HANPA INDUSTRIAL DEVELOPMENT CORPORATION,
Appellant,

v.

HILARIA U. LAKOBONG,
Appellee.

CIVIL APPEAL NO. 10-015
Civil Action No. 06-277

Supreme Court, Appellate Division
Republic of Palau

Decided: January 25, 2011

[1] **Appeal and Error:** Preserving Issues

Parties may not raise new legal theories on appeal when they are available at trial.

[2] **Contract:** Damages

Compensatory damages serve to put the non-breaching party in the same position as though the contract had not been breached.

[3] **Contracts:** Damages

In an instance of an unfinished construction, the injured party can recover for the reasonable cost of completing performance.

[4] **Contracts:** Damages

Damages for two distinct breaches are permissible.

Counsel for Appellant: William L. Ridpath
Counsel for Appellee: Siegfried Nakamura

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and RICHARD H. BENSON, Part-Time Associate Justice.

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

PER CURIAM:

Hanpa Industrial Development Corporation ("Hanpa") appeals the Trial Division's award of damages to Hilaria U. Lakobong. The parties entered into a construction contract in August 2004 to build a two-story building and parking lot. Hanpa completed construction of the building but did not pave the parking lot. Lakobong did not pay Hanpa pursuant to the terms of their agreement, so Hanpa brought suit against Lakobong, Lakobong filed a counterclaim, and the Trial Division concluded that both parties breached their agreement. The Trial Division specifically concluded that Hanpa breached its obligation to pave the parking lot. Hanpa now takes issue with the amount of compensatory and liquidated damages awarded to Lakobong, and the award of both compensatory and liquidated damages to Lakobong. We are not persuaded by Hanpa's arguments, and so the Court **AFFIRMS** the decision of the Trial Division.

BACKGROUND

This dispute is about an unfinished construction project that involved multiple agreements between the parties. On August 13, 2004, Hanpa and Lakobong entered into the original construction contract for construction of the Furusato Building, a two-

story building and car park located at the turn-off to Ngerbeched. Soon Seob Ha signed the original contract for Hanpa, and handled all subsequent negotiations related to the building and car park. Lakobong's lender, the National Development Bank of Palau ("NDBP") and the building designer and inspector, Jesus "Jess" Lizama, were also involved in the negotiations for the original contract. As this appeal is limited to the damages the Trial Division awarded Lakobong related to the parking lot paving, we will discuss the facts related to the building generally, and the parking lot paving in greater detail.

According to the original contract, construction was to begin on August 16, 2004, to be completed by April 16, 2005. The original contract included a term that included all change orders and addenda to the contract documents, with the requirement that each change order be signed by each party or authorized representative and approved by NDBP. (Tr. Order at 3; Pl. Ex. 1.) Section Ten of the original contract also provided that Hanpa would pay $50 per day as liquidated damages if it did not meet the April 16, 2005 deadline:

> It is agreed by and between the parties that the payments specified in this Contract are based solely on the value of the construction described, that it is impracticable and extremely difficult to fix the actual damages, if any, that may proximately result from a failure on the part of contractor to timely perform such services, and that in case failure to timely perform such services in accordance with the completion date set forth in Section Two above and a resulting loss to owner, contractor's liability under this agreement shall be limited to and fixed at the sum of fifty Dollars ($50.00) per day as liquidated damages, and not as a penalty, and this liability shall be exclusive as to damages for delay.

(Pl. Ex. 1, at 4.)

The parties entered into three "change orders," where Ha and Paul Lakobong, Hilaria's son and agent, negotiated terms for additional construction projects. The first change order, signed on June 10, 2005, set terms for additional work in the kitchen, and included all the same terms as the original contract; the only difference was that the amount of liquidated damages per day was set at $25. The second change order was agreed upon or around September 5, 2005, when Lizama requested the addition of a kitchen hood and table. And the third change order, for installation of a down spout and elevating walkway, was approved on September 11, 2005.

To accommodate these changes, the parties extended the time frame for finishing the project multiple times. The first extension was took place on August 10, 2005, where the parties entered into a Memorandum of Understanding ("MOU"), changing the deadline for completion from April 16, 2005 to August 31, 2005. The memorandum did not address the parking lot because work on the lot was not scheduled to begin until

Lakobong demolished the old Furusato restaurant. The second Memorandum of Understanding ("MOU II"), signed on or around October 13, 2005, set October 24, 2005 as the deadline for completing the final tasks or the building; November 14 as the deadline for Lakobong to demolish the old Furusato restaurant; and December 16, 2005 as the deadline to complete the parking lot.

In the end Hanpa did not pave the parking lot. Lakobong demolished the old Furusato restaurant on November 23, 2005, nine days after the agreed upon date. At that point, because Hanpa was not equipped to pave with asphalt, Ha contracted with Socio Micronesia to pave the asphalt. Socio Micronesia required Hanpa to prepare the area to be paved by ensuring the base course could meet the 95% compaction requirement. However, when Socio Micronesia tested the ground, it found soft spots on the base course and refused to lay the asphalt. (Tr. Order at 14; Pl. Ex. 18.) On December 14, 2005, Ha communicated this problem to Teltull, an NDBP representative, saying that the paving was on hold. Then on December 19, 2005 Ha's son sent a letter to Lakobong on his father's behalf, explaining that Socio Micronesia was not going to do the job. In response, Lakobong wrote a letter to Moylan Insurance, Hanpa's surety, on December 20, 2005, requesting that it take over the contract and hire another company to complete the work. The letter noted that the amount of liquidated damages for the delay in finishing the parking lot was $6,450.00. (Pl. Ex. 19.) Moylan refused to intervene, instructing Lakobong to continue negotiations with Hanpa. (Pl. Ex. 20.) After Socio Micronesia removed their equipment from the property, Ha sent Lakobong a series of letters requesting another change order and increased funding due to the problems encountered with paving. In February, after all the interested parties found out that the paving project was on hold, Ha, Lizama, and Teltull exchanged several emails where Ha asked to pave the lot with concrete and Lizama insisted that it be paved with asphalt as required by the original contract.

Nothing was resolved until June 2006, when Lizama came to Palau and met with an engineer from Socio Micronesia. At that point, Lizama approved paving. On June 21 and 22, 2006, Lizama held a meeting with Paul Lakobong, Ha, Teltull from NDBP, and Philip Reklai, who had a deal with Lakobong to purchase the building. The purpose of the two meetings was to resolve the remaining construction issues. During the June 21, 2006 meeting, Ha requested the release of Hanpa from its obligation to pave the parking lot for $16,528.25. Lizama agreed to the release, and the parties went on to discuss the fact that the cost to pave the parking lot would be $20,430. (Pl. Ex. 29.) Because of his interest in the building, Reklai offered to pay for the difference in cost. Lizama recorded the minutes of the meetings in two memoranda. (Pl. Ex. 29-30.) Afterwards, Socia Micronesia contracted to pave the lot for between $22,000 and $24,000, and it paved the lot in November 2006.

Hanpa did not receive payment for its work on the building, so on November 21, 2006, Hanpa filed suit to recover under the contract. Lakobong filed breach of contract, liquidated damages, and breach of warranty counterclaims, seeking recovery for Hanpa's failure to pave the parking lot and for unfinished items related to the building

construction.

The Trial Division concluded that both parties breached the contracts. For Lakobong's failure to pay, it awarded Hanpa $41,793.89 plus pre-judgment interest of $29,479.56. As to Hanpa, the Trial Division concluded that it breached the original contract and the first change order due to the delay and the failure to complete the parking lot. Pursuant to the terms of the original contract and the first change order, the Trial Division awarded Lakobong $14,950.00 in liquidated damages and $6,471.75 in compensatory damages, for a total of $21,421.75 plus pre-judgment interest of $2,399.63. Lakobong therefore owes Hanpa $47,452.16. Hanpa now appeals the Trial Division's damages award.

STANDARD OF REVIEW

Factual findings of the lower court are reviewed using the clearly erroneous standard. Temaungil v. Ulechong, 9 ROP 31, 33 (2001). Under this standard, the findings of the lower court will only be set aside if they lack evidentiary support in the record such that no reasonable trier of fact could have reached that conclusion. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). Conclusions of law are reviewed de novo. *Palau Marine Indus. Corp. v. Pacific Call Invs., Ltd.*, 9 ROP 67, 71 (2002).

ANALYSIS

Hanpa appeals the Trial Division's award of compensatory and liquidated damages to Ms. Lakobong related to the parking lot paving portion of the contract. Hanpa presents two issues for review. First, Hanpa contends that Lakobong waived any claim for damages beyond $6,450 in liquidated damages for the parking lot paving. Second, Hanpa claims that the Trial Division committed reversible error in awarding both compensatory and liquidated damages to Lakobong.

I. Waiver

Hanpa contends that the Trial Division erred in awarding compensatory damages and calculating liquidated damages for the delay and failure to pave the parking lot. Hanpa makes two arguments: (1) Lakobong waived any compensatory damages after the June 2006 meetings; and (2) Lakobong waived any liquidated damages after MOU II was created on October 13, 2005.

[1] Hanpa waived these arguments by not presenting them to the Trial Division. Parties may not raise new legal theories on appeal when they were available at trial. *Ulechong v. Morrico Equip. Co.*, 13 ROP 98, 100 (2006) ("It is well-settled that a party cannot raise new legal theories on appeal."). As Lakobong notes, Hanpa did not present this issue at trial. Rather, Hanpa's defenses at trial were mistake and impracticability or impossibility. Thus, Hanpa is raising this argument for the first time on appeal, and so this argument is waived.

II. Award of Liquidated and Compensatory Damages

Hanpa's second argument is that the Trial Division committed reversible error in awarding Lakobong both compensatory and liquidated damages. Hanpa contends that awarding both types of damages is contrary to

law and has a punitive effect.

As the Trial Division correctly pointed out, the awards for compensatory and liquidated damages are for completely separate breaches of the contract. (Tr. Order at 32–33.) Liquidated damages was a term the parties agreed to in the event of a delay, and Hanpa does not contend that the liquidated damages clause is void. Section Ten of the original contract states that the liquidated damages "shall be exclusive as to damages for delay." (Def. Ex. 1, at 4.) Thus, the Trial Division calculated the liquidated damages for the delay appropriately. (Order at 32.) The delay lasted from August 31, 2005 (the original deadline) to June 21, 2006 (the day Hanpa was released from the paving job), which is 294 days. The trial court subtracted ten days from 294 due to Lakobong's ten-day delay in demolishing the old Furusato building, resulting in 284 days and $14,200.00 in liquidated damages.[1]

[2, 3] Compensatory damages served a different purpose. The compensatory damages were awarded to make Lakobong whole, providing for the difference between the amount Hanpa released to her and the amount the paving ultimately cost. *Lu Rent N Lease v. Ngchesar State Gov't*, 16 ROP 199, 202 (2009) (stating that the goal in awarding contract damages is "[t]o put the non-breaching party in as good a position as if the contract had been performed"). Because this was an issue of unfinished construction, the injured party can recover for "the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the property loss in value to him." Restatement (Second) of Contracts § 348(a).

Lakobong was released from paying for $16,528.25 of the paving, but subsequently paid between $22,000 and $24,000 to pave the parking lot.[2] The amount ultimately paid for the paving was unknown. Thus, the Trial Division appropriately took $23,000—the middle ground of the estimated cost–and subtracted $16,528.25 to reach $ 6,471.75.

[4] The two forms of damages serve to reimburse Lakobong for two separate breaches: delay and failure to pave. Although the delay and ultimate failure to pave are factually related, Lakobong suffered distinct damages from the two breaches: (1) the intangible cost of waiting for Hanpa to complete the construction project from August 2005 to June 2006; and (2) the consequent increased cost of actually paving the lot. The measure of liquidated damages ended on June 21, 2006; the increased cost of paving did not accrue until November 2006 when the lot was paved. If the facts were that Hanpa sought release from paving in August 2005 when the initial delay began, then the assessment of damages would have been for one breach. However, that did not occur, so damages for the two distinct breaches are appropriate, and the Trial Division did not commit reversible

[1] The total amount of liquidated damages included another $750 for 30 days of delay for work under one of the change order forms. The daily liquidated damages under that contract was $25.00. Hanpa only appeals the liquidated damages related to the paving delay, so the Court limited the discussion to the paving delay.

[2] Philip Reklai, who agreed to pay the difference in paving cost, subsequently purchased the property with the paving unfinished with financing from NDBP.

error.[3] *See* 17A Am. Jur. 2d Contracts § 709.

CONCLUSION

Hilaria Lakobong did not waive either compensatory or liquidated damages. The Trial Division properly concluded that Hanpa breached the original contract in two ways, by delaying the paving and ultimately not completing the paving. Thus, the Trial Division did not err in awarding Lakobong both compensatory and liquidated damages. Accordingly, we **AFFIRM** the Trial Division's award of damages to Hilaria Lakobong.

[3] Hanpa cites an American state court case for the proposition that compensatory and liquidated damages cannot be awarded together for a breach of contract. *Arctic Contractors, Inc. v. State of Alaska*, 564 P.2d 30, 49 (Alaska 1977) (citing *United States v. American Surety*, 64 S. Ct. 866 (1843) and *United States v. Cunningham*, 125 F.2d 28 (1941)). *Arctic*, and the cases it cites, are distinguishable from the facts at hand. In *Arctic*, *Cunningham*, and *American Surety*, there was a single breach—the failure to build—so the delay and the termination occurred simultaneously. Here, in contrast, there are two distinct breaches, the delay and later failure to pave. These cases are therefore unpersuasive.