HOUSE OF TRADITIONAL LEADERS,
Appellants,

v.

KOROR STATE GOVERNMENT and KOROR STATE LEGISLATURE,
Appellees.

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

Supreme Court, Appellate Division
Republic of Palau

Decided: February 10, 2010

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

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

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

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

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

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

Counsel for Appellants: J. Roman Bedor

Counsel for Koror State Government: Mark P. Doran

Counsel for Koror State Legislature: Raynold B. Oilouch

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

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

PER CURIAM:

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

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

[1] The Koror State Government ("KSG"), the Koror State Public Lands Authority ("KSPLA"), and the Koror State Legislature

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

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

Even though 35 PNC § 102[2] clearly confers ownership of all public lands below the high water mark to the Republic of Palau, and even though the Republic of Palau transferred authority over public lands to state governments (in this case the Koror State Government), and even though Koror State Public Law No. K-7-145-2004 established the KSPLA and granted *it* the authority to administer the areas below the high water mark, the underlying principles of Palauan traditional law still give HOTL the supreme authority to administer, manage, and control the lands and resources below high water mark.[3] (Answer, Affirmative Defenses ¶ 2,3; *see also* Appellant's Br. at 1.)

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

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

("KSL") were all eventually joined as Plaintiffs.

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

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

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

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

Plaintiffs filed their Opposition to the Motion for Summary Judgment and Cross Motion for Summary Judgment, along with accompanying documents, on November 21, 2008. Therein, Plaintiffs did not dispute that the traditional chiefs formerly "owned" the public lands. However, they noted that the public lands had subsequently belonged to the Japanese government, the Trust Territory, and now the national and state governments. As such, Plaintiffs stated that the case was not about custom and traditional law, but rather, about who owns land and who has right to control land owned by the state. Plaintiffs claimed that the traditional chiefs did not provide any custom or traditional law to support their argument that they can control public lands which they do not own (because the traditional chiefs are no longer the "government"). Plaintiffs went on to state that any claim of ownership by the traditional chiefs is barred by the statute of limitations and other applicable law (claims for public lands were required to be filed by January 1, 1989). Finally, Plaintiffs argued that, under the express language of the Koror State Constitution, (1) HOTL possesses no authority relating to public lands, (2) custom and traditional law does not apply to the exercise of sovereign power by the constitutional government of the State of Koror, and (3) the Koror State Constitution and applicable statutes do not violate underlying principles of traditional law.

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

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

For these reasons, the Trial Division granted Plaintiffs' motion for summary judgment, declaring (1) that the Koror State Government—and not HOTL—controls Koror State public lands below the high water mark, and (2) neither HOTL nor its representatives may enter into any contracts concerning Koror State public lands in the future and that any previous contract they made was null and void. In no portion of its decision did the Trial Division address the alleged factual dispute about traditional law purportedly created by the affidavit of Speaker Tero Uehara. HOTL then filed this appeal.

STANDARD OF REVIEW

[1] We review grants of summary judgment *de novo*. *Becheserrak v. Eritem Lineage*, 14 ROP 80, 81 (2007). The court considers "whether the trial court correctly found that there was no genuine issue of material fact and whether, drawing all inferences in the light most favorable to the nonmovant, the moving party was entitled to judgment. *Id.* To affirm a grant of summary judgment, the Court must reach the same conclusions of law as the trial court, and no deference to the trial court is appropriate. *Senate v. Nakamura*, 8 ROP Intrm. 190, 192 (2000).

DISCUSSION

HOTL's argument on appeal is two-fold: First, the Trial Division erred in granting summary judgment because it ignored a genuine issue of material fact as to the underlying principles of traditional law regarding the use, management, and administration of the public lands of Koror State below the high water mark; second, even if a factual dispute did not exist, the Trial Division misinterpreted the law, because it failed to appropriately reconcile the conflict between underlying principles of traditional

law with 35 PNC § 102's statutory grant of authority to KSPLA. We disagree on both counts.

I. The Trial Division did not ignore a genuine issue of material fact as to the underlying principles of traditional law.

HOTL submitted the affidavits of Maderngebuked Thomas O. Remengesau, Sr. and Ibedul Yukata M. Gibbons, which state, *inter alia*, that even though Koror State currently owns the areas below the high water mark, the traditional chiefs used to own and administer these lands prior to their acquisition by foreign occupying powers. Now, HOTL contends that, when Appellees submitted an affidavit from Speaker Uehara that contradicted HOTL's claims to traditional ownership, the disagreement created a factual dispute about the principles of traditional law.

[2] This argument is unconvincing. Although the contradictory affidavits created a factual dispute, the disputed facts were simply immaterial to the Trial Division's ultimate determination of the case. A factual dispute is material if it must be resolved by the fact finder before the fact finder can determine if the essential element challenged by the movant exists. *Wolff v. Sugiyama*, 5 ROP Intrm, 105, 110 n.3 (1995).

The affidavit of Speaker Uehara is largely focused on proving that HOTL is not a traditional or customary organization of Koror. The affidavit states that, "HOTL is merely a creation of the Koror Constitution. . . . Because HOTL is not a customary or traditional organization, it has no customary / traditional functions with respect to public lands in Koror State." (Aff. of Timothy Uehara at 2-3.) The affidavits of Maderngebuked Thomas O. Remengesau, Sr. and Ibedul Yukata M. Gibbons, on the other hand, were focused (1) on showing that the traditional chiefs, before the foreign occupying powers arrived, possessed control and authority over the areas below the high watermark, and (2) that HOTL now represents those chiefs.

First, the parties, as well as the Trial Division, acknowledged that the traditional chiefs possessed and administered the land prior to the foreign occupying powers. Therefore, no factual dispute exists as to the traditional chiefs' former ownership. Second, the factual dispute about whether HOTL is entitled to represent those traditional chiefs today simply did not matter to the Trial Division's decision. If anything, the Trial Division decided that issue in HOTL's favor by moving forward and performing its legal analysis about the interplay between the traditional rights of the chiefs and the right of the people of Koror State to choose its form of democratic government. This is the very definition of a non-issue. Accordingly, the Trial Division did not ignore genuine issues of material fact as to the underlying principles of traditional law, as there were simply none to ignore. The function of a summary judgment motion is to determine whether there is a material fact to be tried; if there is none, the court may proceed to determine the controversy as a matter of law. *The Senate of the First Olbiil Era Kelulau v. Remelik*, 1 ROP Intrm 90, 90 (Tr. Div. 1983).

II. The Trial Division did not misapply the law.

Appellant's argument that the Trial Division erred in granting KSG judgment as a matter of law can be summarized as follows:

(1) Before the entrance of foreign occupying powers, the traditional leaders of Koror (who are now represented by HOTL) were solely responsible for the administration and management of public lands below the high watermark; (2) Pursuant to Koror State Constitution, art. VI, § 1, HOTL retains that right today and has "supreme authority of the State of Koror for all matters relating to traditional law"; (3) Koror State Public Law No. K-7-145-2004, which established the KSPLA and granted *it* the authority to administer the areas below the high water mark, is in direct conflict not only with the underlying principles of traditional law but also with the Koror State Constitution, which allegedly retains supreme authority in HOTL; (4) A direct conflict such as this triggers Palau Constitution art. V, §1, which provides that "the government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition"; (5) Thus, the Trial Division should have declared Koror State Public Law No. K-7-145-2004 unconstitutional as matter of law.

We disagree. Contrary to Appellant's argument, we find that no conflict exists either between (1) statutory law and the Koror State Constitution, which HOTL asserts grants them *supreme authority* to administer the lands below the high water mark, or (2) between statutory law and HOTL's claims to so-called traditional ownership. Thus, there is no reason to reach the issue whether the Trial Division correctly resolved any alleged conflict. The authority of KSG to manage and administer lands below the high water mark is clear under the law. Indeed, much in this case is clearer than HOTL has made it out to be.

Under 35 PNC § 102, all marine areas below the ordinary high watermark belong to the Republic of Palau. 35 PNC § 102; *see also* Palau Constitution, art. 1, § 1. The Republic of Palau transferred authority to lands below the high water mark to the state governments. *See* Palau Constitution, art. 1,§ 2 ("Each state shall have exclusive ownership of all living and non-living resources . . . from the land to twelve nautical miles seaward from the traditional baselines."). In turn, Koror State Public Law No. K-7-145-2004 established the KSPLA and granted it the authority to administer the areas below the high water mark on behalf of the KSG. Based upon these fairly unequivocal statements of the law, neither party at the summary judgment stage or now on appeal disagree with the proposition that, at the very least, KSG holds Koror State public lands in trust for the public.

Nonetheless, HOTL claims that, because Koror State Constitution, art. VI, § 1 reads "[t]he House of Traditional Leaders, consisting of the Ngarameketii and the Rubekulkeldeu[,] shall be the *supreme authority* of the State of Koror for all matters relating to traditional law," HOTL, which is comprised of the two councils of traditional chiefs, is still entitled to exercise supreme authority over the lands below the high water mark. Koror State Constitution, art. VI, § 1 (emphasis added). We vigorously disagree.

[3] There is simply no conflict between Koror State Constitution, art. VI, § 1, which grants HOTL supreme authority for all matters

relating to traditional law and Koror State Public Law No. K-7-145-2004, which grants KSPLA the authority to administer the areas below the high water mark, because the statement granting HOTL "supreme authority" is in the context of the section titled Membership—not the section outlining HOTL's enumerated powers. The Trial Division correctly noted, "Defendants cannot look to a clause under the Membership section to back door their claim to control over the Koror State Public lands. The language itself and the location of the clause reflects the intent of the drafters that HOTL's 'supreme authority . . . for all matters relating to traditional law' is in the context of membership." *House of Traditional Leaders*, Civil Act. Nos. 06-070, 06-075, Decision at 15 (Jan. 19, 2009). The fact that an additional section is included in the Constitution, entitled "Powers and Responsibilities," and the fact that ownership of lands below the high watermark is not listed in this section, completely undermines HOTL's claim as to this source of conflict. If HOTL's authority to administer public lands below the high water mark was not included in the clearly marked "Powers and Responsibilities" section in the Koror State Constitution, then that power and responsibility does not exist under the law, full stop. Arguments to the contrary offend the basic tenets of statutory and constitutional construction.

Finally, HOTL also claims authority to administer the lands below the high water mark under pure traditional law, the Koror State Constitution notwithstanding. The argument is that their authority over the land, which flowed from customary and traditional law, was not extinguished by the foreign occupying powers, the Trusteeship Agreement, or the Trust Territory Bill of Rights. This argument simply asks too much. Foremost, HOTL presented no evidence supporting this argument at the Trial Division, and arguments not raised at the trial level are waived, and may not be raised on appeal. *Koror State Gov't v. Republic of Palau*, 3 ROP Intrm. 314, 322 (1993). Second, even if we accepted the affidavits of Maderngebuked Thomas O. Remengesau, Sr. and Ibedul Yukata M. Gibbons as evidence that HOTL's authority over lands below the high water mark was not extinguished by the foreign occupying powers, we would find that such evidence was neither clear nor convincing. *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225 (1996) (holding that proof of custom and tradition must be proved by clear and convincing evidence). The affidavits failed to address, in sufficient detail, how traditional ownership rights could survive foreign occupying powers and the 1989 filing deadline for claims for public lands, and now be asserted over lands that HOTL admits even now it does not own.

Accordingly, we hold that the Trial Division did not misapply the law as to the alleged conflict between traditional and statutory law, because no convincing evidence of any conflict was ever presented.

CONCLUSION

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