

**PACIFIC CALL INVESTMENTS, INC.,  
Appellant/Cross-Appellee,**

**v.**

**TAI CHIN LONG,  
Appellee/Cross-Appellant.**

CIVIL APPEAL NO. 09-006  
Civil Action Nos. 04-182, 166-92

Supreme Court, Appellate Division  
Republic of Palau

Decided: April 14, 2010

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

A lower court's order of contempt under the Contempt of Courts Act (14 PNC §§ 2201-2207) is reviewed for abuse of discretion.

[2] **Contempt of Court:** Rationale for Contempt

Civil contempt may serve the purpose of compensation or coercion and is used to rectify contempt as far as it affects another party. Criminal contempt punishes contempt while vindicating the authority of the court.

[3] **Contempt of Court:** Sanctions

Where the purpose of an order of civil contempt is compensation, a fine payable to the complainant is the appropriate sanction, but where the purpose is coercion, the court may exercise its discretion and should consider the character and magnitude of the harm threatened by continued contumacy and

the probable effectiveness of any suggested sanction in bringing about the result desired.

Counsel for Appellant/Cross-Appellee: David F. Shadel

Counsel for Appellee/Cross-Appellant: Richard Brungard

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

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

PER CURIAM:

Before us are the cross appeals of Pacific Call Investments, Inc. (“Pacific Call”) and Tai Chin Long. While the two appealed issues spring from the same lower court case, they relate to different lower court decisions. Pacific Call appeals the Trial Division’s confirmation of sale of all assets of Palau Marine Industries Corp. (“PMIC”) to Long and Long appeals the Trial Division’s finding of contempt against PMIC and Long’s attorney, Richard Brungard. Because of the separate nature of the cross-appeals, this opinion treats them separately. We first consider Pacific Call’s appeal and then turn to the cross-appeal of Long.

## **I. Pacific Call’s Appeal of the Trial Division’s Order Confirming the Sale of PMIC’s Assets to Long.**

### **A. Background**

On November 7, 2000, Pacific Call obtained a \$4,425,525 judgment against PMIC; on October 21, 2005, Long obtained a \$605,280.35 judgment against PMIC. Because PMIC lacked the assets to fulfill either judgment (let alone both), a priority contest ensued. The basis of Long’s judgment was twelve promissory notes, three of which occurred prior to Pacific Call’s judgment. The Trial Division found that Long had priority over Pacific Call as to \$118,660, the portion of his judgment attributable to the first three promissory notes. *See* Civ. Act. Nos. 04-182, 166-92, Order (Tr. Div. Apr. 9, 2007), *aff’d Pac. Call Invs., Inc. v. Palau Marine Indus. Corp.*, 15 ROP 50 (2008).

Before the priority dispute was resolved, the Trial Division made the following order:

[E]ither [Pacific Call] or Long (or both of them) may, upon giving 30 days public notice, sell (either in lots or individually) at public auction all and any of the properties in which PMIC has any claim, interest, rights, privilege, possession, or ownership, such sale to be about 45 days after February 23, 2007.

Civ. Act. Nos. 04-182, 166-92, Order at 2. (Tr. Div. Feb. 9, 2007).

Pursuant to that court order, Pacific Call issued a Notice of Sale announcing a sale on April 26, 2007. The notice stated that Pacific Call “will solicit bids to sell, as is and without any warranty or guaranty, all property in which [PMIC] may have any interest,

ownership, or claim.” Pacific Call’s Notice of Sale at 1, Civ. Act. Nos. 04-182, 166-92 (Tr. Div. Mar. 8, 2007). The property to be sold at the auction included “at least the following items”: (1) PMIC’s lease from Koror State Public Lands Authority;<sup>1</sup> (2) the items on an attached PMIC Fixed Asset Summary Report; (3) a 33-foot boat; and (4) “[o]ther property (including accounts receivable, equipment, tools, furnishings, vehicles, aircraft equipment, construction equipment, and machinery) as it becomes known to Pacific Call and as announced later.” *Id.* at 1-2.

The Trial Division’s order had stated that the sale must occur at the courthouse conference room, but Pacific Call noticed the auction to occur at PMIC’s conference room. Upon Pacific Call’s motion, the Trial Division issued an April 9, 2007 order changing the place of the sale to PMIC’s premises. The order also stated that the sale was to take place on April 27, 2007 (whereas Pacific Call noticed the sale for April 26, 2007). The Trial Division further ordered PMIC to serve Long and Pacific Call with an updated report of its assets in anticipation of the sale, “identify[ing] the exact current location of each asset listed and identify[ing] the make, model, size, license/serial number, and other identifying features of each vehicle, computer equipment, and other items of property.” Civ. Act. Nos. 04-182, 166-92, Order to Change Place of Sale and Provide an Updated List of Assets at 2 (Tr. Div. Apr. 9, 2007).

On April 25, 2007, Pacific Call filed a “Postponement of Sale” with the Trial

Division and served a copy on counsel for PMIC, Long and Koror State Public Lands Authority. Pacific Call claimed that it could not go forward with the sale because PMIC had failed to furnish an updated report of its assets. Later that same day Long filed a “Motion to Appoint Alternate Auctioneer and to Clarify Sale Date” with the Trial Division. The filing sought to have Long’s counsel, Richard Brungard, substituted as auctioneer because Pacific Call’s counsel was no longer willing to go through with the noticed sale. The motion also sought clarification that April 27, 2007 (as stated in the Trial Division’s previous order) and not April 26, 2007 (as stated in Pacific Call’s Notice of Sale) was the true scheduled date of the auction. The Trial Division did not act on either the “Postponement of Sale” or the “Motion to Appoint Alternate Auctioneer and to Clarify Sale Date” before the purported sale date.

According to Long, Brungard visited PMIC’s premises on April 26, 2007 at 9:00 a.m. and again at 4:30 p.m. and found that no one had sought to purchase PMIC’s assets that day. Then, on April 27, 2007, Brungard conducted an auction of all of PMIC’s assets. Those present at the sale included PMIC’s president, general manager and attorney. Brungard, the only bidder, bid a portion of Long’s judgment to purchase all of the assets of PMIC on behalf of Long. Later that same day Brungard telephoned Pacific Call’s attorney, David Shadel, and informed him of the sale. Brungard inquired whether Pacific Call wanted to make a bid or if Shadel knew of anyone else who wanted to make a bid, but Shadel declined to answer. Shadel suggested that if Long was going to auction the assets then Long should pay for the advertising expenses of the sale.

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<sup>1</sup> The lease was subsequently canceled by Koror State Public Lands Authority and thus removed from PMIC’s asset pot.

Long then filed a motion with the Trial Division seeking confirmation of the sale. Pacific Call opposed the motion. The Trial Division ruled that the sale had been effective and confirmed the sale of PMIC's assets to Long in exchange for his partial judgment of \$129,338.76.<sup>2</sup> See Civ. Act. Nos. 04-182, 166-92, Order on Pacific Call's Motion for Reconsideration and Long's Motion to Confirm Sale at 3-5 (Tr. Div. Sep. 28, 2007).

### B. Standard of Review on Appeal

The parties disagree as to the standard of review on appeal. Pacific Call argues that the confirmation of sale should be reviewed *de novo* while Long contends that it should be reviewed for abuse of discretion. (Pacific Call Br. at 3-4; Long Resp. Br. at 6.)<sup>3</sup> This appeal does not involve review of factual findings of the Trial Division. Instead we are reviewing the Trial Division's legal conclusions; therefore we will review *de novo*. See *Estate of Rechucher v. Seid*, 14 ROP 85, 88-89 (2007).

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<sup>2</sup> This figure was reached by adding post-judgment interest of \$10,678.76 to the priority portion of Long's judgment (\$118,660).

<sup>3</sup> Each party filed three briefs for a total of six briefs in the cross-appeals. Pacific Call filed an opening brief and a reply brief and Long filed a responsive brief in the appeal of the order confirming the sale. Long filed an opening brief and a reply brief and Pacific Call filed a responsive brief in the cross-appeal challenging the order of contempt. Because each party filed only one brief of each kind (opening, responsive, and reply), we will cite to them as such (e.g., Pacific Call Br., Pacific Call Resp. Br., Pacific Call Reply Br.) without confusion.

### C. Discussion

The Trial Division erred in entering its September 27, 2007 order granting Long's motion to confirm the sale. Long's attorney hijacked the sale noticed by Pacific Call's attorney; such a sale should not receive judicial blessing.

In short, the court gave both Pacific Call and Long the power to hold a sale on 30 days' notice. Pacific Call noticed a sale, but then noticed a postponement of the sale. Long filed a motion to have his representative appointed as alternate auctioneer. The motion was not ruled upon in advance of the sale. Long went ahead and held the sale anyway, and, not surprisingly, the only bidder that showed up was Long's representative. Without an order from the court appointing Long's counsel, Brungard, alternate auctioneer, he did not have the authority to hold the sale noticed by Pacific Call.

Long argues that under 14 PNC § 2104 ("Levying execution"), Pacific Call's attempt to postpone the sale was ineffective and Brungard's appointment as alternate auctioneer was proper. Assuming (without deciding) that this section of the code applies to the facts at hand, Brungard's self-appointment as auctioneer was still improper. The statute contemplates "[c]ompletion of sale by person other than one making levy": if the duly authorized person "starts to levy execution and for any reason is prevented from or fails to complete the matter, the Director of the Bureau of Public Safety, policeman or other person duly authorized may complete the levy, sale, and payment of proceeds as provided in this section." 14 PNC § 2104(e).

Long argues that Pacific Call's attorney, Shadel (an authorized person), started to levy execution but did not complete the sale; therefore it was proper for Long's attorney, Brungard (another authorized person) to complete the sale. (Long Resp. Br. at 10-11.) Long's argument is not persuasive. Long was authorized to sell PMIC's assets upon giving 30 days' notice. But Long was not authorized to sell PMIC's assets upon Pacific Call's notice. Pacific Call's notice of sale stated that it (and not some other party) would solicit bids for PMIC's assets. *See* Civ. Act. Nos. 04-182, 166-92, Pacific Call's Notice of Sale at 1 (Tr. Div. Mar. 8, 2007). Without a court order appointing Long's agent as replacement auctioneer, Brungard did not have authority to usurp Pacific Call's sale.

The Trial Division's confirmation of sale must therefore be reversed.<sup>4</sup> On remand, the Trial Division should state explicitly what type of sale is ordered. We do not fault the Trial Division for the language used in its current order, but the parties make many pages of hay over whether the order contemplates a sale at execution or a judicial sale and the ramifications of each. To safeguard against future misunderstanding, the Trial Division should issue a new order authorizing a fresh

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<sup>4</sup> Long devoted one sentence of his brief to seek sanctions against Pacific Call for its "frivolous and misleading or worse" appeal. (Long Resp. Br. at 15.) Far from frivolous, Pacific Call's appeal is meritorious. Parties (and their counsel) are cautioned from including a boilerplate request for sanctions in every filing in hopes of some day grasping the brass ring of attorney fees.

sale of PMIC's assets and clarifying the nature of the sale.<sup>5</sup>

## **II. Long's Appeal of the Trial Division's Contempt Order Against PMIC and Brungard.**

Having dispensed with the disputed sale, we now turn our attention to the cross-appeal. Long appeals the Trial Division's January 25, 2008 order finding Long's attorney, Brungard, and PMIC in contempt. The order of contempt was the product of Pacific Call's October 25, 2007 motion seeking an order of contempt. The purportedly contumacious conduct is laid out below.

### **A. Background**

In April 2002 (after Pacific Call secured its \$4.4 million judgment against PMIC), the Trial Division issued two orders directing that neither PMIC nor its agents,

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<sup>5</sup> We recognize the reality that almost three years have elapsed since the April 27, 2007 sale and that many of the assets may have since depreciated or have been dissipated. Instead of attempting to stuff the proverbial omelette back into the eggshell, the Trial Court may wish to receive evidence on the total value of PMIC's assets as of the date of the sale and, to the extent those assets do not exceed \$129,338.76 (the amount of Long's priority judgment, including interest, on that date), simply award those assets to Long. If the total value of the assets at the time of the sale was greater than Long's priority judgment, then the excess assets should be awarded (payable by Long) to the next-in-line creditor, Pacific Call, up to the amount of its judgment, and so on down the line until all assets are exhausted.

employees, and officials were to “sell, assign, transfer, alienate, encumber, or otherwise dispose of in any manner any of [PMIC’s] property, income, or assets or negotiate or attempt to do so without court order” with the exception that PMIC could pay its “ongoing operating expenses as it incurs them.” *See* Civ. Act. No. 166-92, Orders (Tr. Div. Apr. 19 & 26, 2002). Almost five years later, on January 23 and February 7, 2007, PMIC wrote two checks totaling \$3,000 to Brungard to pay for his legal services to Long. Pacific Call took issue with this disbursement and made an October 25, 2007 motion for contempt against PMIC and Brungard pursuant to the Contempt of Courts Act (14 PNC §§ 2201-2207). The trial court granted the motion and found PMIC and Brungard in contempt on January 25, 2008. According to Long, Brungard then returned the \$3,000 to PMIC.<sup>6</sup> The Trial Division subsequently denied Long’s motion to reconsider its finding of contempt and awarded attorney fees to Pacific Call related to the contempt motion.

### B. Standard of Review

[1] We have previously stated that we review a trial court’s “exercise of its inherent power to issue either civil or criminal contempt citations under the abuse of discretion standard.” *Dalton v. Heirs of*

*Borja*, 5 ROP Intrm. 95, 98 (1995); *see also Cushnie v. Oiterong*, 4 ROP Intrm. 216, 219 (1994) (“We review a court’s imposition of sanctions pursuant to its inherent powers under an abuse of discretion standard.”). But we pause to note that the contempt order at issue was imposed pursuant to the civil contempt statute (14 PNC § 2204), not the lower court’s inherent power. *See* Civ. Act. Nos. 04-182, 166-92, Order Granting in Part and Denying in Part Motion for Contempt at 4 (Tr. Div. Jan. 25, 2008) (quoting “pertinent part” of 14 PNC § 2204). However, because it appears that the Contempt of Courts Act (14 PNC §§ 2201-2207) was an attempt by the legislature to codify courts’ inherent contempt powers (or at least some of them), we see no reason to deviate from the abuse of discretion standard of review.<sup>7</sup> Whether a court’s contempt powers arise inherently or under the Contempt of Courts Act, a court is afforded wide discretion to exercise its contempt powers. *See* 14 PNC § 2204 (stating that courts “have the power” to find persons in civil contempt, but not mandating use of that power). We therefore review only for an abuse of that discretion.

An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant

<sup>6</sup> Separately, Brungard was disciplined for accepting the checks by order of the Disciplinary Tribunal. *See In re Brungard*, 15 ROP 144 (2008). That decision was appealed to the Supreme Court, but the appeal was dismissed because the Appellate Division lacks jurisdiction to hear appeals from the Disciplinary Tribunal. *See In re Brungard*, Civ. App. No. 09-010 (Mar. 18, 2009).

<sup>7</sup> We need not decide today whether the Contempt of Courts Act forms a perfect overlap with the inherent power of courts to issue contempt citations. *See, e.g., Dalton*, 5 ROP Intrm. at 103-04 (rejecting the contention that the inherent power of the Trial Division to impose criminal contempt sanctions was overridden by the Contempt of Courts Act).

or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

*Eller v. Republic of Palau*, 10 ROP 122, 128-29 (2003) (quoting *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987)). Stated somewhat more succinctly, a court abuses its discretion when it is “clearly wrong.” *Tmilchol v. Ngirchomlei*, 7 ROP Intrm. 66, 68 (1998) (quoting *Intercontinental Trading Corp. v. Johnsrud*, 1 ROP Intrm. 569, 573 (1989)).

### C. Discussion

Civil and criminal contempt are discrete mechanisms, each designed to safeguard distinct interests. Our civil contempt statute reads in part:

Courts of the Republic have the power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, *by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded or prejudiced . . . .*

14 PNC § 2204 (emphasis added). The criminal contempt statute, which permits a

court to punish an offender for a wilful failure to obey its mandate, order, or command, does not similarly limit the court’s punishment powers to scenarios in which a party’s right or remedy has been impaired. *See* 14 PNC § 2203(g).

[2] This unique limitation, permitting civil contempt orders in only those instances where “a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced” (14 PNC § 2204), highlights the different interests served by civil and criminal contempt. Civil contempt is an instrument used to rectify contempt so far as it affects another party. Criminal contempt, on the other hand, punishes contempt while vindicating the authority of the court. We have addressed this distinction previously:

Contempt can be either civil or criminal. The primary distinction between civil contempt and criminal contempt is whether the sanction imposed is coercive or punitive. A civil contempt proceeding is primarily coercive because a contemnor is able to avoid punishment through compliance. Criminal contempt, on the other hand, is primarily punitive because a court imposes an unconditional sentence to punish the contemnor for disrespecting the court’s dignity or disobeying its order. Civil contempt is normally initiated by an aggrieved party, whereas criminal contempt is

generally initiated by the court itself.

*Cushnie*, 4 ROP Intrm. at 219 (reviewing contempt order issued under inherent powers of trial court).

[3] We would only add to the words of *Cushnie* that civil contempt can also serve the purpose of compensation as well as coercion. See *United States v. United Mine Workers of Am.*, 67 S. Ct. 677, 701 (1947) (sanctions for civil contempt should be imposed in order “to coerce the defendant into compliance with the court’s order, [or] to compensate the complainant for losses sustained”); cf. *id.* at 700-01 (“Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court.”). Where the purpose is compensation, a fine payable to the complainant is the appropriate sanction, but where the purpose is coercion, “the court’s discretion is otherwise exercised” and “[i]t must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” See *id.* at 701.

As stated earlier, the appealed order of contempt was one for civil, not criminal, contempt. See Civ. Act. Nos. 04-182, 166-92, Order Granting in Part and Denying in Part Mot. for Contempt at 4 (quoting “pertinent part” of 14 PNC § 2204). Furthermore, the Trial Division, in quoting the coercion language of *Cushnie* without any discussion of compensation, seemingly sought its order to have a coercive effect on PMIC and Brungard. See *id.* at 4-5. Because we find that the Trial

Division’s order could not have achieved such an effect, we must vacate it.

The violations of the court’s orders to preserve PMIC’s assets occurred on January 23 and February 7, 2007, but Pacific Call did not file its motion for civil contempt until October 25, 2007.<sup>8</sup> Almost one month earlier, on September 28, 2007, the Trial Division confirmed the April 27, 2007 sale of all assets of PMIC to Long. Therefore, although Pacific Call still held a \$4.4 million judgment against PMIC at the time of its motion for contempt, all assets of PMIC had already been sold to a higher-priority creditor in a judicially-confirmed sale.

By the date of the contempt motion, no prospective motivation to coerce PMIC or Brungard to abide by the court’s orders to preserve PMIC’s assets existed. Given the confirmation of the sale of all of PMIC’s assets to Long, no coercion was necessary to ensure compliance with the court’s order to preserve assets because all the assets of PMIC

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<sup>8</sup> In his appellate reply briefing, Long raises the “statute of limitations” of 14 PNC § 2205(c) for the first time. (See Long Reply Br. at 18-20.) That provision states that an alleged contemnor has the right to be charged with contempt within three months of the alleged act of contempt. Because this issue passed unmentioned before the Trial Division (not to mention the initial round of appellate briefing), it is waived and we shall not consider it on appeal. See *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004) (“No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue.”); see also *Rechucher v. Lomisang*, 13 ROP 143, 149 (2006) (applying axiom of *Kotaro* to statute of limitations defense).

had already been sold.<sup>9</sup> The only affront, then, was to the court, but such violations of court orders should be punished—should an offended court see fit—through the distinct mechanism of criminal contempt. *See* 14 PNC § 2203(g).

Indeed, it is unclear how the recourse ordered by the court for the violation of its orders benefitted Pacific Call, the allegedly-aggrieved moving party. The Trial Division ordered Brungard and PMIC to “return the money paid to Brungard out of PMIC’s account, in the amount of \$3000.00, to PMIC by March 12, 2008.” *See* Civ. Act. Nos. 04-182, 166-92, Order Granting in Part and Denying in Part Motion for Contempt at 8. Failure to comply would result in a fine of \$50.00 each for each day until the \$3,000 was returned. *See id.* Brungard and Pacific Call were additionally ordered to pay Pacific Call’s attorney’s fees in connection with the contempt motion. *See id.* Turning back to the wording of our civil contempt statute (14 PNC § 2204), the disposition of \$3,000 by PMIC to Brungard did not cause “a right or remedy of” Pacific Call to be “defeated, impaired, impeded or prejudiced” at the time of the contempt order because all of the assets of

PMIC had been sold to Long.<sup>10</sup> The Trial Division abused its discretion in failing to deny the motion. We therefore vacate the order of contempt, including the assessment of attorney’s fees against PMIC and Brungard related to the motion for contempt.<sup>11</sup>

## CONCLUSION

For the reasons stated herein, the Trial Division’s confirmation of sale of all assets of PMIC to Long is REVERSED and the order of contempt entered against PMIC and Brungard is VACATED.

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<sup>9</sup> Analyzing the contempt order from the perspective of compensation reaches the same result. No actual loss to Pacific Call occurred from the time the checks were issued to Brungard until the time the contempt order was entered because all assets of PMIC were sold to Long and none to Pacific Call. No compensation was therefore necessary. It would be sheer supposition (and, given the circumstances, highly unrealistic) for us to speculate that Pacific Call would have collected a (relatively speaking, minuscule) portion of its judgment had PMIC’s assets totaled \$3,000 more.

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<sup>10</sup> Our reversal today of the order confirming the sale does not alter our analysis of the contempt order. We review the Trial Division’s order of contempt by assessing the information available to it at the time of the contempt order, not through the colored spectacles of hindsight.

<sup>11</sup> Long again seeks attorney fees via a one-sentence add-on to his brief. (*See* Long Br. at 24.) As explained in note 4, *supra*, we need not address such a cursory request. In the proper instance, a request for attorney fees should be accompanied by sufficient factual and legal citation to inform a reviewing court. Having been presented with none, we assume that none exists. *See, e.g., Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 50 (2006) (appellate courts should refuse to hear inadequately briefed claims). We also make no determination on the attorney’s fees assessed in the Brungard disciplinary proceeding, as that matter is not before us.