

**ESTATE OF NOBOR KING,
Appellant,**

v.

**TERUO RENGULBAI, KUKONG
FRITZ, AUGUSTINE MESEBLUU, and
ANNA MELTEL,
Appellees.**

CIVIL APPEAL NO. 10-040
Civil Action No. 06-204

Supreme Court, Appellate Division
Republic of Palau

Decided: October 7, 2011

[1] Custom: Judicial Review

Status and membership in a lineage are questions of fact, as is the existence of a purported customary law, and the Appellate Division reviews these findings of fact for clear error. The Court will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record.

[2] Custom: Proof of Custom

The existence of a Palauan custom is a matter of fact that must be proved by clear and convincing evidence.

[3] Custom: Proof of Custom

Matters of custom must be resolved on the record of each case.

[4] Custom: Expert Testimony

The trial court is entitled to give greater weight to one expert over another.

Counsel for Appellant: Raynold B. Oilouch
Counsel for Appellees Teruo Rengulbai & Kukong Fritz: Roman Bedor
Counsel for Appellees Augustine Mesebeluu & Anna Meltel: Siegfried Nakamura

BEFORE: KATHERINE A. MARAMAN, Part-Time Associate Justice; RICHARD H. BENSON, Part-Time Associate Justice; and C. QUAY POLLOI, Associate Justice Pro Tem.

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

PER CURIAM:

Appellant, the Estate of Nobor King (the Estate), seeks review of the Trial Division's Decision and Judgment. The court held that Ngeskesuk Clan's transfer of 30,000 square meters of its land to Nobor King was invalid, entering a judgment that his Estate is entitled to restitution from Ngeskesuk Clan in the form of attorney fees and pre-judgment and post-judgment interest. For the following reasons, we affirm the Trial Division.

BACKGROUND

This case addresses the validity of the transfer of a 30,000 square-meter portion of Cadastral Lot 054 R 01 (Homestead Lot 168), located in Ngesias Hamlet, Peleliu State. Ngeskesuk Clan owns Cadastral Lot 054 R 01, and this appeal focuses mainly on the Trial

Division's finding of Palauan custom as to the alienation of land from Ngeskesuk Clan.

In May of 1993, Nobor King filed a quiet title action as Obak ra Mengelang of Ngeskesuk Clan for the entirety of Cadastral Lot 054 R 01. Ronald Rdechor, as ochell of the clan, hired counsel. In deciding to file suit and hire counsel, King consulted with members of Kebui Lineage even though Ngeskesuk Clan is comprised of three unrelated lineages, Kebui, Medaliwal, and Roisbeluu. During the course of the quiet title proceeding, Kebui Lineage had difficulty paying the attorney fees. In the end, King agreed to pay the attorney fees, in exchange for a 30,000 square-meter portion of Cadastral Lot 054 R 01 if Ngeskesuk Clan was awarded the land. Only the ochell members of Kebui Lineage were involved in this oral agreement.

On October 13, 1997, the Trial Division awarded Cadastral Lot 054 R 01 to Ngeskesuk Clan. That decision was affirmed in 2000, and a certificate of title was issued to Ngeskesuk Clan in 2004. On May 14, 2005, King and the ochell of Kebui Lineage signed the deed of transfer for the 30,000 square-meter portion of the lot promised in exchange for the legal fees. They did not consult with or seek approval from members of Medaliwal or Roisbeluu Lineages before signing the deed.

In September 2006, King filed a quiet title action for the 30,000 square meters, and Medaliwal and Roisbeluu Lineages both objected to the transfer on the ground that the strong senior members of two of Ngeskesuk Clan's lineages did not agree to the transfer. Teruo Rengulbai and Kukong Fritz represented Medaliwal Lineage, and

Augustine Mesebeluu and Anna Meltel represented Roisbeluu Lineage. The Trial Division of the Supreme Court held a trial on April 27, 28, and 29, and May 3, 4, and 10, 2010, hearing testimony from several witnesses, including two expert witnesses on Palauan custom—Wataru Elbelau for the Estate and Kazumoto Rengulbai for Medaliwal Lineage.

In its Decision, the court made findings as to the strong senior members of each lineage. First the court addressed Kebui Lineage. After hearing testimony of Teruo Nobou, it concluded that Nobor King, the current Bilung Sumiko Joseph, the current Obak ra Mengelang Susong Smau, and others are ochell of Kebui Lineage and Ngeskesuk Clan.

Then the court turned to Medaliwal Lineage, agreeing with Lorenzo Edward's testimony that their great-great grandmother Ebud was adopted by the last remaining members of Medaliwal Lineage. Edward testified that they were therefore ochell by adoption, admitting that if there were blood-born ochell, they would have a higher status than ochell through adoption. The court held that regardless of the adoption, Fritz and Rengulbai were strong senior members of Medaliwal Lineage.

Finally, the court addressed Roisbeluu Lineage. It credited the testimony of Fanny Ngiruos Blunt and Sandy Ngiruos Rengechel's testimony that Edboy is ochell and Augustine Mesebeluu and Anna Meltel are strong senior ulechell members of Roisbeluu Lineage.

Having resolved the identities of the

strong senior members of each lineage, the court turned to the issue of how Ngeskesuk Clan may transfer property under Palauan custom. First, the court noted that Ngeskesuk Clan is comprised of three lineages that are not blood related, and that they each came to Ngeskesuk Clan at different times. The court concluded that there are strong senior members of Ngeskesuk Clan who are not from Kebui Lineage but who must approve land transfers, relying on Haruo Esang's testimony that he is not of Kebui Lineage but holds the title of Ngeskesuk, the seventh-ranking chief in Ngesias hamlet, and represents Ngeskesuk Clan to other clans. He stated that in the past when he has refused to approve a sale of land, that sale did not proceed.

Then the court evaluated the expert testimony. The Estate's expert, Wataru Elbelau, stated that if only one lineage of a clan has ochell members, those ochell can agree to sell land, and the other lineages would simply not be represented in the land transfer. However, Medaliwal Lineage's expert, Kazumoto Rengulbai, offered more persuasive testimony that each lineage has strong senior members that represent their lineage, and they can be either ochell, ulechell, or terreual. According to Kazumoto, the strong senior members of each lineage had to confer and agree to transfer clan land, especially in instances where lineages of a clan are not related by blood.

The court concluded that Kazumoto's testimony provided clear and convincing evidence of Palauan custom. It acknowledged both experts were inconsistent in their testimony regarding the proper Palauan custom, but it concluded that Wataru's testimony regarding custom was too difficult

to accept because it would permit transfer of land without any input from lineages of a clan, even though those lineages have strong senior members and are not near extinction.

The Trial Division thus held that Palauan custom requires that "each lineage from Ngeskesuk Clan designate its strong senior members, and those strong senior members, as representatives of Kebui, Medaliwal, and Roisbeluu, must confer and agree to the transfer of clan land before that transfer can be effective." Applying that custom, the court held that the deed was invalid because the strong senior members of Medaliwal and Roisbeluu Lineages did not approve the transfer. To avoid unjust enrichment, the court awarded the Estate restitution from Ngeskesuk Clan because the clan received the benefit of the attorney fees King paid. Specifically, it directed Ngeskesuk Clan to pay the Estate \$14,276 and 3% pre-judgment interest and 9% post-judgment interest. This appeal followed.

STANDARD OF REVIEW

[1] We review the trial court's conclusions of law *de novo*. *Wong v. Obichang*, 16 ROP 209, 212 (2009). The trial court's finding of fact is reviewed under the clearly erroneous standard. *Idid Clan v. Olngiband Lineage*, 12 ROP 111, 115 (2005). 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. *Roberts v. Ha*, 13 ROP 67, 70 (2006). Status and membership in a lineage are questions of fact, as is the existence of a purported customary law. *Ngiraswei v. Malsol*, 12 ROP 61, 63 (2005).

DISCUSSION

The Estate brings six issues on appeal: (1) whether the court erred in its customary finding that to transfer clan land (a) each lineage in the clan must consent to the transfer, (b) each lineage must designate its strong senior members who must consent to the transfer, and (c) all the strong senior members of each lineage must consent to the transfer; (2) whether the court erred in finding Teruo Rengulbai and Kukong Fritz to be strong senior members of Ngeskesuk Clan; (3) whether the court erred in finding Augustine Mesebeluu and Anna Meltel to be senior strong members of Ngeskesuk Clan; (4) whether Appellees are estopped from challenging the conveyance to Nobor King; (5) whether Nobor King is entitled to the land under the principle of restitution; and (6) whether Appellees should pay the legal fees of the Estate.¹

I. Customary Law Findings

The Estate first takes issue with the Trial Division's finding as to Palauan custom. It lists several reasons why the Trial Division's conclusion was wrong, but its position ignores the well-established principle that determinations of Palauan custom vary depending on the facts of each case.

First, the Estate argues that there is a

“generally recognized and accepted custom” that the strong senior members of a clan must approve a land transfer, not that strong senior members of each lineage must consent to convey clan land. The Estate incorrectly argues that the Trial Division simply “decided to create new custom” relating to land transfer.

[2, 3] The existence of a Palauan custom is a matter of fact that must be proved by clear and convincing evidence. *Arbedul v. Emaudiong*, 7 ROP Intrm. 108, 110 (2006). Thus, the outcome of each case is determined by its own record. *Id.*; see *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, (2006). Although one court may hold that strong senior members of a clan must approve a land transfer, this Court has noted that “other requirements may be found to exist under custom.” *Arbedul*, 7 ROP Intrm. at 110.

Nevertheless, the Estate cites numerous cases for the proposition that only strong senior members of a clan need to approve a land transfer. Although each case included a general reference to this Palauan custom, none of them involved a clan whose lineages are unrelated by blood and thus they are inapplicable. See *Obak v. Bandaril*, 7 ROP Intrm 254 (Tr. Div. 1998) (addressing a transfer of land jointly owned among individuals, not clan or lineage ownership); *Remoket v. Omrekongel Clan*, 5 ROP Intrm, 225, 230 (1996) (resolving who receives shares of rental proceeds from leasing clan land, and making findings of fact as to who the strong senior members of the clan were in the process); *Arbedul v. Diaz*, 9 ROP 218 (Tr. Div. 1989) (discussing removal of clan titles); *Risong v. Iderrech*, 4 TTR 459, 464 (Tr. Div. 1969) (dealing with clan title where two clans

¹ The Estate filed its opening brief on May 31, 2011, a day late, without filing a motion for extension of time providing good cause for the delay. We may dismiss this appeal pursuant to ROP R. App. P. 31(c), but given that Appellees did not take issue with the delay and it was only one day late, we will not dismiss this appeal.

involved all the same people and thus only one membership).

As these cases are factually distinguishable, the court's decision not to blindly accept that general proposition was proper. The court acknowledged Ngeskesuk Clan's unique structure, where the lineages comprising the clan are not blood related, and relied upon the evidence at trial to determine custom. Although Wataru testified for the Estate on direct examination that the rule is that strong senior members of a clan must approve a land transfer, he admitted during cross examination that strong members, not necessarily ochell, of each lineage had to meet and agree to a sale of land. Conversely, Kazumoto testified that strong senior of each lineage should agree on land transfers when the lineages are not blood-related, but during cross examination, he acknowledged the general rule that the strong senior members of a clan agree upon land transfers.

The court noted these inconsistencies in the testimony but concluded that there was clear and convincing evidence that the custom based on this set of facts is that each lineage from Ngeskesuk Clan designates strong senior members who meet and confer regarding land transfers. As there is evidence to support this conclusion, we see no error.

The Estate erroneously contends that the Trial Division's conclusion regarding Palauan custom ignores the different ranking and strengths of each lineage within a clan. Its position is that Kebui Lineage is much stronger than Medaliwal and Roisbeluu Lineages, and so approval from the strong senior members was sufficient to transfer clan lands. To find an error in the court's

reasoning, the Estate points to Kazumoto's testimony where he acknowledged that within a clan ulechell members are weaker than ochell members, and that terreuoal members are the weakest members of the clan. According to the Estate, the court misapplied this testimony when it concluded that strong senior members of Medaliwal and Roisbeluu Lineages are also strong senior members of Ngeskesuk Clan.

Contrary to the Estate's position, the trial court acknowledged the differences between ochell, ulechell, and terreuoal clan members, and that one's status within a lineage may be different than status within a clan. It did not conclude that the strong senior members of Medaliwal and Roisbeluu lineages are strong senior members of Ngeskesuk Clan. Rather, it concluded that Ngeskesuk Clan—unique in the sense that its lineages are not blood related—must have approval by strong senior members of each lineage to transfer land. It reached this conclusion after weighing competing expert testimony, and we see no justification to disturb this finding. *Saka v. Rubasch*, 11 ROP 137, 141 (2004) (stating that the Appellate Court “is in no position to second-guess the trial court, who saw and heard both experts testify, in choosing to credit one over the other”). Thus, the court's conclusion did not ignore status within lineages or clans; it simply concluded that a custom exists as to Ngeskesuk Clan that differs from other clans.

Next, the Estate takes issue with the trial court's customary conclusion that each lineage should “designate” its strong senior members. It argues that the use of the term “designate” shows that the court ignored the generally accepted custom that clan members

obtain seniority and strength based on their status and service, but we do not interpret this comment as changing who are the strong senior members of a lineage. In arguing that the court's use of the term "designate" turned status in a lineage into a democratic process, the Estate reads more into this term than the court made explicit in its Decision. Use of the word "designate" does not mean that members decide who is an is not a strong senior member of a lineage. Had that meaning been the court's intention, its evaluation of who the strong senior members of each lineage of Ngeskesuk Clan would have differed. We see no clear error in the court's use of the term designate.

In its final attack on the court's finding on Palauan custom, the Estate cites several pages of Kazumoto's testimony to show that the court's reliance on the testimony was clearly erroneous. It seeks to show that he was inconsistent and unreliable, including his statement agreeing that an ulehell member of Ngeskesuk Clan is weaker than an ochell member, and that status is assigned at birth and cannot change. The Estate argues that this is inconsistent with his testimony on direct and re-direct that senior members of each lineage must consent to land transfers, and it goes as far as stating that he committed perjury.

[4] Kazumoto's testimony may have included inconsistencies, but the court's decision to credit his testimony over Wataru's was not clearly erroneous. First and foremost, as we have already noted, the trial court is entitled to give greater weight to one expert over another. *Saka*, 11 ROP at 141 (stating that the Appellate Court "is in no position to second-guess the trial court, who saw and

heard both experts testify, in choosing to credit one over the other"). In evaluating both experts, the court acknowledged Kazumoto's inconsistencies, but it was also faced with Wataru's inconsistent testimony—a fact the Estate ignores. The Trial Division therefore chose between two versions of inconsistent testimony. Given that the court noted the inconsistencies, justified its reliance on Kazumoto's testimony, and was in the best position to evaluate the credibility of these witnesses, we find no clear error. Despite all of the Estate's arguments taking issue with the trial court's conclusion as to Palauan custom, we affirm the trial court's finding of Palauan custom.

II. The Clan Status of Rengulbai and Fritz

The Estate's second issue on appeal is whether the court erred when it found that Teruo Rengulbai and Kukong Fritz are strong senior members of Ngeskesuk Clan, and that their consent is required to transfer clan land. As the Estate's argument mischaracterizes the court's conclusion, and the court's conclusion is not clearly erroneous, we disagree.

The court did not conclude that Rengulbai and Fritz were strong senior members of Ngeskesuk Clan. Rather, the Trial Division explicitly stated that "Medaliwal Lineage considers Fritz and Rengulbai strong senior members of Medaliwal Lineage." No where in the initial Decision, or subsequent Judgment and Decision awarding attorney fees did the court state that Fritz or Rengulbai are strong senior members of Ngeskesuk Clan. Thus, the Estate misreads the court's conclusion as to Rengulbai and Fritz.

The Estate contends that the court erred in concluding that Fritz and Rengulbai are ochell members of Medaliwal Lineage because the evidence showed that they were ulechell members of Medaliwal Lineage. It points to Edward's testimony in support, citing his testimony that his ancestor Ebud had been an ulechell member of Medaliwal Lineage by birth, but rose to the level of ochell when he was adopted to a woman named Rirai. Edward also admitted that if there were ochell members of Medaliwal Lineage, he would not be as strong as them, and that because of Ngeskesuk Clan's history, ulechell members have risen to ochell status. The Estate argues that this testimony was wrong because of both experts' testimony that status never changes.

The Estate again mischaracterizes the court's conclusion and fails to find an error. Rather than directly addressing the court's conclusion that Fritz and Rengulbai are strong senior members of Medaliwal Lineage, it criticizes Edward's testimony about ochell versus ulechell status, an issue unrelated to the court's ultimate conclusion about strong senior members of the lineage. The court's conclusion was not reliant on Edward's testimony about a change in status; it actually made no finding on that piece of testimony. Instead, the court credited Edward's testimony tracing Fritz and Rengulbai's ancestry to show that they are strong senior members of Medaliwal Lineage. The court did not conclude that they were ochell, only that they are strong senior member of Medaliwal Lineage. There is no evidence contradicting this conclusion, so we find no error.

III. The Clan Status of Mesebeluu and Meltel

The same is true of the Estate's third argument, that the trial court erred in finding that Augustine Mesebeluu and Anna Meltel are strong senior members of Ngeskesuk Clan whose consent is required to transfer clan land. Again, the Estate mischaracterizes the Trial Division's conclusion, and fails to find a clear error.

To be clear, the Trial Division concluded that there are "strong senior members of Roisbeluu Lineage, including Augustine Mesebeluu and Anna Meltel." It never concluded that they were strong senior members of Ngeskesuk Clan. What is more, the Estate does not point to any testimony or evidence that these individuals are not strong senior members of Roisbeluu Lineage. It states outright that it "has no problem with Augustine and Anna being senior strong members of Roisbeluu Lineage," and then merely reargues its earlier position that all the lineages do not need to agree to the transfer of clan land. The Estate re-reviews all the facts showing that Kebui Lineage is the dominant lineage, listing examples of land transfers that took place without approval of strong senior members of Medaliwal and Roisbeluu Lineages.

This argument fails for the primary reason that the court did not conclude that Augustine and Anna were strong senior members of Ngeskesuk Clan. Moreover, the Estate's argument is flawed because the trial court took into account Kebui Lineage's power and prior transfers. The court noted the evidence that land had been transferred in the past, but did not find it persuasive, reasoning

that the absence of objections to the past transfers does not validate the transfer at hand.

IV. The Clan Status of Edboy

The Estate also contends that the court's comment about Edboy as the remaining ocell of Roisbeluu Lineage was clearly erroneous. According to the Estate, because Edboy did not object to the land transfer, he waived the right to object to the transfer. Yet as the Estate does not explain how this comment somehow led to a clearly erroneous outcome. The court's statement about Edboy was simply a comment; it did not affect its holding that the strong senior members of Roisbeluu Lineage had to approve the transfer of Ngeskesuk Clan land. As it points to no clear error in the court's analysis, the Estate's argument as to Augustine and Anna fails.

The Estate then proceeds to argue that all of the Appellees may not challenge Ngeskesuk Clan's land transfer due to judicial estoppel. However, the Estate did not present this argument at trial. As a party may not raise new legal theories on appeal for the first time, we will not address this argument. *Ulechong v. Morrigo Equipment Co.*, 13 ROP 98, 100 (2006).

V. King's Entitlement to Restitution

The Estate's fifth argument is that Nobor King was entitled to the land through principles of restitution. Restitution is determined by "(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the other party's property has

been increased in value or his other interests advanced." Restatement (Second) of Contracts § 371. According to the Estate, the legal fees and interest awarded by the trial court did not take into account the risk Nobor undertook in providing the attorney fees.

We disagree for two reasons. The Trial Division determined that the appropriate form of restitution to award the Estate of King was the amount paid in attorney fees, plus pre-judgment and post-judgment interest. It based this decision on the principle that Ngeskesuk Clan benefitted in that amount. The Estate of King presents no authority to support the argument that the land was the appropriate form of restitution.

Second, the Estate's argument that the court did not take Nobor King's risk into account is not the proper measure of restitution. In awarding restitution, the proper focus is not the damage to the plaintiff, but the benefit obtained by the defendant. That is exactly the approach the court took here in awarding the Estate exactly what it received—the attorney fees. We therefore see no error in the form of restitution.

VI. Ngeskesuk's Obligation to Pay Legal Fees

Finally, the Estate contends that the Trial Division erred in requiring Ngeskesuk Clan to pay the Estate's legal fees. Its position is that the Appellees herein should be responsible for the legal fees, and the Trial Division did not have the authority to award the restitution because Ngeskesuk Clan was not a party to the proceedings. As Ngeskesuk Clan was a part of the proceedings, we disagree and affirm the trial court.

The Trial Division rightly concluded that Ngeskesuk Clan was unjustly enriched, and that the clan should be responsible for paying the attorney fees and interest to the Estate. The Estate filed an action to quiet title to the 30,000 square-meters that Ngeskesuk Clan allegedly conveyed to Nobor King. A notice was issued informing the public that “any person claiming to be a senior strong member of Ngeskesuk Clan of Peleliu” who has the right to challenge the transfer should file a claim or objection with the Court. Ngeskesuk Clan was therefore involved in the proceeding. *See* 65 Am. Jur. 2d Quieting Title § 63 (“Parties who should be joined . . . include all those who appear of record to have a possible claim or interest in the property or all those who may have a substantial interest in the property and who will be materially affected by the decree.”). As a result of the proceeding, Ngeskesuk Clan retained the land, and the court permissibly required the clan to pay restitution because it received the benefit of the land and should pay for the fees in exchange. *See* Restatement (Second) of Contracts § 369. We affirm the trial court on this ground as well.

CONCLUSION

The Estate of Nobor King has not convinced us that the Trial Division committed a reversible error. We therefore **AFFIRM** the Trial Division’s Decision and Judgment.