

*ROP v. Toribiong*, 2 ROP Intrm. 43 (1990)  
**REPUBLIC OF PALAU,**  
**Appellant,**

v.

**FRANCIS TORIBIONG,**  
**Appellee,**

and

**AIRAI STATE PUBLIC LANDS AUTHORITY and AIRAI STATE GOVERNMENT.**

CIVIL APPEAL NO. 23-88  
Civil Action No. 80-87

Supreme Court, Appellate Division  
Republic of Palau

Opinion

Decided: February 5, 1990

Attorney for Appellant: Shad D. Priest

Attorney for Appellee Toribiong: Kaleb Udui

Attorney for Appellees Airai State PLA and Airai State Government: Johnson Toribiong

BEFORE: ARTHUR NGIRAKLSONG, Associate Justice; EDWARD C. KING,<sup>1</sup> Associate Justice; FREDERICK J. O'BRIEN, Associate Justice Pro Tem.

O'BRIEN, Associate Justice Pro Tem:

On June 27, 1979, in order to achieve its goal of enlarging the Palau airport, the Trust Territory Government (TTPI) instituted eminent domain proceedings to acquire ownership of certain lands in Airai ("the airport land"). Since TTPI was the sovereign in power at the time, the only real issue in the case was how much TTPI would have to pay the landowners. **L44** TTPI was willing to pay approximately \$250,000.00, the appraised value of the land. Attempts at settling the case dragged on for over three years.

Finally, in early 1983, a four-way agreement was reached among TTPI, the government of the Republic of Palau (ROP), the Airai State Government (AIRAI), and the landowners. Through twin contracts, one between itself and AIRAI, and the other between ROP and AIRAI, TTPI was to acquire fee simple ownership of the land, for which it would pay the landowners

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<sup>1</sup> The Honorable Edward C. King is the Chief Justice of the Supreme Court of the Federated States of Micronesia.

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\$500,000. In return for obtaining the consent of all the individual land owners to the contract, AIRAI got the right to build an airport terminal and to derive the revenues from it. ROP was to get a larger airport and a suitable terminal. Thus, each of the parties was to receive something of value to itself from the arrangement.

In April, 1986, after the airport had been expanded and the terminal built, TTPI transferred ownership of the airport land to ROP.

On May 1, 1987, ROP sued to eject Defendant from land upon which he was constructing a house, alleging that the house site was part of the airport land, and that Defendant had no right to enter upon the land or to build anything there. Defendant answered the complaint by denying ROP's title to the land and asserting his own right, title and interest thereto. He also asserted the affirmative defenses of laches and estoppel, and challenged ROP's legal capacity to own land.

On September 2, 1987, AIRAI and the Airai State Public Land Authority (ASPLA) moved to intervene and filed a complaint for specific performance. ¶45 Intervenors asserted that they were parties to a contract with ROP and TTPI, and claimed that the contract required TTPI to deed the airport land to ROP, which was then required to deed that land to ASPLA. TTPI had complied with the contract by deeding the airport land to ROP but ROP had not yet fulfilled its part of the contract, they alleged.

The Trial Division granted summary judgment to Defendant, Airai and ASPLA holding, among all other things, that "All parties involved in these various negotiations and agreements contemplated and intended that the project land would ultimately be returned to the ownership of Airai . . ." Civ. No. 80-87, slip op. at 12. Accordingly, the Trial Division ordered ROP to transfer the project land to ASPLA.

We do not believe the agreement calls for, or permits that result. The only provision in the agreement between ROP and Airai concerning the transfer of land, and the apparent basis for the decision by the Trial Division, is this:

1. The ROP hereby acknowledges and agrees that the law requires the public lands upon which the Airai/Palau Airfield Expansion Project is located to be returned to [PPLA] and thence to [ASPLA] as soon as said air-field project is completed.

ROP/AIRAI Agreement, page 2.

This is not a promise to transfer land, but only an agreement as to the meaning of the pertinent law. Specifically, ROP agrees that "the law requires the public lands . . . to be returned." ROP does not promise to transfer land. ROP does not say whether it would transfer the lands if it has any option to do otherwise. Finally, this is not an independent promise to transfer the land regardless of the state of the law.

¶46 In order to determine the effect of this language it is incumbent upon us first to consider

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the state of the law pertaining to transfer of public lands from ROP to the various states. The statute says:

[PPLA] shall have the following powers and duties:

(j) To transfer and convey, upon the formal request the government of any state, to that state's authority, as may be established pursuant to section 215 of this title, such public lands within the geographical boundaries of that state, either in whole or in part, and to delegate and to assign to the state authority at the time of said transfer certain or all of its rights, interests, powers, responsibilities, duties and obligations provided for and prescribed in this chapter, except those powers reserved to [PPLA] by Section 211 hereof.

Looking at this language in isolation makes for an ambiguity as to whether PPLA has a power (permissive) or a duty (mandatory) to transfer or convey land to a state. All uncertainty vanishes, however, once the statute is considered in its entirety. The statute says that its purpose is to create an entity to receive public lands and to administer them, 35 PNC § 201. It grants PPLA the power to receive and hold title to public lands, 35 PNC § 210(b); to administer, to manage and to regulate the use of public lands and the income therefrom, 35 PNC § 210(c); to establish and administer a program for homesteading on public lands, 35 PNC § 210(d); to sell, lease, exchange, use, dedicate for public purposes or make other disposition of public lands, 35 PNC § 210(e); and to use eminent domain, 35 PNC § 210(f), or to acquire land by negotiation, 35 PNC § 210(g).

Considering the foregoing, the argument that 35 PNC § 210(j) mandates that, upon the formal request of a state public land authority, PPLA is to turn over to it any public land located within the state, is nonsensical. L47 Were matters to be as argued, PPLA would not be able to carry out its functions because it would have no land to administer. How could PPLA have any land to lease or homestead, for example, if it had to give all lands to the states upon request? No state would choose to let the national government "own" land within its borders, especially if the state thought it could derive any economic benefit from the land. Thus, the language of 35 PNC § 210(j) is permissive and not mandatory.

Another clear indication of the legislature's intent is found in 35 PNC § 215(c):

Each state authority shall have such rights, interests, powers, responsibilities, duties and obligations as may be granted to it by the Authority; provided that said grant and delegation by the Authority is limited only to those rights, interests, powers, responsibilities, duties and obligations inherent in the Authority . . . .

This language not only clearly indicates that PPLA was to have a superior position to the state public land authorities, but implies that PPLA would exercise control over them. The power to delegate is the power to control, since the grantor may thereafter modify or withdraw his grant. The existence of such control is a persuasive indicator that PPLA was not intended to be bound to accede to the formal requests of the state public land authorities, but had the power

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to deny such requests.

Thus, ROP's acknowledgment and agreement that "the law requires the public lands . . . to be returned" is in fact wrong. The task of this Court is to determine the effect of that misstatement.

### Condition

One possibility would be that the language constitutes a condition. 148 Under that theory, any or all of Airai's obligations to carry out its part of the contract after the airfield project was completed would be contingent upon prior transfer of the land by ROP to ASPLA.

Conditions to contracts are not favored in the common law because they have the effect of creating forfeitures. In some jurisdictions, courts will not construe terms in a contract as a condition unless an intention to create a condition appears "by plain and unambiguous language or by necessary implication." *A.L. Pickens Co. Inc. v. Youngstown Sheet and Tube Co.*, 650 F.2d 118, 121 (6th Cir. 1981); *In re Bubble Up Delaware, Inc.*, 684 F.2d 1259 (9th Cir. 1982) (requiring plain and unambiguous language); *Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695 (4th Cir. 1976) (requiring plain language).

In other jurisdictions, whether or not language in a contract creates a condition depends on the intention of the parties, to be ascertained from reasonable construction of the language used, considered in light of the surrounding circumstances. *Marker v. United States*, 646 F. Supp. 433, 436 (D. Del. 1986); *O'Brien and Gere Engineers, Inc. v. Taleghani*, 540 F. Supp. 1114, 1116 (E.D. Pa. 1982), *aff'd*, 701 F.2d 1394; and *Appeal of Taleghani*, 707 F.2d 1395 (3d Cir. 1983) (if language is not free from doubt or oral testimony is contradictory, certain conventions of contract interpretation may guide the court).

Under either approach, this agreement does not yield any such condition. The acts to be carried out after the airport project is completed are spelled out in paragraphs five through nine of the agree-149-ment. These provisions cover the responsibilities of Airai to operate the airport facility and of ROP to carry out its governmental functions at the facility. Nothing within those provisions suggests that any undertakings are conditioned upon transfer of land title to ASPLA. Similarly, there is nothing inherent in the operation of the contract that requires transfer of title to the land. Regardless of who holds title, it is clear that both parties are bound to provide sufficient access to the land and airport facilities to enable the parties to carry out their respective responsibilities.

Thus, we conclude that the transfer of land from ROP to ASPLA is not a condition to the obligations of AIRAI to carry out its promises under the contract.

### Implied Promise

The argument principally relied upon by AIRAI and ASPLA is that paragraph one is a promise by ROP to transfer the land, that ROP's failure to carry out this promise is a breach, and

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that this breach may be remedied by an order mandating specific performance.

As already indicated, we read paragraph one only as an agreement about the meaning of the law. There is no express promise to transfer land. To the extent that the language implies a promise to transfer land, that promise is itself conditioned upon the agreement as to the requirements of the law. Since that agreement is in error, the condition has not been fulfilled and no obligation to transfer the land has arisen.

A final possibility might be that ROP was agreeing, regardless of the **150** actual state of the law, to act as though the law required transfer. This would be a promise either to change the law or to disregard it. As to the former, the language cannot possibly be construed as a promise to attempt to change the law. As to the latter, a promise by ROP officials to disobey or ignore the law would be illegal and unenforceable. *See, e.g., McMullen v. Hoffman*, 174 U.S. 639, 669-70, 19 S.Ct. 839, 851, 43 L.Ed. 1117 (1899); *Miller v. McKinnon*, 124 P.2d 34, 140 A.L.R. 570 (Cal. 1942); Restatement (Second) of Contracts, Sections 178 and 179 (1981).

Thus, we conclude that the language of paragraph one constitutes neither a promise nor a condition, but a mere recitation of the understanding of the parties as to the legal context within which they were agreeing. The inaccuracy of that understanding does not affect the obligations of the parties under the agreement.

In view of the foregoing conclusions, we find that the Trial Division erred in ordering ROP to transfer the airport land to ASPLA. Accordingly, we reverse that decision. We further find no basis for permitting AIRAI's intervention in the case and so reverse the grant of its motion to intervene and dismiss AIRAI from the case. As to ASPLA, since it has been shown that it has no enforceable claim in this matter, we also reverse the grant of its motion to intervene and dismiss it from the case.

With this result, it is unnecessary to decide the issues of the Trial Division's alleged usurpation of PPLA's powers or whether summary judgment was unwarranted without agreement or proof of AIRAI's fulfillment of its part of the TTPI/AIRAI and ROP/AIRAI contracts.

**151** As between ROP and Defendant Toribiong, summary judgment is premature since there is no agreement or evidence to establish that his house is located within the boundaries of the airport land. While it would appear from the foregoing that Defendant's claim regarding his right, title and interest to the land is not meritorious, that depends upon whether his house is on the airport land. Further, his affirmative defenses have yet to be adjudicated, as well as his challenge to ROP's legal capacity to own land. Thus, although it is necessary to reverse the decision of the Trial Division, this cause must be remanded for resolution of the initial dispute between Plaintiff and Defendant.

The Trial Division's Order regarding costs is also reversed.

Reversed and remanded.