

**RTEAI CHIEFS OF NGARCHELONG
STATE, represented by ONGINO
IKESIIL, IECHAD RA BUTELBAI
MATHIAS ERBAI, ADOLPH
NGRIATREKED, VICTOR JOSEPH,
ULITECH NGIRAKEBOU, SILLIANG
TEM, TET SINGICH SATO, OBAK RA
IYUBUKEL LORENZO NGIRAMOLAU
Plaintiffs,**

v.

**SWENNY ONGIDOBEL d/b/a PACIFIC
LIVE FISHING CO.,
Defendant**

Civil Action No. 08-150

Supreme Court, Trial Division
Republic of Palau

Decided: December 27, 2010

[1] State Government: Fishing

The national government has not delegated to the state council of chiefs the power to issue fines for violations of fishing buls.

[2] State Government: Fishing

The Palau Constitution and statutes as interpreted by the *Blanco* Court hold that state governments can not impose penalties on criminal fishing to exceed \$100.00.

Counsel for Plaintiffs: J. Uduch Sengebau
Senior

Counsel for Defendant: Mark Doran

The Honorable ARTHUR NGIRAKLSONG,,
Chief Justice:

Plaintiffs are traditional chiefs of Ngarchelong State. On December 5, 2007, they issued a notice of a bul on fishing. No one who is not from Ngarchelong is allowed to fish in the territorial waters of that state. The “bul officers of the chiefs” shall enforce the bul.

“Should the chiefs’ bul officers find anyone not a citizen of Ngarchelong to be fishing within the waters of Ngarchelong, they shall be taken in with the boat to the port of Ollei to pay a fine to be determined by the eight chiefs of Ngarchelong to be able to claim back their equipments and boat.”

On December 27, 2007, defendants Swenny Ongidobel and his fishing companies and fishermen, were caught fishing within the territorial waters of Ngarchelong. Defendants are not citizens of Ngarchelong. On December 28, 2007, the plaintiffs met to decide the penalties for the violation. They decided on \$ 10,000.00 fine. On January 2, 2008, defendant Ongidobel met with the plaintiffs. Ongidobel claimed he did not know the boundaries of the territorial waters of Ngarchelong and asked for a lower fine. The fine was lowered to \$ 2,300.00. Ongidobel paid the fine.

Plaintiffs claim that it was at this meeting that Ongidobel promised to pay a \$10,000.00 fine should he or his fishing companies and fishermen violate the bul again. Ongidobel denies he made such a promise.

On March 4, 2008, Douglas Ngiratrang, an employee of the State working for Governor Brownly Salvador, was in his office. He received a report that there were noncitizens in boats fishing within the state’s territorial waters. Governor Salvador

instructed Ngiratrang to investigate these suspects and if they are not citizens of the state and therefore fishing illegally, seize their boats and bring them to Ollei dock. The state employees did just that. They took a state boat and sped to the area known as Telbadel ra Ngerael, within the waters of Ngarchelong State. And there they saw the defendants’ mother ship and small boats, commonly known as banana boats. They saw defendants fishermen, Filipinos and Chinese, on banana boats with their fishing lines hanging from both sides of the boats. They saw freshly caught fish. Following the Governor’s instruction, they proceeded to untie some of the banana boats from the mother ship and towed them with all the gears and fish to Ollei dock.

According to the terms of the bul referenced above, defendant Ongidobel must pay the fine assessed by the plaintiffs before he can retrieve the seized boats, engines and fishing gears. However, someone from the Attorney General’s Office prevailed on the Ngarchelong State Officials to release all the items, except fish.

The defendants’ evidence disputing the violation of the bul on March 4, 2008 is not persuasive. The Court therefore finds defendants fished illegally on March 4, 2008 at Telbadel ra Ngerael which is within the waters of Ngarchelong State.

On March 14, 2008, a representative of the plaintiffs informed Ongidobel that they wanted a meeting with him to assess the fine for this latest and second violation of the bul. Ongidobel did not show up at the scheduled meeting. Plaintiffs imposed a \$ 10,000.00 fine. Attempts of the plaintiffs to get Ongidobel to meet with them and pay the fine

were unsuccessful.¹ Ongidobel declined to meet with the Plaintiffs. He essentially told the plaintiffs, “I will see you in court”, and so here they are!

Plaintiffs allege in their complaint that they have the authority under customs to promulgate the bul and to impose fines they think appropriate. They want the \$ 10,000.00 fine.

Secondly, Plaintiffs claim that Ongidobel promised to pay a \$ 10,000.00 fine if he, his companies and fishermen violate the bul the second time. Plaintiffs want that promise enforced.

Defendants deny that the plaintiffs have a right to impose a fine greater than \$ 100.00. The existing laws do not allow such fines, they claim.

Secondly, Ongidobel argues that it is the Governor and employees of Ngarchelong State government that enforce the bul. This make it state action. Ngarchelong, like all the state governments, can not impose fines for fishing violation in excess of \$ 100.00.

¹ Reklai Rafael B. Ngirmang testified for the plaintiffs. He was asked what happens if an offender of a bul refuses to pay the fine assessed by the chiefs despite all attempts by all concerned to have him pay the fine? Reklai Ngirmang testified that in such a case, the offender of a bul could be beaten or taken to the sea and be forcefully submerged underwater until he succumbs to these methods of persuasion. Fortunately for the defendants, these two methods of enforcements are no longer popularly practiced in Palau. The U.S. Government, however, still practices waterboarding as an interrogating method on suspected combatants/defendants!

DISCUSSION

The Court first takes the alleged promise of Ongidobel to pay \$10,000.00 fine if he, his fishing companies and employees violate the bul again. Ongidobel denies making such a promise. The so-called “agreement” is not in writing. Plaintiffs fail to set forth the elements of the claimed oral agreement. And fatally, plaintiffs fail to plead this cause of action or move to amend their pleadings to conform to the evidence. See ROP Civ. P. 15 (b). Further, the Palau statute of frauds (39 PNC 504 b) requires a promise to pay for misdoings of another (Ongidobel’s fishermen) to be in writing and if not, the promise is void. The Court finds there is no binding oral agreement between the parties regarding the disputed \$ 10,000.00 fine.

Secondly, Ongidobel argues that the detection, apprehension of his fishermen employees and the seizure of their boats, equipment and fish were done by almost all, if not all, employees of the State Government, including the Governor. The plaintiffs are members of the legislative branch of the Ngarchelong State Constitutional Government. All these activities amount to Ngarchelong State action. Ngarchelong State Government, like all state governments, currently can not lawfully impose a fine for fishing violation in excess of \$100.00.

This state action argument is plausible, but defendants fail to plead it in their answer. They also did not move to add the argument as an affirmative defense to conform with the evidence. The argument, therefore, deserves a mention, but not credit.

The remaining central issue is whether the plaintiffs can, as traditional leaders,

lawfully impose a fine exceeding \$100.00 for violation of a fishing bul? The answer is “no”, they can not.

The Court begins with what is settled law in the case of *State of Koror, v. Blanco*, 4 ROP 208(1994). The *Blanco* Court explained that even though the state governments have “exclusive” ownership of all marine resources from the state base line to 12 miles seaward, *see*, Palau Const., Article I, § 2, this does not mean states can enact criminal laws regulating fishing and enforce their violations. This power of law making and enforcement of criminal laws is reserved to the national government under Article XI, § 2 of the Palau Constitution. *Blanco*, at 209.

The national government, however, “may delegate [its] powers by law to the state government”. (Emphasis added). *Id.* And this delegation has been done by way of 4 TTC § 51. This statute, however, places a limitation on the amount of fines the states can impose. “The penultimate provision of 4 TTC § 51, the same statute which contains the delegation to the states, provides that ‘No municipal ordinance shall provide for penalty greater than a hundred dollar fine, or ninety days imprisonment or both.’ *Blanco*, at 213. See 4 TTC § 51 (2). Coincidentally, 17 PNC § 108 limits penalty for violation of “respected native customs” not to exceed a fine of \$100.00, or six months of imprisonment, or both.

Does the *Blanco* holding apply to the case at hand? Even though the plaintiffs are members of the legislative branch of the Ngarchelong State Constitutional Government by virtue of their traditional titles, they filed this case in their capacity as traditional chiefs and pursuant to Palauan traditions. They cite

Article V, § 2 of the Constitution which protects the role or function of traditional leaders not “inconsistent” with the Constitution. Article I, § 2, of the Palau Constitution also protects “traditional fishing rights and practices...” even though the enactment of criminal laws on fishing and the penalties thereof are powers reserved to the national government.

[1] The obvious question is: Has the national government delegated its powers to enact criminal laws regulating fishing and their enforcement to the council of chiefs in each state? Specifically, has the national government delegated its powers to the state council of chiefs to impose penalties for bul violation in excess of \$100.00? It is clear that this delegation has not taken place.

There is also a question whether a state council of chiefs is constitutionally eligible to receive powers delegated by the national government. The Constitution clearly states that the national government may delegate its powers to “the state government.”

[2] Secondly, the Palau Constitution and statutes as interpreted by the *Blanco* Court hold that state governments can not impose penalties on criminal fishing to exceed \$100.00. Therefore, the fine of \$10,000.00 demanded by the plaintiffs is “inconsistent” with the Constitution and must yield. Traditional role and function are protected as long as they are consistent with the Constitution.

In conclusion, the plaintiffs’ claim to a right to impose a fine for violation of fishing bul exceeding \$100.00 is within the reserved powers of the national government. Before the plaintiffs can impose such a fine, the

national government has to “delegate [the] powers by law” to the traditional chiefs of the state. Palau Const. Article XI, § 2. This has not been done, not to mention the clear language of the Constitution that says delegation of national government reserved powers can only go to “the state government.” Delegating national government powers to the council of chiefs of a state or any other entity beside the state government would be a “delegation running riot.”

Second, the Constitution and statutes of Palau as interpreted by the *Blanco* Court impose a \$100.00 limit on fines for violation of state fishing laws. Plaintiffs’ demand for \$10,000.00 fine for violation of their bul is “inconsistent” with the Constitution. Traditional role and function of the chiefs are protected as long as they do not conflict with the Constitution.

The Court shall enter judgment in favor of the defendants and against the plaintiffs.