

**DONALD HARUO,
Appellant/Appellee,**

v.

**KEIBO RIDEP and BARRET RIDEP,
Appellees¹/Appellants.**

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

Supreme Court, Appellate Division
Republic of Palau

Decided: September 30, 2009

[1] **Equity:** Estoppel

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

[2] **Equity:** Restitution

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

[3] **Equity:** Restitution

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

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

[4] **Contracts:** Terminable

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

[5] **Contracts:** Damages

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

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

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

Counsel for Appellant: John K. Rechucher.

Counsel for Appellees: Raynold B. Oilouch.

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

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

PER CURIAM:

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

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

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

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

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

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

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

TRIAL DIVISION OPINION

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

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

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

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

STANDARD OF REVIEW

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

DISCUSSION

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

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

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

I. Appellant’s Claims

A. Statute of Limitations

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

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

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

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

B. Estoppel

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

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

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

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

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

C. Restitution

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

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

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

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

II. Appellees’ Claims

A. Termination of Use-Right Agreement by Breach

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

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

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

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

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

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

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

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

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

B. Limitation of Lease Payments

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

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

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

C. Award of Expenses, Lost Profits and Attorney Fees

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

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

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

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

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

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

CONCLUSION

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