, there must be some showing that he or she was under the influence of alcohol so as to make it less safe for him or her to operate a motor vehicle.

[6] Criminal Law: Driving Under the Influence

Although a blood alcohol level of 0.10 percent determines conclusively that someone is intoxicated, a lower blood alcohol level does not exclude the possibility that someone is under the influence.

[7] Criminal Law: Driving Under the Influence

In order to establish probable cause for driving under the influence, the Republic must establish that someone was at least slightly perceptibly impaired by intoxicating liquor. This can be accomplished by an affidavit alleging evidence of actual intoxication (such as blood alcohol level or failed sobriety tests) or evidence that a person was otherwise impaired by the consumption of alcohol (such

as erratic driving or slurred speech combined with the smell or presence of alcohol).

[8] Criminal Law: Information

If the Republic lacks probable cause, the Defendant cannot be summoned to appear at trial.

Counsel for Plaintiff: Vameline Singeo
Counsel for Defendant: Rachel Dimitruk

The Honorable HONORA E. REMENGESAU RUDIMCH, Senior Judge:

Before the Court is Defendant Emirose Niro's motion to dismiss the criminal charges against her for lack of probable cause.

BACKGROUND

According to the Amended Affidavit of Probable Cause submitted by the Republic, Defendant was driving and was hit by another vehicle. A witness said that Defendant smelled of alcohol, and a police officer recovered three beer cans from her car. There is no allegation that Defendant was at fault in the accident.

ANALYSIS

I. Driving Under the Influence

[1, 2] 42 PNC § 514 defines the crime of driving under the influence: "It shall be unlawful for any person . . . who is under the influence of intoxicating liquor . . . to drive any vehicle upon any highway within the Republic." In order for the Republic to maintain charges against a defendant, it must have probable cause to support the conclusion that an offense was committed by the defendant. The Appellate Division has described probable cause as "an objective standard . . . . Probability, and not a prima facie showing of criminal activity, is the standard of probable cause. Therefore, an affidavit is sufficient when it demonstrates in some trustworthy fashion the likelihood that an offense has been committed." *ROP v. Gibbons*, 1 ROP Intrm. 547A, 547I (1988). 18 PNC § 208 further states that a warrant or penal summons may issue only

> [i]f the information states the essential facts constituting a criminal offense or offenses by one or more persons named or described therein and is supported by one or ore written statements under oath showing to the satisfaction of the court that there is probable cause to believe or strongly suspect that the offense complained of has been committed by such person or persons . . . ."

[3] In this case, the Republic reads the Defendant's motion as suggesting that the language of § 208 requires more than mere "probable cause" to sustain a criminal information because the motion relies on the Defendant's position that there was no basis to "believe or strongly suspect" that she drove under the influence. To the extent that this accurately reflects Defendant's position, the Court rejects the interpretation. Section 208 requires that a court be persuaded that probable cause is present and, as the *Gibbons* court established, a court need only find that

trustworthy evidence would support a reasonable person's conclusion that the crime was committed by the defendant.

Having established the applicable standard for a finding of probable cause, the question becomes whether the Republic has probable cause in this case to maintain a charge of driving under the influence against Defendant. Defendant cites cases supporting a conclusion to the contrary. First, in *People v. Alberto*, 877 N.Y.S.2d 628, 632 (Dist. Ct. 2008), a New York court concludes that there was no probable cause where an officer smelled alcohol on the defendant's breath, observed bloodshot and glassy eyes, and the defendant was involved in an accident. The court found the officer's observations to be insufficient in part because bloodshot and glassy eyes could have resulted from the defendant being in an accident. *Id.* Similarly, in *State v. Brown*, 853 N.E.2d 1228, 1233 (Ohio Ct. App. 2006), an Ohio court found that the state lacked probable cause to arrest the defendant for a DUI where the officer observed nervous behavior, noted the defendant's glassy bloodshot eyes, smelled alcohol, and caught the defendant speeding. The Defendant contends that this case, in which the only evidence of her intoxicated state is the smell of alcohol and three empty beer cans, is analogous to *Alberto* and *Brown*. The Republic counters that the presence of the beer cans distinguishes this case.

Along the same lines, Defendant argues that 42 PNC § 514 requires more than a simple showing that Defendant operated her vehicle after drinking — Defendant contends that the Republic must have probable cause to believe that her consumption of alcohol *influenced* her driving. Defendant offers several cases illustrating different standards for determining if someone is "under the influence." Standards range from mere ingestion of alcohol with no requisite showing of impairment, *e.g., Milwaukee v. Richards*, 69 N.W.2d 445, 448 (Wis. 1955), to appreciable impairment that "threatens public welfare," *e.g., Commonwealth v. Connolly*, 474 N.E.2d 1106, 1110 (Mass. 1984). In *Snyder v. City of Denver*, 227 P.2d 341, 343 (Colo. 1951), the Colorado Supreme Court charted the middle ground and concluded that "under the influence of intoxicating liquor" meant the ingestion of any amount of liquor which renders a person "less able, either mentally or physically or both, to exercise a clear judgment and with steady hands and nerves operate an automobile with safety to himself [or herself] and to the public."[1]

[4, 5] The Court concludes that the slight impairment standard articulated in *Snyder* is the appropriate metric for gauging whether someone is "under the influence." This interpretation is consistent with the general rules articulated in the applicable *American Jurisprudence* volume. Generally, the "under the influence" of alcohol element is satisfied by a showing that an individual is "affected to a noticeable or perceptible degree." 7A Am. Jur. Automobiles § 341 (2007) (citing authority from a plethora of American jurisdictions). Although "it is not necessary for the [government] to prove that [the] defendant was drunk when driving," there must be some showing "that he or she was under the influence of alcohol so as to make it

[1] Although the Colorado statute at issue in *Snyder* specified that the smell of alcohol was insufficient to show intoxication, the phrase that the court focused on was identical to that in 42 PNC § 514.

less safe for him or her to operate a motor vehicle." *Id.*

[6] This interpretation of "under the influence" is also in line with the purpose of the applicable statute and its amendments to "deter . . . . dangerous . . . conduct . . . for the protection of the public." RPPL No. 7-48. The Court's rejection of an intoxication requirement is not in tension with the blood alcohol limit found elsewhere in the Code. The subchapter entitled Driving Under the Influence, states that intoxication is "conclusively presumed . . . if the alcohol content of [someone's] blood is 0.10 percent." 42 PNC § 608. Although a blood alcohol level of 0.10 percent determines conclusively that someone is intoxicated, a lower blood alcohol level does not exclude the possibility that someone is under the influence. *See* 7A Am. Jur. Automobiles § 341 (2007).

[7] Thus, in order to establish probable cause for driving under the influence, the Republic must establish that someone was at least slightly perceptibly impaired by intoxicating liquor. This can be accomplished by an affidavit alleging evidence of actual intoxication (such as blood alcohol level or failed sobriety tests) or evidence that a person was otherwise impaired by the consumption of alcohol (such as erratic driving or slurred speech combined with the smell or presence of alcohol).

In this case, the Republic has produced ample evidence to show that the Defendant drank alcohol at some time before she drove her car. The smell of alcohol further suggests that her consumption was proximate to her driving. However, the scent of alcohol does not give any indication whatsoever of the amount of alcohol she consumed or the degree to which she was "influenced" by it. Further, the presence of three beer cans, without further evidence of when their contents were consumed, does not give rise to "likelihood" or "probability" that the Defendant was under the influence of alcohol. *Gibbons*, 1 ROP Intrm. at 547I. The Court notes that if the Government had produced evidence that Defendant was careless and caused the accident, its case against her would be stronger and could give rise to probable cause. Absent such evidence, or other evidence of perceptible influence by alcohol, probable cause is lacking.

[8] The Republic also argues that this is a matter to be reserved for trial. However, the question is one appropriately addressed prior to trial because, if the Republic lacks probable cause, the Defendant cannot be summoned to appear at trial. 18 PNC § 208.

Because the Republic lacks probable cause, the Court dismisses Count Three of the Information (Driving Under the Influence).

II. Reckless Driving

The Court agrees with the Republic's premise that probable cause for driving under the influence amounts to probable cause for reckless driving. However, for the reasons explained above, the Republic lacked probable cause to charge Defendant for driving under the influence. The Government offers no further evidence that Defendant drove recklessly. Thus, the Court dismisses Count Four of the Information (Reckless Driving).

CONCLUSION

The Court hereby **DISMISSES** Counts Three and Four of the Information.

KEITH IBECHUI WASISANG,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 11-001
Criminal Action No. 09-208

Supreme Court, Appellate Division
Republic of Palau

Decided: May 8, 2012

[1] **Criminal Law:** Sufficiency of the Evidence; **Criminal Law:** Appellate Review

In evaluating whether evidence was sufficient to sustain a criminal conviction, we ascertain whether the conviction is clearly erroneous by viewing the evidence in the light most favorable to the prosecution. If the evidence presented in a criminal trial was sufficient for a rational fact-finder to conclude that the appellant was guilty beyond a reasonable doubt as to every element of the crime, we will affirm.

[2] **Criminal Law:** Sufficiency of the Evidence; **Criminal Law:** Appellate Review

In reviewing the sufficiency of evidence to support a criminal conviction, we give due deference to the Trial Division's weighing of the evidence and credibility determinations.

[3] Criminal Law: Discovery

We review the Trial Division's criminal discovery rulings for abuse of discretion

[4] Appeal and Error: Credibility Determination

Credibility determinations are generally the province of the trial court. However, in extraordinary circumstances, a credibility issue may warrant reversal of a criminal appeal.

[5] Appeal and Error: Credibility Determination

Even testimony that contains "several inconsistencies" will withstand review.

[6] Criminal Law: Discovery

ROP R. Crim. P. 16(a)(1)(C) requires the government to produce papers and documents in its possession "which are material to the preparation of the defendant's defense." Our Rule 16 mirrors the United States Fed. R. Crim. P. 16, which also requires disclosure of papers and documents "material to preparing the defense." Given the similarities between the two rules and a lack of Palauan law on the matter, it is appropriate to use United States law to interpret the Palauan rule.

[7] Criminal Law: Discovery

Materiality is demonstrated by some indication that the pretrial disclosure of the disputed evidence would enable defendant significantly to alter the quantum of proof in his or her favor. Too much should not be required in such a showing. If materials sought by a criminal defendant could reveal evidence relevant to the development of a possible defense, a court should generally grant a defendant's discovery request.

[8] Criminal Law: Discovery

As former Chief Justice of the United States Supreme Court John Marshall asked, "if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" The answer, of course, is that a defendant cannot be expected to know the contents of the documents or papers he wishes to examine. Thus, only a showing of *potential* probative value is required. However, a trial court need not allow discovery of documents or papers whose materiality is supported only by conclusory allegations."

Counsel for Appellant: Yukiwo P. Dengokl
Counsel for Appellee: Jason L. Loughman

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; ALEXANDRA F. FOSTER, Associate Justice; and RICHARD H. BENSON, Part-Time Associate Justice.

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

PER CURIAM:

Keith Ibechui Wasisang appeals his conviction for trafficking in methamphetamine, in violation of 34 PNC § 3301. He contends that the evidence was insufficient to support his conviction and that

the trial court erred in denying his motion to compel discovery. We affirm on both issues.[1]

BACKGROUND

Officers of the Bureau of Public Safety (BPS) targeted Wasisang as part of a controlled buy, an operation in which a civilian working with the police attempts to purchase drugs from a suspect. Prior to the controlled buy, officers gave a confidential informant cash that had been photocopied for identification and searched the informant and his vehicle to ensure that he had no other cash or drugs. BPS officers told the informant to purchase $100 worth of methamphetamine from Wasisang.

The informant drove to his house, followed by Officer Cedric Tatingal. From his vantage point nearby, Officer Tatingal saw Wasisang arrive at the informant's home in a white pick-up truck. The informant approached Wasisang's pick-up truck, appeared to speak with Wasisang, and then put his hand into the passenger-side window. Wasisang drove away.

After the apparent transaction, Officers Harline Stark and Byron Wong met with the informant, who gave them two yellow straws containing a substance that appeared to be methamphetamine. At trial, the informant testified that Wasisang sold him the methamphetamine. Although he testified that he was given only one straw by Wasisang, the informant later admitted he had a fuzzy memory of the controlled buy and that he might have been given two straws. When Wasisang was pulled over, Officer Tatingal and Detective Sergeant Temdik Ngirblekuu recovered $100 in cash with serial numbers matching those on the cash that BPS had given to the informant.

After his arrest and interrogation, Wasisang contends that he agreed to act as an informant and perform another controlled buy. According to Wasisang, Officer Stark took five "plates" of methamphetamine from the BPS evidence room and gave them to Wasisang. The controlled buy failed when the target did not show up. Wasisang moved for the Government to produce the plates, but the court denied the motion.

On the day Wasisang was arrested, Officer Stark field tested the substance inside the two straws. She then sealed the straws in a plastic bag and locked them in the evidence locker at BPS. Later, after taking the bags from the locker herself, Officer Stark went to Guam to deliver the evidence to Analyn Gatus, a drug analyst with the Forensic Science Division of the Guam Police Department (GPD).

Gatus ran three tests to determine the nature of the substance inside the straws. The first test, a "color test," came back positive for amphetamines, a group of substances that includes methamphetamine. Gatus also performed a gas chromatograph/mass spectrometer (GCMS) test. Methamphetamine is known to have a "retention time" of 5.65 minutes. On Gatus' first test of the substance in the straws, the retention time for the sample was 5.7 minutes, which is within the margin of error for methamphetamine. She ran a second GCMS

[1] Although Wasisang requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

test on a sample with a higher concentration, and the retention time was 5.66 minutes, which is consistent with methamphetamine. The GCMS test also yields a "fragmentation pattern," which creates a graph that is unique to a substance. The fragmentation pattern from both tests matched the graph for methamphetamine. Finally, Gatus performed a Fourier transform infrared spectroscopy (FTIR) test. The FTIR test also produced a graph, which Gatus compared to graphs of known methamphetamine. The test of the substance in the straws generated a graph consistent with that known to correspond to methamphetamine.

At Wasisang's trial, Gatus testified that in her opinion the straws contained methamphetamine. The court accepted Gatus as an expert in narcotics identification. In addition to a degree in biology from the University of Guam, Gatus had a variety of training during her time with GPD. At the time of trial, she had worked in the GPD lab for five years.

The Trial Division found Wasisang guilty of one count of Trafficking in a Controlled Substance. He was sentenced to twenty-five years' incarceration, with all save five years suspended.

On appeal, Wasisang makes two arguments. He contends (1) that the evidence was insufficient to support his conviction and (2) that the trial court erred in denying his request for the production of materials related to the five plates of methamphetamine.

STANDARD OF REVIEW

[1, 2] In evaluating whether evidence was sufficient to sustain a criminal conviction, we "ascertain whether the conviction is clearly erroneous by viewing the evidence . . . in the light most favorable to the prosecution." *ROP v. Chisato*, 2 ROP Intrm. 227, 240 (1991). In doing so, we give due deference to the Trial Division's weighing of the evidence and credibility determinations. *Id.* If the evidence presented was sufficient for a "rational fact-finder[]" to conclude that the appellant was guilty "beyond a reasonable doubt as to every element of the crime," we will affirm. *Id.*

[3] We review the Trial Division's discovery rulings for abuse of discretion. *Ngiraked v. ROP*, 5 ROP Intrm. 159, 167 (1996).

DISCUSSION

I. The Republic presented evidence sufficient to support Wasisang's conviction.

Wasisang contends that there was insufficient evidence to sustain his conviction for trafficking methamphetamine. First, he argues that the Government did not produce evidence sufficient to show that the two straws presented during its case were given to the confidential informant by Wasisang. This prong of Wasisang's argument is framed primarily as an attack on Officer Stark's testimony and fails to acknowledge other evidence presented by the Government.

[4, 5] Credibility determinations are generally the province of the trial court. *Chisato*, 2 ROP Intrm. at 240. However, in extraordinary circumstances, "a credibility

issue may warrant reversal of a criminal appeal." *Iyekar v. ROP*, 11 ROP 204, 206-07 (2004). This is so when a witness has been shown to be "not worthy of belief" and, thus, any evidence presented by that witness is not "reasonable evidence." *ROP v. Tmetuchl*, 1 ROP Intrm. 443, 447 (1988). However, even testimony that contains "several inconsistencies" will withstand review. *Iyekar*, 11 ROP at 207.

Wasisang points to inconsistencies in Officer Stark's testimony, including contradictory evidence regarding when she wrote her report on the interview with Wasisang, her initial report that Wasisang was arrested for trafficking marijuana, her confusion regarding whether she photocopied or wrote down the serial numbers of the cash prior to the controlled buy, and disparities between Officer Stark's testimony and that of Officer Wong. Additionally, the confidential informant initially stated during his testimony that he received one straw from Wasisang, not two.

Although Officer Stark's testimony at times reflects confusion or haphazard police work, the inconsistencies do not render her testimony unworthy of belief. *See Iyekar*, 11 ROP at 207. Her testimony regarding the receipt of two straws from the confidential informant is corroborated by circumstantial evidence. Officer Tatingal saw Wasisang and the confidential informant reach out and exchange something. The confidential informant confirmed that the amount of money he paid to Wasisang was sufficient to purchase two straws of methamphetamine and that Wasisang may have given him two straws. Further, the full $100 was found in Wasisang's vehicle when he was arrested. Either way, whether it was one or two straws, there was sufficient evidence to show that Wasisang sold methamphetamine to the confidential informant. Thus, a "rational fact-finder" could credit Officer Stark's testimony and conclude that Wasisang gave two straws to the confidential informant. *Chisato*, 2 ROP Intrm. at 240.

Wasisang also argues that the Republic's evidence was insufficient to support the conclusion that the substance inside the straws was methamphetamine. In support, he points to several potential deficiencies in the testing performed at GPD, including the fact that the GPD lab has yet to be internationally accredited or otherwise validated, that Gatus did not take detailed notes regarding her tests, that Gatus testimony was not clear as to whether or when some equipment was calibrated, that Gatus ran the GCMS test twice at different concentrations, that Gatus' testimony was not corroborated by her supervisor, and that Gatus was not an expert in drug analysis.

As to the adequacy of the procedures used at GPD, Wasisang fails to cite any authority on the appropriate procedures to be used by drug laboratories. He cites no scientific article or manual explaining the necessity of international accreditation or the importance of contemporaneous calibration. He presented no expert testimony. In the absence of contrary testimony or scientific authority, the trial court did not err in relying on Gatus' expert testimony. *Cf. Salii v. Koror State Pub. Lands Auth.*, 15 ROP 86, 87 (2008) (not clearly erroneous for trial court to rely on unrebutted expert testimony). With respect to whether Gatus took notes and whether it was appropriate for her to run the GCMS test at

two different concentrations, Wasisang has similarly failed to explain how either of these facts disqualifies the tests performed or Gatus' ultimate expert opinion that the substance was methamphetamine. Wasisang also provides no citation to any case law supporting his contention that Gatus' supervisor should have testified to corroborate her testimony.

Wasisang's attack on Gatus' status as an expert also fails. He refers to Gatus as a "young lady" with too little experience to have been properly certified as an expert. Although framed as part of the sufficiency of the evidence argument, this amounts to the contention that the Trial Division erred in certifying Gatus as an expert. We review such determinations for abuse of discretion. *Cf. Tkel v. Hanpa Indus. Dev. Corp.*, 14 ROP 74, 77 (2007) (holding that evaluations of expert testimony are within the trial court's discretion); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1176 (1999). It was demonstrably not an abuse of discretion for the Trial Division to certify as an expert a technician with a degree in biology, numerous drug analysis trainings, and five years' experience performing over 600 tests just like those she performed in this case. Gatus' credible expert testimony regarding the procedures used and the results obtained in this case provided a sufficient basis for the trial court to conclude that the substance in the straws was indeed methamphetamine.

Thus, we conclude that the Republic presented evidence sufficient to support the Trial Division's guilty verdict.

II. The Trial Division did not err in denying Wasisang's discovery request.

Wasisang argues that the Trial Division erred in denying his request for discovery regarding the five plates of methamphetamine that were used in the unsuccessful controlled buy. In support, Wasisang contends such discovery would show that the police were framing him or, along the same lines, that the police switched the substance he gave the confidential informant with the drugs to be used in the second controlled buy. The trial court denied his request because it concluded Wasisang was merely "trolling for information."

[6] ROP R. Crim. P. 16(a)(1)(C) requires the government to produce papers and documents in its possession "which are material to the preparation of the defendant's defense." Our Rule 16 mirrors the United States Fed. R. Crim. P. 16, which also requires disclosure of papers and documents "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E). Given the similarities between the two rules and a lack of Palauan law on the matter, it is appropriate to use United States law to interpret the Palauan rule. *See Taro v. Sungino*, 11 ROP 112, 114 (2004) (importing United States precedent to interpret ROP R. Civ. P. 41(b)).

[7, 8] "Materiality," under United States Rule 16, is demonstrated by "some indication that the pretrial disclosure of the disputed evidence would enable defendant significantly to alter the quantum of proof in his or her favor. . . . Too much should not be required in such a showing." 2 Charles Alan Wright, Federal Practice & Procedure § 254 (3d ed. 2000). If materials sought by a criminal

defendant could reveal evidence "relevant to the development of a possible defense," a court should generally grant a defendant's discovery request. *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990) (quotation omitted). If evidence is very unlikely to yield relevant evidence, the court may in its discretion deny a defendant's discovery request. *See id.*

We are aware that a defendant will often be unable to articulate the precise relevance of documents in possession of the government, and thus a case for materiality will always be somewhat speculative. **[7]** As former Chief Justice of the United States Supreme Court John Marshall asked, "if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14694). The answer, of course, is that a defendant cannot be expected to know the contents of the documents or papers he wishes to examine. Thus, only a showing of *potential* probative value is required. However, a trial court need not allow discovery of documents or papers whose materiality is supported only by "conclusory allegations[]." *United States v. Cadet*, 727 F.2d 1453, 1466 (9th Cir. 1984).

Wasisang's theory that he was framed by the police is no more than a set of conclusory allegations. He points to no other evidence that the police engaged in a "frame-up" or switched the evidence. Because his discovery request amounted to a fishing expedition for evidence of a police conspiracy, the trial court did not abuse its discretion in denying Wasisang's motion.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division.

NANCY R. CAMACHO,
Appellant/Cross-Appellee,

v.

EBIL RAIMEI SARIANG N. OSARCH,
Appellee/Cross-Appellant.

CIVIL APPEAL NO. 11-025
Civil Action No. 06-288

Supreme Court, Appellate Division
Republic of Palau

Decided: May 8, 2012

[1] Appeal and Error: Standard of Review

Factual findings of the Trial Division will not be set aside by this Court unless we are left with a definite and firm conviction that an error has been made. We affirm so long as the findings are supported by evidence such that a reasonable trier of fact could have reached the same conclusion.

[2] Judgments: Stipulations

A stipulation is in the nature of a contract, and its interpretation is a matter of law.

[3] Appeal and Error: Standard of Review

Where there is evidence in the record to support the Trial Division's determination, we cannot say that no reasonable trier of fact could have reached the same conclusion.

[4] Custom: Burden of Proof

In order for a trial court to make a finding concerning the content of a claimed custom, the party proffering the custom has the burden of proving its tenets by clear and convincing evidence

[5] Appeal and Error: Clear Error

Inconsistencies in reasoning may be the basis for a "firm conviction" that the Trial Division erred in its factual determination.

[6] Appeal and Error: Clear Error; **Appeal and Error:** Remand

Remand is usually appropriate for the trial court to clarify its decision if a clear error is found.

[7] Judgments: Stipulations

Stipulations are generally enforceable by courts, but a stipulation's effect will be restricted to the intent manifested by the parties in the agreement.

[8] Judgments: Stipulations

If we cannot determine the content of a stipulation, then it is unenforceable and void.

Counsel for Appellant: Oldiais Ngiraikelau
Counsel for Appellee: Salvador Remoket

BEFORE: KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; ROSEMARY SKEBONG, Associate Justice Pro Tem.

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

PER CURIAM:

Nancy Camacho appeals the Trial Division's decision in favor of Ebil ra Imei Sariang N. Osarch and its determination that a stipulation entered into by the parties is binding. Osarch cross-appeals, disputing a factual finding by the Trial Division. For the reasons set forth below, the judgment is affirmed in part and reversed in part, and the matter is remanded.

BACKGROUND

Appellee Ebil ra Imei Sariang Osarch is the highest ranking female title-holder of Imei Clan. Appellant Nancy Camacho is also a member of Imei Clan as a descendant of a man named Odesongel. Camacho's father, Renguul Obeketang, bore the title Adelbai ra Imei, the highest male title of Imei Clan. When he died, Camacho sought to have him buried at Imei's odesongel. Osarch was not consulted, and Obeketang was buried at the odesongel.

Osarch brought suit. She initially sought a temporary restraining order, but then agreed to allow the burial of Obeketang at the odesongel pursuant to a stipulation. The content and effect of the stipulation are contested on appeal.

The case proceeded to trial. Witnesses testified regarding Palauan custom and the parties' family histories. The two expert witnesses agreed on the relative strengths of different types of clan members. Ochell clan members, whose membership comes by way of an unbroken line of female ancestors, are stronger than ulechell members, whose line to the clan is through a male. Imei has no ochell members; therefore, its ulechell members are the strongest members of the clan. Weaker than ulechell members are the "drifted" and "borrowed" members of the clan, ultechakl and terruaol. These individuals are not members of the clan by blood, but such members may gain strength within a clan over time through their service to the clan.

It was undisputed that Osarch is an ulechell member of Imei Clan. However, several witnesses brought into question Camacho's assertion of ulechell status. According to the testimony and family tree submitted by Osarch, Camacho's and Obeketang's line became part of the Clan via Belui, a Yapese stonemason recruited by a previous Adelbai ra Imei to come and construct an odesongel for Imei. Belui had a child with a woman from Ngisuus, who was unable to raise the child. The child was taken in by the Adelbai ra Imei and named Odesongel, in honor of his father's construction of the odesongel for the Clan. Camacho's witnesses admitted that they could not say the manner in which Odesongel came to be part of Imei Clan, but several of Camacho's relatives, going back to Odesongel, have held the highest titles in the Clan.

Against this genealogical backdrop, each side offered an expert witness on Palauan custom to testify regarding who may be buried where. Appellee's expert, William Tabelual, testified that in a clan with no ochell members, the ulechell members may decide where a person will be buried. Appellant's

expert, Wataru Elbelau, testified that generally a title-bearer, particularly someone bearing the highest title, should be buried at a clan's odesongel. But Elbelau went on to state that a person who is terruaol —a non-blood member of a clan—is not automatically buried at the odesongel and that the female title-holder may decide where he is buried.

The Trial Division ultimately ruled in favor of Osarch, holding that, although the Defendants were also strong members and ulechell members of Imei, Osarch was entitled by virtue of her status to decide where Obeketang was buried. The court further found that Camacho and the Defendants were liable under the stipulation for the exhumation of the body and $10,000.00.

Camacho timely appealed, arguing (1) that the stipulation is not effective and (2) that the Trial Division erred in its determination that Osarch has the authority to deny Obeketang's burial at the odesongel. Osarch cross-appealed, claiming the trial court erred in finding that Camacho and her relatives were strong ulechell members of Imei.

STANDARD OF REVIEW

[1, 2] Factual findings of the Trial Division will not be set aside by this Court unless we are "left with a definite and firm conviction that an error has been made." *Kerradel v. Besebes*, 8 ROP Intrm. 104, 105 (2000). We affirm so long as "the findings are supported by evidence such that a reasonable trier of fact could have reached the same conclusion." *Id.*

[3] "A stipulation is in the nature of a contract" and its interpretation is a matter of law. *Duhame v. Duhame*, 453 N.W. 2d 149 (Wis. Ct. App. 1989); *see also Braxton v. United States*, 500 U.S. 344, 350 (1991). We thus review the trial court's interpretation of the stipulation de novo. *See Yalap v. Umetaro*, 16 ROP 126, 127 (2009) (Contractual interpretation is a matter of law and is reviewed *de novo*.).

ANALYSIS

I. Camacho's status as an ulechell member of Imei Clan

We first turn to Osarch's argument on cross-appeal that Camacho and her relatives are not ulechell members of Imei. Several witnesses testified that Camacho's ancestor, Odesongel, was the son of Belui, a Yapese stone-worker who was enlisted by Imei to build the clan's odesongel. Based on this allegation, Osarch argues that Camacho and her line cannot be ulechell. However, Camacho and her relatives testified that Camacho and her line were members of Imei Clan and both sides agreed that many of Camacho's ancestors held the titles of Ebil ra Imei and Adelbai ra Imei.

[4] The trial court did not go into detail regarding its conclusion that Camacho is an ulechell member of Imei Clan. However, because there is evidence in the record to support that determination, we cannot say that no "reasonable trier of fact could have reached the same conclusion." *Kerradel*, 8 ROP Intrm. at 105. The undisputed evidence that, going back to Odesongel, members of Camacho's family have intermittently held the highest clan titles strongly supports the trial court's decision. Because there are facts in the record to support the Trial Division's

determination, we affirm the court's judgment as to Camacho's ulechell status in Imei Clan.

II. Osarch's authority regarding the burial of Obeketang

[5] Camacho argues on appeal that the Trial Division clearly erred in determining that Osarch, the highest ranking female in the Clan, could deny Camacho the privilege of burying Obeketang at the Clan's odesongel. In order for a trial court to make a finding concerning the content of a claimed custom, the party proffering the custom has the burden of proving its tenets by clear and convincing evidence. *Ngirutang v. Ngirutang*, 11 ROP 208, 210 (2004). Camacho contends that there was "no evidence . . . to support the trial court's decision that the custom of burying a title bearer on the clan's odesongel is subject to the desires of the surviving strong member."

[6, 7] Osarch's expert, Tabelual, stated that, in a situation where there are no longer ochell clam members, ulechell members may decide where someone will be buried. The second expert, Elbelau, testified that generally a title-bearing person should be buried on a clan's odesongel, but that the strong female title-holder of the clan would have a say in her counterpart's burial if he was terruoal. The Trial Division found that Camacho and the other Defendants are "ulechell members and are strong members" of Imei Clan yet also found that Osarch had sole authority to determine who could be buried at the Clan's odesongel. This line of reasoning does not square with the uncontroverted expert testimony; nor can it be reconciled with the Trial Division's own conclusion that ulechell members "decide . . . who can be buried at the odesongel." These inconsistencies give us a "firm conviction" that the Trial Division erred in its factual determination. *Kerradel*, 8 ROP Intrm. at 105 (2000). Remand is appropriate for the trial court to clarify its decision.

III. Whether the stipulation is enforceable

Camacho contends that the Trial Division erred in awarding $10,000 to Osarch pursuant to a stipulation between the parties. The stipulation, signed by both parties and the court, provides in its second paragraph that

> [a]fter [a] trial on [the] merits, if [Osarch] wins her claim that said Defendants Isidoro Tutii, Nancy R. Camacho, Mary Bausoch, and Mike Renguul shall bury the body of Renguul Obeketang shall promptly exhume the body of Renguul Obeketang from Imei land; restore the property as much as practicable to its original state; and shall be jointly and severally liable for damages in the amount of US$10,000.00 to [Osarch]. (sic)

In exchange, Osarch agreed not to pursue a temporary restraining order and to allow Obeketang to be buried at Imei's odesongel.

[8] Stipulations are generally enforceable by courts, but a stipulation's effect "will be restricted to the intent manifested by the parties in the agreement." 73 Am. Jur. 2d Stipulations § 6 (2001). Unfortunately, the intent of the parties is unclear because the clause defining the circumstances that trigger

the stipulation is incomplete. It states that "if [Osarch] wins her claim that said Defendants . . . . shall bury the body of Renguul Obeketang shall promptly exhume the body of Renguul Obeketang . . . ." These clauses are nonsense and simply do not explain on which claim Osarch had to prevail in order for Camacho and the other Defendants to be liable for the burial or exhumation and the $10,000.00. As written, the stipulation is unenforceable.

The rest of the record provides little insight into the intent of the parties. During the proceedings below, each party proffered an interpretation of the stipulation. It is telling that, on appeal, each party relies on the other's earlier interpretation. During her testimony, Osarch stated that she understood the stipulation to mean if Camacho and the other Defendants are shown to be "not from Imei then they will give [Osarch] $10,000.00 and dig [up] Renguul." In her closing argument to the court, Camacho recited the stipulation as being triggered "if Plaintiff wins her case after trial on [the] merits." In its final judgment, the Trial Division, in spite of the lack of operative language in the stipulation, required Camacho and the other defendants to abide by the stipulation, exhume the body, and pay $10,000.00 to Osarch.

[9] Because we cannot determine the content of the stipulation and the version recited by the Trial Division is unenforceable and void, we must reverse the decision of the trial court. The Trial Division, on remand, should therefore determine the appropriate remedy without regard to the stipulation.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division's determination regarding Camacho's ulechell status. We **REVERSE** its conclusion regarding Osarch's sole authority to determine who may be buried at Imei Clan's odesongel and its enforcement of the stipulation. This matter is **REMANDED** for proceedings consistent with this Opinion.

HIROKO SUGIYAMA,
Appellant,

v.

AIRAI STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 11-028
Civil Action No. 10-200

Supreme Court, Appellate Division
Republic of Palau

Decided: May 11, 2012

[1] Appeal and Error: Standard of Review

A trial court's decision to reconsider a previous decision is ordinarily reviewed on appeal for abuse of discretion. Under this standard, a decision of the Trial Division will not be overturned unless it was clearly wrong.

[2] Appeal and Error: Preserving Issues

Arguments made for the first time on appeal are considered waived, although there are exceptions.

Counsel for Appellant: Roy Chikamoto
Counsel for Appellee: Mariano Carlos

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

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

PER CURIAM:

Hiroko Sugiyama appeals the Trial Division's August 12, 2011, order denying Sugiyama's motion for reconsideration, as well as the Trial Division's June 27, 2011, amended decision. We are not persuaded by Sugiyama's arguments and, accordingly, we affirm the Trial Division's decisions as to both orders.[1]

BACKGROUND

This case began on November 23, 2010, when Appellee Airai State Public Lands Authority (ASPLA) and Airai State Government (ASG) alleged that Sugiyama had illegally occupied — and continued to illegally occupy — land known as Ngerikiil in Airai State. The complaint from ASPLA and ASG alleged that Sugiyama had occupied the land beginning in 1993 and that she continued to do so without a valid lease.

In March 2009, Sugiyama went to the Airai State offices.[2] While she was there,

[1] Sugiyama requests oral argument. After reviewing the briefs and the record, the Court finds this case appropriate for submission without oral argument. ROP R. Civ. P. 34(a) ("The Appellate Division on its own motion may order a case submitted on briefs without oral argument.").

[2] The parties offered differing theories as to why Sugiyama went to the Airai State offices: ASPLA said she wanted to make a lease payment, while Sugiyama countered that she wanted to apply for a building permit for a chicken coop. Although

ASPLA staff realized that Sugiyama did not have a valid lease and required her to file for one. She did so on March 25, 2009. On April 28, 2009, ASPLA issued a letter approving Sugiyama's lease application. However, ASPLA decreased the size of Sugiyam's lot to 22,556 square meters, set a rental price of $0.25 per square meter per year, and asked her to make a lease payment totaling $5,691.00 within ninety days.

In December 2009, Sugiyama petitioned ASPLA to lower the lease price to $0.05 per square meter per year. ASPLA sent numerous letters to Sugiyama in late 2009 and early 2010 requiring her to comply with the terms of the new lease. ASPLA also sought back payments in the total amount of $90,224.00 for the sixteen years Sugiyama occupied the land.[3]

Thus, in their complaint, ASPLA and ASG alleged trespass, and sought declaratory judgment, injunctive relief, and damages. On January 20, 2011, Sugiyama brought a counterclaim, seeking a court order requiring ASPLA to draft lease terms of her choosing; or, if the remedy was ejection, for restitution and compensation for crops and improvements she made on the land.

The parties filed cross-motions for summary judgment. Sugiyama sought partial summary judgment as to whether she had a valid lease to the land she occupies. ASPLA sought partial summary judgment as to whether Sugiyama was a trespasser on the lot; whether Sugiyama should cease all activities; and whether ASPLA was entitled to back rent. In her opposition to ASPLA's motion for summary judgment, Sugiyama maintained that three facts were still disputed: (1) whether she had written authorization from ASPLA to occupy and farm Ngerikiil Farm; (2) whether Defendant paid rent for the lease; and (3) whether the rental rate of $0.25 per square meter was a reasonable or fair rate for the farm.

The Trial Division disagreed, holding that there were no genuine issues of material fact. The court found that the Airai State Governor had issued an enforceable lease in 1993, relying upon the signed Addendum to Lease Agreement No. 0075-NR as the enforceable lease agreement. The lease was for a fifty-year term. The lease was recorded with the Clerk of Courts in 1997, and that same year, Sugiyama received a permit to "construct, renovate, or extend her house" in Ngerikiil.

The Trial Division noted that ASPLA's Regulations, which were adopted September 3, 2008, and went into force in October of that year, have retroactive application. *See* Regulations for the Airai State Public Lands Authority ("Regulations"), Part I, § 4.B. The Regulations delineate the requirements that ASPLA must follow in order to lease public land.[4]

this is a dispute, it is not material, as the action simply prompted ASPLA to investigate the validity of the lease and to determine a new one was needed.

[3] In its complaint, ASPLA sought payment in the amount of $111.00 for "lost coral sands and for expenses of delivery." ASG, with permission from the Governor, dumped three piles of coral sands on the property Sugiyama occupied in order to stop her from her farming and other activities ASPLA believed were illegal.

[4] The Regulations state that ASPLA can lease public lands so long as the lease "results in a fair

The Trial Division denied Sugyiama's motion for partial summary judgment and granted in part and denied in part ASPLA's summary judgment motion. The Court found that Sugiyama had a valid lease from 1993 through 2008 because the "essential requirements of a lease agreement were met." Sugiyama had authorization to occupy and farm, but only if she complied with the requirements of the lease. The court found that no dispute of fact existed as to whether Sugiyama paid rent, because she failed to pay rent for sixteen years. Moreover, Appellees terminated the lease due to non-payment of rent. Finally, the Court held that ASPLA's Regulations are "presumed reasonable" and that ASPLA was well within its Regulations when it set the annual lease rate at $0.25 per square meter per year.

Finally, the Trial Division found that Sugiyama presently has no valid lease and that she owes Appellees rent from 1993 through 2008 at a rate of $60.00 per year, along with fees in the amounts of $5,691.00 and $5,639.00 for 2010 and 2011. The court also found that ASPLA should be awarded attorneys' fees.

On August 28, 2011, Sugiyama filed for reconsideration. Her motion was denied. The Trial Division found that Sugiyama raised no new issues under either ROP R. Civ. P. 7(b)(5) (motion for reconsideration) or ROP R. Civ. P. 59(e) (motion to alter or amend judgment). The court found there were "no manifest errors of law and fact, no newly discovered or previously unavailable evidence, no manifest injustice and no intervening change in the controlling law." Sugiyama now appeals[5] the court's decision on the motion for reconsideration as well as the court's original decision denying summary judgment in Sugiyama's favor.

STANDARD OF REVIEW

A lower court's conclusions of law are reviewed de novo. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001)*; see also ROP v. S.S. Enters., Inc.* 9 ROP 48, 50 (2002) ("Review of a Trial Division decision on summary judgment is plenary . . . . It includes both a review of the determination that there is no genuine issue of material fact, and whether the substantive law was correctly applied." (citation omitted)). Factual findings of the lower court are reviewed using the clearly erroneous standard. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.,* 9 ROP 162, 164 (2002).

[1] Sugiyama has also appealed the order denying the motion for reconsideration. "[A] trial court's decision to reconsider a previous decision is ordinarily reviewed on appeal for abuse of discretion." *In re Idelui*, 17 ROP 300, 303 (2010). Under this standard, a

and reasonable income for Airai State and the National Treasury"; the lease "specifies the terms of the lease" and "describes the leased property and improvements"; and it allows ASPLA to terminate the lease within a certain number of days. Regulations., Part VII, Subpart 1, § 1. The Regulations also provide that lease rates shall be between $0.10 and $5.00 for the first twenty-five years and $0.20 and $5.00 for the twenty-sixth through fiftieth years. Regulations, Part VII, Subpart 1, § 3.

[5] This appeal is limited in parties and in scope. Only ASPLA is part of this appeal. Moreover, ASPLA filed a Notice of Waiver of Claims on June 27, 2011, stating that it waived its claim for damages to three coral sand piles and for punitive damages.

decision of the Trial Division will not be overturned unless it was "clearly wrong." *Rechebei v. Ngiralmau*, 17 ROP 140, 144 (2010).

ANALYSIS

Appellant presents five arguments in support of her appeal of the motion for summary judgment. We examine each in turn before turning to the appeal of the motion for reconsideration.

I. Validity of ASPLA's Regulations

Sugiyama's first, second, and fifth arguments focus on regulations that ASPLA promulgated. First, Sugiyama argues that the Regulations were not legally issued because they violate Palau's Administrative Procedures Act ("APA"), 6 PNC § 106 *et seq*. Specifically, she argues that, while 35 PNC § 215(c) permits the Palau Public Lands Authority to grant each state lands agency the authority to enact its own regulations, there is a specific rulemaking procedure, outlined in the APA, that must be carried out. She maintains that "to the best of Appellant's knowledge, no evidence was available to determine whether the APA procedures were followed by Appellees before ASPLA's Regulations became effective." She argues that a "lack of evidence" of compliance with the APA "leads to the conclusion that the statutory procedures set forth in the Administrative Procedures Act were not followed and therefore, the Regulations which Appellees seek to apply to Appellant, are themselves defective and invalid."

Second, Sugiyama argues that the ASPLA Regulations should not be applied retroactively to alter the terms of her land lease. The Regulations "shall have retroactive application on all leases, exchanges, sales, and other conveyances entered into by ASPLA prior to the effective date of these regulations." Regulations, Part I, § 4.B. Sugiyama believes the Regulations violate Article IV, Section 6 of Palau's Constitution. That section provides, "Contracts to which a citizen is a party shall not be impaired by legislation." Sugiyama argues that the Regulations allow for retroactive application (so they apply to her lease) but that Part III, § 1(E)(vi) invalidates any lease encumbering public lands unless approved by a majority vote. Therefore, Sugiyama appears to argue that her lease with ASPLA is encumbered by the Regulations and therefore the Regulations are invalid.

Sugiyama believes that the provisions concerning leases should be "struck down as an unconstitutional exercise[] of authority in violation of Palau's national constitution[]." Sugiyama argues that in *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208-09 (1988), the United States Supreme Court held that an agency cannot give a rule retroactive effect unless Congress provides express approval to do so. Here, Sugiyama contends that the statute creating ASPLA contained no provision granting power to promulgate regulations with a retroactive application. Sugiyama argues ASPLA's actions "should be struck down as unconstitutional" for "exceeding the legislative authority granted to ASPLA by the Airai State Legislature and the National Government."

Sugiyama's final argument is that ASPLA's Regulations contain language that is arbitrary, capricious, and unreasonable. She

argues that ASPLA's Regulations at Part VII, Subpart 1, § 2 provide lease rates in specific amounts per square meter per year in four usage categories, including residential, commercial, residential/commercial, and non-profits. She believes there is no category for farming and, therefore, the rent amounts provided in the Regulations are not reasonable because they do not take this into account.

[2] With respect to each of these arguments, the result is the same. We cannot entertain these arguments for the first time on appeal. *S.S. Enters., Inc.* 9 ROP at 52. Arguments made for the first time on appeal are considered waived, although there are exceptions. *Id.* In *Tell v. Rengiil,* 4 ROP Intrm. 224, 226 (1994), we found that the reviewing court can address an issue not raised below to prevent the denial of fundamental rights or in cases affecting the public interest. *See also Ngaraard State Pub. Lands Auth. v. Rechucher*, 10 ROP 11, 12 (2002) (exceptions to the general rule exist, but because no argument was raised as to the applicability of either, they will not be entertained). Sugiyama stated in passing that this case "is such an exception" to the general rule. However, she does not adequately justify why she introduces new arguments at this time.

As ASPLA points out, the validity of its regulations was not before the Trial Division. Sugiyama did not discuss whether the Regulations were properly executed according to the APA; whether the ASPLA had the authority to enact rules with a retroactive application; or whether the Regulations contain language that is arbitrary and capricious. We note that the Trial Division presented some discussion of ASPLA's Regulations in its Amended Decision, but that was in the context of lease rates, not whether the Regulations themselves were properly promulgated. In failing to raise any argument concerning the Regulations, Sugiyama waived the right to present arguments about the validity and applicability of ASPLA's Regulations.

II. Waiver of Termination Rights

Sugiyama argues that Appellees waived their right to terminate her land lease by failing to collect rent for sixteen years. Sugiyama cites to *Restatement (Second) of Property: Landlord and Tenant* § 12.1(c) (1986), which states that a landlord "may waive his right to the prompt payment of rent by acting in such a manner that the tenant is led to believe that a later date of payment than that specified in the lease is acceptable."

Waiver does not appear to have been raised in the court below. More fundamentally, the Court's legal conclusion that a lease existed is correct: the addendum to the lease meets all four requirements for a lease. *See Renguul v. Orak*, 6 ROP 334, 337 (Tr. Div. 1997) (lease must contain names of parties; description of realty; statement of lease terms; rent or other consideration). ASPLA did not act as though later payment would be acceptable; Sugiyama never paid at all. Sugiyama's actions constitute a breach of contract.

Sugiyama argues that ASPLA is estopped from terminating the lease because it did not collect rent for sixteen years, citing to *Platner Lumber Co. v. Krug Park Amusement Co.,* 270 N.W. 473, 473 (Neb. 1936). That case offers the following rule in the State of

Nebraska: "A landlord who fails for a long period of time to exercise an option to declare a forfeiture of a lease for failure to pay rent according to the terms, while the tenant with the knowledge and consent of the landlord was constructing a building, may be estopped to exercise such option when the improvements are completed." That case is distinguishable on its facts. There, the court found that if a landlord failed to exercise the forfeiture for non-payment of rent during which time the tenant was building something with the landlord's knowledge, the landlord would indeed be estopped from later declaring a forfeiture. *Id*. In that case, the landlord failed to act within 90 days (the option period) to forfeit the lease. Moreover, the landlord failed to exercise this option even as the tenant reconstructed a building that had burned down, all with the landlord's knowledge.

Here, there was no option period for declaring a forfeiture, and while there was one improvement, we are not convinced that the rule in Nebraska applies here. We do not believe we are required to find that ASPLA was estopped from terminating the lease. The court below correctly held that Sugiyama breached the parties' lease agreement by failing to pay rent. Once it realized the error, ASPLA was within its rights to require back rent and revoke the 1993 lease. There is no triable issue of fact with respect to this issue. Accordingly, we affirm the Trial Division.

III. Tender of Rent Payments

Sugiyama's fourth argument is that ASPLA rejected her attempts to tender payment and that the request that she file a new lease was "tantamount to an anticipatory repudiation of the lease agreement by Appellees." Sugiyama argues that ASPLA should have accepted Sugiyama's attempts to pay rent. She also argues that ASPLA's notice that the lease agreement was not valid was improper.

ASPLA argues that there was no anticipatory breach because ASPLA performed as required under the contract but Sugiyama breached. The Trial Division held that ASPLA gave notice in March and April of 2009 that Sugiyama had violated the 1993 lease agreement. We find that ASPLA's actions in March and April of 2009 (requiring a lease and then approving the lease application with conditions) served as sufficient notice that Sugiyama's 1993 lease agreement was no longer valid. The lower court's legal conclusion was correct.

In sum, the Trial Division drew the correct legal conclusions with respect to the existence of a valid lease; Sugiyama's financial obligation to ASPLA for back rent; and the amount owed. The factual findings the Trial Division made are not clearly erroneous. Accordingly, we affirm the Trial Division's decision with respect to the cross-motions for summary judgment.

IV. Motion for Reconsideration

Sugiyama has appealed the Trial Division's denial of her motion for reconsideration. We review the denial of the motion for reconsideration under the abuse of discretion standard. *In re Idelui*, 17 ROP at 303. Because the underlying cross-motions on summary judgment were properly decided, we do not believe the Trial Division abused its discretion or was clearly wrong. Accordingly,

we affirm the Trial Division's denial of the motion for reconsideration.

CONCLUSION

Sugiyama has not shown that the Trial Division erred or that its legal conclusions were incorrect. For the foregoing reasons, the Trial Division's decisions with respect to both Sugiyama's Motion for Partial Summary Judgment and Motion for Reconsideration are **AFFIRMED**.

IN THE MATTER OF THE ADOPTION OF S.N.F, a minor child

STEVEN CARRARA,
Appellant

CIVIL APPEAL NO. 11-035
Common Pleas Case No. 11-033

Supreme Court, Appellate Division
Republic of Palau

Decided: May 12, 2012

[1] Statutory Interpretation: Plain meaning

The well-trod first step in statutory interpretation is to ascertain the plain meaning of the statute's language. If the language of a statute is clear, we need inquire no further.

[2] Family Law: Adoption

In the context of familial relationships, "natural" means "being a relation by actual consanguinity or kinship by descent as distinguished from adoption."

[3] Family Law: Adoption

A majority of American jurisdictions hold that it would be an absurd result to terminate the first parent's rights when she consents to share those rights with another.

Counsel for Appellant: Siegfried B. Nakamura

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII,

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:

Steven Carrara appeals the determination by the Court of Common Pleas that he is unable to adopt S.N.F., the minor adopted child of his significant other and S.N.F.'s biological aunt, Teiko Florencio.

BACKGROUND

Florencio adopted S.N.F. in 2003 and his biological parents' rights were then terminated. Carrara is Florencio's long-time partner, but the two are not married. He has been in S.N.F.'s life as a de facto stepfather for approximately ten years. On February 16, 2011, Carrara filed a petition with the Court of Common Pleas to adopt S.N.F. Florencio filed her written consent to share parental rights and responsibilities with Carrara. The Court of Common Pleas held a hearing on the matter and determined that (1) Carrara is eligible to adopt under statute, but (2) because Carrara is not married to Florencio, the law further requires the termination of Florencio's parental rights if Carrara adopts S.N.F. Because Florencio declined to have her parental rights terminated, the court denied Carrara's petition. Carrara timely appealed. There is no appellee in this matter.

STANDARD OF REVIEW

This case presents a narrow question of statutory interpretation, which is a matter of law reviewed *de novo*. *Isechal v. ROP*, 15 ROP 78, 79 (2008).

ANALYSIS

The only issue in this case is whether the Court of Common Pleas was correct to conclude that the adoption statute requires the termination of Florencio's parental rights if Carrara's petition is granted. We conclude that the court erred.

Title 21 of the Palau National Code provides in relevant part:

> **§ 402. Adoption by decree.**
>
> (a) Any suitable person who is not married, or is married to the father or mother of a child, or a husband and wife jointly may by decree of court adopt a child not theirs by birth. The decree may provide for change of the name of the child. If the child is adopted by a person married to the father or mother of the child, the same rights and duties which previously existed between such natural parent and child shall be and remain the same, subject, however, to the rights acquired by . . . reason of the adoption.
>
> …
>
> **§ 408. Rights and duties of adopting and natural parents.**
>
> The natural parents of the adopted child are, from the

> time of adoption, relieved of all parental duties toward the child and all responsibilities for the child so adopted, and have no right over it.

In rejecting Carrara's petition, the Court of Common Pleas first determined that Carrara was eligible to adopt under the language of § 402 because he was a suitable person who is not married. However, the court went on to read § 408 as requiring the termination of Florencio's parental rights. Although it noted that the "plain language of section 408" requires the termination only of "natural," meaning biological, parents' rights, the court rejected the literal meaning because it "would produce an incongruous and absurd result in a case where a child has a first set of adoptive parents." Accordingly, the court read the statute "more broadly to apply to legal parents" as well as biological parents. Because Carrara and Florencio are not married, the court further concluded that an exception to § 408 for stepparents did not apply. *See* 21 PNC § 402.

[1, 2] The well-trod first step in statutory interpretation is to ascertain the plain meaning of the statute's language. *Lin v. ROP*, 13 ROP 55, 58 (2006). If the language of a statute is clear, we need inquire no further. Section 408 applies only to the rights of "natural parents." In the context of familial relationships, "natural" means "being a relation by actual consanguinity or kinship by descent as distinguished from adoption." *Webster's Third New International Dictionary* 1506 (1981). Florencio is not S.N.F's parent by blood. As S.N.F.'s adopted mother, Florencio, falls squarely outside the purview of § 408's plain language.

Although there is likely some "incongru[ity]," as the Court of Common Pleas phrased it, in finding that first-adoptive parents are free from § 408's mandate whereas natural parents might not be, we leave to another day the determination of whether § 408 requires the termination of a biological parent's rights when she consents to the adoption by her significant other.[1] Florencio is not covered by § 408's plain language, and that ends our inquiry.

CONCLUSION

For the foregoing reasons, we **REVERSE** the Court of Common Pleas' determination that Carrara's adoption of S.N.F. would require the termination of Florencio's parental rights. We **REMAND** for proceedings consistent with this opinion.

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[1] **[3]** Appellant argues that, even if § 408 applies to Carrara and Florencio, the court should nonetheless allow the adoption because it would be an absurd result to terminate the first parent's rights when she consents to share those rights with another. This approach is consonant with a majority of American jurisdictions. *In re Adoption of Infant K.S.P.*, 804 N.E. 2d 1253 (Ind. Ct. App. 2004); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *In re Petition of K.M. & D.M.*, 653 N.E. 2d 888 (Ill. App. Ct. 1995); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *Adoption of Tammy*, 619 N.E. 2d 315 (Mass. 1993); *but see In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002); *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998); *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. App. 1996) (abrogated by statute); *In Interest of Angel Lace M.*, 516 N.W. 2d 678 (Wis. 1994). However, that question is not before us.

RISONG SAITO,
Appellant,

v.

FRANCISCA MEKREOS,
Appellee.

CIVIL APPEAL NO. 11-016
Civil Action No. 04-361

Supreme Court, Appellate Division
Republic of Palau

Decided: May 15, 2012

[1] **Civil Procedure:** Discovery

The trial court has broad discretion to manage discovery and order sanctions under Rule 37, but its discretion is not without constitutional limits.

[2] Civil Procedure: Discovery

To pass constitutional muster, any Rule 37 sanction must be (1) just and (2) specifically related to the particular claim which was at issue in the order to provide discovery.

[3] Civil Procedure: Default Judgment

A party may move for Rule 55 default judgment at any time in litigation when a defendant shows a pattern of deliberate delay or a lack of diligence and has ignored the court's commands or treated them with indifference. This includes situations in which a party has failed to comply with pretrial and discovery orders.

[4] Civil Procedure: Default Judgment

Upon entry of default, the non-defaulting party typically must (1) move the court for judgment by default and (2) send notice of the motion to any defaulting party who has appeared in the case. Once the non-defaulting party has filed a motion and served notice on the defaulting party, the trial court may hold a hearing to determine whether to enter a judgment by default. The court then has discretion to grant or deny the motion for default judgment.

[5] Civil Procedure: Default Judgment

Default judgments, whether entered under Rule 37 or Rule 55, are not favored by the law and any doubts usually will be resolved in favor of the defaulting party. As a result, the standard for setting aside an entry of default or default judgment is low. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

[6] Civil Procedure: Default Judgment

A court abuses its discretion when it enters a default judgment without comport with our rules.

Counsel for Appellant: Salvador Remoket
Counsel for Appellee: Scott Hess

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

Appeal from the Trial Division, the

Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

Appellant Risong Saito appeals the judgment entered against her on April 27, 2011, as a result of her failure to respond to two discovery requests. Saito claims that the Trial Division's entry of judgment was too drastic a sanction for her delay, and that the Trial Division violated her due process rights when it failed to hold a hearing before entering judgment in favor of Appellee Francisca Mekreos. We agree with Saito and, accordingly, we reverse the Trial Division's decision.

BACKGROUND

This dispute began in late 2004. For over two years, the parties accomplished very little. Beginning in April 2007, the case was repeatedly scheduled for trial, but a series of events conspired to halt all progress until January 2010, when the case was scheduled for trial once more. Again, the parties were unable to proceed, and the trial was delayed first to June 2010 and then to February 2011. In October 2010, in anticipation of the February 2011 trial, Mekreos served discovery requests on Saito, but Saito did not answer Mekreos' requests. One month later, Mekreos served Saito with additional discovery requests, but Saito failed to respond to those requests, too. On January 10, 2011, Mekreos filed a motion to compel Saito to respond to her discovery requests and requests for admissions. In turn, on January 21, 2011, the Trial Division apparently ordered Saito to respond to Mekreos' requests within seven days, but the court's instruction was ambiguous. The order as filed was evidently drafted as a proposal by Mekreos, and it included three disjunctive options for the Trial Division to entertain in response to the motion to compel. The three options, enumerated B through D, ranged in severity from demanding a response to the discovery requests within a certain number of days to be determined by the court (option C), to outright judgment in favor of Mekreos (option D). Option B was an intermediate sanction. The Trial Division did not explicitly identify that it chose option C, but it did physically write the number "7" in a blank space provided to specify the number of days within which Saito was to respond to the discovery requests. Thus, it seems logical to conclude that the court intended to select option C and to require Saito to respond to Mekreos' discovery requests within seven days. Nevertheless, the order is unclear, and our conclusion is based on a measure of conjecture.

Whatever the court's intention, Saito once again failed to respond to the discovery requests or to the order. In turn, on February 8, 2011, the Trial Division signed and issued another order. Mekreos appears to have submitted this order, too, and it is even more ambiguous than the January 21 order. In relevant part, the February 8 order provides:

> [T]he Court hereby Orders that:
>
> E) Petitioner, Omelau Tanaka, and Administrator, Risong Saito, have failed to file their responses to Claimant, Francisca Mekreos's discovery requests, within thirty days, and have failed to comply with the January 21, 2011 Order to

> file their respective responses within seven (7) days of January 21, 2011, and find them in Contempt of this Order, and;
>
> F) Enter Judgment for Claimant and against Petitioner, Omelau Tanaka, and Administrator, Risong Saito or, in the alternative; or,
>
> G) Deem admitted, as against Petitioner, Omelau Tanaka, and Administrator, Risong Saito, all responses to requests for admissions and exclude all evidence requested, documentary or otherwise, and not produced by Omelau Tanaka and Risong Saito; or,
>
> H) Enter such other further relief or sanctions as this Court deems appropriate against Petitioner, Omelau Tanaka, and Administrator, Risong Saito;
>
> I) The Court hereby Orders: [sic]

The order contains no other markings, typewritten or otherwise, meant to explain the meaning of its text.

What happened next is indiscernible from the record, but the parties appear to have been engaged in negotiations to file a stipulation of some sort, the nature of which is unclear.[1] The case was initially set for trial on February 15, 2011, but the court delayed it pending a status conference on March 21, 2011. At the March 21 conference, the court gave Saito two days to file a stipulation or motion for relief from the February 8 order.

On March 29, 2011, after three successive motions for more time, Saito's counsel filed a motion for relief from the February 8 order after the parties were apparently unable to reach an agreement regarding the stipulation. Referring to the text of the February 8 order, Saito's motion asks the court to "order the third alternative [option H] against Administrator Saito instead of the first and second alternatives [options F and G, respectively]." Saito, therefore, did not understand the February 8 motion to be a definitive judgment against her. Yet, when the Trial Division denied Saito's motion for relief on April 25, 2011, it explained that "[t]he Court granted Mekreos' motion for an entry of judgment against . . . Saito on February 8, 2011."[2]

Saito was understandably confused about the nature of the February 8 order, but

[1] The court's April 25, 2011, order, discussed *infra*, makes passing reference to the parties' stipulation negotiations in a footnote. We have no other source corroborating or expounding upon the nature of the negotiations or the proposed stipulation.

[2] Paradoxically, the Trial Division included the following as a footnote in its decision denying the motion for relief: "The only reason the Court has not entered a formal judgment is because Saito and Mekreos were talking of a possible stipulation. The parties failed to reach an agreement and instead, Saito has filed a motion to set aside the Court's order on February 8, 2011."

the Trial Division was not. In its April 25 order, the Trial Division explained that Saito had failed to respond to Mekreos' discovery requests and an order from the court and, therefore, the court would not set aside its February 8 order. The April 25 order closed with the following: "This matter has been pending too long and there is no reason to prolong it any longer. All of the parties have been given ample time and chances to move this case along and closure should come now rather than later. A final Order and Judgment is forthcoming."

On April 27, 2011, two days after the denial of Saito's motion for relief, the Trial Division entered its "Final Order and Judgment." This order was not ambiguous. It clearly stated that "[j]udgment is entered for Claimant Francisca Mekreos and against . . . Administrator, Risong Saito," and that the matter "is hereby closed and settled." Saito appealed. Her only argument is that the Trial Division denied her due process when it entered judgment against her as a sanction for failing to respond to a discovery request.

STANDARD OF REVIEW

When a specific determination by the Trial Division is discretionary, we review that determination for an abuse of discretion. *W. Caroline Trading Co. v. Leonard*, 16 ROP 110, 113 (2009). "Under this standard, a trial court's decision will not be overturned unless it was arbitrary, capricious, or manifestly unreasonable, or because it stemmed from an improper motive." *Id.* (internal quotation omitted).

ANALYSIS

When the Trial Division closed this case, its orders and judgment did not specify the precise procedural rules under which it was operating or the exact sanction it was imposing for Saito's discovery dereliction. The judgment was neither a fully parsed consideration of the merits as one would expect from a summary judgment decision, nor a *sua sponte* dismissal of Saito's claim. Rather, the court rendered a judgment in favor of Mekreos as a sanction and, consequently, did not reach the merits of the underlying dispute. Thus, although the Trial Division never explicitly refers to its final judgment and order as a default judgment under either ROP Rule of Civil Procedure 37(b)(2)(C) or 55(b)(2), we must construe it as such.

[1, 2] Rule 37(b)(2) provides that "[i]f a party . . . fails to obey an order [of the court] to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just." ROP R. Civ. P. 37(b)(2). Such orders may include "an order . . . dismissing the action . . . , or rendering a judgment by default against the disobedient party." ROP R. Civ. P. 37 (b)(2)(C); *but see* 23 Am. Jur. 2d Depositions and Discovery § 220 (2002) (describing dismissal as "a sanction of last resort, which should be used only in extreme circumstances to redress the most flagrant discovery abuses").[3] The trial court has broad discretion to manage discovery and order sanctions under Rule 37, but its discretion is not without constitutional limits. *See* 8A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane,

[3] In the absence of controlling Palauan law, we look to applicable American common law for reference. 1 PNC § 303.

Federal Practice and Procedure: Civil 3d § 2284 (3d ed. 1998) (Federal Practice and Procedure) (interpreting Fed. R. Civ. P. 37, the American analogue to ROP R. Civ. P. 37). To pass constitutional muster, any Rule 37 sanction must be (1) "just" and (2) "specifically related to the particular claim which was at issue in the order to provide discovery." *Ins. Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 456 U.S. 694, 707 (1982) (internal quotation omitted).

[3] Separately, Rule 55(a) provides that an entry of default is appropriate "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." ROP R. Civ. P. 55(a). A party may move for Rule 55 default judgment at any time in litigation "when a defendant shows a pattern of deliberate delay or a lack of diligence and has ignored the court's commands or treated them with indifference." 46 Am. Jur. 2d Judgments § 253 (2006). This includes situations in which a party has failed to comply with pretrial and discovery orders. *Id. See also* ROP R. Civ. P. 16(f); ROP R. Civ. P. 37(b)(2)(C).

[4] Upon entry of default, the non-defaulting party typically must (1) move the court for judgment by default and (2) send notice of the motion to any defaulting party who has appeared in the case. ROP R. Civ. P. 55(b)(2). Once the non-defaulting party has filed a motion and served notice on the defaulting party, the trial court may hold a hearing to determine whether to enter a judgment by default. 10A Federal Practice and Procedure § 2688 (interpreting Fed. R. Civ. P. 55, the American analogue to ROP R. Civ. P. 55). The court then has discretion to grant or deny the motion for default judgment. *Id.* § 2685.

[5] Nevertheless, default judgments, whether entered under Rule 37 or Rule 55, "are not favored by the law and any doubts usually will be resolved in favor of the defaulting party." 10A Federal Practice and Procedure § 2681. As a result, the standard for setting aside an entry of default or default judgment is low. "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." ROP R. Civ. P. 55(c).

[6] On these facts, we cannot say that default judgment against Saito is an appropriate sanction under either Rule 37 or Rule 55, even under the abuse of discretion standard. Many or most of the severe delays in this case were caused by Mekreos, not Saito. Saito's failures only occurred toward the end of this litigation. Punishing her with default judgment when both parties caused prolonged delays cannot be "just" under Rule 37. *See, e.g., Anilina Fabrique de Colorants v. Aakash Chemicals & Dyestuffs, Inc.*, 856 F.2d 873, 878 (7th Cir. 1988) (holding that default judgment against defendant was an abuse of discretion when the plaintiff was partly at fault for the delays in the case). Likewise, the default judgment fails under Rule 55 because both Mekreos' motions and the resulting court orders were nonsensical, thereby depriving Saito of sufficient notice, as required by Rule 55(b)(2), that she was in jeopardy of having judgment rendered against her. To affirm the Trial Division's decision, we would have to side-step Rule 55(b)(2)'s notice requirement; disregard Rule 55(c)'s low

bar to setting aside default judgment; and, most critically, look past Rule 37's command that all sanctions be just. Because the default judgment did not comport with our rules, the court abused its discretion, *see W. Caroline Trading Co. v. Kloulechad*, 15 ROP 127, 129 (2008), and we cannot affirm. *See Anilina Fabrique de Colorants*, 856 F.2d at 878 ("While not approving the apparent lack of diligent attention, we are of the opinion that the imposition of the particular sanction was too harsh under the circumstances here presented and judicial discretion should have indicated other less extreme initial steps." (quotation omitted)).

CONCLUSION

Because we are sympathetic to the Trial Division's palpable frustration with the pace of this litigation, we reach our decision reluctantly. Time and time again, both parties caused significant and unreasonable delays only to submit incomprehensible motions, briefs, and proposed orders to the court. The parties' counsel are reminded that, if they are unable to zealously represent their clients' interests, they should consider withdrawing their representation.

For the foregoing reasons, we **REVERSE** the decision of the Trial Division and **REMAND** this case for further proceedings consistent with this Opinion.

PETER MIKEL,
Appellant,

v.

ISEBONG SAITO,
Appellee.

CIVIL APPEAL NO. 11-041
Civil Action No. 11-041

Supreme Court, Appellate Division
Republic of Palau

Decided: May 15 , 2012

[1] Appeal and Error: Clear Error

A court's reliance on unrebutted expert testimony cannot be clear error.

[2] Appeal and Error: Abuse of Discretion; **Appeal and Error:** Standard of Review

Decisions regarding the ordering of witnesses and presentation of evidence are matters left to the determination of the Trial Division and are reviewed for abuse of discretion.

[3] Appeal and Error: Standard of Review

Our deference to the trial court with respect to fact-finding presumes that the court applied the correct burden of proof. Evaluating the facts under the incorrect burden amounts to legal error, which is reviewed de novo.

[4] Custom: Appellate Review; **Custom:** Judicial Notice

Sometimes it may be appropriate for this Court to affirm a lower court, even in the absence of clear and convincing evidence, under certain circumstances. We have upheld the Land Court's judicial notice of particular unchallenged customs. Additionally, some customs are so well-known and well-established that it is unnecessary to waste judicial resources establishing the practices in ever case. The ranking and meaning of ochell and ulechell clan membership, for example, are so well-established by precedent and practice that they need not be proved in every case.

[5] Custom: Expert Testimony

Although custom is normally established through expert evidence, we have stated that a trial court is not *obliged* to accept unrebutted testimony as true.

Counsel for Appellant: Clara Kalscheur
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, 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:

Appellant Peter Mikel appeals the trial court's decision awarding Appellee Isebong Saito title to land known as *Metuker* located in Ngermechau Hamlet in Ngiwal. He contends (1) the Trial Division clearly erred in finding that, under Palauan custom, dry land is awarded to male children, and (2) the Trial Division abused its discretion with respect to its treatment of various procedural issues. We affirm in part and reverse in part.

BACKGROUND

After a hearing considering various claims to *Metuker*, a Land Claims Hearing Officer determined that the land belonged to Ongalk ra Techeboet. A certificate of title in the name of "Ongalk ra Techeboet" later issued. Techeboet was deceased at the time of the Land Court hearing, but she was survived by her eight children, among them Mikel's mother, Maria Paulis. The Land Court did not explicitly define the term "Ongalk" but at times referred to the claim of Techeboet's "children."

On February 23, 2010, Saito purchased the interest in *Metuker* held by Techeboet's sons or their heirs, and the interest of one of Techeboet's daughters, Kelau Gabriel. Saito does not claim that she purchased Paulis' share or that of Techeboet's other three daughters or their heirs.

Saito filed the action below to quiet title to the property. Mikel, proceeding pro se, filed an objection, claiming that his mother and her sisters were co-owners of the land as part of Ongalk ra Techeboet. Saito filed a pretrial statement raising several responses to Mikel's objection. However, neither in her pretrial statement nor in any other filing or notice before trial did Saito contend that, under custom, females generally do not inherit

dry land. The pretrial statement also failed to list Moses Uludong as a potential witness.

At trial, Saito presented Uludong as an expert on Palauan custom, specifically with respect to adoption. When Uludong was unavailable to testify at the beginning of trial as part of Saito's case-in-chief, the trial court had Mikel proceed with his case and later allowed Uludong to testify out of turn. According to Mikel, the Trial Division never notified him that he could put on a rebuttal expert witness to testify regarding custom. The court did, however, explain to Mikel the purpose of a customary expert witness.

Uludong testified that, although "ongalk" means "children," in the context of *Metuker*, which is dry land as opposed to a mesei, the term likely refers to *male* children. He explained that, while females have input into how dry land is used, it is generally males who have actual ownership.

The Trial Division found in favor of Saito, citing Uludong's unrebutted testimony on Palauan custom. Mikel appeals, arguing that the Trial Division's finding was clearly erroneous and that the court's handling of various procedures was "unusual" and "detriment[al]" to him.

STANDARD OF REVIEW

[1] "The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error." *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006). We will not set aside factual findings of the Trial Division "as long as they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion." *Delbirt v. Ruluked*, 13 ROP 10, 12 (2005) (citation omitted). The court's reliance on unrebutted expert testimony cannot be clear error. *Id.* Conclusions of law, however, are reviewed de novo. *Wong v. Obichang*, 16 ROP 209, 212 (2009).

[2] Decisions regarding the ordering of witnesses and presentation of evidence are matters left to the determination of the Trial Division and are reviewed for abuse of discretion. *See W. Caroline Trading Co. v. Leonard*, 16 ROP 110, 113 (2009).

ANALYSIS

I. Application of Custom

Mikel argues on appeal that the trial court erred in its determination that dry land may only be inherited by males under Palauan custom. He points to evidence that contradicts the Trial Division's finding. First, Mikel argues that Uludong suggested that ongalk is a term that can mean all children — not just male children. Second, the Land Court, in the proceedings giving rise to the certificate of title, frequently used the phrase "all children" to refer to the group of Techeboet's children who ultimately received a certificate of title. Finally, Mikel points out that Techeboet herself inherited the land, which suggests that the norm against women inheriting dry land is not without exception.

[3] The mere presence of evidence in tension with the Trial Division's conclusion is not sufficient basis for us to reverse its finding regarding a custom. Our clearly erroneous standard of review leaves such balancing for

the trial court. *See Ngirmang*, 14 ROP at 34-35. However, our deference to the trial court with respect to fact-finding presumes that the court applied the correct burden of proof. Evaluating the facts under the incorrect burden amounts to legal error, which is reviewed de novo. *See Wong*, 16 ROP at 212.[1]

[5] In this case, Saito had the burden to show, by clear and convincing evidence, the substance of the customary practice. *See Ngirmang*, 14 ROP at 34. However, the Trial Division concluded its discussion of custom by stating, "Uludong testified that under Palauan custom, dry land (such as *Metuker*) is owned by the male children. His testimony was not refuted. That ends the inquiry." This is a misstatement of the law. First, although custom is normally established through expert evidence, we have stated that a trial court is not *obliged* to accept unrebutted testimony as true. *Idid Clan v. Olngebang Lineage*, 12 ROP 111, 124 (2005). Thus, unrefuted expert testimony does not end the inquiry. Instead, the court must determine that the expert testimony is sufficient, in light of al the evidence before it, to overcome the evidence, if any, offered by the opposing party and establish the custom by clear and convincing evidence. Second, the Trial Division's statement appears to shift the burden of proof to the party that did not invoke the custom by implying that Mikel had to present evidence to dispute the expert. This burden-shifting is inapposite in cases involving customs; the burden always remains on the party invoking the content of the practice.

Because the Trial Division applied the wrong standard in evaluating the evidence, we must remand this case to that court for consideration of the evidence under the correct standard.

II. Procedural Rulings

Mikel complains that several of the Trial Division's procedural rulings and practices were improper. He argues that the court erred by (1) permitting Uludong to testify out of order after Mikel had already presented his case and allowing Uludong to be added as a witness although he was not listed in the pretrial pleadings; (2) allowing Saito, well into the trial, to raise several new issues; and (3) expressing favoritism toward Saito.

As an initial matter, we note that this section of Mikel's argument is entirely unsupported by citation to case law. We have stated that we will not consider arguments unsupported by legal citations. *See Aimeliik State Pub. Lands Auth. v. Rengchol*, 17 ROP 276, 282 (2010). "Litigants may not, without proper support, recite a laundry list of alleged defects in a lower court's opinion and leave it to [us] to undertake the research." *Id.*

[1]**[4]** Sometimes it may be appropriate for this Court to affirm the Trial Division or Land Court, even in the absence of clear and convincing evidence, under certain circumstances. We have upheld the Land Court's judicial notice of particular unchallenged customs. *See, e.g., Tellames v. Isechal*, 15 ROP 66, 68 (2008); *Ramarui v. Eteet Clan*, 13 ROP 7, 8-9 (2005). Additionally, some customs are so well-known and well-established that it is unnecessary to waste judicial resources establishing the practices in ever case. The ranking and meaning of ochell and ulechell clan membership, for example, are so well-established by precedent and practice that they need not be proved in every case. However, neither of these exceptions to the rule apply in this case.

Further, none of Mikel's complaints about the Trial Division's procedures are so clearly meritorious that research and citation could be forgone. Upon our review of the proceedings below, we discern no abuse of discretion in the court's handling of the trial.

CONCLUSION

For the foregoing reasons, we **REVERSE** the trial court's conclusion regarding the inheritance of dry land and **REMAND** for proceedings consistent with this opinion. We **AFFIRM** the trial court's procedural decisions.

STERLINA GABRIEL,
Appellant,

v.

CHILDREN OF URREI BELLS and TITIBAU BAUMERT,
Appellees.

CIVIL APPEAL NO. 10-036
Civil Action No. 07-146

Supreme Court, Appellate Division
Republic of Palau

Decided: May 16, 2012

[1] Appeal and Error: Credibility Determinations

The trial judge is best situated to make credibility determinations of expert witnesses. This Court will generally defer to those decisions.

[2] Descent and Distribution: Statutes

While the language of the intestacy statute, 25 PNC 301 § 301(b), is ambiguous, it has been interpreted to require that the decedent (1) dies without issue and (2) without a will, and (3) if he or she acquired lands from someone other than the *bona fide* purchaser for value, then the land may be disposed "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 his death."

Counsel for Appellant: Mariano W. Carlos
Counsel for Appellees: J. Uduch Sengebau Senior

BEFORE: ALEXANDRA F. FOSTER, Associate Justice, ROSE MARY SKEBONG, Associate Justice Pro Tem, and RICHARD H. BENSON, Part-Time Associate Justice.

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

PER CURIAM:

Sterlina Gabriel appeals the Trial Division's August 18, 2010, award to Appellees of Cadastral Lot No. 002 D 10 (also known as *Dims*); Cadastral Lot Nos. 013 D 06 and 013 D 09 (also known as *Dort*); and Cadastral Lot No. 013 D 16 (also known as *Dort/Bairarang*). The land is located in Ngiwal and once belonged to decedent Gabriel Renguul.

The Trial Division, relying on the customary determination made at Renguul's cheldecheduch, awarded Lot No. 002 D 10 and other lands to the children of Urrei Bells and Titibau Baumert. Gabriel, a child of Decedent, appeals. We are not persuaded by Gabriel's arguments and accordingly affirm the Trial Division.

BACKGROUND

Decedent Renguul executed a will on December 1, 2005. He co-owned the lots at issue with relatives[1] and did not explicitly dispose of his interest in all of the properties in his will. Instead, he stated in his will that the ownership of *Dims, Dort,* and *Dort/Bairarang* "should be settled at any customary meeting after [his] death by [his] children and relatives." Renguul died on January 13, 2007. Renguul's daughter, Appellant Gabriel, filed a petition to probate the estate of her father. Appellee Hilaria Sullivan, a child of Renguul's first cousin, filed her claim to the lands on behalf of herself and the Children of Baumert and Bells.

The case proceeded to trial. The Trial Division accepted Renguul's will as "true and authentic" and held that the will would control the properties, including Lot Nos. 002 D 10, 013 D 06, 013 D 09, and 013 D 16, which are the subject of this appeal. Moreover, the court recognized testimony from experts and witnesses regarding who has the power to distribute the decedent's properties or interests. Two such witnesses, Walter Tabelual and Antonio Bells, testified that an cheldecheduch took place on February 4, 2007, at Esuroi Clan House in Airai. They testified that, in accordance with custom, Renguul's interests were transferred to the children of Baumert and Bells. The court found these testimonies to be credible and concluded that the children of Baumert and Bells are close relatives of Decedent's father who have the authority to settle the decedent's properties at an cheldecheduch.

Appellant Gabriel now appeals this determination. She argues that the Trial Court erred in finding that Renguul's land was properly disposed of at his cheldecheduch, in interpreting Renguul's will as it did, and in failing to apply the proper statute.

[1] The relatives include Renguul's sister, Kiarii Mellil, his aunts, Titibau Baumert and Urrei Bells, and a relative, Kodep Brel.

STANDARD OF REVIEW

Factual findings of the lower court are reviewed using the clearly erroneous standard. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.,* 9 ROP 162, 164 (2002). Under this standard, the findings of the lower court are set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached that conclusion. *Id.* Conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

The Palau National Code provides that inheritance of land held in fee simple "may be transferred, devised, sold or otherwise disposed of at such time and in such manner as the owner alone may desire, regardless of established local customs which may control the disposition or inheritance of land through matrilineal lineages or clans." 25 PNCA § 301.

Appellant advances three arguments on appeal. First, she argues that the Trial Division committed reversible error by allowing Sullivan to "collaterally attack" the Certificates of Title to several lots, including Lot Nos. 002 D 10, 013 D 06, 013 D 09 and 013 D 16, and to introduce "completely new evidence as to the ownership of these lots which the Trial Court relied on in awarding decedent's interests in these lots to her and her siblings."

As an initial matter, we note that it is not our task to re-evaluate evidence. We evaluate factual determinations under a clearly erroneous standard. In its decision, the Trial Division relied on four critical factual determinations: (1) Renguul's will was valid and stated that the lands at issue before us should be disposed in "any customary meeting"; (2) Renguul's cheldecheduch served as an appropriate "customary meeting" as contemplated by the will; (3) the cheldecheduch, where members of Renguul's family discussed the properties, was held in conformity with custom; and (4) Renguul's family members awarded the lands to the children of Baumert and Bells. There is support in the record for the Trial Division's decision, and the conclusions of fact were not unreasonable.

The Trial Division relied on the direction in Renguul's will to settle ownership of these properties at "any customary meeting" that his children and relatives attended. The court found that a customary meeting, the cheldecheduch, occurred on February 4, 2007. The court heard expert testimony that the father's relatives decide the distribution of properties. Renguul's father's relatives properly decided the distribution of his properties at the cheldecheduch. Therefore, the Trial Division's finding that the cheldecheduch occurred and that the properties were discussed, in accordance with Renguul's will, was not in error.[2]

[1] The trial judge is "best situated to make credibility determinations of expert

[2] Gabriel argues that the Trial Division erred in "allowing [Claimant Sullivan] to alter the ownership of the said lot with new claims and testimonies." The evidence does not support this argument. Instead, we affirm the Trial Division's finding that, based on the evidence, a customary meeting occurred and properties were distributed accordingly.

witnesses, and this Court will generally defer to those decisions." *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006). The Trial Division accepted expert witness testimony from Wataru Elbelau, an expert in Palauan customs, who stated that a decedent's property does not automatically go to his children but must instead be discussed by close relatives. The Trial Division also heard testimony from Sariang Timulch, a member of the Palau Historical Society and another expert in Palauan customs. Timulch testified that the sisters of the decedent's father have the authority to settle decedent's properties at the cheldecheduch. The Trial Division's reliance on this testimony was not clearly erroneous.

The Trial Division relied on Tabelual's and Bells' testimony to find that the properties at issue came from Ibai Clan of Ngiwal into Dort Lineage, which is the lineage of Renguul's father. Tabelual¸ the family spokesperson, explained that he "would not go into *Dims* because it belongs to Tony Bells." Bells corroborated this testimony. The Trial Court's determination that *Dims* was discussed and its ownership decided at the cheldecheduch was supported by credible evidence. The evidence supports the distribution of land that resulted from the cheldecheduch, and we accordingly affirm the Trial Division's decision.

Gabriel's second and third arguments are that the trial court made an incorrect finding of law in interpreting the meaning of "any customary meeting" and in failing to apply 25 PNC § 301(b). Gabriel raises, for the first time on appeal, the argument that the words "any customary meeting" may not refer to an cheldecheduch. An issue not raised in the trial court is waived. *Nebre v. Uludong* 15 ROP 15, 25 (2008). Accordingly, we will not consider this argument.

[2] Appellant next argues that the Trial Division failed to apply 25 PNC § 301(b), the intestacy statute. If the statute were to apply, it would supplant the cheldecheduch as the proper means of disposing of Renguul's land. The statute lists three separate requirements that must be met before the section can apply: If the decedent dies (1) without issue and (2) without a will, and (3) if he or she acquired his lands from someone other than a *bona fide* purchaser for value, then the land may be disposed "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 his death." 25 PNC 301 § 301(b). While the language of the statute is ambiguous, it has been interpreted to require all three conditions. *Marsil v. Telungalk ra Iterkerkill*, 15 ROP 33 (2008) ("All will agree that § 301(b) is not a model of clarity. . . . [T]hree separate requirements must always be met before § 301(b) can apply . . . .In effect, the 'or' becomes an 'and'.").

The Trial Division correctly found that Renguul died with issue and with a will. Thus the statute cannot apply, and custom fills the gap. *Marsil*, 15 ROP at 36; *Nakamura v. Sablan*, 12 ROP 81, 82 (2005).

CONCLUSION

We hold that the findings of the Trial Division were not clearly erroneous and its legal conclusions were correct. The Trial Division properly awarded the lands known as

Dims, *Dort, and Dort/Bairarang* to the children of Baumert and Bells. Accordingly, we **AFFIRM** the Trial Division's award of land to Appellees.

ESTATE OF ICHIRO DINGILIUS,
represented by Francis Matsutaro,
Appellant,

v.

PELELIU STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 11-005
LC/R 10-0011

Supreme Court, Appellate Division
Republic of Palau

Decided: June 5, 2012

[1] Land Commission/LCHO/Land Court: Appeals

The appellate court reviews findings of fact for clear error. The lower court does not commit clear error when it finds, based on the sufficiency of the evidence, that a landowner did not establish ownership prior to occupation by a foreign power.

Counsel for Appellant: Mariano Carlos

BEFORE: LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; and RICHARD H. BENSON, Part-Time Associate Justice.

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

PER CURIAM:

The Estate of Ichiro Dingilius (the Estate), represented by Francis Matsutaro, appeals the Land Court's January 31, 2011, determination that land located in Peleliu State and identified as Cadastral Lot 003 R 07 (also known as *Draiang* or *Elochel*) is public land owned by the Peleliu State Public Lands Authority (PSPLA). Appellee PSPLA does not oppose this appeal. Nonetheless, we are not persuaded by the Estate's arguments and, accordingly, we affirm the Land Court's Adjudication and Determination.

BACKGROUND

This case focuses on the size of land that the Estate believes Dingilius's father owned before the Japanese government wrongfully seized it in 1935. The claimed land spans two lots in the Tochi Daicho. The Estate maintains that Dingilius's father owned a large parcel of land, which the Japanese government subdivided. A portion of the land was registered to Dingilius's father in the Tochi Daicho and has already been awarded to him. The Japanese government claimed the rest, a high rocky ridge with a strip of flat land, and, accordingly, its ownership was recorded as Japanese-owned once the Tochi Daicho was created in 1938. However, the Estate believes Dingilius is entitled to the entire plot.

In 1988, Dingilius filed a claim to Cadastral Lot 003 R 07, the lot which had been rewarded as Japanese government land in the Tochi Daicho. He wrote on his claim form that, after the Japanese government's acquisition, the land was used for storage and for harvesting trees. He also wrote that the land was acquired through "unfair payment," and he listed the name of a person receiving payment for the land (his father).

On July 6 and 7, 2010, the Land Court held a hearing to determine ownership of Cadastral Lot 003 R 07 (also known as *Draiang*) and several rock islands claimed to be public lands near Peleliu. Dingilius, age 84, testified that the Japanese took away part of his land, without compensation, for phosphate mining in 1935. He explained the land was called *Draiang* because that word means "dryer," and the phosphate was dried in the area after it was mined. The parties and the Land Court conducted a site visit on July 15, 2010.

After considering the briefs, the testimony, and the site visit, the Land Court found that Dingilius failed to prove by sufficient evidence that his father owned Lot 003 R 07. The court concluded that the evidence instead supported the conclusion that the strip of rocky ridge was used for an officers' clubhouse, not for drying phosphate as Dingilius had claimed. "The court believes that [Dingilius]'s father's land that the Japanese used is the land that has already been awarded to him," the court wrote. "There was insufficient proof that his property extended to the ridge that is Lot 003 R 07." It also wrote that the evidence related to the taking of the land "consisted of very general statements that the Japanese took the land without their consent and did not pay for it." The Estate appeals this determination, claiming that the Land Court committed reversible error.

STANDARD OF REVIEW

Factual findings of the lower court are reviewed under the clearly erroneous standard.

Dilubech Clan v. Ngeremlengui State Pub. Lands Auth., 9 ROP 162, 164 (2002). Under this standard, the findings 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 that conclusion. *Id.* Legal conclusions are reviewed *de novo*. *Children of Dirrabong v. Children of Ngirailild*, 10 ROP 150, 151 (2003).

ANALYSIS

The return of public lands is governed by 35 PNC § 1304(b). To succeed, 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 that a previous occupying power took through force, fraud, or without just compensation or adequate consideration.

The Estate's sole argument on appeal is that the Land Court committed reversible error by not awarding Dingilius the land in question. The Estate argues that it has met the requirements for return of public land, and it challenges the Land Court's finding that Dingilius had not established that his father was the original owner of the land.

The court below found that Dingilius failed to prove by sufficient evidence that his father owned Lot 003 R 07. The evidence showed that the land was used for phosphate drying, based on the name, *Draiang*, which comes from the machinery equipment for drying the mined material. However, the court concluded that a visit to the actual site revealed the land was rocky and elevated and did not seem large enough to accommodate a phosphate processing or storage facility. The court found that the flat area was more likely the site of a clubhouse.

What is more, the court did not commit clear error when it found that Dingilius had not established that his father owned the land before the Japanese began to use it. Dingilius was asked whether his father owned the land, and he first answered "yes," then answered "no," then said he was confused, then said that he learned his father owned the land when they collected songai (insurance). He also explained that he was first taken to the land after the war. Finally, he testified that he knew the land belonged to his father "because we were there together."

[1] The court's determination that Dingilius did not own this land is not clearly erroneous: Dingilius's testimony does not establish that his father owned the land, and the evidence about what the land was used for does not show that Dingilius was the original owner. These factual findings are reasonable and supported by the evidence, and thus this Court must affirm. *See Dilubech Clan*, 9 ROP at 164. The Estate has not shown that the land was his, and therefore he has not satisfied the second element for the return of public lands under 35 PNC § 1304(b).

CONCLUSION

The Land Court did not commit clear error in its factual findings, and it properly found that PSPLA is the owner of Cadastral Lot 003 R 07. Accordingly, we **AFFIRM** the Land Court's determination that Cadastral Lot 003 R 07 is public land under PSPLA.

In re Determination of Ownership of Real Property Located in Ulimang County of Ngaraard State, Depicted as Worksheet Lot No. 06E005-028, Formerly Identified as Tochi Daicho Lots 1606 and 1607, Called *Ngerdermang*, Listed Under Ngirakesau,

EMERITA KERRADEL FRANCISCO SUNGINO, ANTIONIO BELLS, Appellants

CIVIL APPEAL NO. 11-027
LC/E 08-08620

Supreme Court, Appellate Division
Republic of Palau

Decided: June 18 , 2012

[1] Appeal and Error: Standard of Review

We review the Land Court's findings of fact for clear error and its conclusions of law de novo.

[2] Land Commission/LCHO/Land Court: Appearance at Hearing

In evaluating a land claim, the "Land Court can, and must, choose among the claimants who appear before it."

[3] Land Commission/LCHO/Land Court: Determinations of Ownership

Failure to comply with statutory requirements, such as those pertaining to notification and monumentation, open the Land Court's determination up to collateral attack.

[4] Land Commission/LCHO/Land Court: Settlement; **Land Commission/LCHO/Land Court:** Determination of Ownership

If all potential claimants to a lot were involved in a settlement agreement and all required statutory procedures were followed, the Land Court is required to issue a determination of ownership in accordance with the agreement.

Counsel for Appellants: Raynold B. Oilouch

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

Appeal from the Land Court, the Honorable GRACE YANO, Part-time Judge, presiding.

PER CURIAM:

Emerita Kerrael, Francisco Sungino, and Antonio Bells appeal the Land Court's rejection of their claim to Worksheet Lot 06E005-028A. Because we determine that Appellants were entitled, by the terms of their settlement agreement and by statute, to the Lot, we reverse and remand.

BACKGROUND

This case concerns a mysterious plot of approximately 39,000 square meters of land in Ngaraard. The mystery is why the land is apparently not accounted for in the Tochi Daicho. On May 1, 2006, the Bureau of Lands and Surveys (BLS) issued a notice designating unmonumented lots in Ulimang

County, Ngaraard State, as land to be surveyed and monumented. Among the fifty-four lots to be surveyed and monumented were Toichi Daicho Lots 1606 and 1607. The period for filing claims for the unmonumented land in Ulimang County ended on July 6, 2006. Among the claimants was Sesario Kerradel (Sesario). Appellant Emerita Kerradel (Emerita) attended the monumentation on behalf of Sesario. Two other individuals, brothers Xavier and Herbert Decherong, attended the monumentation. Each party to the monumentation created a sketch of the claimed land, designated Lots 1606 and 1607, and drew them extending down from Tochi Daicho Lot 1638 to the shore. All of the participants acknowledged the same boundary, and none of the adjacent landowners or other claimants contested the boundary. On January 31, 2007, BLS designated the area monumented Worksheet Lot No. 06E005-028.

Over two years later, after mediation, all of the claimants to Lot 06E005-028 entered into a settlement agreement stating in relevant part:

> Herbert Decherong will get 10,000 square meters as his share . . . . The rest of the said lot will be divided equally among the representatives of claimant #4 (Sesario Kerradel). The representatives are Emerita Kerradel, Francisco Sungino, and Antonio Bells and each of their share will be registered under their name as their individual property.[1]

(footnote added)

Almost two years after the settlement was signed, the case was set for hearing before the Land Court. The hearing was held on April 5, 2011. At the hearing, the parties proffered their settlement. The Land Court indicated that it would issue an order governing the rights of the parties to the settlement. However, later that day, the court issued an order posing several questions to the settling parties and scheduling a second hearing. It noted that Lots 1606 and 1607 "have a combined size of over 39,000 square meters. Meanwhile the Worksheet Lot at issue, 06E005-028, has a size of over 78,000 square meters which is almost double the size of the Tochi Daicho."

Several days before the second hearing, Ngaraard State Public Lands Authority (NSPLA) filed a motion to intervene. The settling parties and counsel for NSPLA attended the second hearing. During the hearing, NSPLA's counsel admitted that he could identify no public lands in the area surrounding Lot 06E055-028, and the Land Court accordingly denied NSPLA's motion to intervene. However, counsel for NSPLA went on to suggest that the disparity in the size of the Worksheet Lot as compared to the Tochi Daicho Lots would intrude on some unidentified public lands. NSPLA did not appeal the Land Court's denial of its motion to intervene .

Emerita testified that the reason the Worksheet Lot was larger than the combined area of the Tochi Daicho Lots was that the "property was near the ocean . . . so it's

[1] The settlement was later amended to include additional members of Herbert Decherong's family and a statement that BLS would survey the land.

probably the sediments that came [and] made it big." Emerita's testimony accorded with that from the Ngaraard Land Registration Officer, Larry Tochi. Tochi testified that the swampy area near the ocean "has become solid." There was no scientific or expert evidence offered to support this claim that approximately 39,000 square meters of land accreted in the area since the Japanese time.

Citing our precedent creating a presumption in favor of the Tochi Daicho's accuracy, the Land Court held that the collective claims of the settling parties could only add up to the amount of land listed in the Tochi Daicho — approximately 39,000 square meters. The court rejected as facially absurd the suggestion that the land area had doubled in size due to accumulation of sediment. Accordingly, it ordered BLS and the settling parties to split Lot 06E005-028 into three pieces. First, BLS was to split the Lot into two based on the Tochi Daicho records. Then, one of the newly created lots was to be divided into a 10,000 square meter parcel for the Decherong brothers with the remainder going to Appellants under the terms of the settlement.

BLS and the settling parties divided the parcel into three new lots. Lot 06E005-028A abuts Tochi Daicho Lot 1638 and is the most-inland lot. Lots 06E005-028B and -028C are along the shoreline. Lot 06E005-028C is 10,000 meters and went to the Decherongs in the Land Court's subsequent Determination of Ownership. Lot 06E005-028B includes 28,648 square meters and was awarded to Appellants. The Land Court did not award ownership of Lot 06E005-028A to anyone.

Appellants timely appealed, contending that the Land Court erred by (1) failing to award Lot 06E005-028A to a claimant before it, and (2) refusing to credit the unrebutted testimony regarding the accretion of land.

STANDARD OF REVIEW

[1] We review the Land Court's findings of fact for clear error and its conclusions of law *de novo*. *Koror State Pub. Lands Auth. v. Idong Lineage*, 17 ROP 82, 83-84 (2010).

ANALYSIS

[2] In evaluating a land claim, the "Land Court can, and must, choose among the claimants who appear before it." *Ngirumerang v. Tellames*, 8 ROP Intrm. 230, 231 (2000); *see also Rusiang Lineage v. Techemang*, 12 ROP 7, 9 (2004). Additionally, 35 PNC § 1304(c) requires that when BLS has issued proper notice, the claims period has ended, monumentation is completed, and the parties agree to a settlement, "the Land Court shall issue a determination of ownership."

[3] However, both *Ngirumerang* and Section 1304(c) assume that proper process has been followed. Failure to comply with statutory requirements, such as those pertaining to notification and monumentation, open the Land Court's determination up to collateral attack. *See West v. Ongalek ra Iyong*, 15 ROP 4, 8 (2007) ("[A] party may only collaterally attack a prior determination of ownership if it can carry the burden of proving non-compliance with statutory or constitutional requirements by clear and convincing evidence.") Thus, it would be

inappropriate to require the Land Court to award a parcel to a party in a proceeding tainted by some procedural or statutory error.

In this case, the Land Court did not identify any such error in reaching its conclusion that no party could be awarded ownership to Lot 06E005-028A. It correctly stated that the Tochi Daicho is afforded a presumption of accuracy. *See Tmetbab Clan v. Koror State Pub. Lands Auth.*, 16 ROP 91, 94 (2008). It further noted the discrepancy between the combined area of Tochi Daicho Lots 1606 and 1607 and the size of the created Worksheet Lot 06E005-028. However, the Land Court failed to explain why this discrepancy warranted rejection of Appellants' claim. Appellants' monumentation included all the land from Tochi Daicho Lot 1638 to the shoreline, as depicted by the map drawn on their monumentation record. Although the size of this area (which would become Lot 06E005-028) does not match up with the Tochi Daicho Lots, no party to this appeal or to the case below has objected to Appellants' claim to the entire area. Thus, there was no need for Appellants to disprove the Tochi Daicho's accuracy in order to prevail on their claim.

We do not suggest that the size of a Tochi Daicho lot is irrelevant to the adjudication of a claim. Often, discrepancies of size, location, or designation of a lot will impede the process of notification and monumentation. In such cases, agreements by the parties may be rejected in order to protect the interests of potential claimants who may not have received notice. In this case, however, all statutory requirements were met and all potential interested parties were notified. The notification of impending monumentation listed fifty-four Tochi Daicho Lots in the vicinity of Lots 1606 and 1607. The notification further gave the common names of the land to be monumented. Nowhere in the record before us is there a suggestion that this was insufficient to put potential claimants to Lot 06E005-028A on notice to file their claims and attend the monumentation. Further, all parties involved in the monumentation and all claimants to Lot 06E005-028 concurred in the placement of markers delineating that lot. Finally, there is nothing in the record to support NSPLA's contention below that Appellants' claim encroaches on public lands. NSPLA has already admitted there is no public land in the area.

[4] Based on the record before us, it appears that all potential claimants to Lot 06E005-028 were involved in the settlement agreement and all statutory procedures were followed. Thus, the Land Court was required to issue a determination of ownership in accordance with the agreement. 13 PNC § 1304(c); *see also Ngirumerang*, 8 ROP Intrm. at 231; *Rusiang Lineage*, 12 ROP at 9.

Because we conclude that the court erred in its application of the law, we need not reach Appellants' second argument that the Land Court made a factual error. Therefore, we do not consider whether the court was obliged to accept uncontradicted testimony regarding the alleged accretion of 39,000 square meters of land.

CONCLUSION

For the foregoing reasons, we **REVERSE** the determination of the Land Court as to Lot 06E005-028A and **REMAND**

for proceedings consistent with this opinion, which requires accepting and enforcing the settlement agreement among the parties.

In the Matter of the Ownership of Land Identified as Lot No. 2006 B 12-002 on Bureau of Lands and Surveys Worksheet No. 2005 B 07, and located in Medalaii Hamlet, Koror State

JOHN T. SUGIYAMA
Appellant

CIVIL APPEAL NOS. 11-026, 11-037 & 11-043
LC/B 09-0129

Supreme Court, Appellate Division
Republic of Palau

Decided: June 21, 2012

[1] Land Commission/LCHO/Land Court: Jurisdiction

The Land Court has jurisdiction to entertain motions for post-judgment relief even when an appeal of an earlier order is pending before the Appellate Division.

[2] Appeal and Error: Jurisdiction

The Appellate Division has jurisdiction to review the Land Court's denial of a motion for post-judgment relief independently of an appeal targeting the merits of a judgment in the court below.

[3] Appeal and Error: Procedure

An appellant seeking to file a supplemental opening brief must request leave from the Appellate Division.

[4] Land Commission/LCHO/Land Court: Reconsideration

In certain circumstances, the Land Court has discretion to grant or deny post-judgment motions to vacate.

[5] Land Commission/LCHO/Land Court: Reconsideration

Typically, the only remedy provided to parties aggrieved by a Land Court's determination of ownership is to appeal that determination directly to the Appellate Division of the Supreme Court. Nevertheless, the Land Court has inherent discretion to correct its own decisions in certain extraordinary circumstances.

[6] Land Commission/LCHO/Land Court: Reconsideration

Specifically, the Land Court may correct a 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 a fact, a party's position, or the controlling law.

[7] Land Commission/LCHO/Land Court: Reconsideration

Requests for post-determination relief based on new arguments or supporting facts that were available at the time of the original briefing and argument cannot be granted. As such, the threshold of proof demonstrating error required to obtain post-determination relief before the Land Court is exceedingly high.

[8] Return fo Public Lands: Burden of Proof

At all times, the burden of proof remains on the claimants, not the governmental land authority, to establish, by a preponderance of the evidence, that they satisfy all the requirements of the statute. A claimant meets his preponderance of the evidence burden when the [court] is satisfied that the fact is more likely true than not true. If the claimant fails to convince the court that all requisite elements of his claim are more likely true than not true, then the court cannot rule in his favor.

[9] Return of Public Lands: Return of Public Lands

In a case where a claimant seeks the return of public land, the land authority will prevail if the claimant cannot overcome his burden, regardless of whether the land authority presses its claim before the court.

[10] Land Commission/LCHO/Land Court: Credibility

When evaluating evidence, the Land Court is best situated to make credibility determinations.

[11] Evidence: Credibility

The court is not required to find uncontroverted testimony credible if the court does not trust its veracity.

[12] Land Commission/LCHO/Land Court: Reconsideration

Because the court has broad discretion to evaluate witness credibility, to weigh all the evidence submitted in a case, and to grant or deny a motion for post-determination relief, it cannot be an abuse of discretion to deny a motion for post-judgment relief on the basis that the movant failed to overcome his evidentiary burden, provided that the court diligently weighed all properly submitted evidence. This is true even when all of the available evidence is uncontroverted.

Counsel for Appellant: Roy Chikamoto

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

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

PER CURIAM:

John Sugiyama appeals the Land Court's denial of three motions to vacate a Determination of Ownership in which the Land Court held that Sugiyama failed to establish that he owned certain land. Sugiyama argues that the Land Court incorrectly evaluated the evidence in its original decision, applied an inappropriately onerous burden of proof in its original decision, and abused its discretion when it denied his subsequent motions to vacate. We affirm the decisions of the Land Court.[1]

BACKGROUND

In the underlying dispute, Sugiyama claimed that he was the rightful owner of land identified on Bureau of Lands and Surveys Worksheet 2005 B 07 as Worksheet Lot No. 2006 B 12-002 (Parcel). He argued that the Parcel was originally owned by Ibai Lineage, and that a Japanese man named Yamaguchi bought the Parcel from Ibai Lineage. Yamaguchi, in turn, allegedly sold the Parcel to Sugiyama's parents just prior to the Second World War, after which either the Japanese or the Americans claimed the Parcel as public land. Thus, Sugiyama argued that he was entitled to the return of the Parcel. In support of his argument, Sugiyama testified at the Land Court hearing and submitted a sketch of the land he claimed. He did not, however, submit any other documentation of ownership. No other private claimant submitted evidence regarding ownership of the Parcel, and only Koror State Public Lands Authority (KSPLA) filed a competing claim to the land.

On October 29, 2011, the Land Court issued a Determination of Ownership, in which it held that Sugiyama failed to establish by a preponderance of the evidence that he was the rightful owner of the Parcel. Instead, the Land Court awarded the Parcel to KSPLA. The court reasoned that if Sugiyama's narrative were correct, the Tochi Daicho would likely reflect Yamaguchi's alleged ownership of the Parcel during the Japanese administration, but the Tochi Daicho did not reflect such ownership. Moreover, Sugiyama submitted no documentation of any transaction between Yamaguchi and his parents. In light of the fact that Sugiyama's

[1] Pursuant to ROP Rule of Appellate Procedure 34(a), we find this case appropriate for submission without oral argument.

father was a paralegal and likely would have understood the need to document a transaction for the purchase of land, the court wrote that Sugiyama's dearth of corroborating evidence was troubling. Although no other private party claimed an interest in the Parcel, the court held that Sugiyama failed to provide a sufficient quantum of evidence proving that his parents owned the Parcel before it became public land.

Sugiyama's claim to the Parcel was not the only ownership dispute before the Land Court in the case below. The Land Court's Determination of Ownership also addressed claims by Ngarngedchibel and Idid Clan to land located near Sugiyama's alleged Parcel. After the Land Court issued its decision, both Ngarngedchibel and Idid Clan filed appeals within the time allotted to do so. Sugiyama, however, did not. Rather, he waited nearly four months before filing a "Motion to Vacate" the Determination of Ownership with the Land Court on February 17, 2011 (First Motion to Vacate).

Sugiyama's First Motion to Vacate raised four arguments. He claimed: (1) that the court erred because it did not take judicial notice of the fact that his claim had been specifically excluded from the Ibai Lineage land claim; (2) that none of the Tochi Daicho descriptions relied upon by the court described Sugiyama's alleged Parcel; (3) that the Parcel could not have been awarded to KSPLA because KSPLA's claim excluded the Parcel; and (4) that, because no other party presented "adverse evidence" to Sugiyama's claim, he presented sufficient proof to prevail. Sugiyama also attached an affidavit to the First Motion to Vacate from Yoshie Shishido, a senior member of Sugiyama's family, in which Shishido suggested that the court should rule in favor of Sugiyama.

The Land Court summarily denied the First Motion to Vacate. With respect to Sugiyama's first argument, the court held that even if it erred in failing to take judicial notice of the fact that Sugiyama's claimed Parcel was specifically excluded from the Ibai Lineage land claim, the decision did not rely on the Ibai Lineage claim, so the outcome would have been the same. Sugiyama's second, third, and fourth arguments also failed because, as the court noted, they were essentially disagreements over the Land Court's evaluation of the evidence, a complaint not properly addressed in a post-judgment motion for relief. As for the Shishido affidavit, the court refused to consider it because it was not presented at trial. Ultimately, the Land Court simply was not persuaded that any of Sugiyama's arguments would have changed its determination that Sugiyama failed to meet his burden to establish ownership. In response, Sugiyama filed a timely notice of appeal of the Land Court's denial of his First Motion to Vacate. That notice of appeal spawned Civil Appeal Number 11-026.

Nevertheless, Sugiyama was not finished with the Land Court. Despite the fact that his first appeal was pending before the Appellate Division, Sugiyama filed another motion to vacate with the Land Court on August 29, 2011 (Second Motion to Vacate). This time, Sugiyama attempted to submit new evidence allegedly proving (1) the existence of Yamaguchi, the man from whom Sugiyama claimed his parents purchased the Parcel, and (2) that his father's business was located in Koror Town. He also rehashed many of his

earlier arguments with which the court had already dispensed. On September 14, 2011, the Land Court denied his Second Motion to Vacate, holding once again that the newly discovered evidence would not have changed the outcome of the case. Sugiyama appealed the denial of his Second Motion to Vacate, thus generating Civil Appeal Number 11-037.

With two appeals pending, Sugiyama took one final shot at the Land Court. On November 1, 2011, Sugiyama filed a third motion to vacate the Determination of Ownership (Third Motion to Vacate). He argued that, when the Land Court denied his Second Motion to Vacate, the court was mistaken in its failure to acknowledge Yamaguchi's existence in the face of documentary evidence proving that Yamaguchi did, in fact, exist. The problem, however, was that the court's denial of the Second Motion to Vacate was based not on a disbelief of Yamaguchi's existence, but rather on the conclusion that even if Yamaguchi did exist, Sugiyama still failed to overcome his burden. Accordingly, the Land Court denied Sugiyama's Third Motion to Vacate on November 2, 2011, and he promptly appealed that denial as well. The result was Civil Appeal Number 11-043. Later, we granted Sugiyama's motion to consolidate all three appeals so we could address them together.

Across all three appeals, Sugiyama raises two primary arguments. First, he claims that the Land Court applied a burden of proof more onerous than the "preponderance of the evidence" standard because the court refused to award him the Parcel without documentary evidence corroborating his story. Second, Sugiyama quarrels with the Land Court's evaluation of the evidence. For both those reasons, Sugiyama argues that the Land Court abused its discretion when it denied all three of his motions to vacate.

PROCEDURAL POSTURE

As a predicate matter, this case presents a number of procedural irregularities that warrant specific discussion. Fidelity to our Rules of Appellate Procedure is necessary for the efficient administration of our Court. Sugiyama's counsel's abject failure to adhere to them is cause for sanction.

Sugiyama's first error was that he failed in all three of his appeals to specify the party against whom his appeals were filed. *See* ROP R. App. P. 3(c). Because KSPLA was awarded ownership of the Parcel Sugiyama claims, Sugiyama should have named KSPLA as Appellee and served it with his notices of appeal and attendant briefs. *See* ROP R. App. P. 3(d). "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Appellate Division deems appropriate, which may include dismissal of the appeal." ROP R. App. P. 3(a). In this case, we exercise our discretion to entertain Sugiyama's appeals despite his error.

[1, 2] Second, after failing to appeal the original Determination of Ownership—a step which would have allowed Sugiyama to seek direct review of the Land Court's decision—he chose to appeal the lower court's denial of three successive motions for post-judgment relief, the last two of which Sugiyama pursued after his first appeal was already pending. Technically, this practice is permitted. The Land Court has jurisdiction to

entertain motions for post-judgment relief even when an appeal of an earlier order is pending before the Appellate Division. *Tmetuchl v. Ngerketiit Lineage*, 6 ROP Intrm. 29, 30 (1996) (discussing the Trial Division's jurisdiction to rule upon a post-appeal motion to vacate judgment under ROP R. Civ. P. 60(b)). This is true even though the Land Court is not subject to the Rules of Civil Procedure.[2] *See* 35 PNC § 1318; L.C. Reg. 1-2. In turn, we have jurisdiction to review the Land Court's denial of a motion for post-judgment relief independently of an appeal targeting the merits of a judgment in the court below. *See* 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3916 (discussing appellate jurisdiction under American federal rules of appellate and civil procedure directly analogous to our civil and appellate rules). While technically proper, Sugiyama's successive appeals are nevertheless troubling insofar as they cause Sugiyama to incur additional expense while raising no new arguments. His successive appeals do not advance his cause.[3]

Third, Sugiyama filed a "Designation of Partial Transcript as Part of Record on Appeal" on August 29, 2011, without following the procedure required for obtaining and filing a transcript set forth in Rules of Appellate Procedure 10(b) and (c). He was able to do so because he allegedly obtained a copy of a transcript of the proceedings below from other parties who separately appealed the Land Court's original Determination of Ownership. This is improper, and it subverts our capacity to verify the authenticity of the transcript.

[3] Finally, Sugiyama attempted to file a "Supplemental Opening Brief" in his first appeal, Civil Appeal 11-026. He did so without seeking permission to file additional briefing. Appellate Procedure Rule 28 constrains appellants to one opening brief filed within a specific time period. An appellant may also file a reply brief to answer arguments raised in the appellee's response brief, ROP R. App. P. 28(b), but because Sugiyama failed to name KSPLA as appellee, KSPLA never filed a responsive brief to which Sugiyama could have replied. We will not foreclose the possibility of an appellant filing a supplemental opening brief in all cases, but an appellant seeking to do so must request leave from this court, which we may or may not grant in our discretion.

In light of Sugiyama's counsel's repeated disregard for our Rules of Appellate Procedure, we find that we must sanction him to deter such conduct in the future. *See, e.g.*, *KSPLA v. Diberdii Lineage*, 3 ROP Intrm. 77, 80, 82 (1992) (sanctioning counsel $500.00 for failing to "conduct basic legal research,"

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[2] The Land Court's inherent authority to correct its own mistakes—and thus to entertain motions for post-judgment relief in certain, limited circumstances—is likely less expansive than the Trial Division's authority to reconsider a decision under Rule of Civil Procedure 60(b). *Masang v. Ngerkesouaol Hamlet*, 13 ROP 51, 53 & 53 n.2 (2006).

[3] [A]ppeals challenging the factual determinations of the Land Court . . . are extraordinarily unsuccessful," *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007), in part because we must apply a deferential "clear error" standard of review. As discussed below, the procedural posture of this case requires us to apply a standard of review even more deferential to the Land Court than "clear error," thus making success even more unlikely.

and discussing an earlier order in which counsel was sanctioned $500.00 for failing to "research the appellate rules"); *ROP v. Singeo*, 1 ROP Intrm. 428A, 428D (1987) (sanctioning counsel $500.00 pursuant to the Court's "inherent power to discipline attorneys" for failing to adhere to the Rules of Appellate Procedure). In this case, Sugiyama's counsel, Roy Chikamoto, will be sanctioned $300.00, payable to the Clerk of Courts within fourteen days of the date of this Opinion.

STANDARD OF REVIEW

[4] In certain circumstances, the Land Court has discretion to grant or deny post-judgment motions to vacate. *Shmull v. Ngirirs Clan*, 11 ROP 198, 202 (2004). We review discretionary decisions by the court below for abuse of that discretion.[4] *W. Caroline Trading Co. v. Leonard*, 16 ROP 110, 113 (2009). "Under this standard, a trial court's decision will not be overturned unless it was arbitrary, capricious, or manifestly unreasonable, or because it stemmed from improper motive." *Id.* (internal quotation omitted).

ANALYSIS

Both of Sugiyama's arguments on appeal attack the Land Court's evaluation of the evidence. He submits that the Land Court required a burden of proof more onerous than the preponderance of the evidence standard, and that it relied too heavily on certain assumptions while simultaneously failing to credit other facts that Sugiyama finds persuasive. In essence, he cannot conceive how the Land Court could have denied his motions for post-determination relief when no other claimant, including KSPLA, presented evidence contradicting his claim.

[5-7] Typically, "the only remedy provided to parties aggrieved by a Land Court's determination of ownership is to appeal that determination directly to the Appellate Division of the Supreme Court." *Shmull*, 11 ROP at 201 (citing 35 PNC § 1312 and L.C. Reg. 16). Nevertheless, the Land Court has inherent discretion to correct its own decisions in certain extraordinary circumstances. *Id.* at 202 & 202 n.3; *see also Masang*, 13 ROP at 53. Specifically, the Land Court may correct a 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 a fact, a party's position, or the controlling law." *Shmull*, 11 ROP at 202. Requests for post-determination relief based on new arguments or supporting facts that were available at the time of the original briefing and argument cannot be granted. *Id.* at 202 n.2. As such, the threshold of proof demonstrating error required to obtain post-determination relief before the Land Court is exceedingly high.

[8-9] A claimant seeking the return of public land must show, *inter alia*, "that prior to the acquisition [by previous occupying powers] the land was owned by the [claimant] or

[4] Sugiyama did not appeal the original Determination of Ownership. If he had, we would have reviewed the Land Court's factual findings for clear error. Because he appealed only the Land Court's denials of his motions to vacate, we review only the orders that denied those motions. And because the Land Court has discretion to deny motions to vacate, we review such denials only for an abuse of that discretion. As such, we do not engage in a clear error analysis of the Land Court's factual findings.

[claimants] or that the [claimant] or [claimants] are the proper heirs to the land." 35 PNC § 1304(b)(2). "At all times, the burden of proof remains on the claimants, not the governmental land authority, to establish, by a preponderance of the evidence, that they satisfy all the requirements of the statute." *Palau Pub. Land Auth. v. Ngiratrang*, 13 ROP 90, 93-94 (2006). A claimant meets his preponderance of the evidence burden "when the [court] is satisfied that the fact is more likely true than not true." 29 Am. Jur. 2d Evidence § 173 (2d ed. 2008). If the claimant fails to convince the court that all requisite elements of his claim are more likely true than not true, then the court cannot rule in his favor. *See id.* In a case where a claimant seeks the return of public land, the land authority will prevail if the claimant cannot overcome his burden, regardless of whether the land authority presses its claim before the court. *Masang v. Ngirmang*, 9 ROP 215, 216-17 (2002).

[10-12] When evaluating evidence, the Land Court is "best situated to make credibility determinations." *Kotaro v. Ngotel*, 16 ROP 120, 123 (2009) (quotation omitted). The court is not required to find uncontroverted testimony credible if the court does not trust its veracity. *Ngetelkou Lineage v. Orakiblai Clan*, 17 ROP 88, 92 (2010). Because the court has broad discretion to evaluate witness credibility, to weigh all the evidence submitted in a case, and to grant or deny a motion for post-determination relief, it cannot be an abuse of discretion to deny a motion for post-judgment relief on the basis that the movant failed to overcome his evidentiary burden, provided that the court diligently weighed all properly submitted evidence. This is true even when all of the available evidence is uncontroverted.

In this case, the Land Court considered every piece of evidence properly submitted by Sugiyama. At each turn—in the court's findings of fact and in each of its denials of Sugiyama's motions to vacate—the court explained its interpretation of the evidence that Sugiyama submitted, including the evidence he submitted after the Determination of Ownership was issued. And every time, the result was that the court did not find Sugiyama's narrative credible, and that Sugiyama failed to establish by a preponderance of the evidence that he was entitled to the return of the Parcel. The result was the same even when the court considered Sugiyama's newly submitted evidence because the court concluded that the new evidence would not change the outcome.

Moreover, in contrast to Sugiyama's assertion on appeal, the Land Court did not apply an improper evidentiary burden, and it did not imply that claimants before the Land Court must have documentation supporting their claim to prevail. Rather, even a cursory reading of the court's orders reveals that the court, based on a totality of the evidence, simply did not find Sugiyama's story plausible. His failure to produce documentary evidence was only one factor among many that led the court to its conclusion.

The record below is devoid of any glaring factual or legal inaccuracies that would render the court's denial of Sugiyama's motions to vacate an abuse of discretion. Given the procedural posture of this case and the deference we afford the court's decision, our analysis need not delve any further.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the decisions of the Land Court. Furthermore, Roy Chikamoto is hereby **ORDERED** to pay $300.00 to the Clerk of Court within fourteen days of the date of this Opinion. Mr. Chikamoto must pay the sanction from his personal funds, and he is not permitted to pass the sanction onto his client.

MODESTO PETRUS,
Appellant,

v.

ABEL SUZUKY,
Appellee.

CIVIL APPEAL NO. 12-002
Civil Action No. 09-050

Supreme Court, Appellate Division
Republic of Palau

Decided: June 21, 2012

[1] Appeal and Error: Frivolous Appeal

Raising arguments we have already addressed is frivolous and could warrant sanctions. An appeal is frivolous if the result is obvious, or the arguments are wholly without merit.

[2] Appeal and Error: Mootness

The Appellate Division does not address moot issues.

Counsel for Appellant: Mariano Carlos
Counsel for Appellee: Pro se

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

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

PER CURIAM:

This is an appeal from the Land Court of a Determination of Ownership of land known as *Ngedengir*, located in Ngerkebesang in Koror State. The land at issue is described as Cadastral Lot No. 028 A 10, located on Cadastral Plat No. 028 A 00.

BACKGROUND

The Determination of Ownership was issued following extensive litigation in the Trial Division (Civil Action No. 09-050), and the Appellate Division (Civil Appeal No. 10-004). The Appellate Division remanded the case to the Trial Division, and the court issued a judgment on October 27, 2010, in favor of Suzuky as the owner of "that portion of Cadastral Lot No. 028 A 10, which he occupies." Petrus appealed, and we affirmed on November 23, 2011, in Civil Appeal 10-044. Petrus also filed a petition for rehearing, which we denied on April 12, 2012, but remanded with instructions to the Trial Division to determine the boundary of the land Suzuky occupies under the doctrine of adverse possession.

This appeal concerns the Land Court's Determination of Ownership, issued by Judge Skebong, following adjudication in the Trial Division by Justice Salii (Civil Action No. 09-050). On December 22, 2011, the Land Court issued Determination of Ownership No. 12-796, pursuant to the judgment of the Trial Division in Civil Action No. 09-050. The Land Court awarded Lot No. 028 A 10 on Cadastral Plat 028 A 00 to Suzuky. On January 11, 2012, Petrus filed a timely notice of appeal with the Appellate Division. Suzuky, who is appearing pro se, filed a brief "statement of the case" in opposition, and Petrus then filed a reply brief.

STANDARD OF REVIEW

A lower court's factual finding 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. *Dmiu Clan v. Edaruchei Clan*, 17 ROP 134, 136 (2010). We review a lower court's legal conclusions *de novo*. *Nakamura v. Uchelbang Clan*, 15 ROP 55, 57 (2008).

ANALYSIS

Petrus presents a number of arguments, many of which he raised in his earlier appeal. For instance, he argues that Suzuky is not entitled to any portion of the land because he did not meet the requirements of adverse possession. He also presents a number of reasons supporting his view that the Appellate Division should review the Trial Division's decision in Civil Action No. 09-050. These arguments are improper and without merit, as we have already determined in Civil Appeal No. 10-044 that Suzuky is entitled to some portion of Lot No. 028 A 10. We also opined on Suzuky's rightful ownership in the opinion on the petition for rehearing.

[1] Raising arguments we have already addressed is frivolous and could warrant sanctions. Palau's Rule of Appellate Procedure 38 provides that if the Appellate Division determines an appeal is frivolous, it may award "just" damages, including attorney's fees. Courts in the United States have interpreted the analogue to this rule,

United States Federal Rule of Appellate Procedure 38, to mean that "[a]n appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit." *Wilcox v. Comm'r of Internal Revenue*, 848 F.2d 1007, 1009 (9th Cir. 1988).

Here, the result of this appeal is obvious; the arguments concerning adverse possession are not persuasive, as we concluded in Civil Appeal No. 10-044. However, as discussed below, because the only issue properly before this court is whether the Determination of Ownership is correct, we find that not all of Petrus's arguments are frivolous. Therefore, we will not issue sanctions at this time, but we advise Petrus that we will be highly inclined to do so should he attempt again to bring arguments before this court that we have already decided.

The only argument properly before us in this appeal of the Determination of Ownership is whether the Land Court erred in the scope of its award. Petrus argues that it is "very bad that the trial court erroneously gave away part of Modesto's land, but it is worse when the Land Court thereafter gave the entire land away." Petrus believes the Land Court erred in its Determination of Ownership, and he seeks to retain that portion of the disputed land that he rightfully owns. We have already addressed this issue in our order denying Petrus's petition for rehearing in Civil Appeal No. 10-044.

[2] The Appellate Division does not address moot issues. *Pac. Sav. Bank v. Llecholch*, 15 ROP 124, 126 (2008). "A case is 'moot' when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* (quotation omitted). We addressed the relief Petrus seeks in our April 12, 2012, order on the petition for rehearing in Civil Appeal No. 10-044 by remanding to the Trial Division for a boundary determination.

We note that because we remanded with specific instructions, "those instructions are not subject to interpretation and must be followed exactly to ensure that the lower court's decision is in accord with the appellate court"; in other words, "a lower court must strictly comply with the appellate court's mandate on remand." *Tengoll v. Tbang Clan*, 11 ROP 61, 64 (2004). What is more, we have held before that "[a] mandate brings the proceedings in a case on appeal to a close and returns jurisdiction to the lower court, but the lower court is vested with jurisdiction only to the extent conferred by the dictates of the appellate court's mandate." *Id.* We emphasize that the scope of the Trial Division's determination will be restricted only to the size of the land owned by Suzuky, and nothing more.

CONCLUSION

In light of the foregoing, this appeal is **DISMISSED**.

NGETECHEDONG CLAN and OTEOT LINEAGE,
Appellants,

v.

DONALD HARUO,
Appellee.

CIVIL APPEAL NOS. 11-008 & 11-009
Case No. LC/B 10-0018

Supreme Court, Appellate Division
Republic of Palau

Decided: June 21, 2012

[1] Land Commission/LCHO/Land Court: Mediation

Despite the substantial degree of discretion codified in the statute, the timing of a party's intervention in a dispute is not grounds for bypassing mediation.

[2] Appeal and Error: Preserving Issues

Arguments not raised in the court below are waived and cannot be argued for the first time on appeal.

[3] Appeal and Error: Harmless Error

The Appellate Division will not reverse a lower court decision due to an error where that error is harmless.

[4] Appeal and Error: Harmless Error

Harmless errors are those that do not affect the substantial rights of a party and that do not prejudice a particular party's case.

Counsel for Appellants: J. Uduch Sengebau Senior
Counsel for Appellee: Oldiais Ngiraikelau

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

Appeal from the Land Court, the Honorable Ronald Rdechor, Associate Judge, presiding.

PER CURIAM:

Appellants Ngetechedong Clan and Oteot Lineage charge that the Land Court failed to follow compulsory procedural rules before it awarded disputed land to Appellee Donald Haruo in its February 21, 2011, ruling. Chiefly, Appellants argue that the Land Court failed to direct all competing claims to mediation before adjudication, and failed to join all known claimants to this action before issuing its decision. We affirm the Land Court's decision.[1]

BACKGROUND

The genesis of this dispute lies in overlapping Tochi Daicho lots. In 2005, pursuant to a public notice posted by the Bureau of Lands and Surveys (BLS), Haruo claimed and monumented Tochi Daicho Lots 1123, 1124, and 1130. These Tochi Daicho lots were monumented as Worksheet Lots 05B002-028, 05B002-029, 05B002-029A,

[1] Pursuant to ROP Rule of Appellate Procedure 34(a), we find this case appropriate for submission without oral argument.

05B002-030, 05B002-129, and 05B002-136.[2] In 2007, in litigation concerning Tochi Daicho Lot 1133 to which Haruo was not a party, then-Senior Land Court Judge J. Uduch Sengebau Senior issued a determination of ownership awarding Lots -129 and -136 to Hatsuichi Ngirchomlei and Ngeribkal Clan, respectively. One month later, Haruo learned of Senior Judge Senior's determination and filed a motion to set it aside based upon his earlier monumentations. Senior Judge Senior granted the motion, after which the case was reassigned first to Judge Ingereklii and then to Judge Rdechor.

In early 2010, the Land Court set forth to discover and untangle the competing interests. Because this litigation began as an action regarding Tochi Daicho Lot 1133—and not Tochi Daicho Lots 1123, 1124, and 1130—the Land Court was concerned that some interested parties had not been properly notified of the ongoing litigation. Indeed, as discussed below, neither Appellant was aware of the case at that point. In turn, on February 12, 2010, the Land Court ordered BLS to perform several tasks: (1) determine whether it had provided public notice of monumentation to Tochi Daicho Lots 1123, 1124, and 1130 and, if so, determine whether Haruo was the only claimant; (2) transmit any other claims to those lots, if they existed, to the Land Court; and (3) if those lots were not previously subjected to the notice and monumentation process, issue public notice and receive claims for those lots in accordance with statutory requirements.

On April 21, 2010, at a status conference, BLS represented that no other individuals or groups claimed Tochi Daicho Lots 1123, 1124, and 1130, and that Haruo's claims were uncontested. Shortly thereafter, however, BLS notified the Land Court that, despite its earlier representations, there was in fact at least one other claim that BLS had located in its office. Consequently, the Land Court published notice of a new hearing to be held in May 2010. Either via BLS or the Land Court's efforts, both Appellants eventually received notice of this litigation, though they had not previously engaged in it.

On May 27, 2010, the Land Court held a full hearing at which representatives of both Appellants appeared and testified to competing claims. This was the first time Appellants intervened, and they were not able to articulate precisely the borders of the lands they claimed. Accordingly, the Land Court adjourned the hearing and ordered BLS to provide further clarification. On June 7, 2010, BLS submitted a report to the Land Court indicating that Ngetechedong Clan, relying on Tochi Daicho Lot 1120, had properly claimed Worksheet Lot 028, while Oteot Lineage, relying on Tochi Daicho Lot 1125, had properly claimed Lots 129 and 136. Notably, while both Appellants were claiming worksheet lots originally claimed by Haruo, they were doing so by relying upon different Tochi Daicho lots. The confusion resulted from overlapping Tochi Daicho lots and disputed borders.

Three days later, with BLS's clarification in hand, the Land Court resumed

[2] Where possible, for the remainder of this Opinion, the Court will refer to the land in question by the last three digits of its Worksheet Lot Number. Appellants' claims are confined to Lots -028, -129 and -136. Ownership of Lots -029, -029A, and -030 is uncontested.

its hearing. Bernarda Usibata and Eugene Uehara testified on behalf of Ngetechedong Clan, and Christiana Joseph testified for Oteot Lineage. Before the hearing adjourned, the Land Court noted that while this litigation concerned Tochi Daicho Lots 1123, 1124, and 1130, Appellants' claims were staked in Tochi Daicho Lots 1120 and 1125. Those two lots, however, were also claimed by other individuals not before the court, and the Land Court discussed the possibility of joining them in the dispute and shepherding their claims through mediation. The Land Court then set a status conference to determine the nature of the additional claims to Tochi Daicho Lots 1120 and 1125 and whether they needed to be heard before deciding this case. Shortly after the hearing, BLS notified the Land Court of three additional claims to Tochi Daicho Lots 1125 and 1130.

In late October 2010, all outstanding issues preventing the Land Court from issuing a decision on the merits dissolved. The unrepresented claims to Tochi Daicho Lots 1125 and 1130 were withdrawn, and the Land Court found that Basilia Adelbai's claim on behalf of Oteot Lineage for Tochi Daicho Lot 1125 duplicated the efforts of others on behalf of Oteot Lineage and did not require the submission of additional evidence. Moreover, because the litigation was confined to Tochi Daicho Lots 1123, 1124, and 1130, the Land Court determined that it did not need to entertain all other claimants to Tochi Daicho Lot 1120.[3] On February 21, 2011, the Land Court issued its determination and awarded all six worksheet lots to Haruo, finding that his purchase of the three contested lots, Worksheet Lots -028, -129, and -136, from their prior owner was uncontested, and that his unchallenged construction of a hotel on the land was consistent with ownership in fee simple. The court found that Appellants' failure to object to Haruo's construction on land they allegedly owned was significant and, moreover, neither Appellant properly monumented its claim.

Ngetechedong Clan and Oteot Lineage appealed. They argue that the Land Court (1) deprived them of an opportunity to engage in mandatory mediation as required by law; (2) incorrectly assumed that certain claims of Oteot Lineage had been previously dismissed; (3) prematurely issued its decision before other alleged claimants had an opportunity to participate in the proceedings; and (4) improperly reprimanded Appellants, thereby depriving them of an opportunity to present their full case.

STANDARD OF REVIEW

We review findings of fact from the Land Court for clear error. *Tesei v. Belechal*, 7 ROP Intrm. 89, 89-90 (1998). Legal conclusions, including those regarding due process requirements, are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

Appellants' primary argument is that the Land Court denied them a measure of due process when it failed to require the parties to engage in mediation before adjudicating the

[3] Rather, the Land Court adjudicated only Ngetechedong Clan's claim to Tochi Daicho Lot 1120 to the extent it may have included land mapped as Worksheet Lot -028. Thus, in the words of the Land Court, "this matter does not include Tochi Daichio [sic] Lot 1120."

case on its merits. Section 1308(a) of Palau National Code Title 35 was amended in 2008 to provide:

> The Land Court shall, for all claims in which there remains a dispute regarding title or boundaries after the monumentation, schedule a mediation session within 25 days of receiving the file from the Bureau [of Lands and Surveys]. However, where there is reason to believe that claims may not likely be resolved at mediation or where mediation is apparently unnecessary, the Land Court may bypass mediation and schedule a hearing for disputed cases or enter a determination of ownership for undisputed cases.

35 PNC § 1308(a) (as amended by RPPL 7-54 (2008)).

Because Appellants intervened in this case well after it was initiated, the procedural posture did not allow for efficient mediation, and Appellants are correct that the Land Court failed to schedule a mediation session as required by law. This did not escape the Land Court's attention. Indeed, at the close of testimony, the Land Court remarked:

> We've heard Donald Haruo's claim and have heard Benarda Usibata's claim and Oteot [L]ineage's claim. I am a little sad for this case because due to the fault of the work of the Bureau of Land[s] and Surveys, Benarda's claim and Oteot [L]ineage's claims were not sent with Donald Haruo's claim to the Court. So during mediation there were no discussions, you did not have an opportunity, the [three] parties, to talk during mediation. . . . That is why your claims bypassed mediation and you are now before the Court. Now they have been heard, . . . it's time for closing arguments . . . .

[1] Thus, Appellants were not given the opportunity to mediate their disputes. Moreover, the Land Court's decision to forgo mediation was not based on a determination that the "claims may not likely be resolved at mediation or where mediation is apparently unnecessary." *See* 35 PNC § 1308(a) (as amended by RPPL 7-54). Rather, the decision was based on the fact that Appellants intervened after the preliminary stages of litigation in which mediation would have occurred. Despite the substantial degree of discretion codified in the statute, the timing of a party's intervention in a dispute is not grounds for bypassing mediation. As such, this was error.

[2-4] Nevertheless, Appellants' mandatory mediation argument fails for two reasons. First, they did not raise it in the Land Court. Arguments not raised in the court below are waived and cannot be argued for the first time on appeal. *Children of Merep v. Youlbeluu Lineage*, 12 ROP 25, 27 (2004); *Tulop v. Palau Election Comm'n*, 12 ROP 100, 106 (2005). Absent extraordinary circumstances

not present in this case, appellants cannot prevail on an argument not addressed first by the Land Court. *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998). Second, Appellants' argument fails because the Land Court's error was harmless. "The Appellate Division will not reverse a lower court decision due to an error where that error is harmless." *Ngiraiwet v. Telungalek Ra Emadaob*, 16 ROP 163, 165 (2009). Harmless errors are those that do not affect the substantial rights of a party and that do not prejudice a particular party's case. *Id.* Here, Appellants were given the opportunity to work with BLS to untangle their competing claims. They were also accorded notice and a full hearing before the Land Court at which they were able to present witnesses, cross-examine adverse witnesses, and submit closing arguments. With Appellants' due process rights sufficiently vindicated, the extra step of preliminary mediation would not have provided any additional protection to Appellants' interests. Appellants, therefore, suffered no prejudice at the hands of the Land Court.

Appellants' second argument is that the Land Court erred when it ruled that Imetuker Towai, a member of the group representing Oteot Lineage, dismissed his claims to Tochi Daicho Lots 1123, 1124, and 1130 in an earlier estate matter. This argument fails for several reasons, not the least of which is that it is irrelevant. At the hearing, Christiana Joseph appeared on behalf of Oteot Lineage and testified that "[i]t is now very clear where [Tochi Daicho Lot] 1130 is, where 1125 is, where 1123 is, where 1124 is, <u>but 1123 and 1124 and 1130 are the true properties of [Haruo]</u> . . . 1125 is the only property of Oteot . . . ." (emphasis added.) Thus, Oteot Lineage abandoned any claim it may have had to those lots at the hearing, and the effect of Imetuker Towai's earlier actions is inconsequential. Moreover, like Appellants' first argument, their second argument also fails because it was not raised before the Land Court.

Appellants' third claim is no more successful. In essence, they argue that the Land Court issued its determination without considering the claims of other interested parties, not represented here, to Tochi Daicho Lots 1120, 1125, 1130, and 1133. Appellants do not, however, suggest that the Land Court disregarded any of their claims; their argument is confined to the claims and alleged injuries of others. Appellants do not have standing to seek redress for the injuries of others. *See Rengechel v. Uchelkeiukl Clan*, 16 ROP 155, 159 (2009).

Finally, Appellants complain that, during a colloquy in which the Land Court instructed the parties and BLS to identify the lands at issue in this litigation, the Land Court "reprimanded" Appellants when it did not permit them to raise claims unrelated to those at issue in this litigation. We find no support for this contention in the record, and we find no legally operative consequence to the alleged reprimand even if there was one. Appellants' complaint is without merit.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the decision of the Land Court.

EBUKEL NGIRALMAU,
Appellant,

v.

IWONG KINTARO, MERLYN MALSOL, and IBUUCH NGIRIOU,
Appellees.

CIVIL APPEAL NO. 11-018
Civil Action No. 09-246

Supreme Court, Appellate Division
Republic of Palau

Decided: June 21, 2012

[1] Civil Procedure: Motions for Relief from Judgment

Fraud upon the court as distinguished from fraud on an adverse party, is limited to fraud which seriously affects the integrity of the normal process of adjudication. It is not fraud between the parties or fraudulent documents, false statements or perjury, but where the impartial functions of the court have been directly corrupted.

[2] Civil Procedure: Motions for Relief from Judgment

Palau has no fraud on the court statute, nor does any of case law establish its elements. The Rules of Civil Procedure, however, contemplate the availability of fraud on the court as a cause of action, and, to the limited extent the Appellate Division has previously opined on the topic, it has noted that fraud on the court is typically confined to the most egregious cases such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged.

Counsel for Appellant: Siegfried Nakamura
Counsel for Appellees: Scott Hess

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

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

PER CURIAM:

This appeal arises from the Trial Division's decision of May 17, 2011, in which the court entered judgment against Appellant Ebukel Ngiralmau in her fraud action against Appellees. Ngiralmau argues that the Trial Division improperly applied the law of fraud and failed to construe her claim as one for fraud on the court. We reverse the decision of the Trial Division.

BACKGROUND[1]

This action is borne of a land dispute. Appellant Ngiralmau is the daughter of Mengesebuuch. Ngiralmau has three sisters: Kesau, Isemei, and Ungilredechel. Kesau had three daughters, Ngiralmau's nieces, and they are the Appellees: Iwong Kintaro, Merlyn Malsol, and Ibuuch Ngiriou. In 1988, all four daughters of Mengesebuuch went to the Land

[1] With limited exception noted below, the parties do not contest the Trial Division's conclusions of fact. Thus, we accept as true the Trial Division's factual findings.

Claims Hearing Office (LCHO) together to file a joint claim to Tochi Daicho Lots 274 and 275. These lots were listed in the Tochi Daicho as the individual properties of Mengesebuuch, and the LCHO formally docketed the Mengesebuuch daughters' joint claim.

On July 27, 1997, according to the testimony of Land Court official Chamberlain Ngiralmau, Appellee Iwong Kintaro asked Chamberlain Ngiralmau to cross out the names of Mengesebuuch's daughters on the claim to Tochi Daicho Lots 274 and 275, and to insert her name along with the names of her sisters, Appellees Merlyn Malsol and Ibuuch Ngiriou.[2] Kintaro never informed Ngiralmau that she changed the claim, and Ngiralmau testified she had no knowledge of Appellees' actions until much later. Three months after the names on the claim were changed, Kesau died.

At some point thereafter, the Land Court held a hearing to adjudicate ownership of Tochi Daicho Lots 274 and 275. Ngiralmau testified in this case that she did not receive notice of the Land Court hearing, and she did not appear at it. Kintaro, however, appeared before the Land Court and testified on behalf of Appellees. During the hearing, the Land Court asked Kintaro if Ngiralmau was aware of Appellees' claim and whether Appellees had spoken with Ngiralmau about it. Despite the fact that no such conversation had taken place, Kintaro answered affirmatively and, relying on Kintaro's assertion that Ngiralmau agreed to the arrangement in which Appellees would gain exclusive title to the land instead of the Mengesebuuch daughters, the Land Court awarded the land to Appellees.

Several years later, around late 2009 or 2010, Ngiralmau discovered Appellees' alleged fraud and brought suit.[3] Her complaint did not specifically delineate a cause of action, but its allegations focused on Appellees' deceit and the effect it had on the Land Court. Specifically, Ngiralmau alleged that all members of Mengesebuuch's family, including all three Appellees, agreed that Tochi Daicho Lots 274 and 275 would become the property of the four Mengesebuuch daughters. She further alleged that, because of that agreement, she did not attend the Land Court hearing to adjudicate ownership of the land, and that she instead relied on Appellees to represent the interests of the family. Ngiralmau's complaint then claimed that Appellees made several false and material statements to the Land Court, upon which the Land Court relied, thereby depriving Ngiralmau of her interest in her mother's land.

To evaluate Ngiralmau's complaint, the Trial Division held a four-day trial in

[2] Iwong Kintaro disputes this. She testified that her mother, Kesau, was the one who asked that Appellees' names be inserted on the claim, and that she does not know who crossed out the names of the other Mengesebuuch daughters. The Trial Division, however, did not find Kintaro's testimony credible. Instead, it credited Chamberlain Ngiralmau's testimony that Kintaro herself was the one who requested the changes.

[3] The Trial Division's findings of fact indicate that Ngiralmau uncovered the alleged fraud in 2010 when she went to the Land Court office to check on paperwork for the lands. Ngiralmau's complaint in this action, however, was filed in November 2009, thus making the date on which she discovered the fraud unclear from the record.

October 2010 and then issued its Decision and Judgment. Applying the test for fraud against an adverse party, the Trial Division found that "[Appellee] Iwong Kintaro falsely testified at the Land Court hearing for Tochi Daicho Lot Nos. 274 and 275," and that "[t]he presiding Judge relied on the false testimony and awarded [those] lots to the [Appellees]." Nevertheless, the Trial Division also found that Kintaro's perjury was directed exclusively toward the Land Court and not toward Ngiralmau, and that Ngiralmau presented no evidence that she relied on Kintaro's false statements to her detriment. Thus, the Trial Division concluded that, while Appellees may have lied to the Land Court, they did not defraud Ngiralmau. Accordingly, the Trial Division entered judgment in favor of Appellees.

Ngiralmau lodged the instant appeal. On appeal, she argues that her complaint was one for fraud on the court, not fraud against an adverse party, and that the Trial Division erroneously applied the law of the latter in lieu of the former. She also argues that if the Trial Division had properly construed her claim as one for fraud on the court, she would have prevailed because the Trial Division determined that Kintaro secured her victory at the Land Court through deceit. Ngiralmau does not, however, challenge the Trial Division's findings of fact.

STANDARD OF REVIEW

Ngiralmau's appeal concerns only questions of law. We apply a *de novo* standard of review to all questions of law determined by the Trial Division. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

[1] Ngiralmau's sole argument on appeal is that her cause of action was not fraud against an adverse party,[4] as the Trial Division believed, but rather fraud on the court, which is a completely distinct cause of action.

"'[F]raud upon the court' as distinguished from fraud on an adverse party, 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). It "is not fraud between the parties or fraudulent documents, false statements or perjury, . . . but where the impartial functions of the court have been directly corrupted." *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 89 (1997) (quotation omitted); *see also Hazel-Atlas Glass Co. v Hartford Empire Co.*, 322 U.S. 238, 64 S. Ct. 997 (1944).

[2] Palau has no fraud on the court statute, nor does any of our case law establish its elements. Our Rules of Civil Procedure, however, contemplate the availability of fraud on the court as a cause of action, *see* ROP R. Civ. P. 60(b), and, to the limited extent we have previously opined on the topic, we have noted that fraud on the court is "typically confined to the most egregious cases such as bribery of a judge or juror, or improper

[4] To establish a claim of fraud against an adverse party, a plaintiff must prove that the defendant "(1) made a fraudulent misrepresentation of 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." *Beches v. Sumor*, 17 ROP 266, 273 (2010) (citations omitted).

influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged," *Secharmidal*, 6 ROP Intrm. at 89 (quotation omitted). Nevertheless, United States courts vary widely in their determination of what constitutes fraud on the court. *See* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2870 (2d ed. 1995) (discussing Fed. R. Civ. P. 60(b) and its interpretations).

In this case, a close reading of Ngiralmau's complaint sheds light on her intentions. Though her complaint failed to explicitly announce "fraud on the court" as a cause of action, its allegations and relief requested indicated her objective. For example, the complaint highlighted in detail the Land Court's reliance on the allegedly false statements and, as a remedy, Ngiralmau requested that the Land Court's determination of ownership be vacated. This type of relief is consistent with fraud on the court, not with fraud on an adverse party, and Ngiralmau made no request for money damages or other relief directly from Appellees, as one might expect in an action for fraud on an adverse party.[5] At trial, much of the testimony focused on whether Appellees lied to the Land Court, and Ngiralmau's closing argument proclaimed that "[a]t the end of the day, Your Honor, we believe that there was, plainly, that there was fraud on the court. [sic]."

Although the parameters of fraud on the court are ill-defined, the complaint and trial testimony in this case establish that Ngiralmau advanced such a claim. *See Tulop v. Palau Election Comm'n*, 12 ROP 100, 106 (2005) (holding that a claim must be advanced at trial to be considered on appeal). Consequently, we hold that the Trial Division erred when it did not address fraud on the court as a distinct claim.[6]

CONCLUSION

For the forgoing reasons, we **REVERSE** the decision of the Trial Division and **REMAND** this case for further proceedings consistent with this Opinion.

[5] Appellees do not rebut this or any other point raised by Ngiralmau. In fact, Appellees' response brief fails to discuss or even to mention fraud on the court, Ngiralmau's only argument on appeal.

[6] This is not to say that Ngiralmau did not also advance a fraud on an adverse party claim. Even a cursory review of the record below reveals that she did. Thus, we do not hold that the Trial Division erred in applying the law of fraud on an adverse party. Rather, we hold that the Trial Division also should have analyzed Ngiralmau's fraud on the court claim. Our holding reflects no opinion on the merits of Ngiralmau's fraud on the court theory, as that question is not before us.

ROLL 'EM PRODUCTIONS, INC., JEFF BARABE, and MICHAEL FOX, in their representative capacities, APPELLANTS,

v.

DIAZ BROADCASTING CO. d/b/a MEDAL BELAU TV, and ALFONSO DIAZ in his representative capacity, Appellees.

CIVIL APPEAL NO. 11-017
Civil Action No. 08-209

Supreme Court, Appellate Division
Republic of Palau

Decided: June 29, 2012

[1] Copyright: Work Made for Hire

Whether a work of art qualifies as a "work made for hire" is critical because it determines who owns the copyright to the work of art.

[2] Statutory Interpretation: Conflict Between Provision and Definitions

When a substantive provision of a statute conflicts with a statutory definition, the definition should yield to the substantive provision to give the statute its full effect.

[3] Statutes: Copyright Act; **Copyright:** Work Made for Hire

Sections 801(z) and 822(b) of the Copyright Act are not in tension.

[4] Statutes: Copyright Act; **Copyright:** Work Made for Hire

The Copyright Act begins operation from the fundamental dictate that, subject to certain exceptions, copyright in a work protected under the Act vests initially in the author or authors of the work. One exception is when a work of art is authored by an employee within the scope of her employment, in which case the copyright vests with her employer, provided that there is no written agreement to the contrary. Another exception is when a work of art is commissioned pursuant to a signed writing explicitly stating that the copyright will vest with the commissioning party. These are the only two scenarios in which the "work made for hire" exception applies to Section 822(a).

Counsel for Appellants: Kassi Berg
Counsel for Appellees: Salvador Remoket

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

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellants Roll 'Em Productions, Inc., Jeff Barabe, and Michael Fox appeal the June 2, 2011, Judgment entered by the Trial Division in favor of Appellees in this copyright infringement case. Appellants argue that the Trial Division incorrectly interpreted the "work made for hire" provision of the Copyright Act, 39 PNC § 801 *et. seq.* (Act),

when the Trial Division held that a video created by Appellants for a specific client was a "work made for hire," despite the absence of an explicit written agreement classifying the video as such. We agree with Appellants and reverse the decision of the Trial Division.[1]

BACKGROUND

In 2008, the Executive Branch of the National Government asked Appellants to create a short video (Video) showcasing various capital improvement projects in Palau. Appellants and the Government did not formalize their relationship with a written agreement or contract. Rather, Appellants created the Video, which qualifies as a copyrightable original work of art, *see* 39 PNC § 811, and sent the Government an invoice for it. The invoice does not indicate that the Video was a "work made for hire."

Later, the Government gave the video to Appellees, competitors of Appellants, and told Appellees to air the Video on television. Appellees did so without permission or license from Appellants.[2] In turn, Appellants sent an invoice to Appellees to collect a licensing fee, but Appellees refused to pay it. Appellants sued, claiming Appellees violated their copyright to the Video.

After a hearing, the Trial Division ruled in favor of Appellees, finding that Appellants did not own the copyright to the Video. After reviewing the text of the Copyright Act, the court reasoned that a written agreement was unnecessary to establish a work of art as a "work made for hire." It further reasoned that the Video was a "work made for hire" commissioned by the Government, and that the Government, not Appellants, owned the copyright to the Video. As such, the court entered judgment in favor of Appellees.

Appellants filed the instant appeal. They argue that the text of the Copyright Act is plain and unambiguous insofar as it requires a written agreement to establish a work of art as a "work made for hire," unless that work of art is produced by an employee for an employer. Because Appellants and the Government never signed a written agreement, they argue that their Video is not a "work made for hire," and that they own the exclusive copyright to it.

STANDARD OF REVIEW

We apply a *de novo* review to all legal conclusions of the Trial Division, including those based on statutory construction. *Isechal v. ROP*, 15 ROP 78, 79 (2008).

ANALYSIS

The only question on appeal is whether, under the Copyright Act, a copyrightable work of art produced by an independent contractor may qualify as a "work made for hire" in the absence of a written agreement between an independent contractor and a commissioning party[3] explicitly

[1] Pursuant to ROP Rule of Appellate Procedure 34(a), we find this case appropriate for submission without oral argument.

[2] When Appellees aired the Video, they cut the ending credits from it, which would have attributed the Video to Appellants.

[3] By "commissioning party," we mean the person or persons who commissioned the work of art by the artist.

establishing the work of art as such. The Act defines a "work made for hire" as follows:

> "Work made for hire" means (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for a particular use if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

39 PNC § 801(z).

[1] Whether a work of art qualifies as a "work made for hire" is critical because it determines who owns the copyright to the work of art. Thus, 39 PNC § 822(a) provides that the "[c]opyright in a work protected under [the Act] vests initially in the author or authors of the work."[4] Section 822(b), however, provides a different rule for "works made for hire":

> In the case of a work made for hire, the employer is the author for purposes of this chapter and, unless the parties have expressly agreed otherwise in a written instrument signed by them, the employer owns all of the rights comprised in the copyright. In the case considered in section 811(z)(2), [sic] the person who has ordered or commissioned the work is the copyright owner.

39 PNC § 822(b).[5]

[2] Both parties agree that Section 801(z)(1) is inapplicable in this case because Appellants were not employees of the Government. Appellees, however, argue that Section 801(z)(2) is also inapplicable insofar as it conflicts with Section 822(b).[6] Their argument proceeds as follows: Section 822(b) contemplates a scenario in which a work of art is a "work made for hire" even in the absence of a written agreement because it says that "unless the parties have expressly agreed otherwise in a written instrument signed by them, the employer owns all of the rights comprised in the copyright." *See* 39 PNC § 822(b). Because Section 822(b) implies that a "work made for hire" may exist without a written agreement, it conflicts with the definition in Section 801(z)(2), which requires a written agreement. When a substantive provision of a statute conflicts with a statutory definition, the definition should yield to the substantive provision to give the statute its full effect. *See, e.g.*, 73 Am. Jur. 2d Statutes § 147 (2001). Thus, Appellees argue that Section 801(z)(2)'s writing requirement should be disregarded, and that a work of art

[4] Similarly, 39 PNC § 822(d) provides that "[c]opyright in an audiovisual work or sound recording vests initially in the producer of such work, unless otherwise specified by contract."

[5] The reference to "section 811(z)(2)" is a drafting error. The provision should read "section 801(z)(2)." *See* RPPL 6-38 § 14 & RPPL 6-53 § 4.

[6] Appellees merely adopt the Trial Division's Findings of Fact and Conclusions of Law as their opposition brief on appeal. They submitted no new arguments, nor did they respond to any of Appellants' arguments raised on appeal.

by an independent contractor may be deemed a "work made for hire" even in the absence of an explicit agreement to that effect.

[3] We disagree. Sections 801(z) and 822(b) are not in tension. Section 822(b) is comprised of two sentences, each of which applies to one of the two different types of "works made for hire" defined by Section 801(z). Section 801(z)(1) expressly contemplates a scenario—namely, an employer-employee relationship—in which a work of art is a "work made for hire" in the absence of a written agreement. In that scenario, the first sentence of Section 822(b), which explicitly fixes the rights of an "employer," applies to give copyright ownership to the employer—and not to the employee who authors the work—unless the employer and employee have a written agreement stipulating that copyright ownership vests with the employee. Thus, Section 801(z)(1) correlates to the first sentence of Section 822(b).

In contrast, Section 801(z)(2) correlates to the second sentence of Section 822(b). This is manifest from the text of the second sentence of Section 822(b), which begins, "[i]n the case considered in section 8[0]1(z)(2) . . . ." The second sentence simply provides that, when a specific work of art is designated a "work made for hire" under Section 801(z)(2), the commissioning party—and not the independent contractor who authored the work—owns the copyright. The second sentence makes no reference to a written agreement because, by necessity, the second sentence only applies in the presence of a written agreement stipulating that a specific work of art is a "work made for hire." If there is no written agreement with an independent contractor, then the resulting work of art cannot qualify as a "work made for hire" under Section 801(z)(2), and the second sentence of Section 822(b) does not apply.

[4] Within this framework, the Copyright Act begins operation from the fundamental dictate that, subject to certain exceptions, "[c]opyright in a work protected under [the Act] vests initially in the author or authors of the work." 39 PNC § 822(a). One exception is when a work of art is authored by an employee within the scope of her employment, in which case the copyright vests with her employer, provided that there is no written agreement to the contrary. 39 PNC §§ 801(z)(1) & 822(b). Another exception is when a work of art is commissioned pursuant to a signed writing explicitly stating that the copyright will vest with the commissioning party. 39 PNC §§ 801(z)(2) & 822(b). These are the only two scenarios in which the "work made for hire" exception applies to Section 822(a).

This approach is not only required by the plain meaning of the statute, it is also supported by rules of statutory construction, American case law interpreting a similar statute, and sound public policy. The alternative view would render certain words of the statute superfluous or meaningless, a result that should be avoided if possible. *See, e.g.*, *In the Matter of the Application of Won and Song*, 1 ROP Intrm. 311, 312 (Tr. Div. 1986) ("[T]he [Olbiil Era Kelulau] is presumed to know the meaning of words [it uses], and to have used the words of a statute advisedly." (citation omitted)). The alternative would also be inconsistent with *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 490

U.S. 730, 738, 742-43 (1989), the definitive American Supreme Court case interpreting nearly identical statutory language and opining that "works made for hire" in an employer-employee relationship are mutually exclusive from those made pursuant to a written agreement by an independent contractor.[7] Finally, Appellees' proffered interpretation would upend the foundational policy of Copyright Law—to wit, that copyrights vest initially with the author of a work of art—and would shift the burden to creators, such as freelance artists, poets, musicians, writers, and performers, to take affirmative steps to retain the copyright to their works of art.

CONCLUSION

For the foregoing reasons, we **REVERSE** the decision of the Trial Division that the Video was a "work made for hire." We **REMAND** for further proceedings consistent with this Opinion.

[7] While not binding, American case law interpreting a similar statute is instructive to our analysis. *Cf.* 1 PNC § 303.

KOROR STATE PUBLIC LANDS AUTHORITY, NGERMELLONG CLAN, and TELUNGALK RA NGIRKELAU,
Appellants,

v.

TMETBAB CLAN,
Appellee.

CIVIL APPEAL NO. 11-014
LC/B 04-140
LC/B 04-141
LC/B 04-142
LC/B 04-143
LC/B 04-144
LC/B 04-145

Supreme Court, Appellate Division
Republic of Palau

Decided: July 2, 2012

[1] Appeal and Error: Standard of Review

So long as the Land Court has a reasonable reading of the facts based on the evidence before it, we will not reverse.

[2] Appeal and Error: Frivolous Appeal

Given the standard of review, an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.

[3] Appeal and Error: Preserving Issues

We decline to consider an argument never made below and raised for the first time in a reply.

[4] Appeal and Error: Credibility Determination

Weighing of evidence and determinations of the credibility of witnesses are solely the province of the Land Court.

[5] Appeal and Error: Clear Error

Failure by a court to explain its rationale in not considering certain evidence may be clear error in some cases; however, we will not reverse the Land Court if it clearly articulated the factual and legal basis for its rejection of a claim.

Counsel for KSPLA: J. Uduch Sengebau Senior
Counsel for Ngermellong Clan: Ernestine Rengiil
Counsel for Telungalk ra Ngirkelau: Raynold Oilouch
Counsel for Tmetbab Clan: Yukiwo Dengokl

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

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

PER CURIAM:

The three appellants in this case appeal several findings of fact by the Land Court. Because we discern no clear error, we affirm.[1]

BACKGROUND

This appeal concerns land, previously administered by Koror State Public Lands Authority (KSPLA), located in Ngerkesoaol Hamlet, Koror State, including Worksheet Lot Nos. 04B001-40504, -40505, -40518, -40519, -40520 and -40521. The Land Court held hearings on the matter between October 26, 2010, and February 18, 2011. It issued its determination that the land rightfully belonged to Tmetbab Clan and should be returned to Tmetbab Clan pursuant to 35 PNC § 1304(b) (providing for the return of wrongfully-acquired public lands). The hearing below included Tmetbab Clan, KSPLA, Ngermellong Clan, and Telungalk ra Ngirkelau as claimants, as well as other claimants not party to this appeal.

I. Tmetbab Clan

In support of its claim to the land, Tmetbab Clan submitted the testimony of Dominica Ngoriakl. She testified that the land, referred to as *Tuker*, belonged long ago to Iweaol Clan, but Iweaol Clan gave Tmetbab Clan all its property and titles as ulsiungel. Ngoriakl further testified that a Tmetbab Clan member named Oreng farmed the land during or shortly before the Japanese taking of the land. The Japanese administration, according to Ngoriakl, pressured the head of Tmetbab Clan, Buikrechuld, to give up the land to a Japanese company. Buikrechuld was jailed

[1] Although Appellants request oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter

and the lands taken by the government. This version of events was also supported by the testimony of Ikloi Itpik and the claim filed in 1988 on behalf of Tmetbab Clan. Ngoriakl further explained that Adelbai er Kesoaol Eledui Omeliakl showed her the boundaries of the land. Her understanding of the boundary was corroborated by ninety-one-year-old Itpik, Ngoriakl's maternal uncle's wife. The Land Court found that Tmetbab Clan owned and used the land, and it determined that the Japanese had taken the land by force. Accordingly, it awarded the land to Tmetbab Clan.

II. KSPLA

KSPLA contended below that the land should remain public. Because the Land Court determined that Tmetbab Clan made out its case for the return of public land, Koror State lost title. On appeal, KSPLA contends that the Land Court failed "to apply the requisite burden of proof" in a return of public lands case. Upon closer examination, however, KSPLA's argument amounts to a factual dispute. In essence, KSPLA contends that the Land Court erred in finding that (1) Tmetbab Clan gained lands from Iweaol Clan as ulsiungel; (2) the land at issue before the court was *Tuker*; (3) Tmetbab Clan, rather than Oreng, owned the land prior to the Japanese taking, and (4) the Japanese took the land by coercion or force.

III. Ngermellong Clan

Three witnesses testified on behalf of Ngermellong Clan in support of its claim to all of the land before the court. According to Ngermellong Clan member Yukiko Basilio, both her mother and a former Chief of Ngermellong Clan told her that the land was owned by Ngermellong Clan but had been taken by the Japanese. She testified regarding the boundaries of the land and submitted a document dated June 10, 1963, which purports to be a "Certificate" stating that certain lands were "borrowed" by the Japanese for use by the Institute of Tropical Industry. Attached to the Certificate was a map that showed a road and several lettered lots. Lot "F" was listed as belonging to Ngermellong Clan. The map had no identifying features other than what appear to be roads. Basilio also stated that she farmed the land in the 1960s.

Ngirur Umang, another member of Ngermellong Clan, testified that, when she was a young girl, the Japanese used the land. She also stated that her brother had built a house on the land. Finally, Tekereng Sylvester, a member of the Clan through his father who bore the Clan's highest male title, stated that he built a house on the land because his father told him it belonged to Ngermellong Clan. He testified that, after the war, many settled the land, including some members of Ngermellong Clan and some non-members.

The Land Court found much of this testimony "self-serving and biased." It further noted that Basilio's testimony did not adequately identify the lands previously claimed by Ngermellong Clan. Ngermellong Clan appeals, identifying eight errors in the Land Court's decision. The arguments can be summarized as follows: The Land Court clearly erred in (1) its finding that Basilio did not adequately identify the lands Ngermellong Clan purported to own; (2) its failure to consider Ngermellong Clan Exhibit 2; (3) its

determination that Umang's testimony was contradictory with other testimony and was self-serving; (4) its determination that Sylvester's testimony was similarly self-serving; (5) its finding that the "testimony of witnesses of Ngermellong Clan" was not credible; (6) its determination that Iweaol Clan gave Tmetbab Clan its lands as ulsiungel; (7) its finding that Buikrechuld was imprisoned by the Japanese for failure to give them his land; and (8) its finding that Tmetbab Clan used the land before the Japanese took it.

IV. Telungalk ra Ngirkelau

In the proceedings before the Land Court, Desiu Ngirkelau (Desiu), proceeding pro se, made the case for his family's claim to the land. He testified that his Uncle, Ricardo Ngirkelau (Ricardo), received the land from his brother in 1937. He further stated that the land used to belong to Terekieu Clan. Ricardo began farming the land, but representatives of the Japanese government tried to convince him to give up the land. When he refused, government representatives threatened him and took the land. According to Desiu's testimony, Ricardo was given 500 yen for his labor and the crops that were on the land, but nothing for the land itself.

Although Desiu did not submit any exhibits, on appeal, he relies on exhibits submitted by the Roman Tmetchul Family Trust (RTFT), which is not party to this appeal. Among the evidence submitted by RTFT is a claim filed in 1954 by a member of the Ngirkelau family. The claim was for land called *Ereong* and included a sketch of the claimed land. A statement affixed to the claim mirrors Desiu's testimony, but it also includes the statement that the Japanese "paid . . . 500 yen for the land." A hearing was held in 1955 and the Trust Territory District Land Title Officer determined that the land had been sold, albeit under protest, and that the land should be released to the Trust Territory government. In 1959, an appellate tribunal determined that the 500 yen (which amounted to one yen per *tsubo*) was "at least substantially adequate compensation."

The Land Court rejected Telungalk ra Ngirkelau's claim because it determined that *Ereong* was located in another area, not in Ngerkesoaol. Telungalk ra Ngirkelau appeals, contending that the Land Court erred by "inadequately" considering the 1954 claim and the subsequent Trust Territory litigation.

STANDARD OF REVIEW

[1] An appellant contesting the Land Court's findings of fact must show that its conclusions were clearly erroneous. *Espong Lineage v. Airai State Pub. Lands Auth.*, 12 ROP 1, 4 (2004). In other words, so long as the Land Court had a plausible reading of the facts based on the evidence before it, we will not reverse. *Mechol v. ROP*, 9 ROP 17, 18 (2001).

[2] Empirically, "appeals challenging the factual determinations of the Land Court . . . are extraordinarily unsuccessful." *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). Given the standard of review, an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.

ANALYSIS

A claimant seeking return of public lands must show:

> (1) that the land became part of the public land . . . as a result of the acquisition by previous occupying powers or their nationals prior to January 1, 1981, through force, coercion, fraud, or without just compensation or adequate consideration, and
>
> (2) that prior to that acquisition the land was owned by the citizen or citizens or that the citizen or citizens are the proper heirs to the land.

35 PNC § 1304(b). The burden remains on the private claimants to show, by a preponderance, that the elements of Section 1304(b) have been satisfied. *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93-94 (2006). The governmental land authority retains control of the land if no claimant can satisfy its burden. *Id.*

I. KSPLA's Appeal

KSPLA frames its appeal as an argument that the Land Court failed to apply the correct "burden" for return of public lands. However, KSPLA's argument is actually that the Land Court erred with respect to several of its factual determinations, which led to the court's conclusion that Tmetbab Clan met 35 PNC § 1304(b)'s burden. Thus, we review the record for clear error. *Ngiratrang*, 13 ROP at 93-94.

First, KSPLA contends that Tmetbab Clan failed to meet its burden because it did not show that it was the original owner or proper heir to the land, *see* 35 PNC § 1304(b)(2); instead, the evidence supported the conclusion that Iweaol Clan owned the land. In particular, KSPLA notes that Ngoriakl, at one point during her testimony, stated that the land "went to a female person in the clan" rather than to Tmetbab Clan itself. It further points to evidence that Iweaol Clan was, in separate proceedings, adjudicated the owner of another parcel of land. KSPLA does not argue that the earlier proceedings that awarded land to Iweaol Clan are entitled to some sort of preclusive effect, however. Therefore, KSPLA's argument fails because there is evidence in the record to support the Land Court's conclusion. Tmetbab Clan submitted another case concerning land previously owned by Iweaol Clan in which the Land Court found that "Tmetbab Clan has exercised complete control and dominion over . . . land known as Iweaol, for over sixty years." Additionally, both Ngoriakl and Ikloi testified that all of Iweaol's land came to Tmetbab Clan as ulsiungel.[2] The Land Court found this testimony credible. One statement from Ngoriakl's testimony in tension with the Land Court's conclusion does not undermine

[2] **[3]** KSPLA also argues for the first time in its reply that the Land Court's determination regarding the lands coming to Tmetbab Clan as ulsiungel is a determination of custom that must be proved by clear and convincing evidence. We decline to consider an argument never made below and raised for the first time in a reply. *See Rechucher v. Lomisang*, 13 ROP 143, 149 (2006) (discussing the Court's waiver rule).

its determination that Tmetbab Clan received all of Iweaol's land.

Second, KSPLA argues that it was clear error for the Land Court to conclude that the land at issue in this matter was *Tuker* because a previous Land Court proceeding purported to award *Tuker* to Tmetbab Clan. In support KSPLA proffers a document, which it did not present below, showing that land called *Tuker* was awarded to Itpik Martin, Ikloi's husband. Because KSPLA does not appear to have contested the borders of *Tuker* below, nor did it present the document to the Land Court, it has waived this argument. *See Rechucher*, 13 ROP at 149.

Third, KSPLA complains that a woman, Oreng, and not Tmetbab Clan, was the proper prior owner. However, this does not follow. The testimony was simply that Oreng is the only person who could be remembered using the land prior to the Japanese taking. Oreng's use of the land supports the inference by the Land Court that Tmetbab Clan was the prior owner.

Finally, KSPLA contends that Ngoriakl's statement at one point during her testimony that she did not "really know" how the Japanese got the land undermines the Land Court's determination that the taking was wrongful. However, both Ngoriakl and Itpik gave detailed testimony on how the Japanese threatened Buikrechuld to get him to give up the land to a Japanese company, going so far as to throw him in jail. This is the same account provided in the 1988 claim for return of public lands submitted on behalf of the Clan.

Thus, we affirm the factual findings of the Land Court with respect to Tmetbab Clan's claim. Those findings supported the court's ultimate conclusion that Tmetbab Clan met its burden and proved the elements of 35 PNC § 1304(b).

II. Ngermellong Clan's Appeal

[4] Ngermellong Clan contests eight of the factual determinations made by the Land Court. Several of these factual determinations involved the weighing of evidence and determinations of the credibility of witnesses. Such matters are solely the province of the Land Court. *Idid Clan v. Olngebang Lineage*, 12 ROP 111, 116 (2005); *Ngeribongel v. Gulibert*, 8 ROP Intrm. 68, 70 (1999). Because the Land Court clearly laid out its reasons for giving certain evidence less weight and certain witnesses less credence, we reject Ngermellong Clan's arguments that the Land Court should have given more weight to Basilio's identification of Ngermellong Clan lands; that the court should have credited Umang's and Sylvester's testimonies; and that the Land Court was wrong to determine that Ngermellong Clan's witnesses were not credible.

Further, several of Ngermellong Clan's contentions are addressed above because they mimic those made by KSPLA. For the reasons already outlined, we reject Ngermellong Clan's arguments that the Land Court erred in its determination that Tmetbab Clan came to own the land as ulsiungel; that the court erred in its finding that the Japanese imprisoned Buikrechuld; and that the court was wrong to find that Tmetbab Clan used the land prior to the Japanese taking.

[5] This leaves Ngermellong Clan's second argument: that the Land Court failed to consider Ngermellong Clan Exhibit 2, the Certificate from the Japanese official from the Institute of Tropical Industry purporting to identify lands the Japanese "borrowed." Ngermellong Clan fails to explain how this piece of evidence, which is not identified specifically in the Land Court's order, should be prioritized over the other evidence submitted. Nor does the Clan cite any authority which requires the Land Court to explain its acceptance or rejection of every piece of evidence submitted. *See Rechucher v. Ngirmeriil*, 9 ROP 206, 210 (2002) (The court need not "make a finding with respect to every piece of evidence submitted."); *but see Smanderang v. Elias*, 9 ROP 123, 123 (2002) (the court must "clearly articulate both its findings of fact and its conclusions of law."). There may be some instances in which such a failure by a court to explain its rationale in not considering certain evidence would be clear error; however, in this case, the Land Court "clearly articulate[d]" the factual and legal basis for its rejection of Ngermellong Clan's case. We find no error.

III. Telungalk ra Ngirkelau's Appeal

Telungalk ra Ngirkelau contends that the Land Court clearly erred by "inadequately" considering its 1954 claim and the subsequent litigation in the Trust Territory courts, which strongly supported the conclusion that the family owned *Ereong* before the Japanese taking. Again, this argument attacks the Land Court's weighing of the evidence, to which we defer in the absence of a gross error. *See Idid Clan*, 12 ROP at 116; *Ngeribongel*, 8 ROP Intrm. at 70. Additionally, the Land Court explained that it determined that *Ereong* was not the land before it. *Ereong* was supposed to have been transferred to the Ngirkelau family from Terekieu Clan. However, the court found that Terekieu Clan did not own any land in Ngerkesoaol Hamlet and thus *Ereong* must have been located elsewhere. Telungalk ra Ngirkelau does not explain why this was incorrect. Thus, we affirm the Land Court's rejection of the claim of Telungalk ra Ngirkelau.

CONCLUSION

Thus, we **AFFIRM** the Land Court.

NGARNGEDCHIBEL,
Appellant,

v.

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 11-032
LC/B 09-0135
LC/B 09-0136
LC/B 09-0170
LC/B 09-0171

Supreme Court, Appellate Division
Republic of Palau

Decided: July 2, 2012

[1] Return of Public Lands: Burden of Proof

The burden remains at all times on a private claimant seeking return of public lands.

[2] Return of Public Lands: Burden of Proof

Rusiang Lineage does not apply to cases involving the return of public lands. Instead, the governing case is *Masang v. Ngirmang*, 9 ROP 215, 216-17 (2002), which held that a land authority may retain ownership when a private party fails to meet its burden even if the land authority does not participate in the proceedings.

Counsel for Appellant: Clara Kalscheur
Counsel for Appellee: J. Uduch Sengebau Senior

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

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

PER CURIAM:

This case concerns Lot No. 2006 B 012-016, land which is now part of the Palau Community College (PCC) campus. Appellant Ngarngedchibel, the council of chiefs of Ngerbeched, argues that it was entitled to the return of the land pursuant to 35 PNC § 1304(b); however, because Ngarngedchibel failed to meet its burden of proof under the statute, we affirm.

BACKGROUND

The facts in this case are thoroughly addressed in the Land Court's Findings of Fact and Determination of Ownership. We recite only those facts relevant to this appeal.

The Land Court held separate hearings on several different parcels of land in Medalaii Hamlet, Koror State. Appellant Ngarngedchibel, representing the claims of Ngerbeched Hamlet and its chiefs, was a claimant below. It argued, pursuant to 35 PNC § 1304(b), for return of public lands to Ngerbeched. It presented evidence that the Ibedul and Ngarameketii of Koror awarded Ngerbeched the land in light of Ngerbeched's assistance in defeating warriors from Ngerkebesang, who were a threat to the peace and safety of Koror.

The land that is currently PCC, Appellant admits, somehow came to be administered by Palau Public Lands Authority (PPLA). However, it appears that PPLA never formally transferred control over the PCC lands to KSPLA. PPLA was not a claimant below, but KSPLA was.

The Land Court determined that Ngarngedchibel failed to satisfy its burden to prove (1) that it owned the land prior to the land becoming public and (2) that the land was wrongfully taken by a foreign government. *See* 35 PNC § 1304(b). Ngarngedchibel appeals, arguing (1) the Land Court erred in awarding the land to KSPLA because PPLA was the proper public owner, and (2) the Land Court erred by refusing to award the land to Ngarngedchibel even though Ngarngedchibel was the only valid claimant before it.

STANDARD OF REVIEW

We review the factual determinations of the Land Court for clear error and its legal conclusions *de novo*. *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93 (2006).

ANALYSIS

A private party seeking the return of wrongfully taken public land must show:

> (1) that the land became part of the public land . . . as a result of the acquisition by previous occupying powers or their nationals prior to January 1, 1981, through force, coercion, fraud, or without just compensation or adequate consideration, and
>
> (2) that prior to the acquisition the land was owned by the citizen or citizens or that the citizen or citizens are the proper heirs to the land . . . .

35 PNC § 1304(b). The Land Court concluded that Ngarngedchibel did not prove facts sufficient to satisfy either element of Section 1304(b)'s conjunctive test. It found that Ngarngedchibel's case for ownership was weak because of the lack of testimony from a representative of the Ngarameketii of Koror. The court further was unable to identify any specific testimony concerning the wrongful taking of the land. Appellant does not appear to contest these factual findings. Instead, Ngarngedchibel argues that it should have won by default in light of the weakness of KSPLA's claim to the land and the strength of its evidence of ownership.

[1] This appeal revisits issues and events that we addressed in *Ngarngedchibel v. Koror State Public Lands Authority*, 19 ROP 60 (2012). In that case, we affirmed a similar Land Court decision awarding a portion of the PCC campus to KSPLA. Ngarngedchibel argued in the earlier case that, because PPLA never quitclaimed the PCC lands to KSPLA, it should prevail on its claim as the only other claimant. We declined to consider the argument because Ngarngedchibel did not raise it before the Land Court and therefore waived it. *Id.* at 64. However, we went on to note that, regardless of whether the Land Court was able to identify the proper public owner of the parcel, the burden remains at all times on a private claimant seeking return of

public lands. *Id.*; *see also Ngiratrang*, 13 ROP at 93.

Turning to Ngarngedchibel's arguments in the instant appeal, we first address the contention that the PCC lands at issue here were never transferred to KSPLA and, therefore, the Land Court should have awarded the land to Ngarngedchibel. The relative merits of KSPLA's claim vis-à-vis PPLA's do not support Ngarngedchibel's claim to the land. As we suggested in the earlier appeal, a private claimant is not relieved of its statutory burden simply because a public claimant has failed to adequately vindicate its ownership. *Ngarngedchibel*, 19 ROP at 64; *see also Ngiratrang*, 13 ROP at 96 n.5. The Land Court in this case found that Ngarngedchibel was unable to show that the land was illegally taken from it by a colonizing power as required by 35 PNC § 1304(b). On appeal, Ngarngedchibel advances no argument whatsoever that this determination was in error. It cites no evidence in the record that would support such an argument. Thus, it has failed to carry its burden to show that it was entitled to the return of the land.

[2] Second, we consider the related argument that the Land Court erred by failing to abide by the rule in *Rusiang Lineage v. Techemang*, 12 ROP 7, 9 (2004), which requires the Land Court to award contested land to a claimant before it. This argument was squarely addressed in *Ngarngedchibel*, in which we stated that *Rusiang Lineage* does not apply to cases involving the return of public lands. *Ngarngedchibel*, 19 ROP at 63. Instead, the governing case is *Masang v. Ngirmang*, 9 ROP 215, 216-17 (2002), which held that a land authority may retain ownership when a private party fails to meet its burden even if the land authority does not participate in the proceedings. Further, in the case below, KSPLA *was* a claimant. Thus, Ngarngedchibel's second argument also fails.

CONCLUSION

Because Appellant did not show that the Land Court erred in determining that Ngarngedchibel failed to carry its statutory burden, we **AFFIRM** the Land Court's decision.

FELIX MAIDESIL,
Appellant,

v.

ANNA MAIDESIL, GREGORY UEKI, MOTIL LIEB, and CECILIA YAMADA,
Appellees.

CIVIL APPEAL NO. 11-015
Civil Action No. 10-005

Supreme Court, Appellate Division
Republic of Palau

Decided: July 4, 2012

[1] Custom: Family Law

When a man is in a relationship with another woman who is not his wife, he must leave the family home.

[2] Contracts: Restitution

A person who is unjustly enriched at the expense of another is subject to liability in restitution.

[3] Property: Gifts

Restitution is not a remedy for someone who makes a gift to another.

Counsel for Appellant: Salvador Remoket
Counsel for Appellees: Moses Uludong

BEFORE: KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

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

PER CURIAM:

Appellant Felix Maidesil appeals the Trial Division's May 16, 2011, order that states: (1) he was not allowed to eject his biological daughter, Appellee Annalee Rose Maidesil,[1] from the family home in which they were both residing; (2) the home belongs to Anna, Dudiu, and Arlee Maidesil; and (3) the owner of the land, Appellee Motil Lieb, never promised to transfer ownership of the land to Appellant. We are not persuaded by Appellant's arguments and, accordingly, affirm the Trial Division's decision.

BACKGROUND

This dispute centers on ownership of a two-story family home located on land known as *Remiang* in Melekeok State. The land is currently registered to Lieb, the adoptive mother of Anna Maidesil. Lieb is the biological grandmother of Anna Maidesil. She is also Appellant's mother-in-law. Appellee Cecilia Yamada is the sister of Appellant's wife, Corona. Corona is Anna Maidesil's biological mother. In other words, Lieb adopted her biological granddaughter.

Sometime before 2000, Appellant and his wife decided to build a family home. Appellee Lieb said they should build it on *Remiang*. Appellant then built the two-story home on the property, and it is this home that

[1] Appellee Maidesil's name is spelled differently throughout the briefing; we refer to her here as "Anna Maidesil," which is the name that appears on the brief filed by her attorney.

is the subject of litigation. In 2005, Corona passed away and an cheldecheduch was held. Appellant was finishing a criminal sentence at the Koror State Jail, but he was released so he could attend the funeral and cheldecheduch. During the cheldecheduch, Appellant explained that his wife's relatives asked him for his "thoughts on the house," and he replied that "the house will be the house of my children and I live with them to the end." He testified that when he said the house would be the house of "his children," he only meant his sons.

Since that time, Anna Maidesil and her husband, Appellee Gregory Ueki, have been living on the first floor of the family house, and Appellant has been living on the second floor. However, the relationship between father and daughter had become strained, including several incidents regarding noise, access to power lines, and more.

On January 11, 2010, Appellant filed a complaint seeking ejectment, declaratory relief, and injunctive relief against Appellees. Appellant sought a declaration that he and his sons, Arlee and Dudiu, are owners of the family house as well as a portion of *Remiang*. He also stated that if he were to be required to leave, he wanted Lieb and Yamada to pay him the full appraisal value of the house ($389,000), and he wished to enjoin Lieb, Yamada, and Ueki from coming near the house. Appellees filed an answer and counterclaim to remove Appellant from the second story of the house because he brought his girlfriend to stay in the family home.

Appellant moved for summary judgment, but the court found the motion was not timely filed and instead proceeded with a two-day trial. The outcome of the summary judgment motion was included in the May 16, 2011, decision on the merits of the trial.[2] In its decision, the Trial Division addressed whether Appellant Maidesil could be ejected, as well as who owned the family home and land.

As to ejectment, the Trial Division found that Appellant had not been ousted or deprived of possession and therefore he could not prevail in an ejectment action. The Trial Division found that there were genuine issues of material fact concerning the ownership of the house because Appellees submitted an affidavit that, at the cheldecheduch, one of Corona's uncles had said the house would be given only to the couple's children. The Trial Division held that Appellant "failed to provide proof of why the house belongs to him and his two sons only." As to who should move out of the home, the Trial Division found that "[i]t was established by two of the three customary experts . . . that under custom a widow[er] should not bring another woman into the marital home" and that "a man should move out once he meets another woman."

In summary, the Trial Division held that the home in *Remiang* was the property of Dudiu, Arlee, and Anna Maidesil, and that they owned the two-story concrete home (as determined during the cheldecheduch); that Lieb did not promise to transfer ownership of the property to Appellant and his wife; that Appellant can live in the family home through his children; that under Palauan custom, a man

[2] In its Order, the Trial Division explained that the motion for summary judgment was not timely filed, and it was then "agreed that the Court include its ruling of the motion in its Decision after the trial."

should move out of the family home once he meets another woman; and that because the Appellant is in a relationship with another woman, he must move out of the family home. On May 25, 2011, Appellant filed his notice of appeal.

STANDARD OF REVIEW

A lower court's conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001)*; see also ROP v. S.S. Enters., Inc.* 9 ROP 48, 50 (2002). Factual findings of the lower court are reviewed using the clearly erroneous standard. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.,* 9 ROP 162, 164 (2002). Specifically, "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 . . . ." *Imeong v. Yobech*, 17 ROP 210, 215 (2010) (citation omitted). "Treating custom as a factual matter also limits the depth of appellate review. If the trial court'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 has been committed." *Dokdok v. Rechelluul*, 14 ROP 116, 119 (2007) (citation omitted); *see also Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006).

ANALYSIS

Appellant argues that the Trial Division erred in requiring Appellant to move out of the family home and in "ignoring" his contention regarding damages. We address each argument in turn.

I. Eviction

Appellees alleged in their counterclaim that Appellant was living in the family home with a woman who was not currently his wife. On appeal, Appellant argues that the Trial Division erred when it ordered him to leave his home because he brought this woman to live with him in violation of Palauan custom. He maintains that such a position ignores the fact that Lieb was unjustly enriched, and he explains that the cheldecheduch "should not divest and did not divest Felix Maidesil of his right to his house." He also states that he cannot "find authority on this point, except to say the result of Appellees['] actions and the court judgment brings in unjust enrichment on the part of Appellees."

[1] We review the Trial Division's conclusions about customary law for clear error. *Dokdok*, 14 ROP at 119. The Trial Division considered the testimony of three experts, two of whom testified that when a man is in a relationship with another woman (not his wife), he must leave the family home in accordance with Palauan custom. First, Sariang Timulch, who is a member of the board of the Society of Historians and bears the title Dirrengechel, testified that if a house is built on the land belonging to the maternal side of the family and the wife passes away, the husband can stay. However, if he "do[es] something bad," he will "get out." Second, Antonio Bells, who bears the title of Misech in Ngiwal and Esebei ra Ibedechang in Elab, explained that it is "taboo" in Palau to bring another woman to stay in the house that a husband built with his wife for their children.

He also testified that if property is built on the wife's land or on properties of the wife's relatives, the husband "need[s] to know one thing. You just build it and you don't have any objection to it nor do you have any say over it when there is any disputes that arise[] from it; you just keep your mouth shut because you have built your house in other people's house." In addition, he explained that the children are in charge of property that is "on the land for their maternal uncles." Finally, Appellant's witness on rebuttal, Wataru Elbelau, who holds the title of Uchelrutechei, testified that it is not Palauan custom to bring another woman to stay with the widower or to marry another woman and bring her to the family home.

These experts agreed that a husband cannot bring a new woman to the family home; if he does, he must leave. The Trial Division's findings that a man should move out once he meets another woman "are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion," and we have no "definite and firm conviction that a mistake has been committed". *Dokdok*, 114 ROP at 119. Accordingly, we affirm the Trial Division's decision that Appellant may live in the house with his children for the rest of his life, but that he violates customary law—and must move out—if he enters into a relationship with another woman while living in the family home.

II. Restitution

Appellant argues that the Trial Division did not address the issue of whether he is owed restitution for either the appraised value of the house ($389,000) or for the cost of constructing the house ($200,000). This reading ignores the Trial Division's conclusion that Appellant "is on the land as a guest of his children and does not have any claim over this land or the house." We review this legal conclusion *de novo*. *Roman Tmetchl Family Trust*, 8 ROP Intrm. at 318.

[2] "A person who is unjustly enriched at the expense of another is subject to liability in restitution." 1 Restatement (Third) of Restitution § 1 (2011). However, "[t]here is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract."[3] *Id.* at § 2. The Restatement explains that this limitation "is traditionally expressed by denying restitution to a claimant." *Id.* at cmt. d. Further, "[b]ecause contract is strongly preferred over restitution as a basis for private obligations, restitution is not usually available to a claimant who has neglected a suitable opportunity to make a contract beforehand." *Id.* Finally, restitution is not a remedy if someone makes a gift to another. *Id.* at cmt. b.

[3] Here, there is no evidence in the record below that Appellees were obligated to pay

[3] The Restatement identifies such circumstances as emergency intervention (protecting life, health, property, or another's duty); performance rendered to a third person (generally in the context of insurance or loans); or self-interested intervention (protection of claimant's property, claimant's expectation of ownership, unmarried cohabitants). *See* Restatement (Third) of Restitution §§ 20-25 (2011). None of these circumstances correspond to the facts here, where Appellant conferred a gift on his relatives and then sought restitution for his expenses in making that gift.

Appellant for the house he built. The testimony from Appellant himself indicates that he wanted the house to be for his children and that he would live with them in the house. If he wished for a different arrangement, that his children pay him for the value of the home once it was completed, for example, he had the opportunity to make a contract beforehand. He did not. Instead, he built a house as a gift.

Such action is consistent with custom. It is the "responsibility of the man" to build a house for his children either on his own land or the land of the relatives of his wife. Timulch explained that the husband builds the house because "if he die[s] and there's an [ch]eldecheduch they will give money to their children and prepare them, but they are prepared already with their house and their land." There is no contrary evidence of a relationship between Appellant and his children such that restitution is a remedy for Appellant's perceived wrong.

In sum, Appellant built the house as a gift for his children, and he may reside there as a guest, but he does not own the house. Appellant received the benefit of living in the home after his wife passed away, but he is not owed any money from his children for this benefit.

CONCLUSION

For the foregoing reasons, the Trial Division's decision is **AFFIRMED**.

UODELCHAD RA TEREKIU BILUNG GLORIA SALII and TUCHERUR RECHUCHER RA YOULIDID JOHN C. GIBBONS, on behalf of themselves and TEREKIU CLAN,
Appellants,

v.

TEREKIU CLAN, represented by Chief Tucherur Wilhelm Rengiil and Uodelchad ra Terekiu Brenda R. Ngirmeriil,
Appellees.

CIVIL APPEAL NO. 11-004
Civil Action No. 03-384

Supreme Court, Appellate Division
Republic of Palau

Decided: July 5 , 2012

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

Issue preclusion is a matter of law reviewed de novo.

[2] **Civil Procedure:** Preclusion and Estoppel

Under the doctrine of issue preclusion, or collateral estoppel, 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.

[3] Civil Procedure: Preclusion and Estoppel

Although the terms "res judicata" and "issue preclusion" are often used interchangeably, "true res judicata" is claim preclusion. Issue preclusion is more aptly called collateral estoppel.

[3] Civil Procedure: Preclusion and Estoppel

Although the terms "res judicata" and "issue preclusion" are often used interchangeably, "true res judicata" is claim preclusion. Issue preclusion is more aptly called collateral estoppel.

[4] Civil Procedure: Preclusion and Estoppel

The party alleging preclusion has the burden of showing that all the elements are satisfied.

[5] Civil Procedure: Preclusion and Estoppel

Issue preclusion requires identity, or near-identity, of issues in the first and second actions. When there is a lack of total identity there are several factors that should be considered for the purposes of the rule. These factors include (1) a substantial overlap in the evidence used in both proceedings; (2) whether the proceedings involve the same question of law; (3) whether pretrial discovery and preparation in the first proceeding embrace the matter sought to be presented in the second; and (4) whether the claims in each proceeding are closely related.

[6] Civil Procedure: Preclusion and Estoppel

Because the burden is on the party arguing in favor of estoppel, sufficient proof must be introduced to show priors litigation of the issue that is purportedly barred from relitigation. If reasonable doubts exist as to what issue was originally adjudicated, issue preclusion should not be applied

[7] Civil Procedure: Preclusion and Estoppel

Among the exceptions to the issue preclusion rule are cases in which the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; or the burden has shifted to his adversary.

Counsel for Appellants: Salvador Remoket and Oldiais Ngiraikelau
Counsel for Appellee: Raynold Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; and RICHARD H. BENSON, Part-time Associate Justice.

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

PER CURIAM:

Uodelchad ra Terekieu Bilung Gloria Salii and Tucherur Rechucher ra Youlidid John C. Gibbons appeal the Trial Court's

finding that Tucherur Wilhelm Rengiil is an ochell member of Terekieu Clan and, therefore, is the appropriate representative to receive the proceeds of a judgment in favor of Terekieu Clan. Salii and Gibbons contend that the Trial Division's finding is barred by issue preclusion. Because we conclude that preclusion is inapposite, we affirm.[1]

BACKGROUND

Appellants argue that the central question in this case—who may properly represent Terekieu Clan interests?—was settled almost fifty years ago.

II. Civil Action No. 257

In 1962, Imerab Rengiil sued on behalf of Ituu Lineage of Terekieu Clan to recover land known as *Ituu* from an alleged usurper named Rechuld. Rechuld was the presumptive owner listed in the "Japanese land survey." In her complaint filed with the Trust Territory Trial Division, Imerab stated that she was "head" of the Lineage. The issues slated for trial, as reflected in that court's pretrial order, were:

> 1. How and from whom did the Ituu [L]ineage acquire the land Ituu, what use did they make and what control did they exercise over it during and since the German times?
>
> 2. Did Recheluul have the right and the power to make a will concerning Ituu and, if so, what will did he make, if any, concerning it?
>
> 3. What registration, if any, was made of Ituu or any part of it during the last Japanese land survey and what was the basis and authority for such registration?
>
> 4. If Ituu, or parts of it, were registered in the name of Rechuld in the last Japanese land survey, who authorized such registration and what authority did they have to do so?
>
> 5. What rights in Ituu, or its parts, were transferred to defendant since the last Japanese land survey, by whom, and under what authority?
>
> 6. What use has been made of Ituu and its parts by the defendant or members of plaintiff's lineage since the last Japanese land survey?

A partial transcript submitted by Appellants shows the testimony of Barao, who purported to be Tucherur of Terekieu Clan. He explained that Terekieu Clan had three lineages, Ituu, Ikekemongel, and Iteliang. Barao went on to testify, consistent with Imerab's claim, that Rechuld had no right to the land.

[1] Although Appellants request oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

The Trust Territory Trial Division rejected Imerab's claim to the land in a one-page order and opinion. Its findings of fact stated:

> 1. The plaintiff Imerab has failed to prove that the particular land in question was ever owned by the Ituu [L]ineage as she claims it is constituted.
>
> 2. The land was controlled and used exclusively by a matrilineal family within that lineage for many years before the Japanese land survey of about 1938-41, of which family the plaintiff was not a member.
>
> 3. That matrilineal family with all the consents necessary for the transfer of its property purported to transfer the land to Rechuld as his individual land at the time of the Japanese land survey of about 1938-41 and it was listed as Rechuld's individual land in the records of that survey.

Rengiil v. Rudimch, No. 257 (H.C.T.T. Tr. Div. Mar. 2, 1963). The court's one-paragraph opinion stated that "the presumption that listings in the Japanese land survey of about 1938-41 in the Palau Islands were correct, is entitled to prevail." *Id.*

II. Civil Action No. 298

Less than a year after the order in Civil Action No. 257 was issued, Barao brought his own suit on behalf of Ituu Lineage, also alleging that Rechuld never had good title to Ituu lands located close to those at issue in Civil Action No. 257. In a lengthier opinion, the Trial Division rejected Barao's lawsuit on the grounds of res judicata. *Tuchurur v. Rechuld*, 2 T.T.R. 576, 581 (Tr. Div. 1964). It determined that, although the land in question was not the same as that at stake in Civil Action No. 257, Rechuld's title to Ituu's lands could not be litigated "over and over again." *Id.* The court noted that the issue in each case was Rechuld's "individual title" to the land. *Id.*

III. Civil Action No. 03-384

Civil Action No. 03-384, the present case, began as a lawsuit against the Republic of Palau by Terekieu Clan, represented by several children of Imerab, including Wilhelm Rengiil (Wilhelm), for ejectment from Clan lands. The lands had been used by the Republic for the construction of an elementary school. The Land Court had previously determined that the land belonged to Terekieu Clan. Appellants intervened in the Trial Division case, contending that they were the rightful owners and proper representatives of Terekieu Clan. All parties to the action eventually stipulated to the land's value and a judgment for inverse condemnation was entered against the Republic. However, the litigation continued between the Appellees and Appellants, each of whom claimed to properly represent Terekieu Clan.

In their motion to intervene, Appellants first raised the issue of res judicata, claiming that Civil Action No. 257 barred Imerab's descendents from claiming that she was a member of Ituu Lineage. Later, Appellants moved for summary judgment, contending again that Civil Action No. 257 barred any claim that Imerab was a member of Ituu Lineage or could own Ituu land. The Trial Division denied the motion, stating:

> [t]he records of Civil Action No. 257 appended to [the] motion do little to clarify the issue. That case involved Plaintiffs' mother, Imerab Rengiil, who was claiming a piece of property for Ituu Lineage of Terekieu Clan. The Court never addressed whether [she] was a member of Terekieu Clan, nor did it discuss any opposing claim from Gloria Salii and John Gibbons or their ancestors.

The case proceeded to trial. Brenda Ngirmeriil testified that of the three lineages of Terekieu, only Ituu remains. She further testified that she and her siblings were Ituu members through Imerab who came to Ituu through the maternal line. Specifically, Etor, a member of Ituu Lineage, begat Ngeduas, who begat Telbong, who begat Imerab. According to Ngirmeriil, beginning with Etor, the men and women of her family have frequently held the highest male and female titles in Terekieu Clan. Wilhelm claimed to hold the highest male title, Tucherur, and Ngirmeriil claimed to hold the highest female title, Uodelchad. Salii and Gibbons also purported to hold the titles of Tucherur and Uodelchad, claiming that Idid Clan, in the absence of ochell members of Terekieu Clan, controlled Terekieu land.

Finding in favor of Appellees, the court rejected Appellants' claim to control Terekieu land, noting that "Idid's dispensing of Terekieu lands appears to be an example of strong-arming a weaker clan, and not a historical, customary or cultural right to authority over Terekieu Clan." In contrast, the court concluded that Wilhelm and Brenda were Tucherur and Uodelchad ra Terekieu, ochell members of Terekieu Clan, and proper representatives of Terekieu Clan to receive the proceeds for the judgment in favor of the Clan.

Appellants timely appealed and contend that Civil Action Nos. 257 and 298 preclude the determination that Imerab's descendents are members and leaders of Ituu Lineage and Terekieu Clan.

STANDARD OF REVIEW

[1] Issue preclusion is a matter of law reviewed de novo. *Trolii v. Gibbons*, 11 ROP 23, 25 (2003).

ANALYSIS

[2, 4] Under the doctrine of issue preclusion, or collateral estoppel,[2] "when an issue of fact or law is actually litigated and determined by

[2] **[3]** Although the parties use the terms "res judicata" and "issue preclusion" interchangeably, "true res judicata" is claim preclusion. Issue preclusion is more aptly called collateral estoppel. *See* 18 Charles Alan Wright *et al.*, Federal Practice and Procedure § 4402 (3d. ed. 2002) (internal citation omitted).

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." *Azuma v. Ngirchechol*, 17 ROP 60, 65 (2010) (quoting Restatement (Second) of Judgments § 27 (1982)). The party alleging preclusion has the burden of showing that all the elements are satisfied. Restatement (Second) of Judgments § 27 cmt. f (1982) (Restatement).

[5, 6] This formulation of the doctrine requires identity, or near-identity, of issues in the first and second actions. "When there is a lack of total identity . . . there are several factors that should be considered" for the purposes of the rule. *Id.* at cmt. c. These factors include (1) a substantial overlap in the evidence used in both proceedings; (2) whether the proceedings involve the same question of law; (3) whether pretrial discovery and preparation in the first proceeding "embrace the matter sought to be presented in the second"; and (4) whether the claims in each proceeding are closely related. *Id.* Because the burden is on the party arguing in favor of estoppel, "[s]ufficient proof must be introduced to show [prior] litigation of the . . . issue" that is purportedly barred from relitigation. 18 Federal Practice and Procedure § 4405. If reasonable doubts exist as to what issue was originally adjudicated, issue preclusion should not be applied. *In re Braniff Airways, Inc.*, 783 F.2d 1283, 1289 (5th Cir. 1986).

[7] Among the exceptions to the issue preclusion rule are cases in which "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; [or] the burden has shifted to his adversary." Restatement § 28(4). In such cases, it would be inappropriate to hold that a prior finding that a party failed to meet a high burden bars the same party from proving an issue under a lower burden. Thus, for example, acquittal in a criminal case (in which the burden was proof beyond a reasonable doubt) does not preclude a defendant's liability in a civil case on the same issue (in which the burden would be simple preponderance). *See id.*; *see also* 18 Federal Practice and Procedure § 4422. The same principle applies in civil cases with different burdens. "The differences in gradations of civil standards of proof are more subtle than the shift from the reasonable-doubt standard to the preponderance standard, but the same basic principle continues to apply." *Id.* Similarly, if the initial presumptions in a case have shifted (and thus the burden has shifted), it would be unfair to hold an earlier judgment against the losing party who need not overcome the presumption in the second proceeding. *See id.*

Applying the rules to this case, it is plain that issue preclusion is inapplicable. First and foremost, the issue in Civil Action No. 257 was adjudicated under a different set of burdens and presumptions than those applied below in this case. Therefore, an exception to the issue preclusion rule applies. *See* Restatement § 28(4); Federal Practice and Procedure § 4422. The 1963 judgment states that Imerab "failed to prove" that the land was owned by "the Ituu [L]ineage as she claim[ed] it [was] constituted." It went on in the opinion portion to conclude that Imerab was unable to overcome the "presumption that listings in the Japanese land survey . . . were correct." Thus, Rechuld, by virtue of his

listing as owner in the Japanese survey, was the presumptive owner of the land. Even by 1963, it was well-established that the Tochi Daicho was entitled to a presumption of accuracy. Indeed, those contesting the survey had to make "a clear showing that [the survey] is wrong." *Baab v. Kerang*, 1 TTR 284, 286 (Tr. Div. 1955); *see also Ucherbelau v. Ngirakerkeriil*, 2 TTR 282, 283 (Tr. Div. 1961). In contrast, the burden faced by Imerab's descendents in the present action was a mere preponderance of the evidence. Thus, Imerab faced a higher burden in 1963 than Appellees did here. These different standards are sufficient to bring the case into the exception to the issue preclusion rule for proceedings involving different burdens of proof. *See* Restatement § 28(4).

Even if the burden applied in the 1963 proceedings had been lower, the issues decided in the present case and in Civil Action No. 257 are not the same and thus issue preclusion is inapplicable. The documents submitted by Appellants in support of their claim are insufficient to satisfy Appellants' burden to show that the two issues litigated were the same. *See* Restatement § 27 cmt. f; Federal Practice and Procedure § 4405. Appellants rely on the complaint, the pretrial order, the testimony of Barao, and the judgment from Civil Action No. 257. They argue that "[i]mplicit" in the earlier case we can "essentially" find the determination that Imerab had no authority within Ituu Lineage and she was not ochell. The complaint and the pretrial order lend some support to the conclusion that Imerab claimed to have authority within Ituu Lineage. Further, Barao's testimony asserted that Imerab and he each wielded power within the Lineage. However, nothing submitted on appeal suggests that Imerab's ochell status or her status as a title-holder in Terekieu Clan were central issues in the case. Thus, while some of the evidence put forward in 1963 likely overlapped with that presented below, we are unable to determine to what extent the evidence in both proceedings overlapped or whether discovery in the earlier case would have reasonably "embraced" the issue in the latter. *See* Restatement § 27 cmt. c.

Nonetheless, Appellants invite us to infer, from Imerab's claim to authority and the language of the judgment, that Imerab's status within the clan was actually litigated and decided. The judgment states that a "matrilineal family within Ituu," with the requisite authority, transferred land to Rechuld, and further concludes Imerab was not a member of that family. It might be a fair hypothesis to suggest, as Appellants do, that the court concluded that Imerab was not ochell and was not a legitimate title-holder which led to its ultimate judgment against Imerab. However, this does not necessarily follow. The word "ochell' is found nowhere in the records submitted from Civil Action No. 257. And Appellants have provided no evidence regarding the legal standard that the court was applying in 1963 to matters of traditional clan- and lineage-based land ownership. Appellants' only citation to the operative law is to a Trial Division case from 1969 stating that land transfer requires the consent of senior members of the clan. *See Armaluuk v. Orrukem*, 4 TTR 474, 475 (Tr. Div. 1969). There is no explanation as to how this would have governed the award of land in 1963. Thus, it is unclear whether the proceedings involved the same questions of law. *See* Restatement § 27 cmt. c.

Similarly, we are left wondering how the court reached its conclusion that Imerab was not a member of "a matrilineal family within Ituu." It could be that Imerab admitted or failed to present evidence that she was from the matrilineal line. In such a case, collateral estoppel would not apply because a court's determination pursuant to an admission is not considered "actually litigated." *See id.* at cmt. e.

We turn to the final factor listed in the Restatement: whether the case involved related claims. As the Trial Division noted in its denial of Appellants' motion for summary judgment, the claims involved in each case are somewhat, but not entirely, related. *See id.* at § 27 cmt. c. Civil Action No. 257 involved a determination as to whether the Tochi Daicho was incorrect to list Rechuld as the owner of certain Ituu lands. The present case concerns who has authority to receive a judgment award on behalf of the Ituu Lineage and Terekieu Clan.

These holes in Appellants' case for issue preclusion leave us with serious doubts regarding whether and to what extent Imerab's authority within Ituu Lineage was evaluated by the court in Civil Action No. 257. Because we have these "reasonable doubt[s]," we conclude collateral estoppel did not bar Appellees' suit. *See In re Braniff Airways, Inc.*, 783 F.2d at 1289.

Finally, we decline to consider the preclusive effect of Civil Action No. 298. Although records from the case were presented to the court below, at no point did Appellants argue that Civil Action No. 298 was preclusive. In their motion to intervene and motion for summary judgment, Appellants argued that Civil Action No. 257 alone was preclusive. Even in their closing argument, the only instance that the case is mentioned to support an argument made by the Appellants, it is only cited for the purpose of showing that Imerab was not referred to by her title in the earlier proceedings. Nowhere before the Trial Division did Appellants argue that Civil Action No. 298 barred Appellees' assertion of authority or status with Ituu Lineage. Because the issue was not fairly presented to the Trial Division below, we conclude that the contention that Civil Action No. 298 gave rise to preclusion on certain issues was waived. *See Rechucher v. Lomisang*, 13 ROP 143, 149 (2006).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the trial division.

KOROR STATE GOVERNMENT,
Plaintiff,

v.

REPUBLIC OF PALAU and JOHN C. GIBBONS,
Defendants.

CIVIL ACTION NO. 12-116

REPUBLIC OF PALAU
Plaintiff,

v.

KOROR STATE GOVERNMENT, by and through its Governor, YOSITKA ADACHI, and KOROR STATE LEGISLATURE, by and through its elected representatives
Defendants

Civil Action No. 12-117

Supreme Court, Trial Division
Republic of Palau

Decided: July 17, 2013

[1] Statutes: State Taxation

It is clear on the text of the 40 PNC § 2012 that if a state law fails to provide a detailed description of the purpose of the fee and the date of termination, the state law does not automatically, like sections (a) and (b), become null and void. Deficient compliance with this paragraph does not warrant automatic nullification of a state statute. It is reasonable to read Paragraph (c) as saying that a state shall be given an opportunity to correct the deficiencies under Paragraph (c), and, when a state complies, the state law then becomes effective.

[2] Statutes: State Taxation

Under 40 PNC § 2103(b), the Minister of Justice and the Attorney General are to decide whether the Statute imposing this fee violates Section 2102(a), (b), or (c).

[3] Statutory Interpretation: Preamble

The findings or preamble of a statute may be used to clarify ambiguities, but they do not create rights in the statute or limit those provided in the statute.

[4] Statutes: State Taxation

The Republic cannot read the goals stated in the preamble of 40 PNC § 2101 into Paragraph (c) of 40 PNC § 2102 and require a state tax to avoid discouraging investment, hindering economic development, or interfering with commerce among states.

[5] Statutes: State Taxation.

Although government corruption is a cancer that must be eradicated, the alleged misappropriations are not a subject of this section of 40 PNC §§ 2102, 2103.

Counsel for Koror State Government and Koror State Legislature: James Hollman
Counsel for Republic of Palau: Sara Bloom

The Honorable ARTHUR NGIRAKLSONG,, Chief Justice:

This case is about whether and when Koror State Government may enact a tax. The dispute began with KSPL No. K9-248-2011 (Statute), a law passed by Koror State Legislature on December 20, 2011, that raised the fees for Rock Island Use Permits and Jellyfish Lake Permits to $50.00 and $100.00, from $25.00 and $35.00, respectively. The Statute was to enter effect on June 1, 2012. Shortly after the Statute was passed, the Republic of Palau initiated a dialogue with Koror State Governor Yositaka Adachi, in which the Republic requested additional information regarding the legality of the Statute. The republic contended that, pursuant to 40 § 2103(b), the Statute was not effective until the Attorney General and the Minister of Justice determined that it comported with the requirements of 40 PNC § 2102(c). The Republic also argued that the law required Koror State to prove that the Statute was "justified," and that Koror State had failed to do so, despite the budgetary information Koror State supplied to the Republic allegedly demonstrating the need for additional fee revenue. By letter dated May 22, 2012, the Minister of Justice informed Governor Adachi that, "[u]nless there is a justification for the increase in fees . . . I hereby regret to inform you that the increases [in] fees are not justified. Therefore, it would be a violation of the [sic] 40 PNC 2102 to implement this increase in fees starting June 1, 2012."

On May 30, 2012, the Republic sued Koror State to enjoin the enforcement of the Statute. The Court denied the Republic's request for a temporary restraining order on May 31, but it held in abeyance the Republic's motion for a preliminary injunction pending further consideration. The next day, June 1, 2012, Koror State implemented the Statute and raised the fees. On June 11, 2012, the Court denied the Republic's preliminary injunction motion, but, in the interim, the parties filed new lawsuits against each other in which both parties sought declaratory judgments regarding the Statute's legality. The lawsuits were consolidated in the instant case. The Republic has moved for judgment under Civil Procedure Rule 57, while Koror State Government has moved for summary judgment under Rule 56.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings, affidavits, and other papers show no genuine issue of material fact, and that moving party is entitled to judgment as a matter of law. *Ulechong v. Palau Pub. Utils. Corp.,* 13 ROP 116, 119 (2006) (citing ROP R. Civ. P. 56(c)). "When considering a motion for summary judgment, the court must consider all evidence and inferences in the light most favorable to the nonmoving party." *Id.* (citing *ROP v. Reklai*, 11 ROP 18, 21 (2003)).

ANALYSIS

The critical mixed legal and factual issue centers on 40 PNC § 2202(c). It provides:

> No enactment of a state government which would impose a tax, charge, or fee shall be effective unless such enactment shall contain a detailed description of the activity, purchase, or other purposes to be accomplished with the revenue to be

> generated thereby, and a specific date of termination of such tax, charge, or fee reflecting the anticipated achievement of the objective of the enactment.

40 PNC § 2102(c). The specific issue before the Court is whether the Statute has provided "a detailed description of the activity, purchase, or other purposes to be accomplished with the revenue to be generated thereby." Section 2102(c)'s requirement for "a specific date of termination of such tax" is not at issue because KSPL K8-207-09, which the Statute merely modified, provides for a sunset date of August 31, 2019.

Paragraphs (a) and (b) of Section 2102 are helpful to clarify any ambiguities in the language of Paragraph (c). Paragraph (a) states that when the national government enacts a law that imposes a fee on a subject where a state government already has an existing fee on the same subject, the national law shall "nullify" the state law. Paragraph (b) states that a state law is "null and void and of no effect" if it imposes a fee on a subject where the national government already has a fee on the same subject.

Contrast the words in Paragraphs (a) and (b) with (c), the dispositive paragraph. Paragraph (c) does not state that if a state law imposing a fee fails to "contain a detailed description of the activity, purchase, or other purposes" of the fee and "a specific date of termination of such [fee]" then the state law shall be "null and void and of no effect." Paragraph (c) says it shall not be "effective."

[1] It is clear on the text of the statute that if a state law fails to provide a detailed description of the purpose of the fee and the date of termination, the state law does not automatically, like sections (a) and (b), become null and void. Deficient compliance with this paragraph does not warrant automatic nullification of a state statute. It is reasonable to read Paragraph (c) as saying that a state shall be given an opportunity to correct the deficiencies under Paragraph (c), and, when a state complies, the state law then becomes effective.

[2] In this case, there is no national fee on the rock islands and Jellyfish Lake. Koror State has enacted a law imposing fees on those subjects. Under 40 PNC § 2103(b), the Minister of Justice and the Attorney General are to decide whether the Statute imposing this fee violates Section 2102(a), (b), or (c). Since Paragraphs (a) and (b) are not implicated, it is Paragraph (c) the Court examines. And since the termination date of the fee has been provided for in the earlier Koror State law, the only remaining issue is whether Koror State has provided a detailed description of the fee required by Paragraph (c).

[3, 4] The Republic argues that this fee is excessive, that it discourages investment and economic development, and that it interferes with the free flow of commerce among the states. Protection of investment, economic development, and the free flow of commerce among the states are mentioned in 40 PNC § 2101, the findings or preamble of the statute. The findings or preamble of a statute may be used to clarify ambiguities, but they do not create rights in the statute or limit those provided in the statute. 1A Norman J. Singer

& J.D. Shambie Singer, *Statutes and Statutory Construction* § 20:3 (7th ed. 2009) ("The function of the preamble is to supply reasons and explanations and not to confer power or determine rights. Hence, it cannot enlarge the scope or effect of a statute."); *Yazoo & Mississippi Valley R.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) ("[T]he preamble is not part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous . . . .").[1] In other words, the Republic cannot read the goals stated in the preamble into Paragraph (c) and require a state tax to avoid discouraging investment, hindering economic development, or interfering with commerce among states. Doing so would obviously enlarge the rights of the Republic, and therefore it cannot be done.

For the same reason, the Republic cannot imply-as it attempts to do-that it has a right to determine an appropriate amount of the fee if it deems the fee to be either excessive or not "justified." These words are not found in Section 2102(c). The paragraph does not give the Minister of Justice or Attorney General the right to decide the amount of the fee. It is clear from the text of the statute. *See Ngarameketii v. Koror State Pub. Lands Auth.*, 16 ROP 229, 230-31 (2009) (holding that where the plain meaning of a statute is unambiguous, the court should enforce the statute as written, and it need not review additional evidence regarding public policy).

[5] The Republic also argues that there is evidence of misappropriation of the permit fee revenue. Although government corruption is a cancer that must be eradicated, the alleged misappropriations are not a subject of this section of the law. The parties' rights are specifically provided for in Sections 2102(c) and 2103(b). It is these sections of the law that are controlling. All that is required of Koror State Government is to submit a detailed description of the purposes for the revenue. Has Koror State done that? If so, then Koror State has complied with Section 2102(c), and the Statute and the fee have become valid law.

Koror State has indeed provided the Republic with a detailed description of the purposes for the fee increase. The Statute itself explains that "[t]he increasing number of visitors to the rock islands is placing a strain on Koror State resources," such that a fee increase is required "to generate revenues that may be used to monitor and preserve its marine resources and improve rock island tourist facilities." KSPL K9-248-20 I 1. The Statute also cites the need "to adequately clean and maintain tourist activity areas and to further improve and develop other areas of the rock islands."

Moreover, Governor Adachi provided the Republic a substantial measure of additional information in his communications with the Minister of Justice after the Statute was enacted. For example, in his letter dated December 30, 2011, the Governor explained:

> Koror State Government uses the fees collected for many purposes. These include the construction in the rock islands of summer houses, barbecue facilities, picnic tables and benches,

[1] Where the law of Palau is silent, the common law of the United States applies. 1 PNC § 303.

> construction of 'bio-toilet' facilities to help reduce pollution, and for clean-up crews to rake leaves, clean restroom facilities, and to maintain all rock island tourist facilities.

Another letter from Governor Adachi, this one dated May 10, 2012, enclosed a spreadsheet detailing total revenue collected from the Rock Island Use Fee from 2009 to 2011, along with total expenditures incurred to service the rock islands. It also details the manner in which the expenses are incurred, delineating costs for personnel, sanitation and dog control, supplies, travel costs and other expenditures. Because the Court need not and will not second guess the policy decisions of Koror State Government, the Court's only duty is to determine whether Koror State has complied with the law and supplied the requisite description of the fee. *See Uehara v. ROP*, 17 ROP 167, 172-73 (2010) (holding that "if a statute is not susceptible of more than one construction, courts should not be concerned with the consequences resulting from its plain meaning"). On the strength of the evidence presented, the Court concludes that Koror State has complied with it, and that Koror State is entitled to summary judgment in these cases.

CONCLUSION

Koror State Government has provided the Republic with the statutorily-required "'detailed description of the . . . purposes to be accomplished" with the fee. The Court holds that KSPL K9-248-20 11 conforms to the requirements of 40 PNC § 2102(c), and that it has the full force and effect of valid law. Accordingly, Koror State Government's Motion for Summary Judgment is hereby **GRANTED**. Judgment is hereby **ENTERED** in favor of Koror State Government, Koror State Legislature and Koror State Governor Yositaka Adachi, and against the Republic of Palau and its Minister of Justice, John C. Gibbons.

In the Matter of Clara KALSCHEUR,

CLARA KALSCHEUR
Respondent.

Disciplinary Proceeding No. 12-003

Supreme Court, Trial Division
Republic of Palau

Decided: July 23, 2012

[1] **Professional Responsibility:** Applicable Rules

Disciplinary Rule 3 lists the various forms of discipline that may be imposed on lawyers found to be in violation of the Rules. These include disbarment, suspension, censure, a fine, or community service. The Disciplinary Tribunal may also assess the costs of investigating and prosecuting the action.

[2] Professional Responsibility: Applicable Rules

The Disciplinary Rules are designed to protect the public. The Rules provide safeguards for those who pay for, but do not receive, competent, diligent, expeditious, and fair legal services from their attorneys.

[3] Professional Responsibility: Practice of Law

Attorneys licensed to practice in Palau, as with attorneys in most other jurisdictions, swear an oath and are the designated gatekeepers to the justice system.

[4] Professional Responsibility: Practice of Law

It is the responsibility of the Disciplinary Tribunal, as the supervisors of the Palau Bar, to ensure that its members remain competent to practice law before the courts.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice, KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

PER CURIAM:

In the formal complaint filed June 21, 2012, Disciplinary Counsel charges Respondent with violating Palau's disciplinary rules for attorneys during the course of representation in three particular cases. Because she did not file a response,[1] Respondent admits that the complaint is true. Disciplinary Rule 5(c). Respondent appeared for her formal hearing on July 20, 2012. After the formal hearing, Kalscheur filed with the Clerk of Courts her "Statement of Respondent," which she had prepared but was unable to file until the hearing. The Statement explains that she does not contest the Disciplinary Proceeding and she agrees that she should no longer practice law, but she wishes to delay the onset of her disbarment so that she may finish between five and ten cases that she estimates will go to trial in the coming months.

[1] According to the formal complaint, Respondent indicated to Disciplinary Counsel that she did not intend to contest the proceedings, but she has filed no formal answer or other response with the Court stating this position.

The only matter to decide is the appropriate sanctions. After considering the gravity of the transgressions and her past suspension from law practice in Palau, we find that Respondent shall (1) be required to pay restitution to two clients; (2) be disbarred from the practice of law in Palau; and (3) pay the fees and costs incurred by Disciplinary Counsel during this proceeding. She shall also bear the costs associated with disbarment, including notice of disbarment published in the newspaper pursuant to the Disciplinary Rules. Respondent's disbarment will be effective thirty days after entry of this order, pursuant to Disciplinary rule 5(c).

VIOLATIONS OF DISCIPLINARY RULES

The formal complaint filed on June 21, 2012, charges that Respondent violated the Republic of Palau's Disciplinary Rules and the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules"). The Disciplinary Rules state that one ground for attorney discipline in Palau is violation of the ABA Model Rules. Disciplinary Rule 2(h), while another ground for discipline is violation of Disciplinary Rule 2 (c): "[a]n attorney may be subject to disciplinary action as provided by these rules for . . . violation of his oath or duties as an attorney."

The complaint charges that Respondent has violated ABA Model Rules 1.1 (competence); 1.3 (diligence); 3.2 (expediting litigation); 3.4 (fairness to opposing party and counsel); and 8.4 (misconduct).[2]

The violations, which we accept are true, may be summarized as follows:

1. In the case of *Airai State Gov't v. Kuniyoshi Fishing Co.*, Civ. Action No. 11-086, Respondent represents Plaintiff Airai State Government. The parties agreed to a status conference on September 13, 2011, but Respondent failed to appear. A pre-trial order issued that day was placed in Respondent's box; the order set deadlines for completion of discovery; pre-trial motions; pre-trial statements; and pre-trial conferences. Trial was set for January 30, 2012. Respondent filed nothing on behalf of her client. She arrived late to a pre-trial conference scheduled for January 23, 2012 and said she was on her way to the hospital because she did not feel well. The trial judge issued an order stating that Respondent's actions did a disservice to the court and to opposing counsel. On January 24, 2012, Respondent filed a motion to continue the trial due to health problems; the motion was granted and a status conference was set for February 21, 2012. The defendant in the case filed a motion to dismiss on March 12, 2012, "based mainly on Plaintiff's concessions." Respondent failed to respond, and the motion was granted.

2. In the case *Sato v. Sato*, Civ. Action No. 09-283, Respondent represents Defendant Sato. The trial

[2] The text of the ABA Model Rules is available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

date was set for September 7, 2011. During status conferences held on September 6, 2011, September 14, 2011, and in November of 2011, Respondent sought to continue the trial dates for medical reasons. Her requests were granted. Respondent also represented to the court on two different occasions that she could handle the case.[3] Trial is currently set for August 22 to 24, 2012.

3. In the case *Airai State Gov't v. Masters*, Civ. Action No. 11-115, Respondent represents Plaintiff. At a status conference on September 14, 2011, the parties agreed to deadlines for completion of discovery; pre-trial motions; pre-trial statements; and pre-trial conferences. Trial was set for December 19, 2011. On November 29, 2011, Respondent moved to continue the trial date due her health and the power outages affecting Palau at the time. At a status conference on December 5, 2011, the parties appeared before the court and set new filing deadlines as well as a new trial date. On February 1, 2012, the defendant filed a motion for default judgment because Respondent had failed to answer defendants' counterclaim. Respondent failed to oppose that motion. Respondent failed to respond on behalf of her client to discovery requests, forcing defendants to file a Civ. Proc. Rule 37(b) motion. Respondent promised and then failed to file pre-trial statements, and she filed a motion to continue trial.

The formal complaint alleges, and we accept as true, that Respondent has exhibited a pattern of behavior that involves failing to file required documents, failing to appear in court on behalf of her clients, and a lack of readiness to meet agreed-upon trial dates and deadlines. With this backdrop, we turn to the issue of sanctions.

DISCUSSION

[1] Disciplinary Rule 3 lists the various forms of discipline that may be imposed on lawyers found to be in violation of the Rules. These include disbarment, suspension, censure, a fine, or community service. The Disciplinary Tribunal may also assess the costs of investigating and prosecuting the action. What is more, Rule 5(g) provides that "[i]f the Tribunal finds that the allegations of misconduct are true, it shall impose an appropriate sanction or combination of sanctions pursuant to Rule 3 hereof. In considering what would be an appropriate disposition of the case, the Tribunal may take into account any prior disciplinary actions involving the respondent attorney." Sanctions are determined by reference to the ABA Standards for Imposing Lawyer Discipline.[4] In re *Smith*, 11 ROP 36, 38 (2003). *See also* In re *Shadel*, 6 ROP Intrm. 252, 257 (1997)

[3] In her Statement of Respondent filed July 20, 2012, Respondent claims that she spent considerable time on the case, but ultimately "does not object to returning the fee so that Mr. Sato can use the money to pay other counsel to finish the case."

[4] The text of this document is available at http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards_sanctions.authcheckdam.pdf.

("In determining an appropriate sanction, we refer to factors considered as either aggravating or mitigating circumstances . . . .")

We note that in 2005, Respondent was suspended for six months for a similar lack of diligent and competent representation. *In re Kalscheur*, 12 ROP 164 (2005). While the earlier proceeding is an aggravating factor, we are especially concerned by the similar nature of the behaviors that have been the subject of the 2005 and 2012 disciplinary proceedings. Respondent's medical issues, which the Disciplinary Tribunal acknowledged in 2005 "played a significant role in her derelictions," *id.* at 167, do not appear to have subsided.

Respondent has admitted to "suffering from mental health setbacks beginning in August 2011." However, Respondent did not inform her clients that she was unable to protect their interests; she did not inform her clients about the status of their cases; and she failed to advise her clients to seek help from other attorneys.

During the formal hearing, Respondent reiterated these facts and admitted that she did not do enough to represent her clients. The complaint alleges that Respondent continued to receive legal fees from clients Sato and Airai State Government despite engaging in misconduct in violation of the ABA Model Rules. These are all aggravating factors we consider in assessing sanctions. She did not raise mitigating factors that should ease the sanctions. While we are sensitive to the medical issues that have been plaguing Respondent for some time, we do not believe, as the Disciplinary Tribunal stated in the earlier disciplinary proceeding, that these issues excuse her behavior.

The Disciplinary Rules are designed to protect the public. The Rules provide safeguards for those who pay for, but do not receive, competent, diligent, expeditious, and fair legal services from their attorneys. While disbarment might appear to be a harsh form of sanctions, we take into account that Respondent was suspended for identical conduct in the past. We have considered the alternatives, and we are left with little choice but to disbar Respondent for the ultimate protection of the public.

DISCIPLINE

[3, 4] As the Disciplinary Tribunal wrote in 2005, "[t]he public is entitled to a reasonable guarantee that an attorney remains competent to represent clients." *In re Kalscheur,* 12 ROP at 168. "Attorneys licensed to practice in Palau, as with attorneys in most other jurisdictions, swear an oath and are the designated gatekeepers to the justice system. As such, it is the responsibility of the Disciplinary Tribunal, as the supervisors of the Palau Bar, to ensure that its members remain competent to practice law before the courts." *Id.* Considering Respondent's minimal level of representation on behalf of some paying clients; the aggravating factors discussed above; and the lack of mitigating factors present here, we therefore issue the following sanctions:

> 1. Return of the legal fee of $1,000.00 that Respondent received from Sato. Respondent shall notify Disciplinary Counsel and the Court through an affidavit when she has completed this restitution. The fee shall be due within thirty days of the issuance of this order.

2. Return of the portion of the monthly retainer of $750.00 that Respondent received from Airai State Government for work related to in-court practice and appearances for a period of ten months. Respondent is to submit to Disciplinary Counsel, within thirty days of the issuance of this order, an accounting of the hours she spent to prepare for and attend hearings and other court-related practice on behalf of Airai State Government. Should she fail to do this, she shall return the full amount of $6,750.00 that Airai State Government paid for her representation. She shall notify Disciplinary Counsel and the Court through an affidavit when she has completed this restitution. The fee shall be due within thirty days of the issuance of this order.

3. Disbarment pursuant to Disciplinary Rules 12 and 13. The effective date of disbarment is thirty days from the entry of this order. Respondent shall follow the procedures in Rule 12 for notification of clients being represented in permanent matters and the desirability of prompt substitution of another attorney. She shall file an affidavit pursuant to Rule 12(d) showing compliance and proper notification. Reinstatement is possible after two years, subject to all of the requirements provided in Rule 13.

4. Payment of Disciplinary Counsel's costs of investigating and prosecuting this action. Counsel shall submit to Respondent an itemized list detailing his fees and costs within seven days of the issuance of this order. Kalscheur will then have seven days to object to the amount requested. In the absence of any objection, she shall pay the amount to Disciplinary Counsel within thirty days. If an objection is filed or if Respondent fails to pay the fees, Disciplinary Counsel shall notify the Tribunal by filing a motion for attorneys' fees. We will then set a date for hearing further proceedings.

5. Costs associated with publishing the notice of disbarment. The Clerk of Courts will pay the cost of publication of the notice of disbarment pursuant to Disciplinary Rule 12 (e). The Clerk of Courts will then seek remuneration from Respondent.

ROBERT TUTII,
Appellant,

v.

IBLAI NGIRAULAU,
Appellee.

CIVIL APPEAL NO. 11-019
Civil Action No. 05-156

Supreme Court, Appellate Division
Republic of Palau

Decided: September 12 , 2012

[1] Appeal and Error: Standard of Review; **Custom:** Burden of Proof

The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error.

[2] Appeal and Error: Standard of Review

We affirm the Trial Division's factual determinations as long as they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion.

[3] Appeal and Error: Preserving Issues

An argument not properly raised before the Trial Division is waived.

[4] Equity: Estoppel

The proponent of an estoppel theory bears the burden of production.

Counsel for Appellant: Salvador Remoket
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

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

PER CURIAM:

Appellant Robert Tutii challenges the Trial Division's award of land in Choll Hamlet, Ngaraard State, known as Cadastral Lot No. 001 E 08, to Appellee Iblai Ngiraulau. Because the trial court's conclusions were not clearly erroneous, we affirm.

BACKGROUND

Tutii Delmau (Delmau) died intestate on November 13, 2001. His wife, Mererechong Delmau (Mererechong), predeceased him. The Delmaus adopted Tutii and several others who were related by blood to Mererechong. Appellee Ngiraulau is Delmau's daughter from an earlier marriage. She was adopted out to her paternal grandparents, Delmau's parents.

After Mererechong's death, an cheldecheduch was held. Tutii received American currency, Palauan money, and a share of property known as *Bitruul*. After Tutii's adoptive mother's death, he continued to care for his father until his death.

Tutii filed a petition to settle Delmau's estate on July 20, 2005. Later that year, the Trial Division entered an order and judgment giving him all assets listed in the initial petition. However, on May 12, 2009, Tutii filed a motion to reopen the estate in order to address additional cash and Cadastral Lot No. 001 E 08. Ngiraulau filed an objection, contending that she had a valid claim to the parcel. A trial took place on December 31, 2009.

The court heard evidence from two experts and Ngiraulau on Palauan custom. Riosang Salvador testified for Ngiraulau. Salvador testified that, under the concept of mora kotel, a child who is adopted out to the paternal grandparents may "return[] back to her original house" when her adoptive parents die. She then may have the right to inherit from her biological parents. Additionally, Salvador noted that a child adopted to her biological paternal grandparents has authority vis-à-vis her biological parents as an adoptive sibling of sorts.

Wataru Elbelau testified for Tutii. He agreed that a biological child who is adopted by the paternal grandparents is like a sibling to the biological father. He and Salvador also agreed that someone like Ngiraulau, with status both as a biological child and an adoptive sibling, was stronger in status than an adopted child like Tutii. This is particularly so, Salvador testified, when the adopted child has already been taken care of in a cheldecheduch. Adopted children, in such cases, are ngermedeb, which means they return to their original house and may not inherit further properties.

On May 11, 2011, the Trial Division issued a decision. The court first concluded that the intestacy statute, 25 PNC § 301, did not apply because Delmau died with issue. It credited the testimony of Salvador and determined that, by virtue of her status as the biological child of the decedent and adopted child of decedent's parents, Ngiraulau had the stronger claim.

Tutii appeals. He contends that (1) the trial court erred in its determinations regarding custom and (2) Ngiraulau is estopped from inheriting from her biological parents because she inherited from her adoptive parents.

STANDARD OF REVIEW

[1, 2] "The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error." *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006). We affirm the Trial Division's factual determinations "as long as they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion." *Delbirt v. Ruluked*, 13 ROP 10, 12 (2005) (citation omitted). We review legal conclusions de novo. *Ngoriakl v. Gulibert*, 16 ROP 105, 107 (2008).

ANALYSIS

Tutii's first argument on appeal is that the Trial Court erred because Salvador's testimony regarding mora kotel only supported Ngiraulau's ability to "return" to her biological *mother's* house. This, Tutii contends, does not give her the right to inherit from her biological *father*. While this is an accurate description of mora kotel, it

mischaracterizes the expert testimony. Salvador stated that Ngiraulau had the right to inherit by virtue of her adoptive relationship to her paternal grandmother's house. Salvador said that this gave rise to inheritance rights from both Ngiraulau's adoptive parents (her biological paternal grandparents) and her adoptive sibling (her biological father).

Additionally, Tutii does not address the additional basis given for the trial court's conclusion. The Trial Division determined that Ngiraulau had a stronger claim to inherit from Delmau because she was adopted by Delmau's parents and Tutii was ngermedeb because he was taken care of after Mererechong's death. Evidence to support this conclusion was provided not only by Salvador, but also by Elbelau, Tutii's own expert witness. Thus, there is "relevant evidence" to support the Trial Division's conclusion, and we must affirm. *Delbirt*, 13 ROP at 12.

[3] Tutii's second argument is that Ngiraulau may not inherit from Delmau because she inherited from her adoptive parents as their adopted child. This argument was not properly raised before the Trial Division and is therefore waived. *See Rechucher v. ROP*, 12 ROP 51, 54 (2005). The only mention of Ngiraulau's inheritance from her adoptive parents came in closing argument, during which Tutii's counsel said that Ngiraulau could not "have her cake and eat it too." However, counsel did not advance a theory of equitable estoppel, which is Tutii's argument on appeal. Further, Tutii points to no evidence whatsoever regarding the basis for Ngiraulau's inheritance from her adopted parents. **[4]** This is fatal to his argument because the proponent of an estoppel theory bears the burden of production. *See* Restatement (Second) of Judgments § 27 cmt. f (1982) (discussing the burden of proof to show preclusion).

CONCLUSION

For the foregoing reasons, we **AFFIRM**.

LORENSO EDWARD and NGARANGEBIIS,
Appellants/Cross-Appellees,

v.

ABEL SUZUKY,
Appellee/Cross-Appellant.

CIVIL APPEAL NO. 11-011
Civil Action No. 10-098

Supreme Court, Appellate Division
Republic of Palau

Decided: September 12, 2012

[1] Appeal and Error: Standard of 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.

[2] Appeal and Error: Transcript

An appellant is not required to file a trial transcript, but the absence of a transcript largely precludes any challenge to the findings of fact made below.

[3] Custom: Title Holders

Appointing Ucherbelau is a two-step process. First, the proper person must be appointed by the appropriate title bearer. The ourrot should get together to appoint someone as Ucherbelau. The female title bearer is the most senior member of the clan and as such her decision must be followed. The oldest who happens to be the title bearer is responsible for the clan and is entrusted to make the best decision for the clan.

[4] Custom: Title Holders

While the strongest senior female may appoint someone to act as her proxy, she holds on to the power and authority of her title. She cannot "go off on her own."

[5] Appeal and Error: Clear Error

Without sufficient information as to the trial court's factual findings or credibility determinations, the Appellate Court lacks an adequate basis for review.

Counsel for Appellants: Moses Uludong
Counsel for Appellee: Brian Sers Nicholas

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

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

PER CURIAM:

This case concerns leadership of the Orakiblai Clan in Angaur State. The Orakiblai Clan is the highest ranking clan of Angaur. The dispute centers on who is the proper Ucherbelau, or highest title of the male chief, of the Clan. The Ucherbelau is appointed with the consent of the Dilbelau, the strongest senior female member of the Clan, and then confirmed by the klobak, or council of chiefs. The klobak for one of the villages

on Angaur, Ngerbelau village, is called Ngarangebiis. Defendant Ngarangebiis is a party to this appeal but does not appear to be represented by any individual.[1]

The Ucherbelau is the head of Ngarangebiis Klobak and the highest chief and representative of Angaur State in the Palau Council of Chiefs. The Ucherbelau is also a member of the Angaur State Legislature. Appellant/Cross-Appellee Edward and Appellee/Cross-Appellant Suzuky have each been appointed as Ucherbelau, but there can be only one. In June 2010, Edward filed his complaint, and Suzuky filed a cross-claim. The parties sought, among other things, a declaration from the Trial Division as to who is the proper Ucherbelau.

The case proceeded to trial, and Edward and Ngarangebiis now appeal the Trial Division's May 11, 2011, Judgment and Decision. The Trial Division ultimately concluded that Suzuky was appointed to the title of Ucherbelau, but that he did not secure acceptance from all members of the Ngarangebiis Klobak and therefore did not succeed to the chiefly title. The Trial Division also concluded that Edward did not have the consent of Dilbelau and therefore did not bear the title Ucherbelau.

Edward and Ngarangebiis present the following issues for us to decide: First, whether the three ourrot, or strong senior female members, selected Edward as Ucherbelau of the Orakiblai Clan, and second, whether Ngarangebiis Klobak approved the appointment of Edward. Suzuky has cross-appealed the issue of whether the Trial Court erred in ruling that he cannot succeed to the title of Ucherbelau because he did not secure the acceptance of all the members of the Ngarangebiis Klobak and that he did secure the acceptance of the larger klobak, Ngeaur Klobak, to be their "friend." For the reasons stated below, we affirm in part and reverse in part.

BACKGROUND

I. Factual Background

We have summarized the relevant facts below, but we direct curious readers to the Trial Division's recitation in its May 11, 2011, Judgment and Decision. This case began in 2008 with the passing of Ucherbelau Pedro. With no one claiming the chiefly title, three meetings took place on Guam between 2008 and 2010 to discuss this issue. A title bearer must be appointed and then confirmed according to custom.

Dilbelau Concepcion P. Merrill is the strongest senior female member of the Clan. She lives on Guam and she attended all of these meetings. She is the female equivalent of the Ucherbelau. Her sister, Lorenza Pedro, attended only the second meeting. Lorenza, who lives in Palau, bears the title Omikbil, the next in line to become Dilbelau. She wrote a letter on December 24, 2008, stating that she and her sister would confer over the appointment of Ucherbelau, that "since time immemorial Dilbelau appoints Uche[r]belau," and that she would inform the members of Olbiil ra Ngeaur who the Ucherbelau would be.

[1] The Trial Division held that Andres Uherbelau is a member of the klobak but is not a party in interest to this case.

On January 13, 2009, Dilbelau Merrill wrote a letter to Governor Steven Salii and the members of the Olbiil ra Ngeaur, stating that Lorenza had authority over all Clan matters but that the title Ucherbelau will remain with Lorenza until Dilbelau and others have appointed someone at which time everyone will be informed. On November 30, 2009, Lorenza wrote a letter to the Ngarangebiis Klobak, stating that she, acting as Dilbelau, had appointed Appellant as Ucherbelau and offered him as the "friend" of the klobak. The letter refers to Dilbelau and the typewritten signature says "Dilbelau," but Lorenza signed her own name. Lorenza believed she had the authority to appoint Edward pursuant to a notarized letter from January 13, 2009, in which she claimed Dilbelau had given her power of attorney. Edward met with Rubekul Belau, or the Council of Chiefs, on December 17, 2009.

A short time later, at the third meeting on Guam on January 30, 2010, Dilbelau Merrill questioned Suzuky and then appointed him Ucherbelau. She made this appointment known in writing to the Council of Chiefs and to Ngeaur Klobak Association. On February 1, 2010, she wrote a letter to Lorenza "clarifying that the authority given her was for Lorenza to be Dilbelau's eyes, ears and mouthpiece during meetings and to report to her all important matters concerning Angaur and all of Palau." Upon learning of Lorenza's actions in appointing Ucherbelau, Dilbelau took away Lorenza's title and revoked the power of attorney.

Suzuky then held his blengur (feast)[2] in June 2010 at Bai ra Maibrel in Koror. Ten rubaks, some from Ngarangebiis and some rubaks from other villages, attended this blengur. Believing that he had been appointed as Ucherbelau, Edward also held his blengur in Koror in 2010. Not all of the members of Ngarangebiis Klobak attended Edward's blengur.

Trial took place from January 17 to 21, 2011, and Edward and Suzuky each presented several witnesses and numerous pieces of evidence. In its decision issued May 11, 2011, the Trial Division held that the undisputed ochell and ourrot (strong senior female) members are (1) Dilbelau Merrill and her children, (2) Lorenza Pedro and her children, and (3) Josepha Seba. The undisputed ochell members include the three ourrot members, plus Abel Suzuky and Vivian Pedro. Suzuky bore the title Bebuchel of Orakiblai; the bearer of this title is first in line to become Ucherbelau. Edward is an ulechell, or lower-ranked, member.

The Trial Division found that the selection and approval of Ucherbelau is a two-step process, whereby the ourrot members of Orakiblai must first select and approve a member, subject to approval by the klobak of his home village. Three experts testified to this process during the trial. The Court found that the evidence showed the ourrot should convene to appoint someone to bear the title. Two experts testified that the title bearer may delegate responsibilities and obligations to a merolel, or proxy of a title bearer, but that

[2] Various spellings of this word have been used throughout the briefing. For consistency, we use the spelling provided in the Trial Division's decision.

Dilbelau holds on to the authority of the title. The merolel is the "eyes, ears, and mouthpiece of a title bearer," but does not have independent authority. Rebechall Takeo Ngirmekur testified that the female title bearer's decision must be followed.

The Trial Division found that Dilbelau Merrill is the senior member of Orakiblai Clan, and she has the authority under Palauan custom to appoint a member of the Clan to become Ucherbelau. Her sisters, Lorenza Pedro and Josepha Pedro, are ourrot members of the clan, but they must defer to Dilbelau Merrill's appointment of Suzuky. The Court further held that Edward had not succeeded to the title of Ucherbelau, did not have the consent of Dilbelau to become Ucherbelau, and therefore he does not bear that title. Moreover, even though Dilbelau appointed Suzuky, he did not secure the acceptance of all members of the Ngarangebiis Klobak, and therefore did not have the title.

II. Procedural Background

The parties filed this appeal and cross-appeal in June 2011. This launched a five-month frenzy of filings to request additional time to file transcripts. The trial was conducted in Palauan, and the transcriber stated that she was having difficulty discerning the witnesses' testimony. Suzuky filed with the Court a copy of an order of transcript pursuant to ROP Rule of Appellate Procedure 10(b). Edward filed nothing and then sought an extension to order written transcripts and to file his opening brief. His motion was granted. The parties were both given until October 11, 2011, to file their transcripts. Edward then filed another motion to extend time to file his transcript, which was denied. Suzuky then moved for and was granted an extra week to file his transcript.

However, instead of filing the transcript, he filed a "third ex parte request for extension of time to file transcripts" on October 31, 2011, which was denied on November 1, 2011. The Court acknowledged that the audio recording was served on Edward on June 13, 2011, and on Suzuky on June 30, 2011. The Court then issued an order to show cause as to why the appeal should not be dismissed for failure to prosecute.

Suzuky filed a response and stated that he was unable to secure the funding for this appeal; his counsel states that he is representing Suzuky pro bono. Edward also filed a statement that the lack of a transcript was "caused by the inability of the transcriber and it was beyond their control and was unforeseen" and "does not prejudice nor undermine court rules or adversely affect its proceedings of this appeal." No transcript was filed. The parties filed their opening briefs on November 25, 2011. The Trial Division then considered whether to dismiss these appeals because no transcript was filed. The Court found that the failure to file the transcripts was the result of excusable neglect and the parties filed their response briefs.

According to Palau's Rules of Appellate Procedure, at the time the notice of appeal is filed, "an appellant may request an audio recording of the testimony or evidence adduced in the trial court." ROP R. App. P. 10(b). Within fourteen days after the recording is provided, any appellant who wishes to raise an issue must either order the transcript or file a certificate stating that no transcript will be ordered. The parties ordered

transcripts and then spent several months seeking extensions for the transcription. The transcription was never completed.

STANDARD OF REVIEW

[1] "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. *Imeong v. Yobech*, 17 ROP 210, 215 (2010) (citations omitted). The Court will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record. *Id.*; *see also Estate of Rdiall v. Adelbai,* 16 ROP 135, 137 (2009) ("[S]tatus within a clan is a matter of custom, and [the Appellate Division] review[s] a trial court's findings regarding a custom's terms, existence, or nonexistence for clear error."). This Court has a history of reviewing conclusions about custom as a factual matter, which necessarily limits the scope of appellate review. *Imeong*, 17 ROP at 215. "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." *Orak v. Ueki*, 17 ROP 42, 46 (2009). However, "[i]f 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." *Imeong*, 17 ROP at 215.

ANALYSIS

I. Record on Appeal

[2] Both parties argue about the scope of the record on appeal, and whether the trial testimony may be cited. "An appellant is not required to file a trial transcript, but the absence of a transcript largely precludes any challenge to the findings of fact made below." *Shmull v. Ngirirs Clan*, 11 ROP 198, 203 (2004). Where a party "has chosen not to provide a transcript from the hearing below, we are bound therefore to accept [the trial court's] factual finding as true." *In re Tellei*, 7 ROP Intrm. 195, 196 (1999) (citing *Smau v. Emilian*, 6 ROP Intrm. 31, 33 n.1 (1996)).

However, Rule 10(a) of our Appellate Rules of Civil Procedure provides that the "original papers and exhibits filed in the Trial Division and the transcript or an audio recording of the proceedings, if any, shall constitute the record on appeal. The entire record shall be open for consideration on appeal to the Appellate Division." We note that Edward in his Reply Brief, filed January 20, 2012, argues that Suzuky is prohibited "from using references to specific testimony in audio recording," and notes that the parties are limited to the court judgment and the records and evidence submitted and admitted during trial.

Rule 10(b) permits reliance upon an audio recording under certain conditions. First, an appellant may request an audio recording of the testimony, which is what occurred here. Fourteen days later, any appellant "desiring to raise an issue on appeal depending on the whole or any part of the testimony or evidence adduced in the trial

must either (i) order a transcript . . . and file a copy of the transcript order with the Appellate Division or (ii) file a certificate stating that no transcript will be ordered . . . ." ROP R. App. P. 10(b).

While the parties intended to file transcripts, they appear to have run into a number of difficulties. The Court's November 11, 2011, Order is sufficient to indicate that the parties may proceed in reliance on the audio recording. We note only Suzuky provided specific references to the transcript in his briefing. Pursuant to the Clerk of Courts' letters submitting to the parties copies of the audio recording, "[r]eferences to the record must be followed by a pinpoint citation to the page, transcript line, or recording time in the record . . . . Factual arguments or references to the record not supported by such an adequately precise pinpoint citation may not be considered by the Appellate Division." Because we ultimately remand, we are aware that the Trial Division may ask for additional briefing or references to the testimony from the trial. The parties are advised to cite carefully to the audio transcript.

II. Appointment

[3, 4] With the scope of the record now defined, we turn to the process of the appointment of Ucherbelau. The parties agree that appointment is a two-step process. First, the proper person must be appointed by the appropriate title bearer. The ourrot should get together to appoint someone as Ucherbelau. However, as the Trial Division stated, the "female title bearer is the most senior member of the clan and as such her decision must be followed." The Trial Division also stated that the oldest "who happens to be the title bearer is responsible for the clan and is entrusted to make the best decision for the clan." While a title bearer may delegate some responsibility, she "holds on to the power and authority of the title," and anyone she appoints to act as her proxy cannot "go off on her own." Whether Edward or Suzuky was rightfully appointed as Ucherbelau according to custom is a question of fact that we review for clear error.

In determining that Suzuky was rightfully appointed, there are several pieces of evidence the Trial Division considered. First, Dilbelau Merrill has the authority to make the appointment for Ucherbelau. As Dilbelau, her decisions are to be respected by the ourrot. On February 1, 2010, while Dilbelau clarified that her sister Lorenza was to be the "eyes, ears and voice in attending meetings" occurring in Palau, she was very clear that the "appointment of Ucherbelau and the appointment of men and women who will bear titles for the Clan of Orakiblai are things I should be aware of and have my approval and signature."

Edward argues that the three ourrot appointed him as Ucherbelau, and suggests that the letter Lorenza wrote on November 30, 2009, acts as sufficient evidence of his appointment as Ucherbelau. The letter was written as Dilbelau but signed with Lorenza's name: as the Trial Division concluded, Lorenza was acting outside of her authority because she did not defer to her sister. Edward also argues that any time Dilbelau acted on her own, she was "already ill and old" and that her signature indicated some kind of lack of consent to appointing Suzuky. It is not the function of this Court to review the evidence and evaluate its veracity. Instead, we can only review the factual

conclusions of the Trial Division for reversible error. We find that the conclusion that Suzuky was properly appointed by Dilbelau Merrill was not erroneous.

Second, Dilbelau Merrill did in fact make this appointment at the final meeting held in Guam in 2009 and finalized it in a series of letters in January of 2010. Dilbelau Merrill explained during her deposition that she could not appoint Edward because he is an ulechell member, and "we cannot get an ulechell to bear the title." We find the conclusion drawn by the Trial Division, that Dilbelau Merrill had the authority to make an appointment to Ucherbelau, and that she acted within her authority when she appointed Suzuky, to be a factually correct one. We find no error and we accordingly affirm the Trial Division as to this finding.

III. Acceptance by Ngarangebiis Klobak

The second part of the appointment process requires that the newly appointed Ucherbelau gain approval as the "friend" of the klobak of the village where he comes from. The Trial Division held that both parties needed the acceptance of Ngarangebiis Klobak of Ngerbelau Village. The opinion devotes only a half page to the evidence supporting the custom of acceptance by the klobak. The Trial Division has stated that "as established by the customary experts . . . one must be accepted as a friend of the Klobak of the area where one is from." The opinion also states that the "evidence provided shows not all members of Ngarangebiis attended the blengur," without stating who presented such evidence, and that "no other evidence was shown to prove that all members of Ngarangebiis accepted either of the two men to be their friend." Unfortunately, the Court was not more specific than that.

[5] We have held that "[w]ithout sufficient information as to the trial court's factual findings or credibility determinations, the Appellate Court lacks an adequate basis for review." *Beouch v. Sasao*, 16 ROP 116, 119 (2009). Moreover, we note that "where a lower court has not clearly set forth the basis for its decision, remand for further elaboration is appropriate." *Estate of Tmilchol v. Kumangai*, 13 ROP 179, 182 (2006); *see also Eklbai Clan v. Imeong*, 11 ROP 15, 17-18 (2003).

In his Opening Brief, Suzuky asks the Court to rule there is only one klobak in Angaur, "that of Ngeaur Klobak." Suzuky also seeks a declaration that "it is now the customary practices [sic] of the people of Angaur that any [blengur] must be had with the Ngeaur Klobak." Suzuky further argues that the Trial Division erred in holding that Suzuky needed to "secure the acceptance of the members of Ngarangebiis Klobak of Ngerbelau Village, not the Ngeaur Klobak, of Angaur State." Suzuky argues that Ngarangebiis and the klobaks from the three remaining villages on Angaur had united to form the Ngeaur Klobak in 1937 and therefore the custom was and is presently that for "any [blengur] for any male traditional title be had with Ngeaur Klobak as it is their acceptance and consent that is required as a matter of Palauan customary law as applied in Angaur."

The Trial Division's opinion lacks citations to evidence upon which it relied, making the Appellate Division's review very difficult. The Trial Division's decision says nothing of whether there is only one klobak or whether the customary practices are now

different. The decision says that besides a blengur, "another means of showing acceptance by a klobak is through a document with the rubaks showing support," but this is not supported by citation to testimony or other evidence. This decision lacks the specificity to show how the Trial Division reached the conclusions that (1) an Ucherbelau must be accepted by the klobak of the village where he is from, and (2) how that acceptance is made.

Suzuky also asks that we "take judicial notice" of certain facts in order to draw an inference about the rubaks who attended his blengur. We cannot take judicial notice of facts at this stage in the appellate process. Further, we are sympathetic to Edward's argument that there was no evidence that was "legitimized by the Palau or Angaur governments through constitutional or legal mechanisms or through traditional and customary laws or practices" regarding the blengur. The decision below lacks the detail necessary for us to review it properly. *See Estate of Tmilchol*, 13 ROP at 182. Accordingly, on the issue of whether Suzuky was accepted by the klobak (and which klobak must accept him), we reverse the Trial Division below and remand for further proceedings.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division's conclusion as to the appointment of Suzuky as Ucherbelau, and we **REVERSE AND REMAND** on the limited issue of which klobak must accept Ucherbelau as its "friend." We remind the parties that "disputes over customary matters are best resolved by the parties rather than the courts." *Imeong*, 17 ROP at 220. As we have noted in other cases, we believe it would "be even better if the two competing factions were able to conclude this matter on satisfactory terms outside of court." *Id.*

The Trial Division is instructed to review the record and make a conclusive determination as to the appropriate custom for the Clan. The Trial Division may choose to receive additional evidence and, if necessary, should "articulate its reasoning to the best of its ability, making explicit any customary law or findings of fact upon which it relies." *Imeong*, 17 ROP at 220.

FIRST COMMERCIAL BANK,
Petitioner,

v.

NANCY WONG and BERLINDA NGIARAUNGIL,
Respondents.

SPECIAL PROCEEDING NO. 12-002
Civil Action No. 07-348

Supreme Court, Appellate Division
Republic of Palau

Decided: September 18, 2012

[1] Appeal and Error: Writs and Petitions

Although Rule 21 petitions are not appeals, we emphasize that the other Rules of Appellate Procedure, to the extent practicable and appropriate, should be followed with respect to any matter filed with the Appellate Division. For example, the Appellate Division will not grant a stay of Trial Division proceedings absent compliance with Rule 8; we will not hesitate to levy sanctions for frivolous petitions based on Rule 38; and we will enforce any applicable form and content requirements found in Rule 28. Labeling one's filing a "petition" instead of an "appeal" does not absolve a litigant of compliance with these Rules.

[2] Appeal and Error: Writs and Petitions

A writ of prohibition will be issued only in extraordinary circumstances. A petitioner must clearly establish that a lower court is about to exercise judicial power in an unauthorized manner and that the exercise of such power result in an injury for which there is no other adequate remedy. We will not issue such writs simply to review and correct errors and irregularities of a lower court.

[3] Property: Attachment

A writ of attachment does not become a lien until it is served on legal authorities.

[4] Appeal and Error: Writs and Petitions

Unless a lower court has clearly overstepped its jurisdictional bounds, a writ of prohibition is improper.

Counsel for Petitioner: David Shadel
Counsel for Respondents: Mariano Carlos and Jason Shaw

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Special Proceeding arising from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Before the Court is First Commercial Bank's (Bank or Petitioner) Amended Emergency Motion to Stay the proceedings before the Trial Division and its Petition for a Writ of Prohibition.[1] For the following

[1] Although Petitioner styles its filing as a Petition for a Writ of Prohibition or Mandamus, it is clear that the Bank is requesting a writ of prohibition

reasons, we will not enter a writ of prohibition or stay the proceedings before the Trial Division.

BACKGROUND

The pertinent facts are these. Nancy Wong sued First Commercial Bank in 2007. During the pendancy of the law suit, the Bank closed its doors and began to wind down its business in Palau. Accordingly, on March 13, 2012, the Trial Division entered an order issuing a writ of attachment, attaching $420,219.78, which corresponds to the potential amount of a judgment against the Bank. Unfortunately, the Bureau of Public Safety was not served with the Writ, so the funds were not attached at that time. In an affidavit, Wong attested that she was told by a representative of the bank that there are no more funds available. She filed an emergency motion hoping to effect the writ. On August 30, the Trial Division granted Wong's motion and ordered the Bank to deposit the amount with the Director of Public Safety, or explain by affidavit why it is unable to deposit the funds and to post a bond for the amount.

On September 7, 2012, Petitioner Bank filed a Petition for Writ of Prohibition or Mandamus with this Court. In its often unfocused supporting Memorandum, Petitioner appears to object to the Trial Division's August order for two reasons. First, the Bank protests that funds may not be attached if they are no longer within Palau. This point seems to concede that the hearsay attested to in Wong's affidavit is correct, and the funds have left the country. Second, the Bank protests that, because a writ of attachment may not be had, the Trial Division may not require the alternative posting of a bond.

ANALYSIS

[1] We begin with a note regarding the unusual procedural posture of this case. This is not an appeal from a final judgment, not does the Bank argue that it is an interlocutory or collateral order subject to our appellate jurisdiction. Instead, it is filed as a Special Proceeding pursuant to ROP R. App. P. 21. Rule 21 allows litigants to file petitions for writs of mandamus and prohibition with this Court. It also provides an outline of briefing and filing procedures to be followed when such petitions are filed. ROP R. App. P. 21(b), (d). Although such petitions are not appeals, we emphasize that the other Rules of Appellate Procedure, to the extent practicable and appropriate, should be followed with respect to any matter filed with the Appellate Division. For example, the Appellate Division will not grant a stay of Trial Division proceedings absent compliance with Rule 8; we will not hesitate to levy sanctions for frivolous petitions based on Rule 38; and we will enforce any applicable form and content requirements found in Rule 28. Labeling one's filing a "petition" instead of an "appeal" does not absolve a litigant of compliance with these Rules. This is simple common sense and is consistent with the letter and spirit of the Rules of Appellate Procedure.

[2] A writ of prohibition will be issued only in extraordinary circumstances. "[A] petitioner must clearly establish that a lower court is about to exercise judicial power in an unauthorized manner <u>and</u> that the exercise of such power result in an injury for which there is no other adequate remedy." *Kruger v. Mokoll*, 5 ROP Intrm. 121, 121-22 (1995)

and not mandamus.

(emphasis in original). If an appeal will serve to return to remedy any potential injury to the Petitioner, we will not issue a writ of prohibition. *Id.* We will not issue such writs simply "to review and correct errors and irregularities of a lower court." *Ngetpak Clan v. Keptot*, 9 ROP 99, 99 (2002). Although Petitioner cites non-Palau cases involving the issuance of such writs in cases involving a clear lack of jurisdiction of the lower court, *see, e.g., Whitney v. Fresno Cnty. Sup. Ct.*, 250 P. 666 (Cal. 1926), we have made clear that a Petitioner must show an irreparable injury in order to attain such a writ. *See id.*; *Kruger*, 5 ROP Intrm. at 121-22.

[3] With respect to the merits of the Petition, we first address the legality of the writ of attachment. Petitioner protests that the Trial Division's August Order "suggests that [the Bank] violated some obligation owing under the March Order." We are at a loss as to how this suggestion created an irreparable injury that justifies the issuance of a writ or prohibition. While Petitioner is correct that a writ of attachment does not become a lien until it is served on legal authorities, the August order issuing a writ remedied the mistake made in March. The writ was served. If the funds are still in Palau, then there is a valid writ of attachment. *See* 6 Am. Jur. Attachment & Garnishment §§ 284 (attachment not effective until it is levied), 289 (no authority to execute a writ outside the jurisdiction). Although Petitioner suggests that the money is no longer in Palau, this is not a fact that has been supported by admissible evidence submitted to the Trial Division—this deficiency was noted by Petitioner itself before the Trial Division in its objection to Wong's August motion. Because it is entirely unclear whether any or all of the funds to be attached are still in Palau, it would be woefully premature for this Court to prohibit the Trial Division from seeking out the funds.

[4] Next, we turn to the remainder of the court's order, specifically its requirement that, if the funds are not available to be attached, the Bank instead post a bond in lieu of attachment. Petitioner argues that there is no legal basis for the court to issue such a requirement and that the Trial Division should be prohibited from issuing such an order. This argument fails for two reasons. First, Petitioner has made no showing that furnishing such a bond would cause the type of irreparable injury entitling it to a writ of prohibition. *See Kruger*, 5 ROP Intrm. at 121-22. Petitioner, in its lengthy Memorandum in support of its Petition, fails to articulate *any* injury it would suffer by furnishing a bond pending the completion of the litigation. Second, it is far from "clearly established" that there is no legal basis for the Trial Division's bond requirement. *Id.* Petitioner fails to cite any Palauan authority for its conclusion that the requirement for a bond in lieu of attachment is improper. The remedy crafted by the Trial Division appears designed to further the statutory purpose of 14 PNC § 2101 to ensure that there will be "sufficient [funds] to satisfy the demand set forth" in a future judgment against the Bank, if any. Unless a lower court has clearly overstepped its jurisdictional bounds, a writ of prohibition is improper. *See Kruger*, 5 ROP Intrm. at 121-22; *Ngetpak Clan,* 9 ROP at 99.

CONCLUSION

For the foregoing reasons, the Petition is **DENIED**. The request for a stay is **DISMISSED** as moot.

VERONICA OMELAU,
Appellant,

v.

RISONG SAITO,
Appellees.

CIVIL APPEAL NO. 11-040
Civil Action No. 11-059

Supreme Court, Appellate Division
Republic of Palau

Decided: September 18, 2012

[1] Custom: Appellate Review

Customary matters are factual in nature. We will not set aside the Trial Division's findings unless we are "left with a definite and firm conviction that an error has been made."

[2] Descent and Distribution: Statutes; **Descent and Distribution:** Applicable Law

Section 301(b), although it uses the word "or," has been interpreted to apply only when someone dies without issue or a will *and* the land owned was not purchased for value. If these criteria are met and the appropriate lineage comes forward, § 301(b) applies, and the land goes to the lineage. If a person dies with issue and was a bona fide purchaser for value, then 25 PNC § 301(a) applies, and the land goes to the decedent's eldest child in the absence of a will stating otherwise. Otherwise, if neither § 301(a) nor (b) is applicable, a court will award property based on custom

Counsel for Appellant: Moses Uludong
Counsel for Appellee: Salvador Remoket

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

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

PER CURIAM:

Veronica Kotaro Omelau appeals the Trial Division's decision allowing Appellee Risong Saito to dispose of three parcels of land in Ngeschar State, which are part of the estate of Omelau's husband. Because the Trial Division did not clearly err in its fact-finding concerning custom, we affirm.

BACKGROUND

Edison Omelau (Edison), Omelau's husband, died intestate on March 21, 2009. Edison inherited the disputed parcels of land from his father. He did not purchase them for value. Edison was survived by his wife and three children. Saito is Edison's adoptive paternal aunt.

Saito claimed the three parcels of Edison's property, and the trial court held a hearing on the matter. According to the expert testimony of Wataru Elbelau, because Edison inherited the land from his father, his father's relatives should be permitted to dispose of the land. The Trial Division credited Elbelau's testimony and awarded the land to Saito.

STANDARD OF REVIEW

[1] Customary matters are factual in nature. We will not set aside the Trial Division's findings unless we are "left with a definite and firm conviction that an error has been made." *Kerradel v. Besebes*, 8 ROP Intrm. 104, 105 (2000). We will affirm the Trial Division as long as the "findings are supported by evidence such that a reasonable trier of fact could have reached the same conclusion." *Id.* We review conclusions of law de novo. *Wong v. Obichang*, 16 ROP 209, 212 (2009).

ANALYSIS

[2] Omelau levels two arguments on appeal. First, she contends that the Trial Division "erred in its finding that decedent died without issue." When an owner of land held in fee simple dies without issue or a will, or the land owned was not purchased for value, "the land in question shall 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 his death."[1] 25 PNC § 301(b). Section 301(b), although it uses the word "or," has been interpreted to apply only when someone dies without issue or a will *and* the land owned was not purchased for value. *Marsil v. Telungalk ra Iterkerkill*, 15 ROP 33, 36 (2008). If these criteria are met and the appropriate lineage comes forward, § 301(b) applies, and the land goes to the lineage. *See Koror State Pub. Lands Auth. v. Ngirmang*, 15 ROP 29, 33 (2006) (holding that a lineage meeting the statutory requirements must exist and come forward). If a person dies with issue and was a bona fide purchaser for value, then 25 PNC § 301(a) applies, and the land goes to the decedent's eldest child in the absence of a will stating otherwise. Otherwise, if neither § 301(a) nor (b) is applicable, a court will award property based on custom. *See Ngirmang*, 14 ROP at 33.

Appellant seems to be under the impression that the Trial Division concluded that Edison died "without issue" and thereafter applied § 301(b). This is simply a misreading of the court's decision. The court not only acknowledged that Edison was survived by three children; it also stated that he "did not die without issue." Because neither § 301(a) nor (b) applied, the Trial Division properly concluded that the land should be disposed of on the basis of custom.

Omelau's second argument is that "the court erred in finding that [Saito] is the closes[t] relative" of Edison. Again, this contention appears to miss the Trial Division's point. The court never made a finding that Saito was more closely related to Edison than his wife and three children. Instead, the court stated that Saito was "the closest surviving relative of Decedent *and his father*." (Emphasis added). Because Edison inherited the land from his father, the court determined, based the testimony of Elbelau, that Saito had authority, as Edison's paternal aunt, to determine how the lands should be distributed. Absent some citation to the record explaining how the court's conclusion lacks any support, Appellant's second argument fails. *See Kerradel*, 8 ROP Intrm. at 105.

[1] We apply the statute that was in force at the time of Edison's death.

CONCLUSION

For the foregoing reasons, we **AFFIRM**

LUCAS BEKEBEKMAD,
Appellant/Cross-Appellee,

v.

CHILDREN OF SABINO BEKEBEKMAD, represented by ANTOINETTE SABINO and WINIFRED SABINO,
Appellees/Cross-Appellants.

CIVIL APPEAL NO. 11-021
Civil Action No. 07-374

Supreme Court, Appellate Division
Republic of Palau

Decided: September 20, 2012

[1] **Custom:** Expert Testimony

On matters of custom, the trial court is free to credit the testimony of expert witnesses as it deems appropriate.

[2] **Appeal and Error:** Clear Error

Unless a court's determination lacks any foundation in the evidence submitted or is internally inconsistent, we will find no clear error and will defer to the Trial Division's findings.

[3] **Civil Procedure:** Alternative Claims

A plaintiff is not barred from submitting different theories to support his ultimate goal of attaining power to dispose of the lands at issue, so long as the theories were not so inconsistent such that one necessarily negated the other.

[4] **Custom:** Expert Testimony

It was not within a customary expert's province to opine on legal conclusions and it was certainly not error for the Trial Division to disregard this portion of his testimony.

Counsel for Appellant/Cross-Appellee: J. Uduch Sengebau Senior

Counsel for Appellee/Cross-Appellant Winifred Sabino: Salvador Remoket
Counsel for Appellee/Cross-Appellant Antoinette Sabino: Raynold B. Oilouch

BEFORE: KATHLEEN M. SALII, Associate Justice; C. QUAY POLLOI, Associate Justice Pro Tem; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

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

PER CURIAM:

Lucas Bekebekmad ("Bekebekmad") and the Children of Sabino ("the Children") have filed cross-appeals in this matter concerning thirteen parcels of land owned by Sabino Bekebekmad ("Sabino"). Because the Trial Division did not identify clear and convincing evidence concerning participation of the Children in disposition of the estate, we reverse in part and affirm in part.[1]

[1] Although Bekebekmad requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

BACKGROUND

Sabino died intestate on October 7, 2007. His wife predeceased him. Bekebekmad is Sabino's eldest living sibling. Two other siblings survived Sabino, Thomas and Johnny. Sabino is also survived by his children, Sabina, Antonio, Anghenio, Antoinette, Judy Anne, and Sarah. At the time of his death, Sabino held thirteen parcels of land in fee simple. These lands came to him through his family on his mother's side.

Bekebekmad petitioned to be the administrator of Sabino's estate. The Children filed a claim seeking the thirteen parcels of land. The Trial Division held a hearing, at which several witnesses were heard concerning Palauan custom. Kazumoto Rengulbai testified that land coming to someone by his mother's side should be disposed of by surviving maternal relatives. However, on cross-examination, Rengulbai expressed his understanding that land owned in fee simple is inherited by a decedent's children. The Trial Division credited Rengulbai's testimony above the other expert testimony. It held that Sabino's relatives on his mother's side "must get together to dispose of his properties," and it went on to make clear that this group of relatives included the Children.

On appeal, Bekebekmad argues that the Trial Division clearly erred in its determination that the Children should be involved in the disposition of Sabino's land. The Children cross-appeal raising four arguments: (1) the Trial Division erred by failing to dismiss Bekebekmad's claim; (2) the Trial Division erred by awarding relief not requested to Sabino's siblings, several of whom did not file claims ; (3) the Trial

Division erred by crediting Rengulbai's testimony but failing to heed his statement that customary rules do not apply to individually owned land; and (4) the Trial Division clearly erred in its determination that Sabino's maternal relatives should be involved in the disposition of Sabino's land.

STANDARD OF REVIEW

Conclusions concerning the content of customs are factual findings, which we will not set aside unless we are "left with a definite and firm conviction that an error has been made." *Kerradel v. Besebes*, 8 ROP Intrm. 104, 105 (2000). We affirm the Trial Division as long as its "findings are supported by evidence such that a reasonable trier of fact could have reached the same conclusion." *Id.* Conclusions of law are reviewed de novo. *Wong v. Obichang*, 16 ROP 209, 212 (2009). If an error is identified, the correct course is not to substitute our judgment for that of the Trial Division's, but to remand for determinations regarding " unresolved factual or customary issues." *Imeong v. Yobech*, 17 ROP 210, 215 (2010).

ANALYSIS

I. Bekebekmad's Appeal

Bekebekmad's sole argument on appeal is that the Trial Division erred in ordering that Sabino's children be allowed to participate in the determination regarding the disposition of Sabino's lands. The Trial Division, after hearing several witnesses testify on the matter, credited Bekebekmad's expert, Rengulbai. Specifically, the court concluded that "[t]he credible testimony was that the relatives on whose side the land came from get to dispose the decedent's lands." Because no gathering took place after Sabino's death to dispose of his property, the Court determined that the relevant descendants of Sabino's mother must meet to dispose of the property. It went on to state that the relevant family members included Sabino's siblings and his children. The court did not provide its reasoning as to why the Children should be included in the determination.

Our review focuses on Rengulbai's testimony. Bekebekmad points to other testimony suggesting that it is Sabino's siblings alone who have the authority to dispose of his lands. However, the Trial Division did not credit this testimony; it credited Rengulbai's. Rengulbai's testimony regarding who is empowered to dispose of property was open to some interpretation. Rengulbai stated that the "relatives" of a decedent's mother, provided she is the one from whom he received the land, "are the ones with the authority to dispose of the . . . land." He also stated that "[n]ot all relatives of the deceased have that authority." He further noted that if the children of a decedent would like to receive such land, they must go to the maternal relatives and ask. Although Rengulbai did not confine his definition of "relatives" to the decedent's siblings, he did not explicitly say that the Children should be involved in the disposition of the property.

[1, 2] On matters of custom, the trial court is free to credit the testimony of expert witnesses as it deems appropriate. *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006). Unless a court's determination lacks any foundation in the evidence submitted or is internally inconsistent, we will find no clear error and will defer to the Trial Division's findings. *See Kerradel*, 8 ROP Intrm. at 105.

In this case, the court's determination that Sabino's children and siblings all have a role in the disposition of Sabino's property is not supported by Rengulbai's testimony. Although Rengulbai's testimony was open to some interpretation by the Trial Division, we fail to see any clear and convincing evidence, credited by the Trial Division, to support the Children's role in the handling of the estate. Nowhere in Rengulbai's testimony does he reach the counterintuitive conclusion that the Children, who are younger and therefore less senior than Bekebekmad and his siblings, may participate in the property disposition. Therefore, we must remand because the Trial Divisions reasoning and the evidence were insufficient to support its finding. *See Imeong*, 17 ROP at 215.

II. The Children's Appeal

The Children's first argument is that Bekebekmad's claim should have been dismissed by the Trial Division because Bekebekmad refused to acknowledge that Sabino owned the lands in fee simple. In support, the Children cite *Temaungil v. Ulechong*, 9 ROP 31, 35 (2001), in which this Court held that certain theories not advanced at trial were waived on appeal. Furthermore, the Children contend, it is internally inconsistent for Bekebekmad to argue *both* that Sabino did not own the land *and*, that pursuant to custom, Sabino's maternal relatives have a role in the disposition of those lands.

[3] However, it is clear from the record below that, though Bekebekmad did not agree with the settled conclusion that Sabino owned the land in fee simple, Bekebekmad raised the argument below that he and his siblings should have the power to dispose of Sabino's individually owned lands. Furthermore, Bekebekmad was not barred from submitting different theories to support his ultimate goal of attaining power to dispose of the lands at issue, so long as the theories were not so inconsistent such that one necessarily negated the other. *See Whittom v. Alexander-Richardson P'ship*, 851 SW 2d 504, 507 (Mo. 1993).[2] Finally, the Children cite no portion of the record below in which they moved to dismiss Bekebekmad's claim. Thus, they have waived the argument on appeal. *See Temaungil*, 9 ROP at 35.

Along similar lines, the Children contend that Bekebekmad's siblings have waived the right to stake any claim to Sabino's property or to be involved in its disposition. However, none of the cases cited by the Children support the conclusion that Bekebekmad may not act on behalf of his siblings. Given the customary expert's testimony that Sabino's maternal relations, including Bekebekmad and his other siblings, have a say in the disposition of Sabino's property, the court did not err in recognizing their rights. The Children cite no authority stating that one family member may not vindicate his family's interests in the courts.

Next, pointing to certain portions of Rengulbai's testimony, the Children argue that Palauan custom does not apply to individually-owned land. Rengulbai testified that, according to custom, there is no individually-owned land in Palau. However, Rengulbai also stated that land "registered" as individual property should be disposed of by the owner's relatives upon his death. Thus, although Rengulbai indicated that individual

[2] Because there is no Palauan law on point, we rely on the common law in reaching this determination. *See* 1 PNC § 303.

ownership is inconsistent with Palauan culture, his testimony supports the conclusion that individually-owned land, when acquired by means other than purchase, should be dispensed of by customary means. It was not error for the Trial Division to attempt to reconcile the contemporary notion of fee simple ownership with traditional Palauan custom in a manner consistent with the credible expert testimony.

[4] Finally, the Children claim that Rengulbai "appeared to admit that . . . individually-owned lands go to [the decedent's] children after death." During cross-examination of Rengulbai, he was prompted to agree that land owned in fee simple is inherited by the children of a decedent. But this is a legal conclusion regarding land that is not subject to disposition by custom. It was not within the Rengulbai's province to opine on such a matter and it was certainly not error for the Trial Division to disregard this portion of his testimony. It is clear from Rengulbai's testimony as a whole that land which comes to someone from his mother's family should be disposed of with input from his maternal relatives upon his death.

CONCLUSION

For the foregoing reasons, we **AFFIRM** as to the Children's allegations of error. We **REVERSE** the Trial Division's judgment insofar as it requires inclusion of the Children in the meeting to take place regarding disposition of the property. We **REMAND** for proceedings consistent with this opinion. The Trial Division is within its discretion to hold a hearing on the matter to solicit additional argument and testimony or to decide the matter on the record as it stands.

RTEAI CHIEFS OF NGARCHELONG STATE, represented by ONGINO IKESIIL, IECHAD RA BUTELBAI MATHIAS ERBAI, ADOLPH NGRIATREKED, VICTOR JOSEPH, ULITECH NGIRAKEBOU, SILLIANG TEM, TET SINGICH SATO, OBAK RA IYUBUKEL LORENZO NGIRAMOLAU
Plaintiffs,

v.

SWENNY ONGIDOBEL d/b/a PACIFIC LIVE FISHING CO.,
Defendant

Civil Action No. 08-150

Supreme Court, Trial Division
Republic of Palau

Decided: December 27, 2010

[1] State Government: Fishing

The national government has not delegated to the state council of chiefs the power to issue fines for violations of fishing buls.

[2] State Government: Fishing

The Palau Constitution and statutes as interpreted by the *Blanco* Court hold that state governments can not impose penalties on criminal fishing to exceed $100.00.

Counsel for Plaintiffs: J. Uduch Sengebau Senior
Counsel for Defendant: Mark Doran

The Honorable ARTHUR NGIRAKLSONG,, Chief Justice:

Plaintiffs are traditional chiefs of Ngarchelong State. On December 5, 2007, they issued a notice of a bul on fishing. No one who is not from Ngarchelong is allowed to fish in the territorial waters of that state. The "bul officers of the chiefs" shall enforce the bul.

"Should the chiefs' bul officers find anyone not a citizen of Ngarchelong to be fishing within the waters of Ngarchelong, they shall be taken in with the boat to the port of Ollei to pay a fine to be determined by the eight chiefs of Ngarchelong to be able to claim back their equipments and boat."

On December 27, 2007, defendants Swenny Ongidobel and his fishing companies and fishermen, were caught fishing within the territorial waters of Ngarchelong. Defendants are not citizens of Ngarchelong. On December 28, 2007, the plaintiffs met to decide the penalties for the violation. They decided on $ 10,000.00 fine. On January 2, 2008, defendant Ongidobel met with the plaintiffs. Ongidobel claimed he did not know the boundaries of the territorial waters of Ngarchelong and asked for a lower fine. The fine was lowered to $ 2,300.00. Ongidobel paid the fine.

Plaintiffs claim that it was at this meeting that Ongidobel promised to pay a $10,000.00 fine should he or his fishing companies and fishermen violate the bul again. Ongidobel denies he made such a promise.

On March 4, 2008, Douglas Ngiratrang, an employee of the State working for Governor Browny Salvador, was in his office. He received a report that there were noncitizens in boats fishing within the state's territorial waters. Governor Salvador instructed Ngiratrang to investigate these suspects and if they are not citizens of the state and therefore fishing illegally, seize their boats and bring them to Ollei dock. The state employees did just that. They took a state boat and sped to the area known as Telbadel ra Ngerael, within the waters of Ngarchelong State. And there they saw the defendants' mother ship and small boats, commonly known as banana boats. They saw defendants fishermen, Filipinos and Chinese, on banana boats with their fishing lines hanging from both sides of the boats. They saw freshly caught fish. Following the Governor's instruction, they proceeded to untie some of the banana boats from the mother ship and towed them with all the gears and fish to Ollei dock.

According to the terms of the bul referenced above, defendant Ongidobel must pay the fine assessed by the plaintiffs before he can retrieve the seized boats, engines and fishing gears. However, someone from the Attorney General's Office prevailed on the Ngarchelong State Officials to release all the items, except fish.

The defendants' evidence disputing the violation of the bul on March 4, 2008 is not persuasive. The Court therefore finds defendants fished illegally on March 4, 2008 at Telbadel ra Ngerael which is within the waters of Ngarchelong State.

On March 14, 2008, a representative of the plaintiffs informed Ongidobel that they wanted a meeting with him to assess the fine for this latest and second violation of the bul. Ongidobel did not show up at the scheduled meeting. Plaintiffs imposed a $ 10,000.00 fine. Attempts of the plaintiffs to get Ongidobel to meet with them and pay the fine

were unsuccessful.[1] Ongidobel declined to meet with the Plaintiffs. He essentially told the plaintiffs, "I will see you in court", and so here they are!

Plaintiffs allege in their complaint that they have the authority under customs to promulgate the bul and to impose fines they think appropriate. They want the $ 10,000.00 fine.

Secondly, Plaintiffs claim that Ongidobel promised to pay a $ 10,000.00 fine if he, his companies and fishermen violate the bul the second time. Plaintiffs want that promise enforced.

Defendants deny that the plaintiffs have a right to impose a fine greater than $ 100.00. The existing laws do not allow such fines, they claim.

Secondly, Ongidobel argues that it is the Governor and employees of Ngarchelong State government that enforce the bul. This make it state action. Ngarchelong, like all the state governments, can not impose fines for fishing violation in excess of $ 100.00.

[1] Reklai Rafael B. Ngirmang testified for the plaintiffs. He was asked what happens if an offender of a bul refuses to pay the fine assessed by the chiefs despite all attempts by all concernced to have him pay the fine? Reklai Ngirmang testified that in such a case, the offender of a bul could be beaten or taken to the sea and be forcefully submerged underwater until he succumbs to these methods of persuasion. Fortunately for the defendants, these two methods of enforcements are no longer popularly practiced in Palau. The U.S. Government, however, still practices waterboarding as an interrogating method on suspected combatants/defendants!

DISCUSSION

The Court first takes the alleged promise of Ongidobel to pay $10,000.00 fine if he, his fishing companies and employees violate the bul again. Ongidobel denies making such a promise. The so-called "agreement" is not in writing. Plaintiffs fail to set forth the elements of the claimed oral agreement. And fatally, plaintiffs fail to plead this cause of action or move to amend their pleadings to conform to the evidence. See ROP Civ. P. 15 (b). Further, the Palau statute of frauds (39 PNC 504 b) requires a promise to pay for misdoings of another (Ongidobel's fishermen) to be in writing and if not, the promise is void. The Court finds there is no binding oral agreement between the parties regarding the disputed $ 10,000.00 fine.

Secondly, Ongidobel argues that the detection, apprehension of his fishermen employees and the seizure of their boats, equipment and fish were done by almost all, if not all, employees of the State Government, including the Governor. The plaintiffs are members of the legislative branch of the Ngarchelong State Constitutional Government. All these activities amount to Ngarchelong State action. Ngarchelong State Government, like all state governments, currently can not lawfully impose a fine for fishing violation in excess of $100.00.

This state action argument is plausible, but defendants fail to plead it in their answer. They also did not move to add the argument as an affirmative defense to conform with the evidence. The argument, therefore, deserves a mention, but not credit.

The remaining central issue is whether the plaintiffs can, as traditional leaders,

lawfully impose a fine exceeding $100.00 for violation of a fishing bul? The answer is "no", they can not.

The Court begins with what is settled law in the case of *State of Koror, v. Blanco*, 4 ROP 208(1994). The *Blanco* Court explained that even though the state governments have "exclusive" ownership of all marine resources from the state base line to 12 miles seaward, *see*, Palau Const., Article I, § 2, this does not mean states can enact criminal laws regulating fishing and enforce their violations. This power of law making and enforcement of criminal laws is reserved to the national government under Article XI, § 2 of the Palau Constitution. *Blanco*, at 209.

The national government, however, "may delegate [its] powers by law to the state government". (Emphasis added). *Id*. And this delegation has been done by way of 4 TTC § 51. This statute, however, places a limitation on the amount of fines the states can impose. "The penultimate provision of 4 TTC § 51, the same statute which contains the delegation to the states, provides that 'No municipal ordinance shall provide for penalty greater than a hundred dollar fine, or ninety days imprisonment or both.' *Blanco*, at 213. See 4 TTC § 51 (2). Coincidentally, 17 PNC § 108 limits penalty for violation of "respected native customs" not to exceed a fine of $100.00, or six months of imprisonment, or both.

Does the *Blanco* holding apply to the case at hand? Even though the plaintiffs are members of the legislative branch of the Ngarchelong State Constitutional Government by virtue of their traditional titles, they filed this case in their capacity as traditional chiefs and pursuant to Palauan traditions. They cite Article V, § 2 of the Constitution which protects the role or function of traditional leaders not "inconsistent" with the Constitution. Article I, § 2, of the Palau Constitution also protects "traditional fishing rights and practices…" even though the enactment of criminal laws on fishing and the penalties thereof are powers reserved to the national government.

[1] The obvious question is: Has the national government delegated its powers to enact criminal laws regulating fishing and their enforcement to the council of chiefs in each state? Specifically, has the national government delegated its powers to the state council of chiefs to impose penalties for bul violation in excess of $100.00? It is clear that this delegation has not taken place.

There is also a question whether a state council of chiefs is constitutionally eligible to receive powers delegated by the national government. The Constitution clearly states that the national government may delegate its powers to "the state government."

[2] Secondly, the Palau Constitution and statutes as interpreted by the *Blanco* Court hold that state governments can not impose penalties on criminal fishing to exceed $100.00. Therefore, the fine of $10,000.00 demanded by the plaintiffs is "inconsistent" with the Constitution and must yield. Traditional role and function are protected as long as they are consistent with the Constitution.

In conclusion, the plaintiffs' claim to a right to impose a fine for violation of fishing bul exceeding $100.00 is within the reserved powers of the national government. Before the plaintiffs can impose such a fine, the

national government has to "delegate [the] powers by law" to the traditional chiefs of the state. Palau Const. Article XI, § 2. This has not been done, not to mention the clear language of the Constitution that says delegation of national government reserved powers can only go to "the state government." Delegating national government powers to the council of chiefs of a state or any other entity beside the state government would be a "delegation running riot."

Second, the Constitution and statutes of Palau as interpreted by the *Blanco* Court impose a $100.00 limit on fines for violation of state fishing laws. Plaintiffs' demand for $10,000.00 fine for violation of their bul is "inconsistent" with the Constitution. Traditional role and function of the chiefs are protected as long as they do not conflict with the Constitution.

The Court shall enter judgment in favor of the defendants and against the plaintiffs.