IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

LOKURO ISHIGURO,

Appellant,

v.

IMAM MATIULLAH JOYIA & AHMADIYYA MUSLIM JAMA' AT REPUBLIC OF THE MARSHALL ISLANDS, INC.,

Appellees.

Supreme Court No. 2017-001
(High Court Case No. 2015-062)

OPINION

BEFORE: CADRA, Chief Justice; SEABRIGHT,* and SEEBORG,** Associate Justices

CADRA, C.J. with whom SEABRIGHT, A.J. and SEEBORG, A.J., concur:

Appellant, Lokuro Ishiguro, appeals an order of the High Court granting summary judgment and dismissing his claims against Appellee, Ahmadiyya Muslim Jama' at Republic of the Marshall Islands, Inc. (hereinafter "Muslim Temple") with prejudice. For the reasons set forth below we affirm.

I. INTRODUCTION

This case arises out of a dispute involving a ground lease between lessor Tebro Nera Nena (Nena)[1] and lessee Muslim Temple and a subsequent modification or amendment to that

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

** The Honorable Richard Seeborg, U.S. District Judge, Northern District of California, sitting by designation of the Cabinet.

[1] As recognized by the High Court, "the documents in the court's file contain several different spellings of the parties' and other persons' names." The High Court used "the most commonly appearing variation of each person's name." We use the same spellings as did the High Court.

ground lease which reduced annual lease payments from $1,000.00 per year to $1.00 per year for the remainder of the lease term.

The original "ground lease" provided that Nena would distribute lease payments received from Muslim Temple to Appellant Ishiguro in accordance with Marshallese custom and tradition and pursuant to a rent agreement. The initial lease rate was $1,000.00 per year, which would increase by $100.00 every ten years for the duration of the lease. Nena made payments to Ishiguro and who accepted them.

Subsequent to the original ground lease, Nena and the Muslim Temple entered into a "Modification of Ground Lease Agreement" whereby lease payments were reduced from $1,000.00 per year to $1.00 per year for the remainder of the lease term. After this "Modification of Ground Lease Agreement," Ishiguro was not distributed the amounts which were due him under the original ground lease. Nena died soon after entering into the "Modification of Ground Lease Agreement."

After Nena's death, Ishiguro sued Muslim Temple alleging a claim for breach of the original ground lease agreement. Ishiguro alleged he never consented to an amendment of that. He further alleged he has not been paid sums due him under that lease agreement and pursuant to a 1989 "Agreement" entered into between himself and Nena resolving Alab and Senior Dri Jerbal rights on the land which was subject to the lease, Toeak weto.

The Muslim Temple moved to dismiss Ishiguro's complaint for failure to state a claim under Marshall Islands Rules of Civil Procedure ("MIRCP"), Rule 12(b)(6), which was converted to a Rule 56 motion for summary judgment. In opposing the motion Ishiguro asserted the Marshallese custom of *Drien Bujirok* applies to this case and that his consent was necessary

to any actions taken by Nena involving her exercise of Senior Dri Jerbal rights affecting the land subject to the lease and the subsequent modification.

Summary judgment was entered in favor of the Muslim Temple. The High Court reasoned that the 1989 "Agreement" resolving Alab and Dri Jerbal rights and title to the land leased in favor of Nena was "clear and unambiguous;" that the 1989 "Agreement" did not reference the Marshallese custom of *Drien Bujirok*; and found as a matter of law that Nena was not obligated to obtain Ishiguro's consent for the original ground lease or its modification. This appeal followed.

As further discussed below, we find no genuine issue of material fact regarding the applicability of the custom of *Drien Bujirok* to the facts of this case. The evidence before the High Court regarding the custom of *Drien Bujirok* consisted of the declaration of Kalamen Jinuna, a recognized expert on Marshallese custom. Jinuna explained that *Drien Bujirok* applies to a conveyance of traditional land rights and title upon a member of the bwij "by the person holding the right and title to the land." Thus, for the custom to apply Ishiguro had to produce some evidence that he was the rightful holder of the right and title to the land at the time he recognized Nena as holding the Alab and Senior Dri Jerbal interests by the 1989 "Agreement." Ishiguro did not produce any evidence that he was the holder of the Senior Dri Jerbal rights to the land at the time he executed the 1989 "Agreement." Having failed to produce such evidence, there is no genuine issue of material fact regarding application of the custom of *Drien Bujirok* to this case. We further find the High Court did not err in finding the 1989 "Agreement," the "ground lease" and the subsequent "modification of ground lease" were "clear and unambiguous," not requiring the consent of Ishiguro, and that those agreements are valid under the Constitution, Art X, Sections (1) and (2). We, accordingly, affirm.

II. FACTS

On May 6, 2011, Appellee Muslim Temple entered into a ground lease for a certain portion of Toeak weto, Uliga Island, Majuro, with Nena. The lease provided that lessee Muslim Temple would pay the landowners $1,000 per year, which rate was to increase by $100 every ten years. The term of the lease was for 30 years beginning on May 1, 2013 and ending on April 30, 2041 with an option by Muslim Temple to renew for two additional terms of 30 years.

Nena signed the 2011 ground lease on behalf of the landowners as both Alap and Senior Dri Jerbal. The ground lease warranted that there was no Iroijlaplap or Iroijedrik interest on the leased premises. Under Section 4 of the ground lease the landowners (Nena) undertook the duty of distributing lease payments received pursuant to Marshallese custom and tradition. Muslim Temple, as lessee, was to "have no control over or legal responsibility for the distribution scheme of the lease." Section 4 of the ground lease acknowledged that "there is a rent sharing agreement by which part of the rent payments are distributed by the landowners to Rose Maddison and Lokuro Ishiguro."

It is undisputed that Nena held the Alap title and interest to Toeak weto at the time the May 6, 2011, ground lease was entered into. Nena also held the Senior Dri-Jerbal title and interest to Toeak weto by virtue of an Agreement dated August 15, 1989, between Appellant Lokuro Ishiguro and Nena. This August 15, 1989, Agreement provided that Nena "will exercise and hold the Senior Dri Jerbal interest and title to Toeak weto for her lifetime." Upon Nena's death the Senior Dri Jerbal title and interest was to pass to the oldest surviving child of Molik Ishiguro. The 1989 Agreement provided that Nena was to pay Lokuro Ishiguro 25% of her Senior Dri Jerbal share of land use payments on Toeak weto "including all income received since the date of judgment in Civil Action No. 1983-41 and including those shares in escrow or due

and owing but not yet received" during her lifetime. Both Ishiguro and Nena signed the "Agreement" along with their attorneys.

On May 1, 2013, a "Modification of Ground Lease Agreement" was entered into between Nena, signing as both Alap and Senior Dri Jerbal, and the Muslim Temple. This lease modification reduced the annual lease payment from $1,000.00 per year to $1.00 per year for the remainder of the lease term. All other provisions of the original May 6, 2011, ground lease remained in effect.

Ishiguro did not receive his share of the lease payments under the original ground lease agreement subsequent to the May 1, 2013, "Modification of Ground Lease Agreement." Nena passed away on or about November 11, 2013. Ishiguro, through counsel, sent several notices of default under the original ground lease to Muslim Temple.

III. PROCEDURAL BACKGROUND

A. Ishiguro's Complaint

On March 31, 2015, Lokuro Ishiguro filed a Complaint against Imam Matiullah Joyia and Ahmadiyya Muslim Jama' at Republic of the Marshall Islands, Inc. The complaint alleges Ishiguro currently holds the Senior Dri Jerbal title on Toeak weto. Ishiguro conceded the validity of the May 6, 2011 ground lease stating Nena had obtained his consent to that lease. Ishiguro further alleged that Nena was obligated by the August 15, 1989 Agreement to obtain his consent before Nena signed any documents affecting his Senior Dri Jerbal rights to Toeak weto. Ishiguro alleged he never agreed to or approved any amendments to the lease. He claimed Muslim Temple failed to comply with the ground lease sections 3(a) and (b) whereby Muslim Temple was obligated to pay an annual lease of $1,000 per year due on April 15 of each preceding year to Nena. Ishiguro alleged Muslim Temple failed to make lease payments from

April 15, 2014, as required by the original 2011 ground lease. Ishiguro sought a declaration that Muslim Temple had breached the lease and that the lease was terminated. He also sought eviction of Muslim Temple from the leased portion of Toeak weto. The complaint did not allege any violation of Marshallese custom but rather alleged the 1989 Agreement required his consent for Nena to transfer or lease the land.

B. Muslim Temple's Motion to Dismiss and Conversion to a Motion for Summary Judgment

On May 12, 2015, Muslim Temple filed a motion to dismiss for failure to state a claim upon which relief can be granted under MIRCP, Rule 12(b)(6) and failure to join an indispensable party under Rule 12(b)(7). Muslim Temple sought dismissal because the 1989 Agreement did not require Ishiguro's consent for Nena to exercise her rights as Senior Dri Jerbal; Ishiguro's consent was not needed for the original ground lease or its subsequent modification; and the original land lease agreement placed no duty on Muslim Temple to distribute lease payments, rather that was the duty of the Alab. The motion also sought dismissal for failure to name an indispensable party, John Nena, the current Alab.

On June 25, 2015, Ishiguro filed an opposition to Muslim Temple's motion to dismiss. In his opposition, Ishiguro alleged the 1989 "Agreement" was subject to the Marshallese custom of *Drien Bwijrok* under which Nena was obligated to "always consult the plaintiff (Ishiguro) on every matter, legal or otherwise, that would affect his current and future traditional land rights." Ishiguro alleged Nena "for unexplained reasons or without good cause" ignored her duty to consult with him when she reduced the annual lease amount to $1.00 per year by the May 1, 2013, "Modification to Ground Lease Agreement." Ishiguro suggested "there may be the possibility that Alab Tebro (Nena) was under undue influence or duress." Ishiguro claimed he was currently entitled to $333.33 per year from 2013 forward and that Muslim Temple had

breached its duty to him under the original ground lease "because it relies on the Modification or Amendment signed by Alab Tebro (Nena) over the objection or disapproval of Plaintiff." Ishiguro contended Muslim Temple defaulted under the original ground lease and requested an order that Muslim Temple compensate him for the amounts due under the original ground lease or alternatively rescind the ground lease and evict Muslim Temple.

Attached to Ishiguro's opposition was a "Declaration of Kaleman Jinuna," an expert in Marshallese custom. Jinuna explained the Marshallese custom of *Drein Bujirok* was an "important Marshallese custom wherein traditional land rights and titles may be conveyed upon a member of the bwij by the person holding the right and title to the land. This is usually done out of love and respect for an elderly and very close kin of the grantor. In return the grantee is obligated under custom to consult and get the consent and approval of the grantor on all matters, legal or otherwise, concerning the land rights of the grantor." An affidavit of Ishiguro was submitted with the opposition but was stricken by subsequent High Court order for reasons not pertinent to the instant appeal.

On July 2, 2015, Muslim Temple filed a reply to Ishiguro's opposition reiterating its argument that Ishiguro had submitted no evidence to support his claim that Nena needed his consent to sign the ground lease and its modification; that Ishiguro's claims, if he had any, were properly against the current Alab; and that Ishiguro had submitted no evidence that the Marshallese custom of *Drein Bwijrok* applies to the fact of this case. Muslim Temple argued that the 1989 Settlement Agreement was not the result of Ishiguro's "great love and respect for his aunt (Nena)" but, rather, was the product of "protracted litigation" between Ishiguro and Nena in the case of *Zion v. Peter,* High Court Case No. 1989-4-7, Appeal No. 89-09. The 1989 Agreement was prepared by the parties' attorneys and did not reference the custom of *Drien*

Bwijrok or reference any requirement that Nena obtain Ishiguro's consent before exercising her Senior Dri Jerbal rights. Further, Muslim Temple claimed it had the right to rely on the lease signed by Nena "as the undisputed title holder of Toeak weto." Finally, Muslim Temple argued that Ishiguro had to look to the current Alab for any payment due under the lease, not Muslim Temple.

On September 20, 2016, the High Court entered an order converting Muslim Temple's Rule 12(b)(6) motion to a motion for summary judgment under Rule 56 because matters outside the pleadings had been submitted for consideration. Ishiguro was given until December 8, 2016, to submit any additional material and Muslim Temple was given until January 19, 2017, to submit any materials in reply.

On October 11, 2016, Ishiguro filed his affidavit (his previous affidavit having been stricken because it had not been signed when filed) along with Exhibits consisting of the May 6, 2011 "Ground Lease Agreement;" a "Legal Description" of the portion of Toeak weto subject to the ground lease; the 1989 "Agreement" between Ishiguro and Nena; the May 1, 2013, "Modification of Ground Lease;" a "Lease Agreement" between Nena and Majuro Stevedore and Terminal Company dated January 12, 1995; a "Notice of Default" dated October 13, 2014, sent by Ishiguro's counsel to Muslim Temple; an "Eviction Notice" dated January 28, 2013, sent by Ishiguro's counsel to Muslim Temple; Muslim Temple's counsel's January 29, 2016, response to Ishiguro's counsel; and a Certificate of Death indicating Nena died on November 11, 2013. On January 19, 2017, Muslim Temple filed a "Reply to the Affidavit of Lokuro Ishiguro."

The above referenced pleadings, papers and affidavits constitute what the High Court had before it for consideration when ruling on the motion to dismiss which had been converted to a Rule 56 motion for summary judgment.

C. The High Court's Order of Dismissal, Subsequent Orders and Filings

On January 30, 2017, the High Court entered a "Partial Ruling Arising From Motion To Dismiss." The court dismissed Iman Matiullah as he was not an individual party to any of the challenged lease agreements and no claims had been asserted against him by Ishiguro's complaint on which he might be personally liable. The court *sua sponte* found that Ishiguro was a third-party beneficiary of the lease and, therefore, entitled to sue to protect his interests under the rent sharing agreement. The court concluded that the August 15, 1989, "Agreement" was "clear and unambiguous" as a matter of law and that the court was required to give effect to its terms as written. The 1989 Agreement did not reference the custom of *Drien Bujirok* and said nothing about any requirement for Nena to obtain Ishiguro's advice or consent on matters affecting Toeak weto. The court thus concluded as a matter of law that Nena was not obligated to obtain Ishiguro's consent to the ground lease or its subsequent amendment and that the amendment was valid. The court allowed the parties additional time in which to submit proof regarding the payment of Ishiguro's share of the payments under the lease for 2013, 2014, 2015, and 2016. Muslim Temple submitted proof of lease payments of $1.00 for those years. Ishiguro did not submit any proof of payment or nonpayment of those lease amounts by the court-imposed deadline of March 6, 2017.

On March 22, 2017, Ishiguro filed a "Motion for Reconsideration and To Set Aside Entry of Order of Dismissal Without (sic) Prejudice." Ishiguro claimed he was not aware of the March 6, 2017 order for submitting proof of payment/non-payment and asserted the court had ignored customary law in reaching its January 30, 2017, Partial Ruling. Ishiguro requested an extension of time to submit proof of nonpayment and sought leave to amend his complaint "to accommodate the issues raised by the court."

On March 29, 2017, the High Court issued an "Interim Order" allowing Ishiguro until April 19, 2017, to file proof of non-payment and denied reconsideration of its January 30, 2017, "Partial Ruling Arising From Motion To Dismiss." On April 19, 2017, Ishiguro submitted his evidence of non-payment of the lease amounts.

On April 21, 2017, the High Court entered its "Order Denying Motion For Reconsideration and To Set Aside Entry of Order of Dismissal."

On May 18, 2017, Ishiguro filed a "Motion to Stay Order of Dismissal With Prejudice Pending Appeal" with the High Court. The instant appeal followed, which was timely filed on May 19, 2017.

IV. ISSUES RAISED ON APPEAL

Ishiguro identifies six issues on appeal: "1. Whether the High Court erred in issuing an Order of dismissal without a trial on the merits of the case in an open court; 2. Whether the trial court erred in not referring the case to the Traditional Rights Court; 3. Whether plaintiff was denied due process under Article II, Sec. 4(1) of the Constitution; 4. Whether the High Court erred in finding the agreement of 1989 was valid under Article X, Sec. 1(1); 5. Whether the High Court erred in finding defendant met its annual lease payment of $1 rather than $1,000 as agreed to in the original land lease; and 6. Whether the High Court erred in dismissing with prejudice when there is substantial contrary evidence that was going to be adduced at trial supporting plaintiff's claims."

V. STANDARD OF REVIEW

The standard of review of a summary judgment is *de novo*. *Jalley v. Majilona*, 3 MILR 106, 109 (2009); *Ammu v. Ladrik, et al*, 2 MILR 20, 22 (1994). While the standard of appellate review is *de novo*, the appellate court is limited in its review in two ways. First, it can consider

only those papers that were before the trial court. The parties cannot add additional evidence to support their position on appeal. Nor can they advance new theories or raise new issues in order to secure a reversal of the lower court's determination. Second, the reviewing court may only determine whether a genuine dispute exists and whether the law was applied correctly, it cannot decide disputed issues of material fact. *See, e.g.*, 10A, Fed. Prac. & Pro., Civil 4th, Wright, Miller, Kane, Sec. 2716 (pp. 313-319 text).

Summary judgment is determined on the basis of the record. The pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, collectively are the record of the case. *Amma v. Ladrik, et al*, 2 MILR 20, 22 (1984). The court can consider admissions in the brief of a party opposing the motion in determining that there is no genuine dispute as to material fact since they are functionally equivalent to "admissions," which are expressly mentioned in Rule 56(c)(1)(A). *See, e.g.*, 10A, Fed. Prac & Pro., Civil 4th, Wright, Miller, Kane, sec. 2723 (pp. 407-409 text).

VI. DISCUSSION

A. The High Court Did Not Err in Dismissing Appellant's Complaint

1. There is No Genuine Issue of Material Fact Regarding the Meaning of the "1989 Agreement"—That Agreement is Not Subject to the Marshallese Custom of Drien Bujirok

The 1989 "Agreement" is a contract settling customary land rights and title as between Nena and Ishiguro. In a contract dispute, summary judgment is appropriate when the contract terms are clear and unambiguous. *United Brotherhood of Carpenters and Joiners of America, Lathers Local 42-L v. United Brotherhood of Carpenters and Joiners of America*, 73 F.3d 958, 961 (9th Cir. 1996.); *Waterbury v. T.G. & Y. Stores Co.*, 820 F.2d 1479, 1481 (9th Cir. 1987) (interpreting lease agreement.)

Ishiguro concedes the 1989 "Agreement" is clear and unambiguous. The only question raised on appeal by Ishiguro regarding the 1989 "Agreement" is whether it is valid according to customary law and the Constitution, Art. X, Sec. 1(1) and (2). Ishiguro contends the Marshallese custom of *Drien Bujirok* applies to the 1989 "Agreement" and that, therefore, the High Court erred in relying on the "Agreement," as it is written, as its legal ground to dismiss the case. Muslim Temple contends on appeal, as it did below, that the 1989 "Agreement" did not require Ishiguro's consent to any lease agreements entered into by Nena. Further, that "Agreement" does not reference and, therefore, is not subject to the custom of *Drien Bujirok*.

Ishiguro's assertion that the 1989 "Agreement" required Nena to obtain his consent before signing "on all legal documents affecting his Senior Dri Jerbal rights on Toeak weto" is simply unsupported by that document. We will not read into the 1989 "Agreement" a condition which is not there. Ishiguro unconditionally recognized Nena (aka Tabro Neri Nenam) as the holder of the Alap and Senior Dri Jerbal interests on Toeak weto during her lifetime. There was no mention in that "Agreement" of any requirement that Nena consult with and obtain the approval of Ishiguro prior to exercising her rights as Senior Dri Jerbal. There is no mention of the custom of *Drien Bujirok* in that "Agreement." Further, the parties to the 1989 "Agreement" were represented by counsel in a litigation context. We, like the High Court, find this fact significant in that if the "Agreement" was subject to the traditional Marshallese custom of *Drien Bujirok* or if Nena had a duty to obtain the consent of Ishiguro prior to exercising her rights as Senior Dri Jerbal, the Agreement could have so provided. It didn't. Even if Ishiguro entered into the 1989 "Agreement" with the subjective belief that *Drien Bujirok* applied to that Agreement or that Nena otherwise required his consent to enter into a lease of Toeak weto, his reliance on Marshallese custom is evidence extrinsic to that Agreement and is not to be

considered. It is a general rule of contract law that where a contract is unambiguous, the language of a contract alone expresses the parties' intent, and it must be enforced as written. Parole or extrinsic evidence may not be introduced to vary its terms. *See, e.g.*, *Hawaiian Association of Seventh Day Adventists v. Wong*, 305 P.3d 452, 461 (Haw. 2013.)

We conclude that there is no genuine issue of material fact regarding the application of the Marshallese custom of *Drien Bujirok* to the 1989 "Agreement." That custom does not apply.

2. Appellant Has Failed to Demonstrate That the Custom of Drien Bujirok Applies to the Ground Lease and/or Its Subsequent Modification

The evidence submitted to the High Court by Ishiguro regarding the custom of *Drien Bujirok* consists of the "Affidavit of Lokuro Ishiguro" dated October 11, 2016, and the "Declaration of Kalemen Jinuna" dated June 25, 2015.

According to Kaleman Jinuna's definition of *Drien Bujirok* "the grantor must be the holder of the right and title to the land conveyed to the grantee member of the bwij." Ishiguro submitted no evidence he was the rightful holder of Senior Dri Jerbal interest at the time he conceded title to Nena and/or at the time of the 2011 ground lease or subsequent 2013 modification. Further, according to the evidence adduced before the High Court, *Drien Bujirok* "is usually done out of love and respect for an elderly and very close kin of the grantor." The evidence indicates the 1989 "Agreement" arose out of contentious litigation between Ishiguro and Nena in the *Zaion, Ishiguro, et al v. Peter, Tebro Neri Nenam* case. Ishiguro failed to raise a material issue of fact that the custom of *Drien Bujirok* applies to the 1989 "Agreement," the subsequent ground lease or its modification. As such, we find Ishiguro failed to raise a material issue of fact as to the application of *Drien Bujirok* to this case. The High Court did not err in finding the 1989 "Agreement" was "clear and unambiguous" and that Ishiguro's consent was not required for the ground lease agreement or its subsequent modification.

3. The Ground Lease and Its Subsequent Modification are Clear and Unambiguous

In *Kramer and PII v. Are and Are*, 3 MILR 56, 65 (2008), this Court noted "[t]he long recognized general rule is that '[w]here language used in a lease is controverted, the controlling factor is the intent expressed in the language of the written document itself, not the intention of which may have existed in the minds of the parties at the time they entered into the lease, nor the intention the court believes the parties ought to have had. If there is a written lease, 'the provisions of the lease are conclusive and govern the rights of the parties.'" (internal citations omitted.)

As found by the High Court, we also find the ground lease and its subsequent modification are "clear and unambiguous." As such, the provisions of those leases are conclusive and govern the rights of the parties. *Id. and PII v. Are and Are, supra*.

B. An Issue of Material Fact Has Not Been Raised Regarding the Validity of the 1989 "Agreement" Under the Constitution, Article X, Section 1(1),(2)

The Constitution, Article X, Sec. 1(1) states:

> Nothing in Article II shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter in any part of the Republic of the Marshall Islands, including where applicable, the rights and obligations of the Iroijlaplap, Iroijedrik, Alap and Dri Jerbal.

Article X, Sec. 1(2) provides:

> Without prejudice to the continued application of the customary law pursuant to Section 1 of Article XIII, and subject to the customary law or to any traditional practice in any part of the Republic, it shall not be lawful or competent for any person having any right in any land in the Republic, under the customary law or any traditional practice to make any alienation or disposition of that land, whether by sale, mortgage, lease, license or otherwise, without the approval of the Iroijlaplap, Iroijedrik where necessary, Alap and the Senior Dri Jerbal of such land, who shall be deemed to represent all persons having an interest in that land.

Ishiguro suggests in his briefing that the August 15, 1989 "Agreement" is invalid or "null and void" under Article X, Sections 1(1) and 1(2) because the names and signatures of the Iroij and Iroijedrik were not obtained on that document.

Ishiguro never raised this issue below and we, therefore, hold the issue was waived. *See, e.g.*, *Tibon v. Jihu, et al*, 3 MILR 1, 6 (2005) ("It is well settled in this jurisdiction, as elsewhere, that issues not raised or asserted in the court below are waived on appeal."); *see also ITMO The Vacancy of Mayoral Seat*, 3 MILR 114, 121 (2009) (a constitutional challenge not raised in the trial court is deemed waived on appeal).

Further, Ishiguro does not identify who he contends holds or held those Iroij and Iroijedrik interests necessary to comply with the Constitution or identify whether such interests actually exist on the Toeak weto (e.g. whether Toeak weto is on Jebdrik's side, etc.) Because those interests are not identified or whether such interests even exist, no issue of fact has been raised as to whether the consent of the Iroij and/or Iroijedrik to the 1989 "Agreement" or "Modification of Ground Lease" was necessary.

Finally, as argued by Appellee, the 1989 "Agreement" is not subject to the requirements of Article X, Section 1(2) because it was not an alienation of land by "sale, mortgage, lease or other disposition of real property." As concerns Article X, Sec. 1(1) we again note that Ishiguro has failed to establish or raise a material issue of fact as to the application of the custom of *Drien Bujirok* to the 1989 agreement and subsequent leases.

C. Ishiguro Failed to Raise a Material Issue of Fact as to the Constitutionality of the Ground Lease Modification

Ishiguro argues that "it appears that the August 15 agreement and the amendment (i.e. the Modification of Ground Lease) are both inconsistent with Article X, Section 1(1) & (2) therefore

are null and void (sic)." Ishiguro urges us to take up this issue of law under our discretion recognized in *RMI v. de Brum* (1), 2 MILR 223 (2002) and *RMI v. Kabua*, 1 MILR (Rev.) 39, 40 (1986.) Although we have discretion to identify and take up questions of law on our own motion, we are not obligated to do so and we decline to do so here. Again, this issue was not raised before the High Court and was, consequently, deemed waived. Further, Ishiguro does not identify what title holder's signatures recognized by Ishiguro as the Alap and Senior Dri Jerbal on Toeak weto, other than that of Nena, by the 1989 "Agreement," were necessary to comply with the requirements of Article X, Section 1(1), 1(2).

As regards Article X, Section 1(1), Ishiguro's theory appears to be that the custom of *Drien Bujirok* applies and that his consent to the ground lease modification was necessary. Ishiguro, however, has failed to raise a material issue of fact as to the application of that custom. Again, while there may be a custom of *Drien Bujirok*, Ishiguro has failed to adduce evidence that he was the proper holder of the Senior Dri Jerbal title to Toeak weto when he conceded Nena was the proper title holder in the 1989 "Agreement." Ishiguro has raised no genuine issue of material fact regarding application of that custom.

In the absence of a genuine issue of material fact as to whether the custom of *Drien Bujirok* applies to this case, the signature of Nena as Alab and Senior Dri Jerbal on the lease modification is deemed by Article X, Section 1(2) to represent all persons, including Ishiguro, having an interest on the land leased. Because Ishiguro is deemed by the Constitution to be represented by Nena, he is bound by the terms of the ground lease modification.

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D. Ishiguro's Other Contentions on Appeal

1. The High Court's Dismissal Order Did Not Deprive Ishiguro of His Due Process Rights Under Article II, Section 4(1) of the Constitution

Ishiguro contends the High Court's dismissal of his case without a hearing on the merits deprives him of due process as guaranteed by Article II, Section 4(1) of the Constitution. That section provides "No person shall be deprived of life, liberty or property without due process of law."

It is well settled that a party is not entitled to a full-blown trial on the merits in every case. The summary judgment procedure, as provided for by MIRCP, Rule 56, is designed to promptly dispose of actions in which there is no genuine issue of fact. Its purpose is to eliminate a trial if a trial is unnecessary. *See, e.g.*, Moore's Federal Practice, 2d ed., Section 56.04(1), discussing FRCP Rule 56 on which MIRCP Rule 56 is modeled. Similarly, a Rule 12(b)(6) motion is designed to dispose of actions without trial if a claim is not stated. Due process requires only that the parties be given notice and an opportunity to be heard.

"The fundamental aspects of procedural due process are notice and an opportunity to be heard." *Dribo v. Bondrick, et al*, 3 MILR 127, 139 (2010) citing *Navarro v. Chief of Police*, 1 MILR (Rev.) 161, 165 (1989) and *Goldberg v. Kelly*, 397 U.S. 254, 268-9 (1970). Beyond the minimum requirements of notice and an opportunity to be heard, due process "is flexible and calls for such procedural protections as the particular situation demands." *Dribo, supra*, at 139, citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1973).

Review of the record reveals Ishiguro received notice of the motion to dismiss and its conversion to a motion for summary judgment. Ishiguro was afforded an opportunity to respond and be heard. Ishiguro does not explain how his due process rights were denied by the High

Court's order dismissing his case and presents no authority that a hearing on the merits was required prior to dismissal. We find no due process violation.

2. The High Court Did Not Err in Finding Muslim Temple Paid Annual Lease Payments for the Years 2013 Through 2016

Ishiguro argues the 2013 ground lease modification was not valid and Muslim Temple is therefore obligated to pay the $1,000.00 annual lease payments pursuant to the original ground lease for the years 2013, 2014, 2015, and 2016. As discussed above, we find Ishiguro's premise that the 2013 ground lease modification is invalid is without merit. The evidence adduced before the High Court was that Muslim Temple paid the annual lease payments pursuant to the ground lease modification over this time frame. There is no contrary evidence in the record and we find no error in the High Court's April 21, 2017 Order finding that Muslim Temple paid the annual lease payments as required by the ground lease modification.

3. The High Court Did Not Err in Not Referring This Case to the Traditional Rights Court

Ishiguro's complaint did not raise an issue of customary law. Ishiguro did not comply with the procedures for invoking the jurisdiction of the Traditional Rights Court provided by The Traditional Rights Court Rules of Procedure, Rule 1, when filing his complaint or any time thereafter. Ishiguro has cited no authority that the High Court has the duty to *sua sponte* refer an issue to the Traditional Rights Court absent proper and timely request by a party. Further, as discussed above, we find that Ishiguro has failed to identify an issue of fact raising the Marshallese custom of *Drien Bujirok* as applicable to this case. We accordingly find no error by the High Court in failing to refer this issue to the Traditional Rights Court.

VII. CONCLUSION

We limit our review to the issues and legal theories as raised by the parties in this appeal. We have no obligation to raise arguments or theories not raised below or on appeal. *See, e.g.*, *State v. Johnson*, 416 P.3d 433, 449 (Utah 2017) ("Under our adversarial system, the parties have the duty to identify legal issues . . . . This duty of the parties exists in both the trial court and the appellate court. If the parties fail to raise an issue in either the trial or appellate court they risk losing the opportunity to have that court address that issue.").

The main issue presented to us was whether the Marshallese custom of *Drien Bujirok* required Ishiguro's consent to the ground lease modification reducing the annual lease payment of $1,000.00 to the significantly lower amount of $1.00. As discussed above, Ishiguro failed to raise a genuine issue of material fact as to the application of that custom to the facts of this case. There being no issue of fact in that regard, the High Court did not err in holding the parties to the "clear and unambiguous" language of the 1989 "Agreement" and subsequent 2013 "ground lease modification." There being no issue of fact regarding the application of this custom, the High Court did not err in not referring this case to the Traditional Rights Court or dismissing Ishiguro's claims.

Dated: September 9, 2019

/s/ Daniel N. Cadra
Daniel N. Cadra
Chief Justice

Dated: September 9, 2019

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice

Dated: September 9, 2019

/s/ Richard Seeborg
Richard Seeborg
Associate Justice