UODELCHAD RA TEREKIU BILUNG GLORIA SALII and TUCHERUR RECHUCHER RA YOULIDID JOHN C. GIBBONS, on behalf of themselves and TEREKIU CLAN,
Appellants,

v.

TEREKIU CLAN, represented by Chief Tucherur Wilhelm Rengiil and Uodelchad ra Terekiu Brenda R. Ngirmeriil,
Appellees.

CIVIL APPEAL NO. 11-004
Civil Action No. 03-384

Supreme Court, Appellate Division
Republic of Palau

Decided: July 5 , 2012

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

Issue preclusion is a matter of law reviewed de novo.

[2] **Civil Procedure:** Preclusion and Estoppel

Under the doctrine of issue preclusion, or collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

[3] Civil Procedure: Preclusion and Estoppel

Although the terms "res judicata" and "issue preclusion" are often used interchangeably, "true res judicata" is claim preclusion. Issue preclusion is more aptly called collateral estoppel.

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[4] Civil Procedure: Preclusion and Estoppel

The party alleging preclusion has the burden of showing that all the elements are satisfied.

[5] Civil Procedure: Preclusion and Estoppel

Issue preclusion requires identity, or near-identity, of issues in the first and second actions. When there is a lack of total identity there are several factors that should be considered for the purposes of the rule. These factors include (1) a substantial overlap in the evidence used in both proceedings; (2) whether the proceedings involve the same question of law; (3) whether pretrial discovery and preparation in the first proceeding embrace the matter sought to be presented in the second; and (4) whether the claims in each proceeding are closely related.

[6] Civil Procedure: Preclusion and Estoppel

Because the burden is on the party arguing in favor of estoppel, sufficient proof must be introduced to show priors litigation of the issue that is purportedly barred from relitigation. If reasonable doubts exist as to what issue was originally adjudicated, issue preclusion should not be applied

[7] Civil Procedure: Preclusion and Estoppel

Among the exceptions to the issue preclusion rule are cases in which the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; or the burden has shifted to his adversary.

Counsel for Appellants: Salvador Remoket and Oldiais Ngiraikelau
Counsel for Appellee: Raynold Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; and RICHARD H. BENSON, Part-time Associate Justice.

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

PER CURIAM:

Uodelchad ra Terekieu Bilung Gloria Salii and Tucherur Rechucher ra Youlidid John C. Gibbons appeal the Trial Court's

finding that Tucherur Wilhelm Rengiil is an ochell member of Terekieu Clan and, therefore, is the appropriate representative to receive the proceeds of a judgment in favor of Terekieu Clan. Salii and Gibbons contend that the Trial Division's finding is barred by issue preclusion. Because we conclude that preclusion is inapposite, we affirm.[1]

BACKGROUND

Appellants argue that the central question in this case—who may properly represent Terekieu Clan interests?—was settled almost fifty years ago.

II. Civil Action No. 257

In 1962, Imerab Rengiil sued on behalf of Ituu Lineage of Terekieu Clan to recover land known as *Ituu* from an alleged usurper named Rechuld. Rechuld was the presumptive owner listed in the "Japanese land survey." In her complaint filed with the Trust Territory Trial Division, Imerab stated that she was "head" of the Lineage. The issues slated for trial, as reflected in that court's pretrial order, were:

> 1. How and from whom did the Ituu [L]ineage acquire the land Ituu, what use did they make and what control did they exercise over it during and since the German times?
>
> 2. Did Recheluul have the right and the power to make a will concerning Ituu and, if so, what will did he make, if any, concerning it?
>
> 3. What registration, if any, was made of Ituu or any part of it during the last Japanese land survey and what was the basis and authority for such registration?
>
> 4. If Ituu, or parts of it, were registered in the name of Rechuld in the last Japanese land survey, who authorized such registration and what authority did they have to do so?
>
> 5. What rights in Ituu, or its parts, were transferred to defendant since the last Japanese land survey, by whom, and under what authority?
>
> 6. What use has been made of Ituu and its parts by the defendant or members of plaintiff's lineage since the last Japanese land survey?

A partial transcript submitted by Appellants shows the testimony of Barao, who purported to be Tucherur of Terekieu Clan. He explained that Terekieu Clan had three lineages, Ituu, Ikekemongel, and Iteliang. Barao went on to testify, consistent with Imerab's claim, that Rechuld had no right to the land.

[1] Although Appellants request oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

The Trust Territory Trial Division rejected Imerab's claim to the land in a one-page order and opinion. Its findings of fact stated:

> 1. The plaintiff Imerab has failed to prove that the particular land in question was ever owned by the Ituu [L]ineage as she claims it is constituted.
>
> 2. The land was controlled and used exclusively by a matrilineal family within that lineage for many years before the Japanese land survey of about 1938-41, of which family the plaintiff was not a member.
>
> 3. That matrilineal family with all the consents necessary for the transfer of its property purported to transfer the land to Rechuld as his individual land at the time of the Japanese land survey of about 1938-41 and it was listed as Rechuld's individual land in the records of that survey.

Rengiil v. Rudimch, No. 257 (H.C.T.T. Tr. Div. Mar. 2, 1963). The court's one-paragraph opinion stated that "the presumption that listings in the Japanese land survey of about 1938-41 in the Palau Islands were correct, is entitled to prevail." *Id.*

II. Civil Action No. 298

Less than a year after the order in Civil Action No. 257 was issued, Barao brought his own suit on behalf of Ituu Lineage, also alleging that Rechuld never had good title to Ituu lands located close to those at issue in Civil Action No. 257. In a lengthier opinion, the Trial Division rejected Barao's lawsuit on the grounds of res judicata. *Tuchurur v. Rechuld*, 2 T.T.R. 576, 581 (Tr. Div. 1964). It determined that, although the land in question was not the same as that at stake in Civil Action No. 257, Rechuld's title to Ituu's lands could not be litigated "over and over again." *Id.* The court noted that the issue in each case was Rechuld's "individual title" to the land. *Id.*

III. Civil Action No. 03-384

Civil Action No. 03-384, the present case, began as a lawsuit against the Republic of Palau by Terekieu Clan, represented by several children of Imerab, including Wilhelm Rengiil (Wilhelm), for ejectment from Clan lands. The lands had been used by the Republic for the construction of an elementary school. The Land Court had previously determined that the land belonged to Terekieu Clan. Appellants intervened in the Trial Division case, contending that they were the rightful owners and proper representatives of Terekieu Clan. All parties to the action eventually stipulated to the land's value and a judgment for inverse condemnation was entered against the Republic. However, the litigation continued between the Appellees and Appellants, each of whom claimed to properly represent Terekieu Clan.

In their motion to intervene, Appellants first raised the issue of res judicata, claiming that Civil Action No. 257 barred Imerab's descendents from claiming that she was a member of Ituu Lineage. Later, Appellants moved for summary judgment, contending again that Civil Action No. 257 barred any claim that Imerab was a member of Ituu Lineage or could own Ituu land. The Trial Division denied the motion, stating:

> [t]he records of Civil Action No. 257 appended to [the] motion do little to clarify the issue. That case involved Plaintiffs' mother, Imerab Rengiil, who was claiming a piece of property for Ituu Lineage of Terekieu Clan. The Court never addressed whether [she] was a member of Terekieu Clan, nor did it discuss any opposing claim from Gloria Salii and John Gibbons or their ancestors.

The case proceeded to trial. Brenda Ngirmeriil testified that of the three lineages of Terekieu, only Ituu remains. She further testified that she and her siblings were Ituu members through Imerab who came to Ituu through the maternal line. Specifically, Etor, a member of Ituu Lineage, begat Ngeduas, who begat Telbong, who begat Imerab. According to Ngirmeriil, beginning with Etor, the men and women of her family have frequently held the highest male and female titles in Terekieu Clan. Wilhelm claimed to hold the highest male title, Tucherur, and Ngirmeriil claimed to hold the highest female title, Uodelchad. Salii and Gibbons also purported to hold the titles of Tucherur and Uodelchad, claiming that Idid Clan, in the absence of ochell members of Terekieu Clan, controlled Terekieu land.

Finding in favor of Appellees, the court rejected Appellants' claim to control Terekieu land, noting that "Idid's dispensing of Terekieu lands appears to be an example of strong-arming a weaker clan, and not a historical, customary or cultural right to authority over Terekieu Clan." In contrast, the court concluded that Wilhelm and Brenda were Tucherur and Uodelchad ra Terekieu, ochell members of Terekieu Clan, and proper representatives of Terekieu Clan to receive the proceeds for the judgment in favor of the Clan.

Appellants timely appealed and contend that Civil Action Nos. 257 and 298 preclude the determination that Imerab's descendents are members and leaders of Ituu Lineage and Terekieu Clan.

STANDARD OF REVIEW

[1] Issue preclusion is a matter of law reviewed de novo. *Trolii v. Gibbons*, 11 ROP 23, 25 (2003).

ANALYSIS

[2, 4] Under the doctrine of issue preclusion, or collateral estoppel,[2] "when an issue of fact or law is actually litigated and determined by

[2] **[3]** Although the parties use the terms "res judicata" and "issue preclusion" interchangeably, "true res judicata" is claim preclusion. Issue preclusion is more aptly called collateral estoppel. *See* 18 Charles Alan Wright *et al.*, Federal Practice and Procedure § 4402 (3d. ed. 2002) (internal citation omitted).

a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Azuma v. Ngirchechol*, 17 ROP 60, 65 (2010) (quoting Restatement (Second) of Judgments § 27 (1982)). The party alleging preclusion has the burden of showing that all the elements are satisfied. Restatement (Second) of Judgments § 27 cmt. f (1982) (Restatement).

[5, 6] This formulation of the doctrine requires identity, or near-identity, of issues in the first and second actions. "When there is a lack of total identity . . . there are several factors that should be considered" for the purposes of the rule. *Id.* at cmt. c. These factors include (1) a substantial overlap in the evidence used in both proceedings; (2) whether the proceedings involve the same question of law; (3) whether pretrial discovery and preparation in the first proceeding "embrace the matter sought to be presented in the second"; and (4) whether the claims in each proceeding are closely related. *Id.* Because the burden is on the party arguing in favor of estoppel, "[s]ufficient proof must be introduced to show [prior] litigation of the . . . issue" that is purportedly barred from relitigation. 18 Federal Practice and Procedure § 4405. If reasonable doubts exist as to what issue was originally adjudicated, issue preclusion should not be applied. *In re Braniff Airways, Inc*., 783 F.2d 1283, 1289 (5th Cir. 1986).

[7] Among the exceptions to the issue preclusion rule are cases in which "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; [or] the burden has shifted to his adversary." Restatement § 28(4). In such cases, it would be inappropriate to hold that a prior finding that a party failed to meet a high burden bars the same party from proving an issue under a lower burden. Thus, for example, acquittal in a criminal case (in which the burden was proof beyond a reasonable doubt) does not preclude a defendant's liability in a civil case on the same issue (in which the burden would be simple preponderance). *See id.*; *see also* 18 Federal Practice and Procedure § 4422. The same principle applies in civil cases with different burdens. "The differences in gradations of civil standards of proof are more subtle than the shift from the reasonable-doubt standard to the preponderance standard, but the same basic principle continues to apply." *Id*. Similarly, if the initial presumptions in a case have shifted (and thus the burden has shifted), it would be unfair to hold an earlier judgment against the losing party who need not overcome the presumption in the second proceeding. *See id.*

Applying the rules to this case, it is plain that issue preclusion is inapplicable. First and foremost, the issue in Civil Action No. 257 was adjudicated under a different set of burdens and presumptions than those applied below in this case. Therefore, an exception to the issue preclusion rule applies. *See* Restatement § 28(4); Federal Practice and Procedure § 4422. The 1963 judgment states that Imerab "failed to prove" that the land was owned by "the Ituu [L]ineage as she claim[ed] it [was] constituted." It went on in the opinion portion to conclude that Imerab was unable to overcome the "presumption that listings in the Japanese land survey . . . were correct." Thus, Rechuld, by virtue of his

listing as owner in the Japanese survey, was the presumptive owner of the land. Even by 1963, it was well-established that the Tochi Daicho was entitled to a presumption of accuracy. Indeed, those contesting the survey had to make "a clear showing that [the survey] is wrong." *Baab v. Kerang*, 1 TTR 284, 286 (Tr. Div. 1955); *see also Ucherbelau v. Ngirakerkeriil*, 2 TTR 282, 283 (Tr. Div. 1961). In contrast, the burden faced by Imerab's descendents in the present action was a mere preponderance of the evidence. Thus, Imerab faced a higher burden in 1963 than Appellees did here. These different standards are sufficient to bring the case into the exception to the issue preclusion rule for proceedings involving different burdens of proof. *See* Restatement § 28(4).

Even if the burden applied in the 1963 proceedings had been lower, the issues decided in the present case and in Civil Action No. 257 are not the same and thus issue preclusion is inapplicable. The documents submitted by Appellants in support of their claim are insufficient to satisfy Appellants' burden to show that the two issues litigated were the same. *See* Restatement § 27 cmt. f; Federal Practice and Procedure § 4405. Appellants rely on the complaint, the pretrial order, the testimony of Barao, and the judgment from Civil Action No. 257. They argue that "[i]mplicit" in the earlier case we can "essentially" find the determination that Imerab had no authority within Ituu Lineage and she was not ochell. The complaint and the pretrial order lend some support to the conclusion that Imerab claimed to have authority within Ituu Lineage. Further, Barao's testimony asserted that Imerab and he each wielded power within the Lineage. However, nothing submitted on appeal suggests that Imerab's ochell status or her status as a title-holder in Terekieu Clan were central issues in the case. Thus, while some of the evidence put forward in 1963 likely overlapped with that presented below, we are unable to determine to what extent the evidence in both proceedings overlapped or whether discovery in the earlier case would have reasonably "embraced" the issue in the latter. *See* Restatement § 27 cmt. c.

Nonetheless, Appellants invite us to infer, from Imerab's claim to authority and the language of the judgment, that Imerab's status within the clan was actually litigated and decided. The judgment states that a "matrilineal family within Ituu," with the requisite authority, transferred land to Rechuld, and further concludes Imerab was not a member of that family. It might be a fair hypothesis to suggest, as Appellants do, that the court concluded that Imerab was not ochell and was not a legitimate title-holder which led to its ultimate judgment against Imerab. However, this does not necessarily follow. The word "ochell' is found nowhere in the records submitted from Civil Action No. 257. And Appellants have provided no evidence regarding the legal standard that the court was applying in 1963 to matters of traditional clan- and lineage-based land ownership. Appellants' only citation to the operative law is to a Trial Division case from 1969 stating that land transfer requires the consent of senior members of the clan. *See Armaluuk v. Orrukem*, 4 TTR 474, 475 (Tr. Div. 1969). There is no explanation as to how this would have governed the award of land in 1963. Thus, it is unclear whether the proceedings involved the same questions of law. *See* Restatement § 27 cmt. c.

Similarly, we are left wondering how the court reached its conclusion that Imerab was not a member of "a matrilineal family within Ituu." It could be that Imerab admitted or failed to present evidence that she was from the matrilineal line. In such a case, collateral estoppel would not apply because a court's determination pursuant to an admission is not considered "actually litigated." *See id.* at cmt. e.

We turn to the final factor listed in the Restatement: whether the case involved related claims. As the Trial Division noted in its denial of Appellants' motion for summary judgment, the claims involved in each case are somewhat, but not entirely, related. *See id.* at § 27 cmt. c. Civil Action No. 257 involved a determination as to whether the Tochi Daicho was incorrect to list Rechuld as the owner of certain Ituu lands. The present case concerns who has authority to receive a judgment award on behalf of the Ituu Lineage and Terekieu Clan.

These holes in Appellants' case for issue preclusion leave us with serious doubts regarding whether and to what extent Imerab's authority within Ituu Lineage was evaluated by the court in Civil Action No. 257. Because we have these "reasonable doubt[s]," we conclude collateral estoppel did not bar Appellees' suit. *See In re Braniff Airways, Inc*., 783 F.2d at 1289.

Finally, we decline to consider the preclusive effect of Civil Action No. 298. Although records from the case were presented to the court below, at no point did Appellants argue that Civil Action No. 298 was preclusive. In their motion to intervene and motion for summary judgment, Appellants argued that Civil Action No. 257 alone was preclusive. Even in their closing argument, the only instance that the case is mentioned to support an argument made by the Appellants, it is only cited for the purpose of showing that Imerab was not referred to by her title in the earlier proceedings. Nowhere before the Trial Division did Appellants argue that Civil Action No. 298 barred Appellees' assertion of authority or status with Ituu Lineage. Because the issue was not fairly presented to the Trial Division below, we conclude that the contention that Civil Action No. 298 gave rise to preclusion on certain issues was waived. *See Rechucher v. Lomisang*, 13 ROP 143, 149 (2006).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the trial division.