

Remoket v. Omrekongel Clan, 5 ROP Intrm. 225 (1996)
FAYE REMOKET,
Appellant,

v.

OMREKONGEL CLAN,
Appellant,

v.

VICTORIA NGIREMARIANG,
Appellee.

CIVIL APPEAL NO. 11-94
Civil Action Nos. 626-89

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: June 4, 1996

Counsel for Appellant Remoket: Johnson Toribiong

Counsel for Appellant Omrekongel Clan: Yoshiharu Ueda

Counsel for Appellee Ngiraremiang: John K. Rechucher

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BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice;
PETER T. HOFFMAN, Associate Justice.

HOFFMAN, Justice:

In this appeal, we are asked to review the trial court's determination of who is entitled to share in the rental proceeds from the leasing of land known as *Desomel* as well as how the proceeds are to be distributed among the recipients.

Desomel, located in Ngerkebesang, Koror State, is owned by Omrekongel Clan. The land was leased to United Micronesian Development Association on behalf of the Clan by the Clan's highest male title holder, Espangel Esebei Arbedul ("Arbedul"), its highest female title holder, Uodelchad Isebong, and the person named by the Palau Land Commission as the trustee for the property, Nglodech Asang. Following various stipulations and settlements between the parties, the lease proceeds still to be divided and distributed totaled \$1,300,000.

The primary issue before the trial court concerned the membership and strength in the

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Clan of several individuals whose provenance was disputed. The trial court held that among those parties claiming membership in the Clan, Remoket Tarimel, Dirrachur Mekoll and Ana Dideriusch Ramarui were adopted by Rebai, an *ochell*¹ member of the Clan, and therefore these individuals are also members of the Clan; Nglodech Asang, who died during the pendency of this appeal, was an *ochell* member of the Clan;² and Meklechel Remoket, who died during the pendency of the action, was an *ulechell*³ member.⁴ The trial court also made findings of fact concerning the relative strength within the Clan of each of the parties.

L227 Victor Rehuher, Lali Ngiratreged, Maria Rehuher, Alvina Timarong and Faustina Rehuher claimed membership in the Clan through their natural father, Rehuher Tarimel. The trial court found that Rehuher Tarimel was not a member of the Clan and therefore his children also were not members.

After determining the membership issue, the trial court, in its initial memorandum of decision, ordered the parties to confer and attempt to reach an agreement for the division of the rental proceeds. The court stated that, if no agreement was reached by the given deadline, it would issue further orders setting forth the share of rental income to which each party is entitled. When no agreement was forthcoming after the passing of the deadline for doing so, the court issued a supplemental decision and order allocating the rental proceeds among the Clan's membership. Two percent each was awarded to Remoket Tarimel, Dirrachur Mekoll and Ana Dideriusch Ramarui; four percent to Faye Remoket; ten percent to Nglodech; and eighty percent to Arbedul, in his capacity as the Clan's highest male title bearer and for the benefit of those Clan members on whose behalf he was appearing.

The Plaintiffs, Faye Remoket, Remoket Tarimel, Dirrachur Mekoll, Ana Dideriusch Ramarui and the children of Rehuher Tarimel ("Plaintiffs") appeal from both decisions as does Omrekongel Clan. The Plaintiffs are challenging the trial court's holding that Rehuher Tarimel and therefore his children are not members of the Clan and also the trial court's division of the rental proceeds. Omrekongel Clan challenges the holdings that Nglodech Asang, Faye Remoket, Remoket Tarimel, Dirrachur Mekoll and Ana Dideriusch Ramarui are members of the Clan and the award of a share of the rental proceeds to them.

¹ *Ochell* is the term for a natural child of a female member of a clan.

² Victoria Ngiraremiang, Nglodech Asang's daughter, has been substituted for her mother.

³ *Ulechell* is the term for a natural child of a male member of a clan.

⁴ Faye Remoket has been substituted for her mother, Meklechel Remoket.

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STANDARD OF REVIEW

Issues involving the application of customary law present unique problems regarding the standard of review to be applied to these issues on appeal to the Appellate Division. The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence at the trial court level. *See generally Ngiraremiang v. Ngiramolau*, 4 ROP Intrm. 112, 115 (1993); *Silmai v. Rechucher*, 4 ROP Intrm. 55, 59 (1993); *Ngirmang v. Orrukem*, 3 ROP Intrm. 91, 92 (1992); *Chief Uoruyos Udui v. Dirrecheteet*, 1 ROP Intrm. 114, 116-17 (1984). To the extent that an appellant is challenging a trial court's finding of the terms or existence of a customary law, we review such an assignment of error under the "clearly erroneous" standard set forth in *Umedib v. Smau*, 4 ROP Intrm. 257, 260 (1994):

1228 [I]f the trial court's findings of fact are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless this Court is left with a definite and firm conviction that a mistake has been committed.

The trial court is usually required to apply customary law to a set of facts which, in most civil actions, must be established by a preponderance of the evidence. *See generally Ucherremasech v. Wong*, 5 ROP Intrm. 142, 147 (1995). Challenges to the trial court's findings regarding the facts to which customary law is being applied are again reviewed by this Court under a clearly erroneous standard. *Aguon v. Aguon*, 5 ROP Intrm. 122, 130 (1995).

Finally, on appeal to this Court, we apply a *de novo* standard of review to challenges to a trial court's findings on mixed questions of law and fact, regardless of whether customary, statutory or common law is being applied. *See Ngiraremiang*, 4 ROP Intrm. at 116-17 (*de novo* standard applied but not articulated); *Ngeliei v. Rengulbai*, 3 ROP Intrm. 4, 10 (1991); *but see In re Delemel*, 4 ROP Intrm. 148, 151 (1994) (clearly erroneous standard applied to mixed question of law and fact).

We should also note that a party may attempt in the trial court to establish custom in at least two different contexts. First, a party may contend that a particular custom has the force and effect of law and therefore controls the resolution of the issue before the court. *See* 1 PNC § 302 ("The recognized customary law of the Republic shall have the full force and effect of law . . ."). When used in this manner, custom is reviewed on appeal under the standards set forth above.

But custom may also be offered before the trial court as circumstantial evidence of a fact at issue in the litigation. In this context, custom is used in an effort to establish that, for instance, a person was more or less likely to behave in a particular way because the person's actions were in conformity with or in violation of custom. Custom used as circumstantial evidence is no different in form or effect than any other type of circumstantial evidence, and its admission is reviewed under the same standard applied to the admission of other factual evidence.

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DISTRIBUTION OF ASSETS

The trial court awarded eighty percent of the lease proceeds at issue to Arbedul in his capacity as the highest male title bearer of the Omrekongel Clan. As the trial court stated in its decision,

T229 In dividing the rental proceeds, the court must be mindful that all members of Omrekongel Clan who are not parties to this case, as well as Uodelchad Isebong who is a party merely representing the clan, must be paid out of whatever share goes to the clan, represented by Arbedul and Isebong. Of course, Arbedul's own share must come out of the same fund. Plainly, that is the fund from which the clan's strongest members will be paid and therefore the clan will get the bulk of the rent proceeds at issue.

The Plaintiffs claim the trial court erred in its determination that Arbedul and those on whose behalf he was appearing should receive eighty percent of the lease proceeds. In support of their argument, the Plaintiffs urge that since the land in question has not been used by any Clan members since before World War II, the proceeds should be distributed equally among all of the Clan members, as if it were a War Claims award. Omrekongel Clan, on the other hand, argues that Arbedul should have received all of the rental proceeds for distribution in such a manner as he and the other senior members of the Clan decide.

Since Trust Territory days, the courts have recognized that clan matters should be determined by the clan without interference from the courts.

Under Palau custom the management and distribution of assets within a clan is primarily a private matter, in which the clan is entitled to exercise a wide discretion, so long as it acts fairly with a proper regard for the interests of all its members and in accordance with law, including particularly accepted customary law.

Lalou v. Aliang, 1 T.T.R. 290, 293 (Tr. Div. 1955). See *Sengebau v. Balang*, 1 ROP Intrm. 695, 699 (1989). But when a clan is unable to resolve a dispute among its members, the courts have not hesitated to intervene, albeit with restraint. *Blesam v. Tamakong*, 1 ROP Intrm. 578, 582 (1989). See *Espangel v. Diaz*, 3 ROP Intrm. 240, 245 (1992); *Sengebau*, 1 ROP Intrm. at 700. Here the trial court provided the Clan with the opportunity to resolve among its members how the rental proceeds were to be distributed; the Clan failed to take advantage of this opportunity. Therefore, it was appropriate for the court to take this task upon itself.

The trial court found that the customary law did not contemplate the leasing of clan land nor did it speak to how the proceeds from such leasing should be distributed. Nonetheless, the court looked to customary law for guidance in fashioning the **T230** court's distribution of such assets. We find no reason to disagree with the trial court's approach. While customary law is not directly applicable to the distribution of extraordinary clan assets such as Micronesian War Claim awards, see *Sengebau*, 1 ROP Intrm. at 698, and by analogy, lease payments, the principles of customary law illuminate the path the court should follow in distributing such assets. *Id.*

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Customary law throughout Palau requires that assets of a clan or lineage obtained in the normal course be distributed fairly. Traditionally, these fundamental considerations of fairness form the bases of most just decisions under customary law.

Id. at 699.

Neither this Court nor the Trust Territory High Court has ever suggested that clan assets should, as a matter of law, be equally divided among clan members.⁵ To the contrary, we have instead stated that such matters should be determined by consensus among the strong, senior members of the clan. *Id.* at 699. Contributions of money and services to the clan is one of the factors that enters into the customary determination of how clan assets should be distributed. See *Lalou*, 1 T.T.R. at 98. Where a clan cannot agree among its members on how assets should be distributed, thereby requiring the intervention of the courts, there is no reason why contributions to the clan should not also be considered by the courts in crafting a judicially determined distribution.

The trial court's decision to allocate the lease proceeds according to the respective strengths of the clan members found ample support in the expert testimony heard by the court concerning the application of customary law to the distribution of ordinary clan assets. While the Plaintiffs also presented expert testimony on Palauan custom suggesting that for certain clan assets equal 1231 distribution is appropriate, this raised nothing more than a factual question to be resolved by the court. The existence and terms of customary law are factual questions to which we apply a clearly erroneous standard of review. We can find no error in the trial court's resolution of this factual question.

The Plaintiffs also contend the trial court erred in its determination of the contributions of money and services made to the Clan by its respective members and the members' resulting strength from such contributions. The trial court acknowledged that the evidence presented at trial concerning the contributions made was sparse, but inferred that the contributions made by those appointed as title bearers exceeded those of equal or greater status in the Clan who were not chosen to bear a title. The Plaintiffs argue this is an impermissible inference unsupported by the evidence.

While the trial court is correct that the evidence is thin concerning the contributions made by many of the Clan's members, the record does contain substantial evidence of Arbedul's

⁵ The closest this Court has ever come to adopting the position urged by the Plaintiffs is in *Balang*, 4 ROP Intrm. at 35, where we said

We are not ruling that equal distribution is unfair and inequitable as a matter of law, nor are we retreating from our comments in the earlier appeal regarding the role of customary law in distributing war claims. We are merely stating that the parties should be afforded an evidentiary hearing to attempt to establish the relevant considerations for devising a fair and equitable plan.

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expenditures and services. "[I]t is not our duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence. The trial judge's analysis and consideration of the facts will not be disturbed on appeal unless clearly erroneous." *Ngirmang*, 3 ROP Intrm. at 92. The trial court could, based on the record before it, reasonably infer that the Clan's title holders have made greater contributions to the Clan than those without titles. So long as an inference is reasonable, it will not be disturbed on appeal.

The Plaintiffs next argue that Arbedul should not have been awarded any portion of the lease proceeds for the benefit of those Clan members on whose behalf he was appearing. The basis for the Plaintiffs' argument is that the trial court, in a pretrial order, had set a deadline by which all persons claiming to be members of the clan and who claimed any interest in the lease proceeds should file their claims or they would be forever barred. The Plaintiffs argue that the claims of any of the Clan members purportedly represented by Arbedul are barred because they failed to file their claims by the required deadline. The Plaintiffs also argue that in fact there are no other members of the Clan and therefore there is no one to whom Arbedul is to distribute the lease proceeds awarded to him. Omrekongel Clan reverses the Plaintiffs' argument by urging that it is the Plaintiffs who are barred from receiving any of the lease proceeds. The Clan argues that even though the Plaintiffs brought this action, they were also required to file a claim to membership in the Clan and to the lease proceeds. Having ~~L232~~ failed to do so, the Plaintiffs are now barred from asserting their claim.

It is not at all clear that the pretrial order required claims to be filed by persons who were already parties or who were claiming through persons already parties. The trial court was permitted to interpret its own orders in a reasonable manner. Certainly one reasonable interpretation was to exclude such persons from the need to file claims.

Even if the order were clear, however, there can be no question that the trial court had the power and discretion to modify the procedures by which it determined the Clan's membership. The trial court by its actions here implicitly exercised that power and discretion. Merely because the change in procedure is not reflected in a formal order of the court does not serve to deny the result reached nor the validity of the trial court's actions. See *Ngermelkii Clan v. Remed*, 5 ROP Intrm. 139, 141 (1995). We find no error in the procedures followed by the trial court.

There was ample evidence establishing the existence of other strong members of the Clan, including several who testified as witnesses, who had not filed claims with the trial court. The trial court was correct in concluding that Arbedul was appearing on behalf of these members and in awarding him a portion of the lease proceeds for distribution to these members.

In addition to the arguments already discussed, Omrekongel Clan urges that Nglodech Asang had previously settled her claim to the lease proceeds and is now barred from seeking any further portion of the lease monies. The basis of this contention is an agreement between Nglodech Asang and Arbedul, dated October 3, 1989, containing the following statement [translated from Palauan to English]:

And the money to be released on the first payment in the amount of

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\$1,000,000.00, I [Asang] will take or receive \$500,000.00 as a share to my lineage. And you will take the \$500,000.00 and those payments afterwards will be your responsibility to divide among all members of Omrekongel Clan.

The trial court made no findings of fact regarding this agreement and the court's decisions neither mention the agreement nor discuss its legal significance. The question on appeal is what effect, if any, should be given this agreement.

¶233 The authenticity of the agreement was not questioned before the trial court; no evidence was offered by any of the parties concerning the intent or meaning of the agreement; nor did any party suggest the agreement was ambiguous. In short, the existence and terms of the agreement are undisputed. Therefore, the only issue is the effect to be given it.

The interpretation of a contract is, in the first instance, a question of law entrusted to the trial court for determination, *Etpison v. Rdialul*, 2 ROP Intrm. 211, 217 (1991) ("[T]he interpretation or construction of contracts are matters of law for the court."), unless there are ambiguities which must be resolved by reference to the evidence. *See Brookhaven Landscape & Grading Co. v. J.F. Barton Contracting Co.*, 681 F.2d 734, 735 (11th Cir. 1982). Upon appeal to this court, questions of law are subject to *de novo* review. *Elbelau v. Semdiu*, 5 ROP Intrm. 19, 21 (1994); *Silmai v. Rechucher*, 4 ROP Intrm. 55, 57 n.1 (1993). Thus, the agreement between Arbedul and Nglodech Asang is subject to independent evaluation by this Court regardless of the trial court's failure to note how it construed the agreement. *Etpison*, 2 ROP Intrm. at 217 ("[W]e review the trial court's interpretation of a contract *de novo* and we may interpret the contract language by our own independent examination.").

Our interpretation of the agreement is that Arbedul and Nglodech Asang agreed that any payments beyond the \$1,000,000.00 of lease proceeds covered by the agreement should be distributed by Arbedul in accordance with the procedures and principles by which clan assets are usually and normally distributed. The agreement did not foreclose Nglodech Asang or any other member of the Clan from receiving a further portion of the lease proceeds. Nor is any member of the Clan barred from challenging any proposed distribution on the grounds it was not in accordance with the principles of customary law. Therefore, Nglodech Asang's claim to an additional portion of the lease proceeds is not barred by the agreement between her and Arbedul and she is correctly before the court.

MEMBERSHIP AND STRENGTH IN THE CLAN

Both appellants challenge the trial court's determination of the current membership of Omrekongel Clan. The Plaintiffs argue that the trial court erred in failing to find that Rehuher Tarimel was a member of the Clan and therefore that his children are now [sic] members. On the other hand, Omrekongel Clan asserts that the trial court erred in finding that Nglodech Asang and the remaining Plaintiffs are members of the Clan and also challenges the trial ¶234 court's determination of the strengths of the respective Clan members.

Suffice it to say that the trial court heard lengthy and extensive testimony on each party's

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claim to membership and strength in the Clan. This evidence was buttressed by evidence of customary law and of custom as circumstantial evidence. While we review *de novo* the application of customary law to the facts, the trial court's findings regarding the terms and existence of customary law and the existence of the facts to which the customary law is applied are subject to the clearly erroneous standard of review. There was ample evidence to support the trial court's findings and ultimate determination of clan membership. We therefore AFFIRM the judgment of the trial court in its entirety.