

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

v.

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

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

Supreme Court, Appellate Division
Republic of Palau

Argued: November 27, 2009

Decided: December 3, 2009

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

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

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

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

[3] **Custom:** Appellate Review

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

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

Counsel for Appellants: Raynold B. Oilouch

Counsel for Appellees: William Ridpath

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

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

PER CURIAM:

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

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Trial Division decided that the fight over Recheyungel was misplaced

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

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

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

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

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

STANDARD OF REVIEW

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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