Toribiong v. Gibbons, 3 ROP Intrm. 419 (Tr. Div. 1993)

FRANCIS TORIBIONG and
THE REPUBLIC OF PALAU,
Plaintiffs,

v.

JOHN C. GIBBONS, Koror State Executive Administrator, et al.,
Defendants.

CIVIL ACTION NO. 451-91

Supreme Court, Trial Division
Republic of Palau

Memorandum of decision
Decided: September 24, 1993

BEATTIE, Associate Justice:

THIS MATTER came on for trial commencing July 14, 1993. Plaintiff Toribiong was represented by Yukiwo P. Dengokl, Esq. The Republic of Palau was represented by Mark L. Driver, Assistant Attorney General. Defendant Gibbons was represented by Stephen Kruger, Koror State Attorney. Having heard the testimony, examined the other evidence adduced by the parties and heard and read the arguments of counsel, the Court, pursuant to Rule 52 of the Rules of Civil Procedure, makes its following findings of fact and conclusions of law as they appear herein.

The First Amended Complaint filed by Plaintiff Toribiong and the Complaint for Declaratory Judgment Against Koror State filed by the Republic of Palau ("ROP") Plaintiffs essentially assert the same claims against Defendant Gibbons, the Koror State Executive Administrator ("Koror State").[1] Plaintiffs allege that Koror State intends to dismantle or remove a World War II Zero fighter airplane which is located under the Palau Lagoon at a depth of approximately sixty feet. They allege that such removal would violate ⊥420 the provisions of 19 PNC § 301 *et seq.* (the "Lagoon Monument Act") because the Zero is part of the Palau Lagoon Monument. The relief sought by the Plaintiffs is a declaratory judgment that Koror State may not remove or dismantle the Zero without complying with the Lagoon Monument Act and that it be permanently enjoined from removing or dismantling the Zero unless it obtains a permit to do so pursuant to the Lagoon Monument Act.

Section 302 of the Lagoon Monument Act provides in pertinent part that:

> All . . . aircraft, and any and all parts and contents thereof, which

[1] The other defendants have been dismissed out of the case or dropped as parties under Rule 21.

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> formerly belonged to or were part of the armed forces of . . . Japan, . . . which were sunk to or otherwise deposited on the bottom of the Palau Lagoon and its territorial waters . . . shall be and hereby are set apart as monuments which shall be collectively called the "Palau Lagoon Monument".

Plaintiffs have proven by a preponderance of the evidence that the airplane at issue herein is a Zero formerly a part of the armed forces of Japan and that it has been sunk or otherwise deposited on the bottom of the Palau Lagoon.

Section 304 of the Lagoon Monument Act requires that, before a person may gain access to a monument aircraft to examine it or gather objects from it, a permit must be obtained from the President or his duly authorized representatives. Similarly, section 306 provides for penalties for any person who removes such aircraft or any part thereof without first obtaining permission from the President. Koror State contends that it does not have to comply with the Lagoon Monument Act by obtaining a permit to gain access to or otherwise deal with the Zero because (1) under Article I, Section 2 of the ROP Constitution, Koror State is the owner of the Zero, and the owner can "do what he pleases with what he owns", (2) the Republic of Palau's regulatory powers are limited by Koror State's right to own and derive revenues from exploiting state resources; (3) the Lagoon Monument Act is unconstitutional as sought to be applied here because, without compensation, it takes away Koror State's right to exploit and derive revenues from the Zero; and (4) absent regulations, ⊥421 the Republic of Palau has no rights under the Lagoon Monument Act.

Article I, Section 2, of the Palau Constitution provides that:

> Each state shall have exclusive ownership of all living and non-living resources . . . from the land to twelve (12) nautical miles seaward from the traditional baselines . . . .

The preponderance of the evidence at trial shows that the Zero is located within twelve nautical miles seaward from the Koror State traditional baselines, about 200 feet northwest of You'l Lukes Reef. The Court assumes, without deciding, that the Zero is a non-living resource and is therefore owned by Koror State by reason Article I, Section 2.[2]

Koror State's submission that an owner of property can do as it pleases with his property is untenable. If that were the case, people could drive their automobiles wherever they please and at whatever speed they pleased. A business could dump its waste wherever and in whatever manner it pleased. Article IX, Section 5(12) of the Palau Constitution provides that the Olbiil Era Kelulau ("OEK") has the power to regulate the ownership, exploration and exploitation of natural resources. Article IX, Section 5(20) gives the OEK the power to provide for the general welfare, peace and security. Koror State relies on the "equal dignity" rule that teaches that "no

[2] The determination of this issue is not necessary for determination of the present dispute, so the Court will not address the question. *Republic of Palau v. Sakuma*, 2 ROP Intrm. 55 (App. Div. 1990) (Munson, J. concurring).

constitutional guaranty enjoys preference, so none should suffer subordination". *Downs v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 783 (1900). However, applying that rule makes it clear that Koror State's ownership rights under Article I, Section 2, are subject, to some extent, to the OEK's powers under Article IX, Section 5.

The so called General Welfare Clause of the United States Constitution is substantially similar to the General Welfare Clause found in Article IX, Section 5(20) of the ⊥422 Palau Constitution. Under the General Welfare Clause, the United States Supreme Court has upheld zoning laws that prohibit industrial use of property *Euclid v. Ambler Realty Co.* , 272 U.S. 365 (1926), zoning laws that require that portions of property be left unbuilt *Welch v. Swasey* , 214 U.S. 91 (1909), and laws prohibiting a person from continuing his otherwise lawful business because it was inconsistent with neighboring uses *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). More recently, that court recognized that the government can enact use restrictions or controls to enhance the quality of life by preserving the character, aesthetic features, and historic landmarks of an area. *See, Penn Central Transp Co. v. City of New York* , 438 U.S. 104, 98 S.Ct. 2646 (1978). Article I, Section 2, cannot have been intended to nullify the broad grant of power to the OEK in Article IX, Section 5 of the Palau Constitution. The more difficult issue is, to what extent can the Republic of Palau impinge on Koror States' use and exploitation of the Zero without paying compensation to Koror? In other words, when does regulation become so restrictive that it amounts to a "taking" of property requiring that the economic injury be compensated by the national government. *See*, ROP Constitution, Article XIII, Section 7.

The policy behind the Lagoon Monument Act is to "preserve forever historic landmarks, structures, and other sites and objects of significance to the Republic . . . for the inspiration and benefit of the people of the Republic." 24 [sic] PNC § 301. This was the same type of policy behind New York City's Landmark Law involved in *Penn Central, supra*. In that case, the court restated the frequently stated rule that whether a particular regulation or law restricting use and exploitation of property will be rendered invalid by the government's failure to pay for any losses caused by it depends upon the circumstances of the case. There is no set formula. It is clear, however, that Koror State cannot establish a "taking" simply by "showing that [it has] been denied the ability to exploit a property interest that [it] heretofore had believed was available for development . . . ." *Penn Central, supra*. 438 U.S. at 130, 98 S.Ct. at 2662. In deciding whether there is a "taking", a court will focus on both the character of the governmental action and the nature and extent of interference with ⊥423 rights. *Penn Central, supra*.[3]

Courts will not, however, decide abstract questions presented by persons who bear only a hypothetical burden presented by the a statute. *Socialist Labor Party v. Gilligan* , 406 U.S. 583, 92 S.Ct. 1716 (1972). John C. Gibbons, the Koror State Executive Administrator, testified that Koror State has no present plans to gain access to the Zero or exploit it. He testified that, in the future, Koror may well want to gain access to the plane. In the event that there comes a time

[3] In *Penn Central*, the court upheld a landmark preservation law that denied permission to construct an office building atop the Grand Central Terminal in New York. The denial prevented the owners from earning minimum rents of $3,000,000 annually under a 50 year lease that had been signed. The court held, further, that there was no showing of a "taking" under the circumstances of that case.

when Koror State does want to gain access to or exploit the Zero for some purpose and applies for a permit to do so, the permit may well be granted. In that event, Koror State would not be harmed by the statute at issue. Until Koror State unsuccessfully applies for a permit to gain access to the Zero or otherwise exploit the aircraft, any burden imposed by the Lagoon Monument Act is hypothetical. This principle disposes of Koror's contention that the statute is unenforceable against Koror until the President makes rules and regulations respecting the permitting process.[4] While there may be constitutional problems in issuing or denying a permit without any rules or regulations, the Court will not assume that, if Koror ever applies for a permit, the rules and regulations will not then be in place.

In the event that Koror applies for a permit and the permit is not granted, Koror State may well suffer economic injury. But in that event, the permit application will state the nature of the intended use or exploitation of the Zero, so any court reviewing the matter will ⊥424 know the extent of interference with Koror's rights, the scope of the economic injury, and the character of the governmental action involved. In the instant case, Koror State would have the Court assume that someday it will want to exploit the Zero, that any permit application would be denied, that the denial would be in the absence of rules and regulations regarding permitting, and that the denial would cause an economic injury so great as to be a "taking" without compensation. The issues presented by Koror are abstract and hypothetical. Questions concerning the constitutionality of a statute must be tendered in a "clean-cut and concrete form". *Rescue Army v. Municipal Court* , 331 U.S. 549, 584, 67 S.Ct. 1409, 1427 (1947). Until it is known what is being restricted and the extent of the restriction, it is impossible to tell if the restriction amounts to a "taking".

There is an actual controversy, ripe for determination, regarding whether Koror State's ownership rights in the Zero are subject to the Lagoon Monument Act. For the foregoing reasons, the Court concludes that, even if Koror State owns the Zero, Koror State must comply with the Lagoon Monument Act before removing or dismantling the Zero or its contents. A declaratory judgment so stating will be set forth on a separate document pursuant to Rule 58.

Plaintiffs have requested a permanent injunction as well as a declaratory judgment. Before the equitable remedy of an injunction will issue, plaintiffs must demonstrate by a preponderance of the evidence that an injury is threatened--that there is a reasonable probability, not a mere possibility, that Koror State will remove, dismantle, or otherwise deal with the Zero without first complying with the Lagoon Monument Act. 42 Am. Jur. 2d., *Injunctions*, § 31. At the time the complaint was filed herein, there was an immediate threatened injury--Koror State was planning on removing the Zero according to the testimony of Mr. Alex Merep. Koror State was of the opinion that it owned the aircraft, so it could remove it without a permit. However, by the time the case came to trial, circumstances had changed. Although Koror State still maintained it did not have to obtain a permit before accessing the Zero, John Gibbons, the Koror

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[4] Judge Nakamura ruled in this case that sovereign immunity was not applicable to the actions of the Minister of Trade and Commerce in granting a permit to NECO Marine Corporation because, due to the fact that the permit was issued in the absence of any rules and regulations, due care was not used in issuing the permit. By stipulation, claims against NECO were dismissed and NECO agreed not to take any action based on the permit.

State Executive Administrator, testified at trial that Koror State was going to abide by the Court's decision on the issue. If ⊥425 the Court decides that Koror must comply with the Lagoon Monument Act, that is what Koror will do. [5] Further, as already stated, he testified that there are no immediate plans for gaining access to the Zero. Mr. Gibbons is a credible witness. Based upon his testimony, there is insufficient evidence to establish a reasonable probability of an injury to any Plaintiff if an injunction is not entered.

Accordingly, it is ORDERED, that a declaratory judgment shall be entered against Koror State declaring that it may not remove or dismantle the Zero, any parts thereof, or its contents without first obtaining a permit in compliance with the Lagoon Monument Act. The request for an injunction is DENIED. No Costs are awarded.

[5] Nothing herein, however, will preclude Koror State from attacking the statute in the event that it applies for a permit without success or is granted a permit that is determined to be invalid because of constitutional infirmities in the permitting process. The issues then will not be abstract.