Omenged v. UMDA, 8 ROP Intrm. 232 (2000)

BROBESONG OMENGED,
Appellant,

v.

UNITED MICRONESIA DEVELOPMENT AUTHORITY and MELEKEOK ECONOMIC DEVELOPMENT AUTHORITY,
Appellees.

CIVIL APPEAL NO. 98-22
Civil Action No. 598-93

Supreme Court, Appellate Division
Republic of Palau

Decided: November 27, 2000[1]

Counsel for Appellant: David Kirschenheiter

Counsel for Appellees: Kevin N. Kirk

BEFORE: LARRY W. MILLER, Associate Justice; ALEX R. MUNSON, Part-Time Associate Justice; DANIEL N. CADRA, Senior Land Court Judge.

MILLER, Justice:

Appellant Brobesong Omenged appeals from the trial court's judgment declaring that Appellee Melekeok Economic Development Authority ("MEDA") owned the land in dispute and was entitled to lease it to Appellee United Micronesian Development Association ("UMDA"). We affirm.

⊥233 **Background**

Appellee MEDA, an entity created by state law to further economic development, and Appellee UMDA, a foreign developer, brought this action to quiet title to land that MEDA leased to UMDA in 1989 and 1990. They brought the action against private parties, including Appellant Omenged, who had claimed the land before the Land Claims Hearing Office ("LCHO"), after the LCHO hearings were delayed indefinitely.[2]

At trial, MEDA and UMDA called several witnesses who testified that for several generations until the 1970's, the community had used the land as a coconut plantation under the

[1] The parties have waived oral argument, and the Court agrees that oral argument would not materially advance the resolution of this appeal. *See Irikl Clan v. Renguul*, 8 ROP Intrm. 156, 156 (2000).

[2] The LCHO ultimately dismissed its proceedings in deference to this action.

supervision of Melekeok's High Chief Reklai. Thus, these witnesses testified, the land was public land that the Melekeok State Public Lands Authority ("MSPLA") was properly authorized to convey to MEDA through a 1989 conveyance that was approved by the Reklai and Melekeok's other high-ranking chiefs, who were also members of MSPLA and/or MEDA.

Several witnesses presented by the private claimants testified that the land had belonged to Ngermadel Clan ever since its members landed there hundreds of years ago. These witnesses testified that the Clan gave the Reklai permission to use the land as a community coconut plantation, but never ceded ownership to the Reklai or the public, and thus was entitled to reclaim the land after the coconut planting ended. Omenged, a member of Ngermadel Clan, testified along with several of the Clan's witnesses that the Clan, through its former titleholder Ngirmang Rekewis Ngirakloi, had given part of the land to his predecessors, who had then left it to him.

The trial court found that the land had a reputation in the community as *chutem buai,* community or public land. The court questioned how the Clan could have owned the property for hundreds of years "without leaving a trace" and why it failed to assert ownership when coconut planting ended in the 1970's. Citing inconsistencies in the documents that Omenged presented in support of his claim, the court found his evidence "suspect," and that his "testimony as a whole has to be discounted." The court thus concluded that MEDA met its burden of proving by a preponderance of the evidence that the land was " *chutem buai*, and later MEDA, property," while the other claimants did not prove their claims by a preponderance of the evidence. The court then entered judgment in MEDA's favor, and Omenged appealed.[3]

Analysis

We review the trial court's finding that the land was *chutem buai* under the clearly erroneous standard. In applying that standard, we may not "reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence." *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 227 (1996). If the trial court's factual findings "are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be disturbed unless this Court is left with a definite and firm conviction that a mistake has been committed." *Umedib v. Smau* , 4 ROP Intrm. 257, 260 (1994). Thus, where "there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous." *Ngiramos v. Dilubech Clan*, 6 ROP Intrm. 264, 266 (1997).

⊥234 Several witnesses testified that the land in question was *chutem buai,* or public land, under the Reklai's control. We note in particular that two of the witnesses called by Ngermadel Clan agreed with Appellees on this point. While there was contrary testimony that the land had belonged to Ngermadel Clan and that the public only had a use right, the trial court was entitled to decide which of these conflicting accounts to believe, and we may not disturb its choice between them.

The dissent asserts that the trial court did not make credibility determinations based on a

[3] Ngermadel Clan initially appealed but its appeal was later dismissed.

rational weighing of conflicting evidence, but rather relied on unfounded assumptions as to what leaders would be "expected" to know. We disagree. The trial court specifically noted the testimony of the two Ngermadel Clan witnesses, and while it did not explicitly say so, we believe that a fair reading of its opinion is that it found this testimony persuasive.

The dissent also suggests that the trial court''s weighing of the evidence was tainted by an erroneous finding of a chain of title tracing ownership to the government. We disagree. As we read the trial court's opinion, it did not consider the chain of title in concluding that the land was public, but rather found the land to be public based on reputation evidence, and then only noted the chain of title in a footnote. We thus cannot conclude that the finding of a chain of title tainted the weighing of the other evidence.

The dissent also questions whether a finding that the land was *chutem buai* is sufficient to establish a Public Lands Authority's power to assert control over the land. That is a fair question, but we do not believe that it is properly before us today. Even if there are distinctions between the legal status of *chutem buai* and government-controlled public lands, it is undisputed that the *chutem buai* in this case was controlled by the Reklai, who clearly participated in and ratified the transfer of the land to MEDA. Thus, even if there were some issues as to MSPLA's power to transfer the land, the Reklai would be the proper party to raise those issues, and the private parties would not have standing to do so. *See Rurcherudel v. PPLA*, 8 ROP Intrm. 14, 15 (1999) (holding that appellant lacked standing to assert that land should be awarded to village rather than to public lands authority). Thus, we find no reason to remand for consideration of this issue, as the dissent would do, in this case where the Reklai has not challenged MSPLA's authority to convey *chutem buai*, and where the private claimants have not raised the issue on appeal.

We note finally that, although the dissent persuasively marshals evidence that could support a finding in favor of the private claimants, it does not aver that the record is devoid of any evidence that could support the conclusion the trial court reached, and argues only that the case should be remanded so the evidence can be reweighed by the trial court. We do not believe a remand is necessary. Because a rational trier of fact could credit the testimony that the land was *chutem buai* under the Reklai's control rather than Clan land that the public was using temporarily, we cannot find the trial court's characterization of the land as *chutem buai* to be clearly erroneous. We therefore find no basis for setting aside the trial court's conclusion that MEDA had clear title to the land.

Conclusion

For the foregoing reasons, the judgment of the trial court is AFFIRMED.

MUNSON, Part-Time Associate Justice, dissenting:

In affirming the trial court's conclusion that MEDA established it had valid title to the land, the majority reasons that the trial court could rationally find that the land was *chutem buai* rather than Clan land, and that this status as *chutem buai* gave MSPLA sufficient authority to convey the land to MEDA. I respectfully dissent, both because the trial court's characterization of the land as *chutem buai* was based on erroneous assumptions rather than on a rational weighing of the evidence, and because MEDA failed to establish that the land's status as *chutem buai* sufficed to vest MSPLA with the authority to convey the land to MEDA.

Characterization as *Chutem Buai*

In characterizing the land in question as *chutem buai,* the trial court found that it had a reputation in the community as *chutem buai,* or public land, and that there was a "chain of title from Melekeok Municipality and the Trust Territory Government to MEDA." After reviewing the record and the trial court opinion in accordance with the highly deferential clearly erroneous standard, *see Ngiramos v. Dilubech Clan*, 6 ROP Intrm. 264, 266 (1997); *Remoket v. Omrekongel Clan,* 5 ROP Intrm. 225, 227 (1996); *Umedib v. Smau,* 4 ROP Intrm. 257, 260 (1994), I conclude that both the finding of a chain of title and the finding of a community reputation as public land are based on erroneous assumptions rather than on a rational weighing of the evidence, leaving me with the definite and firm conviction that a mistake has been committed.

A. Chain of Title

In finding that MEDA proved a chain of title traceable back to the Trust Territory government, the trial court effectively found that the land had been government-controlled public land since Trust Territory days. This finding, if taken as true, would establish MSPLA's authority, as the agency charged with controlling public lands, to convey the land to MEDA as it purported to do in the 1989-90 conveyances that are challenged here. Contrary to this finding of a chain of title from the Trust Territory Government, however, the record is devoid of evidence of any government entity's having acquired, owned or controlled the land before the purported conveyances at issue. Indeed, MEDA's own witnesses and non-party witnesses testified that the land never came under the control of Melekeok Municipality or the Trust Territory government. [4] Although MEDA presented deeds transferring public lands from the Trust Territory government

[4] *See* Tr. Vol. 1 at 131-33, 194-95; Tr. Vol. 4 at 114. MEDA's Director asserted that she "believed" the land was covered by these deeds, but did not present any factual basis for her belief. Tr. at 89-90. A rational trier of fact could not credit this testimony over that of MEDA's other witnesses, who testified that they knew through their involvement in MSPLA that the land was never part of the public lands controlled by Melekeok Municipality or the Trust Territory government.

to the Palau District Public Land Authority and its successors, MEDA presented no evidence that the land in question had been characterized as a public land covered by these documents.

Nor can the purported conveyance from MSPLA to MEDA itself be found to support an inference of a valid chain of title from the Trust Territory government to MSPLA. This conveyance did not occur at arms' length, but rather occurred between closely related entities, for no consideration, in furtherance of a lucrative foreign ⊥236 investment opportunity.[5] It thus did not provide MEDA any incentive to scrutinize MSPLA's authority to convey the land. Accordingly, because the record is devoid of any evidence that MSPLA or any prior government agency owned or controlled the land before the challenged conveyance to MEDA, the trial court's finding of a chain of title from Melekeok Municipality and the Trust Territory government to MEDA is clearly erroneous.

The majority, in making no allusion to this erroneous finding of a chain of title, apparently disregards it as immaterial in light of the trial court's finding that the land had a reputation as *chutem buai,* or public land, rather than Clan land. However, I cannot similarly view the erroneous finding of a chain of title tracing public ownership back to the Trust Territory government as irrelevant to the determination of whether the land had a reputation as public land rather than Clan land. A belief that the land had a documented history as government land would have a significant effect on the weighing of testimony as to whether the land was public land as opposed to Clan land. Indeed, a chain of title traceable to the government could be considered such persuasive evidence of a land's status as public land that even a conclusory assertion of a reputation as public land would sound plausible whereas even a detailed history of a reputation as Clan land would sound implausible. Thus, I view the erroneous finding of a chain of title to the Trust Territory government as too closely intertwined with any weighing of testimony as to whether the land was *chutem buai* or public land rather than Clan land to be disregarded as immaterial.

B. Reputation as *Chutem Buai*

In affirming the trial court's holding that the land was public land, the majority cites testimony that the land was *chutem buai* under the Reklai's control, and reasons that the trial court was entitled to credit this testimony. While we must, of course, refrain from disturbing a trial court's credibility determinations, I find no indication that the trial court considered or credited this testimony in any rational weighing of the evidence. First, as discussed above, I believe that the erroneous assumption that there was a chain of title traceable to the government inevitably distorted any weighing of evidence as to whether the land was owned by a Clan and an individual rather by the public.

Moreover, in finding that the land had a reputation as *chutem buai,* the trial court did not

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[5] In addition to MEDA and MSPLA sharing several members in common, MEDA chairman Polycarp Basilius and MSPLA chairman Reklai Siangeldeb Basilius, who executed the transfer, were brothers. They were both uncles of MEDA Director Kathy Kesolei, who was MEDA's primary witness regarding the transfer. The transfer occurred within three months of MEDA's leasing the land to UMDA for $2.2 million.

cite testimony to that effect or find that testimony credible. Rather, it recited a list of the prominent individuals who were members of MSPLA and MEDA and who participated in the challenged conveyance, noted that two of them were witnesses in the case, and stated, "[i]t is expected that these leaders . . . would know" whether the land was public or not. Thus, the court, from all that appears, did not assess the persuasiveness of the testimony characterizing the land as *chutem buai*, but rather inferred the land's status from the fact that prominent individuals engaged in a transaction treating it as public land. There is no rational support in the record for an inference that leaders can be expected to make uniformly accurate, good faith assessments of the status of any given parcel of land.

Even if the court's analysis could be construed as relying on the *testimony* of the ⊥237 two leaders who appeared as witnesses, rather than on the fact that the leaders who purported to convey the land from MSPLA to MEDA effectively *treated* the land as if it were public land, a trier of fact is not entitled to presume testimony to be correct based on assumptions as to what a witness would be "expected" to know. Leaders, like all individuals, are capable of making inaccurate assertions, whether due to mistaken beliefs, incomplete knowledge, or an absence of good faith. Thus, instead of relying on assumptions as to what such leaders would be "expected" to know, a rational trier of fact must determine what they *actually* know, based on the quality and content of their testimony, the factual knowledge on which their conclusions are based, their demeanor, and any other factors rationally bearing on their credibility and reliability as witnesses.

In this case, the private claimants argued that the leaders of Melekeok's most powerful clans abused their positions of power on MSPLA and MEDA to appropriate the land of a less powerful clan, in furtherance of a lucrative foreign investment opportunity, by purporting to convey Clan land from MSPLA to MEDA so MEDA could lease it to foreign investors. [6] In this context, it was critically important for the trial court to examine the factual basis for, and the credibility of, the leaders' assertions that they believed the land in question to be *chutem buai* or public land rather than Clan land. I find no indication that the trial court engaged in any such weighing of the credibility or reliability of the witnesses' testimony, and every indication that it instead relied on an assumption that leaders could be "expected" to be both accurate and forthright in characterizing the land. In my view, this assumption of the correctness of leaders' assertions, which was not based on evidence in the record or assessments of the witnesses' demeanor, amounts to clear error underlying the factual determination as to whether the land was *chutem buai* rather than Clan land, particularly when coupled with the erroneous finding of a chain of title as public land.

C. Reputation as Clan Land

While I believe that the foregoing assumptions precluded a rational weighing of the

[6] *See, e.g.*, Tr. Vol. 1 at 120 ("it was an economic interest that drove the government to take over the clan property of . . . one of the lowest clans in Melekeok . . . [The] powerful come [sic] and took our land, lease[d] it for financial consideration"). Ngermadel Clan is the tenth-ranking Clan out of Melekeok's eleven Clans, while MEDA and MSPLA were controlled by the Chiefs of the four highest-ranking Clans.

evidence, warranting remand in themselves, I also believe that the court compounded these errors by assessing the private claimants' evidence based on further unfounded inferences, instead of weighing the credibility and reliability of the Clan's oral history based on its quality and content and the demeanor of the witnesses.

Contrary to MEDA's assertion that the land was public land which MEDA properly acquired from MSPLA, private claimants Brobesong Omenged and Ngermadel Clan presented extensive testimony that the Clan had owned the land for generations before conveying part of it to Omenged's family, had merely given the Reklai a right to use the land as a community coconut plantation, and was entitled to reclaim the land when copra planting ended. [7] The Court discredited the Clan's oral history because the Clan did not assert ownership when copra production ended in the 1970's which, in the Court's words, "reinforced the State's belief that it ⊥238 had clear title." While a delay in asserting a claim certainly may hold some relevance, the trial court clearly considered this factor in light of its erroneous assumption that the State had title, or at least believed it had title, dating back to the Trust Territory days of the 1970's. To the contrary, however, there was no evidence of State ownership or of any *belief* of state ownership until MSPLA purported to convey the land to MEDA in 1989. Undisputed evidence indicated that neither the State, the community, nor the Reklai made any use of the land or any assertion of ownership after copra production ended in the 1970's, and the Clan's inaction assumes far less significance when viewed in this context than when viewed in light of the erroneous assumption of longstanding, documented state ownership. Thus, I believe the court's analysis on this point was considerably tainted by its erroneous assumptions.

The court also discredited the private claimants' evidence on the grounds that "[n]o other traditional leader of Melekeok supports the Clan's oral history." However, as discussed above, Melekeok's leaders were interested parties who, through their positions on MSPLA and MEDA, were intimately involved in the challenged conveyance of the land in dispute. Thus, just as these leaders could not necessarily or presumptively be "expected" to characterize the land accurately, so the private claimants' evidence could not rationally be discounted on the grounds that it was not confirmed by leaders who were effectively their adversaries, without an independent weighing of the quality and content of the witnesses' testimony.

The trial court further discredited the Clan's oral history on the grounds that there was no physical evidence to corroborate it. However, the Clan's oral history did not assert that the Clan placed graves, stone platforms, or other lasting structures on the land, but rather asserted that the Clan used the land for hunting crabs, collecting food, and launching boats. Thus, the absence of physical structures is inconclusive, and cannot alone explain the court's discrediting of the Clan's evidence, apart from its reliance on the improper considerations discussed above and without any indication that it weighed the plausibility of the testimony in light of the record as a whole and rational inferences therefrom. Accordingly, the court did not cite any rational grounds for discrediting the Clan's evidence.

Similarly, in evaluating Brobesong Omenged's testimony that Ngermadel Clan gave a

[7] Although the Clan's appeal was dismissed, its evidence largely corroborates Omenged's account of the land's history, and remains a relevant part of the record.

portion of its land to his predecessors, the trial court, without discussing the content of his testimony, the extent of its consistency or inconsistency with other evidence, or his demeanor, found that documents he offered in support of his claim were "suspect," and concluded that, "consequently his testimony as a whole has to be discounted." However, I cannot find that the grounds on which the court discredited his documents -- and consequently his entire claim -- represent the type of rational inferences that are entitled to deference under the clearly erroneous standard.

The documents, which were "composed on yellowed Japanese rice paper," purported to be recorded recollections of Omenged's belief that his father had owned part of the land and had transferred it to him. In discrediting the documents, the court found that their use of the western compass symbol "N" for North, and a chart reading from left to right, were inconsistent with Omenged's claim that the documents were drafted during the Japanese era. However, Omenged testified that he worked on a ship during this time, where they used compasses made in the West, and thus became familiar with the symbol "N" for North. While the Japanese language expert who translated the documents testified that he had not seen that symbol used ⊥239 in Japanese-era documents, he was qualified as an expert in Japanese language, and did not claim to have any knowledge of historical documents or maps. Thus, it is questionable whether the court properly discredited the documents based on a symbol whose use was rationally explained by undisputed testimony, merely because the use of that symbol struck the court as "counter-intuitive." The same expert testified that he did not have "any idea" whether Palauans during Japanese time would have composed a chart from left to right or vice versa, and given the fact that the written Palauan language reads from left to right, this factor likewise seems inconclusive based on the evidence and the rational inferences therefrom.

In considering the documents, the court acknowledged that the "paper itself does look authentic," but discounted this fact based on the testimony of MEDA witness Kathy Kesolei that such paper was "so widely available in the years following the war that school children used it for scrap paper," because Japanese people left it behind in their homes when they fled after the war. However, while this testimony could rationally support an inference that the documents were drafted several years after the war on paper saved from the Japanese era, it does not rationally support an inference that the documents were drafted recently, such as in the late 1980's when MEDA first showed an interest in developing the land, on paper saved for over forty years. MEDA, significantly, did not attempt to refute that the aged, fragile rice paper on which the documents were written dated from the Japanese era, yet did not present any theory as to how writing could have been applied to such paper relatively recently without damaging it. Thus, even upon crediting Kesolei's testimony that the documents could have been drafted after the war on paper saved from before the war, I do not believe that a rational trier of fact could infer from this testimony that the documents were drafted in the late 1980's on paper saved since the 1940's.[8] Accordingly, even accepting the trial court's inferences that these documents were

[8] In relying on Kesolei's testimony, the trial court noted that she had a "particular interest in Palauan history." However, while she described her role in compiling an oral history, none of this expertise related to the issues on which she testified. The court's allusion to her unrelated expertise seems to suggest that the Court viewed her as a disinterested expert rather than as an interested party who was the Director of MEDA and the niece of the Basilius brothers who

drafted after the war, the documents would still constitute a recorded recollection of the factual basis of Omenged's claim dating from long before MEDA or MSPLA demonstrated an interest in or asserted ownership of the land.

Finally, the trial court also questioned why Omenged would save genuine documents while failing to present them for decades. However, because there is no evidence rationally supporting an inference that the documents could have been created as recently as the 1980's, or even the 1970's, it is equally puzzling why Omenged would go to the trouble of creating sophisticated forgeries while failing to present *those* for decades. [9] ⊥240 Thus, the failure to present the documents earlier does not, in itself, support an inference that the documents are not authentic recorded recollections of the land's reputation as private land.[10]

None of the reasons the trial court cited in discounting the private claimants' evidence constitute rational inferences from the evidence in the record. While a trial court is entitled to wide latitude in assessing the credibility of the evidence, its findings must be based on rational inferences from the record. In this case, where the court clearly evaluated the evidence in light of unfounded assumptions that the State had a claim of title dating back to Trust Territory days and that the traditional leaders who were involved in the challenged conveyance could be expected to characterize the land accurately, the series of unsupported inferences that the court drew in discounting the private claimants' evidence leave me with a definite and firm conviction that a mistake has been committed.

In making these observations, I do not intend to suggest that a rational trier of fact would be compelled to credit the private claimants' evidence over MEDA's evidence, but rather intend

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chaired MSPLA and MEDA.

[9] Omenged testified, and a Land Registration Officer confirmed, that he attended a monumentation and staked a claim to the land in the 1970's. While the mere assertion of a claim does not, of course, establish its merit, particularly when Omenged did not complete the presentation of that claim, his actions in the 1970's arguably indicate a belief in the basis of his claim predating the instant dispute, as do his documents, even upon accepting the inferences that they were drafted some time after the war. The trial court acknowledged that the parties' beliefs as to ownership "before the litigation began" was a "factor to consider," and inferred a pre-litigation belief of public ownership from its erroneous findings that there was a chain of title to the Trust Territory government. Contrary to the trial court's findings, there is no indication in the record of an assertion of *public* ownership predating the transactions at issue, whereas the 1970's monumentation and the documents are colorable evidence of an assertion of *private* ownership predating the transactions at issue.

[10] While the court discredited Omenged's testimony primarily because of the documents, it also made two other observations. Citing general patterns of historical land ownership that were not demonstrated by any evidence in the record, the court stated that the land in question, "would not be a likely candidate for individual land ownership." Again citing sources outside the record, the court noted that Omenged's claim was inconsistent with patterns of ownership that resulted from coconut planting, despite the fact that Omenged did not claim to have acquired the land through coconut planting. Neither of these factors supplies rational grounds for discrediting Omenged's testimony.

to insist only that the trier of fact weigh the evidence rationally in light of the evidence in the record and the reasonable inferences therefrom instead of based on erroneous findings and unsupported inferences. Having found no indication that the trial court engaged in a rational weighing of the evidence, and every indication that it instead relied on erroneous assumptions and unsupported inferences, I would remand to the trial court for a rational weighing of the evidence as to whether the land had a reputation as *chutem buai* or as Clan land that the public was obliged to return when copra production ended.

II. MEDA's Acquisition of the Land

Apart from my conviction that there was no rational factual finding as to whether the land was *chutem buai* or Clan land with a public use right, I have serious concerns regarding the conclusion that the land, even if properly characterized as *chutem buai*, then properly became MEDA's property. The central issue in this quiet title action was, of course, whether MEDA had title to the land, and MEDA bore the burden of proving its clear title by a preponderance of the evidence. In my view, MEDA failed to present a coherent account of how it acquired title to the land that a rational trier of fact could credit. The trial court, rather than attempting to resolve the conflicting evidence as to how MEDA purportedly acquired the land, obscured the conflicts by vaguely finding that the land was "*chutem buai*, and later MEDA, property."

⊥241 MEDA primarily based its claim of title on the quitclaim deeds purporting to convey the land from MSPLA to MEDA, and attempted to suggest that MSPLA acquired the land in a chain of deeds from the Trust Territory government. However, as discussed above, there was no evidence that the land was covered by those deeds, and MEDA's witnesses expressly conceded that the land was not among those government lands. Given the close relationship between MSPLA and MEDA and their mutual interest in creating an appearance of valid title so they could execute the $2.2 million lease to UMDA, the quitclaim deed from MSPLA to MEDA is not alone sufficient to establish MEDA's clear title, without some evidence of MSPLA's authority to convey the land.

Apparently aware that MSPLA had not properly acquired title from the Trust Territory government or predecessor land authorities, MEDA's witnesses suggested other theories of how MSPLA purportedly acquired title. One MEDA witness who was also an MSPLA member asserted that the Reklai, acting as both trustee of the land and as chairman of MSPLA, transferred the land to MSPLA. He also testified, however, that the four High Chiefs of Melekeok agreed to give the land directly to MEDA rather than to MSPLA. [11] The majority apparently finds the contradictions as to how the land came into MEDA's control to be of no concern because in its view, the Reklai "clearly participated in" the conveyance of the land to MSPLA. However, the trial court made no finding of any transfer from the Reklai to MSPLA, but rather found that MSPLA acquired ownership through a chain of title from the Trust Territory government. Thus, the majority's theory that MSPLA acquired the land from the Reklai contradicts the findings actually made by the trial court.

While the clearly erroneous standard requires us to defer to findings the trial court

[11] Tr. Vol. 1 at 199, 213-14.

actually made insofar as there is evidence to support them, I do not believe it permits us to disregard the clearly erroneous finding of a non-existent chain of title by adopting an alternate theory which the trial court did not consider, and which directly contradicts the trial court's actual findings. The majority's reliance on that alternate theory is particularly problematic in this instance because of the unresolved factual and legal questions implicated by that theory. If MEDA believed that the Reklai had the power, in his sole discretion, to transfer the land to MSPLA and that he actually did so, it is difficult to explain why MEDA attempted to argue that MSPLA acquired title from the Trust Territory government. It is likewise difficult to explain why one of MEDA's witnesses who was involved in the purported conveyance from MSPLA to MEDA was confused as to whether the land was transferred by the Reklai alone or by the four High Chiefs, and whether it was transferred to MSPLA or to MEDA directly.

In my view, a theory that MSPLA acquired the land from the Reklai differs so markedly from the trial court's finding that MSPLA acquired it from the Trust Territory government that it is inappropriate to adopt this distinct theory for the first time on appeal, when there has been no resolution of the factual questions concerning the scope of the Reklai's authority to dispose of *chutem buai* in his capacity as the trustee thereof, and no findings concerning the nature of the Reklai's actual acts in this case. For these reasons, I would remand for consideration of this alternate theory after adequate factual findings before simply adopting it on appeal.

The majority places great weight on the fact that two of the private claimants' witnesses used the term *chutem buai* in describing the land. Even assuming that the ⊥242 trial court, upon rationally weighing the content of each party's evidence, would have construed the testimony in this manner,[12] the majority acknowledges that these witnesses raised the issue in the course of *questioning* MSPLA's authority to convey the land if it "was village or community land rather than government-controlled public land." In my view, there was testimony *contesting* the notion that MSPLA was entitled to exert authority over *chutem buai*, no contrary evidence that tended to *establish* such authority, and every indication that MEDA itself believed it needed to establish an affirmative, effective transfer to MSPLA in addition to establishing a history as *chutem buai*.

The majority suggests that, because we have previously left open the question of whether village land may be treated like other public lands, testimony that the land was *chutem buai* could in itself suffice to support a finding that MSPLA properly controlled and conveyed the land, without the need for any evidence of a transfer from the Reklai to MSPLA. However, while we have left the question open, we have never directly held that *chutem buai* may be treated in all respects identically to government-controlled public lands. MEDA did not brief or argue this proposition below, and it is strikingly apparent that MEDA did not view the testimony that the land was *chutem buai* as sufficient in itself to establish MSPLA's authority to convey the land to MEDA. To the contrary, MEDA took great care to present evidence of a purported chain of title from the Trust Territory government to MSPLA, and alternatively of an affirmative transfer by the Reklai or the four High Chiefs to MSPLA or directly to MEDA. Because we

[12] I find it inappropriate to construe and rely on that testimony on appeal, when there is no indication that the trial court did so below, and no indication as to how it would construe this testimony in the absence of the assumptions that tainted its analysis of whether the land was *chutem buai* or Clan land.

have never held that *chutem buai* may be treated like government-controlled public lands, and because this theory was neither argued to nor adopted by the trial court, I, unlike the majority, would not rely on this novel rule of law on appeal, but would instead remand to the trial court to address in the first instance the question of a public land authority's power to convey *chutem buai* to another entity in the absence of an affirmative conveyance to the public land authority.

For these reasons, even if I believed the trial court had made a proper finding that the land was *chutem buai* , I would not view this finding as adequate on the present record to establish MSPLA's authority to convey the land to MEDA, and thus would not view it as sufficient, without more, to discharge MEDA's burden of proving it had clear title. Rather, in view of the factual and legal questions that were neither considered nor resolved below concerning the significance of a finding that the land was *chutem buai* , I would remand for resolution of these questions at the trial level.

For the foregoing reasons, I must respectfully dissent.