

Ngiraiuelenguul v. Ngchesar State Gov't, 8 ROP Intrm. 342 (Tr. Div. 1999)
ANASTACIO NGIRAIUELENGUUL,
Plaintiff,

v.

NGCHESAR STATE GOVERNMENT,
Defendant.

CIVIL ACTION NO. 88-97

Supreme Court, Trial Division
Republic of Palau

Decided: November 19, 1999

BEFORE: LARRY W. MILLER, Associate Justice.

Plaintiff Anastacio Ngiraiuelenguul brought this action claiming that the construction of a road by defendant Ngchesar State Government injured his business and now entitles him to recover damages.¹ Following a trial last month, this decision constitutes the Court's findings of fact and conclusions of law.

The basic facts are not in dispute. Anastacio owns land in Ngchesar Hamlet of Ngchesar State that is adjacent to a saltwater pond known as the "wang." Since sometime after the war, Anastacio operated a sawmill on his land, and also made furniture there. Until the construction complained of in this action, the "wang" was connected to the sea by a small stream that passed under a bridge that connected an old stone path that went along the shoreline. The stream was big enough for small boats to go in and out of the wang and, more important for Anastacio's purposes, for logs to be floated through and up to his sawmill.

In 1993, as part of a long-term project to build a road connecting all of Ngchesar's hamlets, a road was constructed on landfill created alongside the old stone path. The effect of the road construction was to cut off any direct access from the wang to the sea. Anastacio asserts that this change ruined his business by blocking his ability to bring new logs to his sawmill for cutting. Ngchesar counters that, at its narrowest point, the distance from the sea to the wang was only 18 feet and that Anastacio could and did, with the assistance of State employees and equipment, bring new logs into the wang over the road. Notwithstanding the State's assertions, however, and accepting them as true, the Court believes that it is still fair to say that the construction of the road interfered to some degree with his business, requiring at least some amount of additional time and effort to transport logs to his sawmill as compared with the conditions that existed previously. The question, then, is whether this interference entitles Anastacio to recover damages from the State.²

¹ Anastacio's complaint also sought to have the construction undone. At trial, however, he made clear that he was no longer seeking such relief.

² Anastacio had alleged in his complaint and also testified that the State had agreed to put

In attempting to answer this question, the Court has reviewed numerous cases from the United States, many of them dating from **L343** the 19th century, when, as in Palau today, increasing economic development raised numerous new legal issues for courts to consider. Based on its review, the Court concludes that the facts presented do not entitle Anastacio to any compensation.

In reaching this conclusion, the Court first emphasizes what this case is not about. First, there has been no physical invasion or taking of Anastacio's property. He still owns the same land and the construction of the road has not altered its physical condition in any way. Second, although Anastacio has suggested that his riparian right of access to the water has been interfered with or taken, strictly speaking that is not so. As the Court reads the cases, and as one of the treatises relied on by Anastacio explains, the right of access refers to access to the water directly in front of a person's land. *See 2 Nichols on Eminent Domain*, § 5.792[1] at 5-353 (1978) ("The right of access to public waters is limited to the channel in front of the upland to which the right is appurtenant.").

Here, there has been no denial of access from Anastacio's land; rather, what has been cut off is the access from the wang to the sea. That, however, the Court finds, does not give rise to a claim for damages. According to the same treatise just quoted, "it seems to be generally conceded that if the legislature authorizes the construction of a dam, [or] a bridge with or without a draw, across a stream, upper riparian proprietors who are cut off from navigation to and from the outside world have no redress." *Id.*

The leading case cited for that proposition is *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96 (1866). There, "complainants [who owned] a valuable and productive wharf and dock property above the site of [a] contemplated bridge," 18 L. Ed. at 98, argued that construction of the bridge would diminish the value of their property:

The bridge will not be more than thirty feet above the ordinary high-water surface of the river, and hence will prevent the passage of vessels having masts. This will largely reduce the income of the property, and render it less valuable.

Id.

The United States Supreme Court denied relief, emphasizing that it was for the

things back as they were. The State denied that any such promise was made, explaining that although the road built in 1993 and still in existence was and is intended to be temporary, the permanent road would occasion the creation of even more landfill and would not undo the obstructed access to the wang.

At the close of Anastacio's case, the Court ruled that the existence *vel non* of this alleged agreement was immaterial – on the one hand, because it was unsupported by consideration and therefore unenforceable by Anastacio, and on the other, because the State's obligation to pay compensation, if any, need not turn on any agreement to do so.

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government to determine whether the costs of obstructing navigable waters would be outweighed by the benefits accruing from the construction of the bridge:

It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs.

It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other.

Id. at 101.

A more recent case in the same vein is *Colbert, Inc. v. State*, 62 Cal. Rptr. 401, 432 P.2d 3 (1967), *cert. denied*, 88 S.Ct. 1037 (1968), decided by the Supreme Court of California. The plaintiffs owned property “riparian to the Upper Stockton Channel upon **L344** which for more than sixty years they have conducted shipyards for the construction and repair of yachts and ocean-going vehicles.” 432 P.2d at 6. They sought a declaratory judgment that the construction of two bridges across the channel that would limit the ability of ships to reach its property constituted a taking or damaging of property for which just compensation would be required:

Plaintiffs allege in substance that after the construction of the proposed bridges, no vessel with fixed structure in excess of 45 feet above the water line will be able to enter their respective shipyards, ³ that there is no other access by water to the yards from the San Joaquin River, San Francisco Bay and the oceans of the world; and that plaintiffs, their properties and their businesses will suffer loss and damages because of the impairment of access resulting from the construction of the bridges.

Id.

The Court found that compensation would not be required, holding that

the state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse[,] . . . and that ‘when the act [of the state] is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience.’

Id. at 11 (quoting *Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622, 636, 163 P. 1024, 1030).⁴

³ One plaintiff alleged that “81 percent of its current business involve[d]” ships of that size, and the other alleged that “35 percent of its current business involve[d] such ships.” *Id.*

⁴ The court explicitly rejected the principle, recognized in some cases and urged by

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A few other cases are worth mentioning here. In *Northern Transportation Co. v. Chicago*, 88 U.S. 635, 25 L. Ed. 336 (1879), the Court rejected a claim for damage resulting from obstruction to its access to the Chicago River during the construction of a tunnel. As a general rule, the Court stated that

[a]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action.

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99 U.S. at 641, 25 L. Ed. at 338.⁵ Looking to the specific circumstances, it further stated that it had found no case in which it was decided

that a riparian owner on a navigable stream, . . . , can maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream . . . in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence or want of skill in causing the obstruction.

99 U.S. at 643-44, 25 L. Ed. at 339.

In *Gibson v. United States*, 166 U.S. 269, 17 S. Ct. 578 (1897), plaintiff had a landing on the Ohio River “which was used in shipping the products from, and the supplies to, her . . . farm.” As the result of the construction of a dike by the United States about 400 feet from the farm, however, which obstructed the passage of boats, she was generally⁶ unable to use her landing, and could not “get the products off, or the supplies to, her farm, without going over the farms of her neighbors to reach another landing.” 166 U.S. at 270, 17 S. Ct. at 578. Again, however, the Supreme Court rejected a claim for damages:

[T]he damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a

Anastacio here, that the state could act without risk of being held liable only for the purpose of improving navigation: “[T]he state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters held in trust for the public should not be burdened with an outmoded classification favoring one mode of utilization over another.” *Id.* at 12.

⁵ This general rule is not limited to acts involving waterways or affecting riparian rights: “[F]or consequential loss or injury resulting from lawful governmental action the law affords no remedy. The character of the power exercised is not material.” *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510, 43 S.Ct. 437, 438 (1923).

⁶ According to the facts stated, plaintiff was able to use the landing in certain months when the water was high.

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governmental power.

166 U.S. at 275, 17 S. Ct. at 580.

Finally, in *Manigault v. Springs*, 199 U.S. 473, 26 S.Ct. 127 (1905), the plaintiff claimed that the construction of a dam hindered access to his land via the creek on which it was located.⁷ Citing *Gibson*, the Court stated:

We have repeatedly held that where the government of the United States has, for the purposes of improving the navigation of a river, erected piers or other structures by which access to plaintiff's land is rendered more difficult, there is no claim for compensation We see no reason why the same principle should not apply to cases where the state legislature, exercising its police power, directs a certain dam to be built, and thereby incidentally impairs access to lands above the dam. In both cases the sovereign is exercising its **1346** constitution right, – in one case in improving the navigation of the river, and in the other, in draining its lowlands, and thereby enhancing their value for agricultural purposes.

166 U.S. at 485, 26 S.Ct. at 132.

Other cases could be discussed,⁸ both in accord with the principles that have been set forth above and contrary to it – Anastacio's position is not without support in some states and in some circumstances. But the Court believes that the cases discussed above exemplify the prevailing and the better rule as it has developed in the United States. When the government actually takes away or invades in some destructive fashion a person's land, compensation must be paid. The Palau Constitution, like the U.S. Constitution, requires this result. Art. IV, § 6; Art. XIII, § 7. But when the government acts only upon its own property, and in what it believes to be the public interest, it should be able to do so without fear that it may be called upon to pay damages for consequential injuries to the value of nearby land, or to businesses located there.⁹

Is this rule subject to abuse? Perhaps. But as the Court noted in *Gilman*, “[i]f a state exercise unwisely the power here in question, the evil consequences will fall chiefly upon her own citizens.” 18 L. Ed. at 101. Hence, “[the] safeguard and remedy are to be found in the virtue and intelligence of the people.” *Id.* Here, the government of Ngchesar State, including

⁷ He also claimed that the dam caused an overflow on his land. Although that claim was also rejected, it is not pertinent here.

⁸ See, e.g., *United States v. Rands*, 389 U.S. 121, 88 S. Ct. 265 (1967); *United States v. Commodore Park*, 324 U.S. 386, 65 S. Ct. 803 (1945); *Scranton v. Wheeler*, 179 U.S. 141, 21 S. Ct. 48 (1900); *Central Clay Drainage District v. Booser*, 219 S.W. 336, 9 A.L.R. 1021 (Ark. 1920) (upholding the state's right to ban the floating of logs in certain waterways).

⁹ The Court sees no good reason to limit this rule only to occasions when the government acts in aid of navigation. See n.4, *supra*. That rule has been applied inconsistently, at best, and the Court believes that the better rule, as stated in cases as old as *Gilman* or as recent as *Colbert*, is that government authorities should be free to determine whether a bridge (or here, a road) or an unobstructed waterway will better serve the public interest.

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both its elected and traditional leaders, determined that it was in the best interests of the State and its people to construct a road that would bring its several hamlets together. It did so, perhaps making it difficult for Anastacio to conduct his business, but without taking away or injuring the property where he still resides today. The Court will accordingly enter judgment in its favor.