IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

BERNIE HITTO and HANDY EMIL,

Plaintiffs-Appellees,

v.

RAEIN TOKA and NANCY CALEB, aka NANCY PIAMON, on behalf of BILLY PIAMON.

Defendants-Appellants.

BERNIE HITTO and HANDY EMIL,

Plaintiffs-Cross Appellants,

v.

ALDEN BEJANG, AUN JAMES, AMON JEBREJREJ, and CALORINA KINERE,

Defendants-Cross Appellees.

Supreme Court No. 2015-03

OPINION

Supreme Court No. 2015-04

OPINION

BEFORE: PLASMAN, Acting Chief Justice; SEABRIGHT,* and KURREN,** Acting Associate Justices

* The Honorable J. Michael Seabright, U.S. District Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Barry M. Kurren, U.S. Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

PER CURIAM:

I. INTRODUCTION

This Opinion concerns two related appeals in this long-running legal dispute that began in the courts in September 1980, nearly thirty-seven years ago (although it arose much earlier). Both appeals are from a May 22, 2015 Decision and Judgment of High Court Justice Dinsmore Tuttle (the "May 22, 2015 Decision") in *Hitto et al. v. Toka et al.*, which is a consolidated civil action comprising two related cases -- High Court Civil No. 21-80 (filed on September 17, 1980), and a superseding case, High Court Civil No. 1986-149 (filed on November 11, 1986).

Specifically, in Supreme Court No. 2015-03, Defendants Raein Toka and Nancy Caleb, aka Nancy Piamon appeal from the May 22, 2015 Decision; and in Supreme Court No. 2015-04, Plaintiffs Bernie Hitto and Handy Emil cross-appeal. Given the relationship between the Appeal and Cross-Appeal, a single Opinion regarding both appeals is appropriate. Based on the following, the High Court's May 22, 2015 Decision is AFFIRMED.

II. BACKGROUND

A. Procedural Background

"The delays that have occurred in this case are deplorable." May 22, 2015 Decision at 18. As described by Justice Tuttle:

> Ten of the parties have died since the case was filed. Land payments have been held in trust for over thirty-three years, depriving the rightful owners and their families of the use and benefit of that income. Individual parties have begged the Court to resolve the case. Individual judicial officers have commented on the woefully slow pace of the proceedings. Individual attorneys have urged the court to bring this case to a conclusion. All to no avail.

Id.

The May 22, 2015 Decision explains the long history of this action from 1980 until 2000, and sets forth many of the reasons for the delay that was caused both by the parties and the courts. Here, the Court focuses on the following proceedings, which occurred after 2000 and which are more germane to the present appeals.

The long-awaited proceeding before the Traditional Rights Court ("TRC") finally took place from November 28 to December 19, 2001. On March 22, 2002, the TRC issued an opinion ("TRC 2002 Opinion"). May 22, 2015 Decision at 6. Based on that TRC opinion, High Court Justice H. Dee Johnson, Jr., issued an Opinion and Judgment on August 20, 2002 ("Justice Johnson's 2002 Opinion and Judgment"). Both sides appealed Justice Johnson's 2002 Opinion and Judgment to the Supreme Court.

On March 14, 2007, the Supreme Court (Chief Justice pro tem Plasman, and Justices Goodwin and Kurren), issued an Order remanding the action to the High Court. The Supreme Court's Order provided, in pertinent part:

> Among the matters reviewed [at a March 14, 2007 status conference] were the status of the appeal and parties, the status of the record, and outstanding motions. Outstanding motions currently before the Court include a motion to remand to High Court, a motion to dismiss appeal and a motion to dismiss out defendants. The status of those motions and the submissions of the parties were reviewed and the parties were in agreement as to their current status. . . . The parties present agreed to waive oral argument on the issue of remand and have the motion decided on written submissions.
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> The court determines that in light of the failure of the High Court to hold appropriate proceedings under Rule 14 of the Rules of the Traditional Rights Court then in effect, the matter will be remanded to the High Court. In light of this decision, the Supreme Court will not decide the other outstanding motions. This decision is without prejudice to the rights of the parties to bring these other outstanding motions, if appropriate, or other motions, to the High Court.

March 14, 2007 Order at 1-2.[1]

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[1] TRC Rule 14 "then in effect" (in 2002), had been renumbered and modified slightly in 2006 as TRC Rule 9. (The current version of TRC Rule 9, effective May 25, 2017, reflects further amendments -- all of the amendments are procedural and are not relevant to this Opinion.). Rule 14 provided as follows:

> Rule 14. Procedure After Transmittal of Decision. After transmittal of the opinion of a panel of the Traditional Rights Court the Trial Judge shall examine the opinion to make certain that all of the questions referred to the Traditional Rights Court have been answered sufficiently to permit the case to be tried to its conclusion in the trial court without further referrals to the Traditional Rights Court. The Trial Court shall then set the case for hearing before itself, and allow the parties to make their presentations regarding the decision and regarding the

(continued . . .)

Upon remand, various delays occurred stemming primarily from efforts to find a High Court judge to preside over the case. Some six years later, High Court Justice Herbert Soll held a hearing and "concluded that [the High Court] would, once again, certify questions to the Traditional Rights Court for its determination and resolution." May 22, 2015 Decision at 10. Under Rule 4 of the TRC Rules of Procedure, however, the High Court "deferred entering the Referral Order to give the parties a further opportunity to address how trial should proceed." *Id.* at 10-11. Some further proceedings (and further delay) ensued, where a tentative trial date was set, and then vacated. The parties continued discussing the setting of a trial

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(. . . continued)

> status of the case, and such other or further proceedings . . . as appear necessary to a final determination of the case. If, after such hearing, it appears to the Trial Judge that it is in the best interests of justice that the questions referred to the Traditional Rights Court for determination be resubmitted for any valid reason such as the failure to follow procedure, failure to completely answer any questions submitted to the Court, or the apparent necessity of further opinions on additional questions by such Court, then the Trial Judge shall resubmit the case to the same panel of the Traditional Rights Court that made the original decision together with necessary instructions. If there be no necessity for re-submission then the Trial Judge shall proceed to trial and to determination to judgment of all of the issues in the case, including those questions submitted to the Traditional Rights Court, but the trial court, in disposing of the case before it, shall give substantial weight to the opinion of the Traditional Rights Court on the questions referred to it as required by the Constitution. (Art. VI, Sec. 4).
>
> Should the Trial Court conclude that justice does not require that the Traditional Rights Court's resolution of any question submitted to it be binding upon it in its (the trial court's) resolution of the case before it and out of which the submitted questions arose, the Trial Court shall set forth in writing its reasons therefor and shall continue to determine the case without being bound by the Traditional Rights Court's opinion, but shall in any event give substantial weight to such opinion.

date, but no further action was taken until January 27, 2015, when the case was transferred to Justice Tuttle.

On May 22, 2015, Justice Tuttle issued her thirty-seven page Decision and Judgment. In issuing her decision, she reviewed the entire record in the then-thirty-four year-old action. And she chose -- rather than referring questions to or remanding to the TRC for further proceedings as Judge Soll indicated in 2013 -- to decide the contested matters based on the extensive record before the High Court. Specifically, she determined that "[t]he High Court is not required to certify this case back to the [TRC] for a third time." May 22, 2015 Decision at 18. She invoked Rule One of the Marshall Islands Rules of Civil Procedure (which states in part that the rules "shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"), as well as Rule 16 of the TRC Rules of Procedure (which provides that "[i]n the interest of justice, or for other good cause, the High Court may suspend the requirements or provisions of any of these rules in a particular case . . . and may order proceedings in accordance with its direction"). She summarized:

> The case is now before yet another judge in a long list of judicial officers who have presided over this controversy. No case filed in this Republic better illustrates the saying, "Justice delayed is justice denied." The people impacted by this case have been denied

> justice for over thirty-four years. To delay an adjudication of these issues further, for any reason, would truly be a travesty of justice.

Id.

The May 22, 2015 Decision also concluded that Justice Johnson's 2002 Opinion and Judgment -- which this Court had remanded in 2007 for further proceedings -- was "based on a misapplication of the law." May 22, 2015 Decision at 36. That is, she "exercise[d] [the High Court's] discretion to reconsider the order of its predecessor, and vacated[d] that order to correct error." *Id.*

B. Factual Background

The basis of the controversy in these two related cases arose many years ago, before history in the Marshall Islands was recorded in written form. Evaluation of facts from oral history is a difficult task at best, as reflected in the protracted litigation in these cases. The dispute arose in the courts in 1980 when plaintiffs[2], the descendants of Abner, complained their asserted land rights in Aibwij weto on Bikej Island in Kwajalein Atoll were no longer recognized by the

[2] The plaintiffs, descendents of Abner, are named in the case caption as Bernie Hitto, claiming alab rights, and Handy Emil, claiming senior dri jerbal rights, on Aibwij weto (and Monke and Lojonen wetos to the extent they are separate from Aibwij.) They are the appellees in S. Ct. No. 2015-003 and the cross-appellants in S. Ct. No. 2015-004.

Iroij, who recognized the descendants of Jibke.[3] As noted by the trial court, the basis for the Iroij's original decision "was only known by oral history, memory and reference to the Iroij book." In the course of the legal proceedings, additional parties intervened as defendants/counter-claimants, asserting their rights in Monke[4] and Lojonen[5] wetos, which they claimed were separate wetos from Aibwij, while the Abner plaintiffs maintained those wetos were not distinct from Aibwij.

Plaintiffs' claim is that Aibwij weto, as well as Monke and Lojonen wetos, were *morjinkot*[6] awarded by Iroij Laninbit to Laemokmok, plaintiffs' ancestor from whom their land rights descended, for an act of bravery many years ago. The Jibke defendants assert that the *morjinkot* story is just that, a story, with no basis in fact. Further, any rights plaintiffs had in the land were cut off for good cause when

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[3] The defendants in regard to Aibwij weto are named in the case caption as Raein Toka, claiming alab rights, and Nancy Caleb, claiming senior dri jerbal rights, on Aibwij weto. They are descendents of Jibke. They assert no claim to Monke and Lojonen wetos. They are the appellants in S.Ct. No. 2015-003.

[4] The intervening defendants/cross-claimants are named in the case caption as Alden Bejang, claiming alab rights, and Aun James, claiming senior dri jerbal rights in Monke weto. They are cross-appellees in S. Ct. No. 2015-004.

[5] The intervening defendants/cross-claimants for Lojonen weto are Amon Jebrejrej, claiming alab rights, and Calorina Kinere, claiming senior dri jerbal rights, on Lojonen weto. They are also cross-appellees in S. Ct. No. 2015-004.

[6] *Morjinkot* was described by the Traditional Rights Court as "an award (inheritance) given to a man for his bravery." (TRC 2002 Opinion, p. 2.)

Iroij Jeimata placed Jibke on the land. The defendants/counter-claimants on Monke weto and Lojonen weto contend the two wetos are separate from Aibwij and their rights are independent of plaintiffs' claims to Aibwij.

III. DISCUSSION

A. The May 22, 2015 Decision Did Not Violate the Law of the Case Doctrine

Appellants (in Supreme Court No. 2015-03) argue that Justice Tuttle abused her discretion and violated the law of the case doctrine when, after she was assigned to the case in 2015, she decided -- contrary to Justice Soll's 2013 Order -- not to refer the matter to the TRC for additional proceedings. That is, they contend that the Supreme Court's March 14, 2007 Order of remand and Justice Soll's subsequent 2013 Order to send issues back to the TRC constituted "law of the case," and Justice Tuttle abused her discretion in revisiting Justice Soll's Order and, ultimately, in reconsidering Justice Johnson's 2002 Opinion and Judgment.

Similarly, Cross-Appellants (in Supreme Court No. 2015-04) argue that Justice Tuttle violated the law of the case doctrine by not giving any deference to major aspects of Justice Johnson's 2002 Opinion and Judgment and determining it was manifestly erroneous.

Based on the following, we disagree -- the High Court did not violate the law of the case doctrine.

1. Principles of the Law of the Case Doctrine

"The law of the case doctrine originated in the courts as a means of ensuring the efficient operation of court affairs." *City of L.A. v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001) (citing *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990)). It "was designed to further the 'principle that in order to maintain consistency during the course of a single lawsuit, reconsideration of legal questions previously decided should be avoided.'" *Id.* (quoting *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986)). But "it is 'not an inexorable command.'" *Id.* (quoting *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988)). "That is, the doctrine 'is discretionary, not mandatory' and is in no way 'a limit on [a court's] power.'" *Id.* (quoting *Houser*, 804 F.2d at 567).

Courts throughout the United States agree that the doctrine is discretionary. *See, e.g.*, *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) ("Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice."); *United States v. U. S. Smelting Ref. & Min. Co.*, 339 U.S. 186, 199 (1950) ("[T]he 'law of the case' is only a discretionary rule of practice."); *Boyer v. BNSF Ry. Co.*, 824 F.3d 694, 711 (7th Cir.) (explaining that

the doctrine "does not prohibit a court from revisiting an issue when there is a legitimate reason to do so, whether it be a change in circumstances, new evidence, or something the court overlooked earlier."), *modified on other grounds*, 832 F.3d 699 (7th Cir. 2016); *Bishop v. Smith*, 760 F.3d 1070, 1082 (10th Cir. 2014) (reiterating that the Tenth Circuit has "routinely recognized that the law of the case doctrine is 'discretionary, not mandatory,' and that the rule 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power'") (quoting *Kennedy v. Lubar*, 273 F.3d 1293, 1299 (10th Cir. 2001)); *Robinson v. Parrish*, 720 F.2d 1548, 1550 (11th Cir. 1983) ("New developments or further research often will convince a district court that it erred in an earlier ruling, or the court may simply change its mind. We believe it would be wasteful and unjust to require the court to adhere to its earlier ruling in such an instance.").

In particular, "[a] court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997); *see also Bishop*, 760 F.3d at 1086 ("As a practice rather than a rigid rule, the law of the case is

subject to three narrow exceptions: (1) when new evidence emerges; (2) when intervening law undermines the original decision; and (3) when the prior ruling was clearly erroneous and would, if followed, create a manifest injustice."). "Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Alexander*, 106 F.3d at 876.

Moreover, "[t]he doctrine simply does not impinge upon a [trial] court's power to reconsider its own interlocutory order provided that the [trial] court has not been divested of jurisdiction over the order." *Santa Monica Baykeeper*, 254 F.3d at 888 (citation omitted).

> The legal effect of the doctrine of the law of the case depends upon whether the earlier ruling was made by a trial court or an appellate court. *All rulings of a trial court are subject to revision at any time before the entry of judgment.* A trial court may *not,* however, reconsider a question decided by an appellate court.

Id. at 888-89 (quoting *Houser*, 804 F.2d at 567). "A contrary conclusion would be irreconcilable with the . . . rule that 'as long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.'" *Id.* at 889 (quoting *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (9th Cir. 1981) (emphasis omitted)). *See also Dreith v. Nu Image, Inc.*, 648 F.3d 779, 787-88 (9th Cir. 2011) ("a [trial] court has the inherent power to revisit its non-final orders, and that

power is not lost when the case is assigned mid-stream to a second judge. Orders . . . are 'subject to reconsideration and revision either by the same judge, a successor judge or a different judge to whom the case might be assigned.'") (quoting *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970)).

2. *Application of Principles*

a. Justice Soll's 2013 Order

Given the ample and well-settled authority allowing a trial court to reconsider an interlocutory order, the Court readily concludes that Justice Tuttle did not abuse her discretion in reconsidering (or otherwise not following) Justice Soll's 2013 Order regarding further referral of issues to the TRC. It is undisputed that, after this Court's 2007 remand to the High Court, Justice Soll's 2013 Order was interlocutory -- that is, judgment had not entered and no new appeal had been filed or attempted. The High Court (whether Justice Soll or Justice Tuttle was presiding) retained jurisdiction over the case, and the High Court "possess[ed] the inherent procedural power to reconsider, rescind, or modify [that] interlocutory order for cause seen by it to be sufficient." *Santa Monica Baykeeper*, 254 F.3d at 889 (emphasis omitted). And there was "sufficient cause" for her to exercise her

discretion to modify that Order. In particular, she considered that "the interests of justice require action." May 22, 2015 Decision at 18. She also explained that

> A number of [TRC] hearings have been held jointly with the High Court; the parties have been given the opportunity to participate in numerous hearings over the past thirty-four years; counsel have been given a full opportunity to present evidence and make argument in support of their respective positions; and counsel were given years to develop and present their responses before participating in the High Court's . . . proceedings. The issues have been fully litigated before the courts.

Id.

This reasoning also fits within the specific rationale expressed under the law of the case doctrine. *See Arizona*, 460 U.S. at 618 n.8 ("[I]t is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice"); *Alexander*, 106 F.3d at 876 (allowing reconsideration where "a manifest injustice would otherwise result"); *Boyer*, 824 F.3d at 711 (allowing a court to revisit an issue "when there is a legitimate reason to do so, whether it be a change in circumstances, new evidence, or something the court overlooked earlier"); *Robinson*, 720 F.2d at 1550 ("New developments or further research often will convince a district court that it erred in an earlier ruling, or the court may simply change its mind.").

b. Justice Johnson's 2002 Opinion and Judgment

For similar reasons, addressing the Cross-Appeal, Justice Tuttle did not abuse her discretion in reconsidering Justice Johnson's 2002 Opinion and Judgment. Those High Court rulings had no precedential value or binding effect after this Court's March 14, 2007 Order remanding the case to the High Court. Although the March 14, 2007 Order did not explicitly "vacate" the 2002 Opinion and Judgment, this Court explained that the matter was remanded "in light of the failure of the High Court to hold appropriate proceedings under Rule 14 of the [then-]Rules of the [TRC]." The Court's 2007 Order also allowed the High Court, "if appropriate," to consider the "other outstanding motions" then-pending before the Supreme Court, "or other motions." March 14, 2007 Order at 2. The intent of our 2007 Order -- where two of the Justices entering that Order are now deciding the present appeals -- was in fact to vacate Justice Johnson's 2002 Opinion and Judgment and remand to the High Court to examine the opinion of the TRC pursuant to Rule 14's procedural requirements, and then determine if any questions required re-submission to the TRC.[7] With that understanding, it is clear that this

[7] Although Rule 14 (now Rule 9) requires the "case to be tried to its conclusion in the High Court" if the TRC opinion sufficiently answered the questions before it, we have held that "[t]he definition of 'trial' is broad enough to include a procedure . . . where the evidence produced before the Traditional Rights Court is examined by the High Court and a determination (continued . . .)

Court never *required* a re-submission to the TRC -- that was a matter for the High Court to address on remand.

It follows that Justice Tuttle had discretion to re-examine Justice Johnson's 2002 Opinion and Judgment. That is, Justice Johnson's 2002 Opinion and Judgment is not "law of the case." As described above, when Justice Tuttle addressed that matter in 2015, eight years had passed since the 2007 remand, and thirteen years had passed since Justice Johnson issued his Opinion and Judgment. Circumstances had changed, and she had the power to consider those circumstances, especially where she considered the 2002 Opinion and Judgment to have been clearly erroneous and a misapplication of the law. *See, e.g.*, *Alexander*, 106 F.3d at 876; *Boyer*, 824 F.3d at 711; *Robinson*, 720 F.2d at 1550.

In short, Justice Tuttle did not violate the law of the case doctrine. We thus turn to the merits.

B. Merits

1. Questions referred to the Traditional Rights Court

Three questions were referred to the Traditional Rights Court. May 22, 2015 Decision at p. 19.

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made whether that evidence supports the Traditional Rights Court's 'opinion in answer' to the question certified to it." *Dribo v. Bondrik*, 3 MILR 127, 138 (2010).

Question 1: What specific parcels of land are in dispute in this matter? Please identify each parcel by giving the name of the weto, the name of the island, and the name of the atoll. (In the following Questions, the parcels of land you name in answer to this Question 1 will be called "the disputed parcels.")

Question 2: What person or persons are proper under Marshallese tradition and customary practices to hold the position of alap for each of the disputed parcels?

Question 3: What person or persons are proper under Marshallese tradition and customary practices to hold the position of dri jerbal for each of the disputed parcels?
Your advice to the High Court in the form of an opinion of the Marshallese tradition and customary practices is requested.

2. Aibwij Weto

In answer to Question 1, the Traditional Rights Court determined "AIBWIJ WATO, Bikej Island, Kwajalein Atoll"[8] was in dispute. There were two critical customary issues in the case between the Abner descendant plaintiffs and Jibke descendant defendants. First, had Aibwij been given to Abner's ancestor Laemokmok as *morjinkot*; and second, if so, was there good cause to take the land from Abner's bwij. The Traditional Rights Court determined Aibwij was *morjinkot* land given to Laemokmok, and that it descended to Abner and then to plaintiffs. While there was evidence to the contrary, there was sufficient evidence

[8] TRC 2002 Opinion, at p. 2.

to support the Traditional Rights Court's conclusion as set forth in the TRC 2002 Opinion (at p. 3) and the May 22, 2015 Decision (at p. 20.)

The TRC further determined there was no good cause shown for taking the land from plaintiffs. The nature of *morjinkot* is such that only a severe violation could constitute good cause.[9] There was no *bwilok* (cut-off.) Based on these findings, in answer to Question 2, the TRC found Enti Tibon held the alab title, which was the basis for the High Court's determination that Enti Tibon's successor, Bernie Hitto held the alab interest.

Surprisingly, in light of the TRC's opinion regarding the alab, the court "awarded" the dri jerbal title to defendant Towe Toka, who claimed the alab right based upon Jeimata's giving the land to Jibke. In contrast to the logical analysis of custom and fact involved in making the alab determination, the Traditional Rights Court's analysis of the dri jerbal right consisted of a single sentence: "This Court award such right to Towe Toka in reconigation [sic] of the fact that Jibke had been living on Aibwij for a very long time." TRC 2002 Opinion at p. 5. The court apparently recognized this was an abbreviated analysis, by following that statement

[9] Defendants' Exhibit D-1 "CUSTOMARY TITLES AND INHERENT RIGHTS, A General Guideline in Brief" (1993) by Amata Kabua, states: "The two top entitlement and awards, e.g., the Morijinkwot and Koraelem are commonly perceived to be permanent insofar the recipient bwij is concerned and can only be revoked if the bwij as a whole is found to have been engaged in activity that is clearly an act of sedition or treason." (pp. 10-11.)

with "That is all." This analysis contrasted sharply with the careful reasoning and examination of evidence that led to the determination that Abner's successors held the alab title. Moreover, it was inconsistent with that reasoning. Consequently, Justice Tuttle found this finding to be "clearly erroneous" and determined Handy Emil was the senior dri jerbal, based upon the same reasoning that supported the TRC's determination that Bernie Hitto was the alab.

The determination of the High Court that the TRC's "award" of the senior dri jerbal right to Towe Toka was clearly erroneous was reasonable and, in turn, not clearly erroneous.[10] The application by Justice Tuttle of the analysis of the TRC in regard to the alab title to the dri jerbal title was reasonable and there was sufficient evidence in the record to support the High Court's conclusion that Handy Emil was the senior dri jerbal.[11] This court finds the conclusion of the High Court that Handy Emil was senior the dri jerbal on Aibwij weto is not clearly erroneous.

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[10] On appeal of the High Court's judgment concerning a determination of the Traditional Rights Court, the Supreme Court reviews the High Court's factual findings for clear error and its decision of law de novo. (*Kelet, et al., v Lanki & Bien*, 3 MILR 76, 78 (2008)).

[11] "Findings of fact by the High Court will not be set aside unless 'clearly erroneous.' A finding of fact is 'clearly erroneous' when review of the entire record produces a definite and firm conviction that the court below made a mistake. In determining whether the High court has made a mistake in the finding of a fact, the Supreme Court will not interfere with the finding if it is supported by credible evidence. The Supreme Court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision." (citations omitted) (*Kramer and PII v. Are and Are*, 3 MILR 56, 61 (2008).)

3. Monke and Lojonen wetos

Plaintiffs characterize Justice Tuttle's 2015 High Court Judgment in relation to Monke and Lojonen wetos as speculation and conjecture. From this, we deduce cross-appellants assert the decision to be "clearly erroneous."[12]

With regard to Monke and Lojonen wetos, the High Court was faced with a different situation than with Aibwij weto. In its opinion, the TRC stated it was "very reluctant to form an opinion" with regard to these two wetos and made no explicit findings as to the title holders on those two parcels of land. The High Court examined the basis for this reluctance and found it to be that Monke and Lojonen did not appear in "Iroij book." This is perhaps understandable as the TRC stated "[t]he Iroij book lists all the watos on an atoll, and also those persons who iniherit [sic] the rights and interests to each weto." TRC 2002 Opinion at p. 2. However, Justice Tuttle noted there was "ample evidence" submitted to explain why Monke and Lojonen wetos did not appear in the Iroij book.[13] As noted by counter-claimants, the Iroij book was not a "land registry," but rather an aid to the memory of the Iroij. Further, none of the parties argued Monke and Lojonen do

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[12] See footnote 10.

[13] *See* testimony of Iroij Michael Kabua, Reviewed & Corrected Transcript of Proceedings (Volume II - Contents of the Disk marked as Bikej 2), November 28, 2001, at p. 191.

not exist.[14] While the Traditional Rights Court noted two of the defendants have not heard of Monke and Lojonen wetos, Justice Tuttle noted that the testimony by some of the parties that they had not heard of the story of Laninbit and Laemokmok did not prevent the Traditional Rights Court from finding Aibwij was *morjinkot* based on that story.

The court concluded that the reluctance could not be interpreted to mean Monke and Lojonen wetos did not exist and any such finding would be clearly erroneous. Indeed, the TRC recognized the existence of the two wetos when it stated "this court suggests that it would be appropriate and proper that the INTERVENERS file a separate action pursuing their claims on the two watos." TRC 2002 Opinion at p. 5. There was sufficient evidence presented to the TRC to support Justice Tuttle's conclusion that Monke and Lojonen wetos existed.

Justice Tuttle rejected the suggestion that "interveners" start a new case and also rejected the option of returning the matter to the TRC for additional proceedings, finding it was not in the interests of justice to do so. Having so

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[14] Plaintiffs contended that "shortly after the filing of this litigation, Aibwij was illegally and arbitrarily divided into three smaller wetos know as Aibwij, Monke and Lojonen." Cross-Appellants' Opening Brief, at pp. 4-5. However, there was evidence in the record indicating a recognition of Monke and Lojonen wetos well before that time. *See* Exhibit I-8, "Ownership of Land" Trust Territory, October 15, 1959, listing "Monke" weto and "Lojonan" weto. *See also* Exhibit I-9, dated October 31, 1959, with a similar listing.

determined, the High Court proceeded to dispose of "all of the issues in the case" as required by Rule 14 (now Rule 9) of the Rules of the Traditional Rights Court. In doing so, the court was required to "give substantial weight to the opinion of the Traditional Rights Court" (*id.*) Further,

> Should the Trial Court conclude that justice does not require that the Traditional Rights Court's resolution of any question submitted to it be binding upon it in its (the trial court's) resolution of the case before it and out of which the submitted questions arose, the Trial Court shall set forth in writing its reasons therefor and shall continue to determine the case without being bound by the Traditional Rights Court's opinion, but shall in any event give substantial weight to such opinion. (*id.*)

In determining the respective holders of the alab and dir jerbal interests in Monke and Lojonen wetos, the Justice Tuttle set forth her reasons and, by basing her decision on the principles and logic of the TRC, gave substantial weight to its opinion.

With the resolution of the issue of whether there were three separate wetos, Justice Tuttle turned to the question of title. Because of the reluctance of the TRC to address this issue, that court made no determination. However, the High Court, based upon the reasoning the TRC used in determining ownership of Aibwij, and the structure of its opinion, was able to answer those questions.

Plaintiffs based their claim to Monke and Lojonen upon the award of *morjinkot* made by Laninbit to Laemokmok. The High Court stated as a corollary:

"if the land had not been given as marjinkot, their claims would not be recognized." May 22, 2015 Decision at p. 28. In relation to the Jibke defendants' claims to Aibwij, the TRC implicitly recognized this, stating "if Iroijlaplap Jeimata Kabua had given another wato instead of Aibwij, there would be no question that they own it." TRC 2002 Opinion at p. 5.

Justice Tuttle concluded the plaintiffs did not prove their case in relation to Monke and Lojonen on two grounds. Plaintiffs' claims were based upon the gift of *morjinkot*. The TRC found in favor of plaintiffs on Aibwij. If the court had similarly concluded Monke and Lojonen to be *morjinkot* land, it would have so stated. It did not.

Secondly, Justice Tuttle found this conclusion supported by the structure of the TRC opinion. The High Court gave significance to the fact that the opinion did not discuss Monke and Lojonen until *after* resolving Aibwij. In the TRC's analysis of Monke and Lojonen, that court specifically raised the question of evidence supporting Jeimata's giving the wetos to counter-claimants. The only reason to look for evidence that Jeimata had given the land to counter-claimants would be if the TRC had determined Monke and Lojonen were not *morjinkot*, even if it were reluctant to express that opinion. The reason the TRC looked for this evidence was that it would be determinative of who owned the rights on Monke

and Lojonen because the court had already stated "if Iroijlaplap Jeimata Kabua had given another wato instead of Aibwij, there would be no question that they own it." TRC 2002 Opinion at p. 4. Justice Tuttle determined from this that the TRC implicitly concluded plaintiffs were not entitled to their claims to Monke and Lojonen wetos. The Supreme Court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision.[15] This court finds Justice Tuttle's logic to be reasonable and not clearly erroneous.

The High Court then turned to the claims of counter-claimants to Monke and Lojonen. The court noted the TRC addressed these claims questioning "[h]ow could the Intervenors assert their claim that they are the Alab and Dri Jerbal of these watos, Lojonen and Monke. If Iroijlaplap Jeimata Kabua had empowered them, then how." TRC 2002 Opinion at p. 4. Justice Tuttle's analysis here focused on the TRC's stated reliance on a set of interrogatories answered by three Kwajalein alabs. This reliance was determined to be misplaced for a number of reasons, including the fact that they were not admitted into evidence in the 2001 hearing before the TRC. Critically, the interrogatories supported the Jibke

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[15] *Kramer and PII v. Are and Are, op. cit.*

defendants', rather than counter-claimants' claims of title to Monke and Lojonen. However, the Jibke defendants, by the time of the 2001 hearing, had abandoned these claims. Justice Tuttle attributed the TRC's inability to address the issues of title on Monke and Lojonen to this confusion. The court finds High Court's logic here to be reasonable and not clearly erroneous.

Justice Tuttle then turned to review the evidence before the TRC in relation to counter-claimants' claims to Monke and Lojonen. The court found by a preponderance of the evidence the counter-claimants proved their claims to the alab and dri jerbal titles on Monke and Lojonen. The court reviewed the evidence supporting those claims.

Iroij Michael Kabua testified that the current alab on Lojonen weto was Amon Jebrjrej and Iroij Jeimata Kabua put the family on the land. He testified that Alden Bejang was the alab on Monke weto and the family was given the land by the Iroij.[16] Emlain (Jody) Juonien, the older sister of counter-claimant Calorina Kinere, testified that for Lojonen weto Calorina was the senior dri jerbal and Amon Jebrejrej was the alab.[17] Amon Jebrejrej testified he was the alab on Lojonen

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[16] Reviewed & Corrected Transcript of Proceedings (Volume II - Contents of the Disk marked as Bikej 2), November 28, 2001 at p. 129.

[17] Reviewed & Corrected Transcript of Proceedings (Volume II - Contents of the Disk marked as Bikej 2) Part II, November 28, 2001 at p. 227.

weto[18]and Calorina the dri jerbal.[19] Jerakoj Jerry Bejang testified his older brother Alden Bejang was the alab on Monke weto and Aun James the dri jerbal. He also confirmed Amon Jebrejrej was the alab on Lojonen and Calorina the senior dri jerbal.[20]

The findings drawn from this evidence are consistent with the logic behind the TRC's statement: "if Iroijlaplap Jeimata had given another wato instead of Aibwij, there would be no question they own it." TRC 2002 Opinion at p. 4.

The High Court determined:[21]

> As to Aibwij Weto, Bernie Hitto holds the alab interest and Handy Emil holds the senior dri jerbal interest.
>
> As to Monke Weto, Alden Bejang holds the alab interest and Aun James holds the senior dri jerbal interest.
>
> As to Lojonen Weto, Amon Jebrejrej holds the alab interest and Calorina Kinere holds the senior dri jerbal interest.

We find the High Court's conclusions are consistent with Traditional Rights Court Rule 14 then in effect.[22] The High Court's findings are reasonable and are

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[18] Reviewed and Corrected Transcript of Proceedings, December 10, 2001 at p. 19.

[19] Reviewed and Corrected Transcript of Proceedings, December 10, 2001 at p. 22.

[20] Reviewed and Corrected Transcript of Proceedings, December 19, 2001 at p. 23.

[21] May 22, 2015 Decision at p. 37.

[22] As well as with current Rule 9.

supported by credible evidence. They are not clearly erroneous.

Based on the forgoing, the High Court Judgment is AFFIRMED.

DATED: 7/28, 2017

James Plasman
Acting Chief Justice

DATED: 7/27, 2017

J. Michael Seabright
Associate Justice

DATED: 7-27, 2017

Barry M. Kurren
Associate Justice