

Ngeribongel v. Gulibert, 8 ROP Intrm. 68 (1999)
LOUISA NGERIBONGEL, et al.,
Appellants,

v.

MASAO GULIBERT,
Appellee.

CIVIL APPEAL NO. 98-25
Civil Action No. 334-95

Supreme Court, Appellate Division
Republic of Palau

Argued: November 5, 1999

Decided: November 18, 1999

Counsel for Appellants: David J. Kirschenheiter

Counsel for Appellee: Kevin N. Kirk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

PER CURIAM:

This appeal concerns a dispute among members of the Orakiblai Clan over funds the Clan received from the Angaur Mining Trust Fund (“AMTF”). Appellants, who are Clan members, contend that Appellee, who is the Clan’s chief, denied them their fair share of the Clan’s AMTF monies in violation of Palauan custom. Following a trial, the trial court entered judgment in favor of Appellee. Appellants brought this appeal, contending that the trial court clearly erred in finding that they had not proven any violation of Palauan custom, and abused its discretion in precluding them from introducing rebuttal evidence. For the following reasons, we affirm.

I.

Appellants are five siblings who are ochell members of the Clan, and whose late mother held the Clan’s highest female title. Appellee, as the Clan’s chief, received the AMTF monies on behalf of the Clan. From 1990 through 1994, these monies consisted of annual income. In 1995, however, the Clan received a final payment of \$182,359.97, including both annual income and the Clan’s share of AMTF’s principal. During each of these years, each Appellant received between zero and five hundred dollars. Appellants claimed that, because of their strength in the Clan, they are each entitled to \$120 to \$1,300 more for each year from 1990 through 1994, and to \$9,700 to \$10,000 more for 1995.

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According to the three Appellants who testified,¹ their status as ochell members descended from the Clan's highest-ranking woman and their history of service to the Clan gave them great strength in the Clan, and thus entitled them to distributions equal to or greater than those received by certain ulechell members of the Clan, including Appellee and his relatives. Appellants testified that Appellee violated Palauan custom both by distributing the AMTF monies himself instead of turning them over to the Clan's highest-ranking women for distribution, and by giving Appellants less than he had given some ulechell members of the Clan.

¶69 Appellee testified that before distributing the AMTF funds, he sought and obtained the approval of the highest-ranking female titleholder and then distributed the AMTF funds among Clan members based on their services to the Clan and their needs. He and several of his relatives testified that Appellants were only entitled to a small share of the monies because they, unlike those who received larger distributions, had provided few, if any, services to the Clan, had moved to Guam, and were not in great need because they had received \$92,000 in AMTF monies through their membership in another clan.²

Appellee called an expert witness, Rimat Ngiramechelbang, from the Palau Society of Historians,³ who testified that under Palauan custom, clan monies are to be distributed by the highest-ranking male and female titleholders based on a number of factors, including the strength of the members, the services they have provided, and the needs of the individuals. Furthermore, she explained, because clan members can achieve strength through services and contributions to the clan, and because the titleholder considers a broad range of factors, ochell members are not necessarily entitled to receive more than ulechell members.

Appellants sought to introduce rebuttal evidence to refute the testimony that they had provided few services to the Clan, but the court precluded them from doing because they had addressed the issue during their case-in-chief. The court held in favor of Appellee on the grounds that Appellants failed to prove that he violated any Palauan custom, either by distributing the funds himself or by granting Appellants significantly less than he granted some uchell members.

In making this determination, the court emphasized that Appellants had relied exclusively on the testimony of Appellant Louisa Ngeribongel to support their claims that Appellee violated

¹ Appellants Louisa Ngeribongel, Conception Meriil, and Balerio Pedro testified. Appellants Lorenzo Pedro and Jossie Pedro did not attend the trial. Appellants did not call any non-party witnesses.

² Appellant Balerio Pedro received this \$92,000 through his membership in the Ngeruosch clan, and testified that he shared it with his siblings, the other Appellants. Appellant Louisa Ngeribongel testified that she and their other siblings had received some of the money, but she had forgotten how much.

³ The Palau Society of Historians is dedicated to compiling and recording information about Palauan culture and history. See Tr. at 375; see also Palau Society of Historians, Division of Cultural Affairs, Republic of Palau, *Rechuodel: Traditional Culture & Lifeways Long Ago in Palau* ii-iv (William Hampton Adams and Florencio Gibbons, eds., DeVern Reed Smith, trans., 1997).

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customary distribution practices by distributing the funds himself instead of turning them over to the female titleholders for distribution. Because it found that this testimony was “not impartial expert testimony,” and “lacked credibility,” the court placed greater weight on Ngiramechelbang’s expert testimony that male and female titleholders were to decide together how funds should be distributed. Based on Appellee’s uncontested testimony that he had consulted with and obtained the approval of the highest-ranking female titleholder before distributing the funds, the court found that Appellants had not proven any violation of customary distribution methods.⁴

¶70 Turning to Appellants’ claim that their ochell status entitled them to more of the Clan monies, the court cited the expert testimony that distributions may properly be based on a number of factors, including strength derived from contributions and services to the Clan. The court noted that this testimony was consistent with past decisions holding that there was no precise custom directly governing the distribution of non-traditional assets such as American money, but that such assets must be distributed fairly. Faced with “sharply conflicting” testimony regarding Appellants’ contributions and services to the Clan, the court found Appellants’ testimony “lacking in credibility,” and found Appellee’s witnesses “more credible” in their testimony that Appellants had made few contributions and performed few services. The court credited Appellee’s testimony that he based his decisions on traditionally recognized factors such as each member’s contributions, services, needs, and status in the Clan, and accordingly concluded that, “the distributions were not unfair” and were “within [the clan leaders’] wide discretion.” Having found no violation of customary distribution practices, the court entered judgment against Appellants and this appeal ensued.

II.

The existence and content of a claimed custom must be established by clear and convincing evidence, *see Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 227 (1996); *Udui v. Dirrecheteet*, 1 ROP Intrm. 114, 117 (1984), and a trial court’s findings as to a custom’s terms, existence, or nonexistence are reviewed under the clearly erroneous standard. *See Udui*, 1 ROP Intrm. at 117. As this Court has previously emphasized in reviewing determinations as to the fair distribution of clan monies, this Court may not “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.” *Remoket*, 5 ROP Intrm. at 225 (quoting *Ngirmang v. Orrukem*, 3 ROP Intrm. 91, 92 (1992)). Thus, “where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.” *Ngiramos v. Dilubech Clan*, 6 ROP Intrm. 264, 266 (1997) (citations and internal quotations omitted). In this case, the trial court’s findings that neither the distribution process nor the distribution amounts violated Palauan custom appear to well founded on a rational weighing of the evidence, and do not appear to be clearly erroneous.

A.

⁴ In the court’s words, the distribution process “was a proper way of proceeding--and certainly plaintiffs did not prove that it was improper.”

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Although Appellant Louisa Ngeribongel testified that Appellee was obligated to give Clan monies to the female titleholders for distribution, her testimony was not corroborated by any other evidence, and was not based on extensive expertise regarding customary distribution methods.⁵ Thus, the court had a sound basis for crediting the contrary testimony of Rimat Ngiramechelbang, a non-party expert witness, who testified that a clan's male and female titleholders were to decide together how to distribute clan funds. The court was also entitled to credit Appellee's essentially 171 uncontroverted testimony that he consulted with and obtained the approval of the Clan's highest-ranking female titleholder before making the distribution. Because this testimony, combined with Ngiramechelbang's, supports a finding that Appellee's distribution method was consistent with Palauan custom, there is no clear error in the trial court's finding that Appellants failed to establish a violation of customary distribution processes.

B.

Nor is there any clear error in the trial court's finding that Appellants failed to prove that the distribution amounts violated Palauan custom. The courts have held that:

'[u]nder Palauan 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.'

Remoket, 5 ROP Intrm. at 229 (quoting *Lalou v. Aliang*, 1 TTR 290, 293 (Tr. Div. 1955)).

Moreover, Ngiramechelbang testified that services, contributions and needs are as important as ochell or ulechell status, and that all these factors are to be considered together. As the trial court noted, this expert testimony was consistent with prior courts' findings regarding customary distribution practices. Specifically, in *Lalou v. Aliang*, 1 TTR 94, 98 (Tr. Div. 1954), the court held that under Palauan custom the share of AMTF money due to each clan member would:

depend in part upon the services the [members] render to the clan and the relative needs of the different members The clan is entitled to work out such division of the money received from the Trust as it desires, so long as it gives fair consideration to the welfare of all of its members in accordance with accepted Palau custom.

Likewise, in *Remoket*, the court acknowledged the clan's broad discretion to divide clan income based on a number of factors, including "[c]ontributions of money and services to the clan," and emphasized that, "[c]ustomary law throughout Palau requires that assets of a clan . . . obtained in the normal course be distributed fairly." *Id.* at 229-30 (quoting *Sengebau v. Balang* 1 ROP

⁵ Appellant sought to be qualified as an expert based on customs she learned from her grandmother. However, when questioned about her grandmother's teachings on the subject of money and its distribution, she did not describe any relevant customs.

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Intrm. 695, 699 (1989)).⁶

There is ample evidence in the record to support the trial court's finding that, although Appellants received considerably less than some other Clan members, this disparity resulted from a fair consideration of these customary factors, and thus was within the Clan's wide discretion. This evidence 172 included the testimony of Appellee and other Clan members regarding Appellants' lack of services or contributions to the Clan and their limited needs in light of the \$92,000 in AMTF monies they received through their membership in the Ngeruosch Clan.

Although Appellants introduced contrary testimony seeking to establish that they had rendered important services to the Clan, the trial court articulated sound reasons for according Appellants' testimony little weight and finding that they had little involvement or strength in the Clan.⁷ Because the record amply supports a finding that the distributions were fair in light of customarily recognized considerations such as strength in the clan, contributions, services, and needs, we find no basis for setting aside the trial court's determinations as clearly erroneous.

III.

Appellants contend that the trial court abused its discretion by precluding them from introducing rebuttal evidence regarding their services to the Clan. A trial court has broad discretion to exclude proffered rebuttal evidence, particularly when it was available during the plaintiff's case-in-chief, merely elaborates upon issues that arose during the plaintiff's case-in-chief, or merely counters evidence that could be expected to arise during the defense case-in-chief. *See Tramonte v. Fibreboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991); *Lubanski v. Coleco Indus., Inc.*, 929 F.2d 42, 47 (1st Cir. 1991); *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir. 1991). In this case, Appellants sought to introduce rebuttal testimony regarding their services to the Clan, a subject they had addressed extensively during their case-in-chief. During her direct testimony, Appellant Louisa Ngeribongel agreed that services to the Clan were one factor that conferred strength in the Clan. When asked what services she had performed for the Clan, she described her participation in several Clan customs, and after repeated prompting on cross-examination, elaborated upon the services she performed and recounted her participation in several additional customs.⁸ Moreover, when specifically asked, “[a]re there other things . . . like

⁶ Appellants also acknowledged that the clan has wide discretion in distributing clan assets, and may consider the services rendered and contributions made by the clan members, as well as the relative needs of the members. *See* Tr. at 107-08, 117.

⁷ In addition to one Appellant's inability to remember the name of her title, the court cited Appellants' concessions that they did not hold blengurs for themselves or attend the blengurs of high-ranking title holders, Appellants' evasiveness or forgetfulness about several important points, and other witnesses' testimony that Appellants had not attended important clan customs or made customary monetary contributions. Appellants also suggested that Appellee denied them their fair distribution based on a prior dispute between them and Appellee. However, the trial court was entitled to credit Appellee's testimony that he based his decisions on proper factors such as services and needs rather than on that dispute.

⁸ This prompting included questions such as, “[a]ny other services or is that it?” and “I'll give you one more opportunity. Are there any other services that you performed that entitled you

Ngeribongel v. Gulibert, 8 ROP Intrm. 68 (1999) participating in funerals, holding ocheraol[s], are those considered as services to the clan or not?" Ngeribongel agreed that they were considered services to the Clan, and stated that she had attended ocheraols and funerals for members of the Clan.

Although Appellee and his witnesses testified that Appellants had failed to attend a number of important ocheraols and funerals 173 and had not rendered substantial service to the Clan, this testimony merely refuted Appellants' testimony and did not, as Appellants contend, raise new issues beyond the scope of their case-in-chief. Because Appellants had a full and fair opportunity to recount their services to the Clan, including their participation in ocheraols and funerals, during their case-in-chief, and to challenge the credibility of Appellee's contrary testimony through cross-examination, we find no abuse of discretion in the trial court's refusal to admit rebuttal testimony on the same subject.

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

to a share of this distribution . . . I'm just asking if there are any others that you've forgot[ten] to mention?" Tr. at 126-31.