

Demei v. Eight Eng'g Co., 14 ROP 64 (2007)
HITLER DEMEI and PALAU DEVELOPMENT COMPANY,
Appellants,

v.

EIGHT ENGINEERING COMPANY and SHINJI CHIBANA,
Appellees.

CIVIL APPEAL NO. 06-001
Civil Action No. 03-240

Supreme Court, Appellate Division
Republic of Palau

Decided: April 12, 2007¹

Counsel for Appellants: Roman Bedor

Counsel for Appellee: Raynold B. Oilouch

BEFORE: LARRY W. MILLER, Associate Justice; LOURDES F. MATERNE, Associate Justice; JANET HEALY WEEKS, Part-Time Associate Justice.

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

PER CURIAM:

Appellant Hitler Demei appeals the Trial Division's order ruling Demei breached his contract with Appellee Eight Engineering Co. ("EEC") and awarding \$180,084.51 in damages. The facts are not in dispute and Demei only raises a single issue concerning whether the contract is void because it violated the Foreign Investment Act. Having considered the arguments of the parties, we **L65** affirm the judgment of the Trial Division.

BACKGROUND

On July 27, 2002, Demei, acting as president of his solely owned company Palau Engineering Company, and EEC, through its president Yukio Kobayashi, agreed to a Memorandum of Understanding that EEC would provide construction equipment to Demei. EEC bore the costs associated with shipping the equipment to Demei in Palau and Demei handled the costs once the equipment arrived in Palau. They also agreed that if Demei leased the equipment, he would pay \$70.00 per hour of equipment rental to Demei. In August 2002, EEC prepared a shipment of six construction vehicles, four trucks, and one passenger car valued at

¹Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral arguments pursuant to ROP R. App. P. 34(a).

Demei v. Eight Eng'g Co., 14 ROP 64 (2007)

\$87,850.00. EEC shipped the vehicles to Palau for a cost of \$92,234.51. Demei received the shipment, registered the vehicles and stored them on his land. From 2002 to 2003, Demei leased some of the equipment and later sold three of the vehicles.

In October 2002, Kobayashi sent a written request to Demei to pay the agreed rental payments. Demei replied asking for a bank account number to deposit the funds. Kobayashi provided the account number, but Demei did not make any payments. In November 2002, Kobayashi and Demei met and signed an agreement that Demei would pay \$20,000 by November 25, 2002, and if no payment was made any contracts between them would be canceled. Demei did not make any payment and Appellee sent notice of cancellation of contract in December 2002. As of the appeal, Demei has made no payments to EEC.

EEC filed a breach of contract claim. Demei counterclaimed that the contract was not valid because it violated the Foreign Investment Act, 28 PNC § 101 *et seq* ["the Act"]. The Trial Division found that Demei breached the contract and awarded \$180,084.51 in damages. The Trial Division dismissed all of Demei's claims. The only issue Demei appeals is whether the contract violated the Foreign Investment Act.

STANDARD OF REVIEW

Factual findings of the lower court are reviewed using the clearly erroneous standard. *Temaungil v. Ulechong*, 9 ROP 31, 33 (2001). 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. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). This Court employs the *de novo* standard in evaluating the lower court's conclusions of law. *Hanpa Indus. Corp. v. Black Micro Corp.*, 12 ROP 29, 32 (2004).

DISCUSSION

Demei claims the Act voided the contract because EEC, a wholly owned Japanese company, conducted business within Palau without obtaining a foreign investment approval certificate (FIAC). The Act prohibits the inflow of foreign capital investment into the country unless approved by the national government. The Act states that "[n]o non-citizen shall carry on a business enterprise in the Republic, either directly or indirectly, without first obtaining a foreign investment approval certificate in accordance with the provisions of this chapter." 28 PNC § 103(a). The term "non-citizen" means "any person, natural or legal, who is not a citizen and includes a business enterprise, in which a non-citizen owns an interest." 28 PNC § 102(b). To "carry on a business" means "engaging in any kind of business enterprise, profession or trade, as an owner or part-owner, for the purpose, in whole or part, of commercial gain or profit." 28 PNC § 102(d). The term "business enterprise" means "any sole proprietorship, partnership, corporation, trust, joint venture, association, or any other form of business organization established in the Republic for the purpose of carrying on a business." 28 PNC § 102(c); *see also Micronesia Yachts Co. v. Palau Foreign Inv. Bd.*, 7 ROP Intrm. 128, 129-30 (1998).

Demei v. Eight Eng'g Co., 14 ROP 64 (2007)

The exact nature of the business relationship between Demei and EEC is unclear. On appeal, Demei claims that he and EEC created a joint venture business to lease and rent the construction equipment and that they would split the profits. Whatever business relationship they had, EEC's business activities did not violate the Act. Demei has not proven that EEC carried out business in Palau. EEC's only representative to visit Palau was Kobayashi, who came to Palau once to negotiate the contract with Demei, once to ensure Demei received the shipment, and then finally to ask Demei for payment. Otherwise, EEC representatives have not been to Palau in conjunction with this contract. Demei testified that EEC never actually did any business in Palau. EEC has not made an investment in Palau to make a profit and can not be classified as carrying on business in Palau under the Act.

Even if EEC did carry out some sort of business venture with Demei in Palau, Demei has not proven that EEC established the business in violation of the Act. This Court has held that in addition to carrying out business, to violate the Act there must also be an establishment of business:

“The question of whether the business is being carried on in the Republic is separate and distinct from the second issue of whether the business enterprise is ‘established in the Republic for the purpose of carrying on a business.’ Statutes should be construed to give effect to every word Applying this canon of statutory interpretation to the Foreign Investment Act, establishing a business in the Republic therefore must be different than carrying on a business in the Republic.”

Tulmau v. R.P. Calma and Co., 6 ROP Intrm. 54, 55 (1997). To establish business, “[s]ome degree of permanency must exist before a business can be deemed ‘established’.” *Id.* at 56. In *Tulmau*, this Court ruled that a foreign accounting firm that had sent accountants to Palau for a period of a few weeks apiece to do audits of Palauan businesses did not establish a business in Palau and did not violate the Act. *Id.* EEC had no physical presence in Palau, no degree of permanency, and no control over Demei. Without EEC's approval, Demei leased equipment in ways not originally intended by the parties and then sold some of the equipment. Additionally, EEC has never received any money from Demei for leasing the equipment. The Trial Division awarded damages only for the value **167** of the equipment and the cost of shipping and did not award any damages for leasing the equipment. As EEC has no presence in Palau and have never received any commercial gain or profits from the leasing of the equipment, they have not established a business under 28 PNC § 102(d). Accordingly, the contract does not violate the Foreign Investment Act.

CONCLUSION

EEC did not conduct business in violation of the Foreign Investment Act and therefore the Act does not void the contract. The Trial Division's judgment is affirmed.