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Opinions and Selected Orders 2015 through 2022

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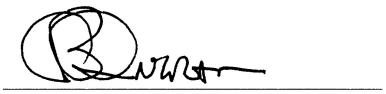

Carl B. Ingram
Chief Justice, High Court

TABLE OF CASES

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

JOHN MARTIN NIEDENTHAL,
(a.k.a. Jack Niedenthal), Plaintiff-Appellee,
v.
ROBSON YASHIO ALMEN (in his capacity as Chief Electoral Officer), Defendant-Appellant.

SCT CN2015-001 (HCT CN 2014-263)

ORDER DENYING "MOTION FOR STAY"

Submitted May 4, 2015
Filed June 3, 2015

Summary

In its Order Denying Motion for Stay pending appeal, the Supreme denied the motion by Appellant Chief Electoral Officer ("CEO") to stay the High Court's decision that Appellee Niedenthal was qualified to run for a seat in the Nitijela. The Court's decision was based on several findings. First, the Court determined that the Appellant CEO had not shown that the Government would suffer irreparable harm if the motion for a stay were denied. Second, the Court emphasized that if the stay were denied and Niedenthal was elected, and later the Court found that he was not qualified to run, the Court could still vacate his election, providing a remedy. Third, in contrast, if the Court granted the stay and later determined that Niedenthal was indeed qualified to run, he and those who would vote for him would suffer irreparable harm because there would be no mechanism for a re-do election. Fourth, the Court also weighed the harm to the Government against the harm to Appellee Niedenthal and found that any potential harm to the Government did not outweigh the harm to Niedenthal. Fifth, the Court determined that the public interest did not favor either party in this matter. Finally, the Court found that the Appellant CEO had not demonstrated a substantial likelihood or probability of success on the issues raised in its underlying appeal.

Digest

1. CIVIL PROCEDURE – *Stay – Purpose*: The purpose of a stay is to preserve the status quo pending the outcome of an appeal.

2. CIVIL PROCEDURE – *Stay – Irreparable Harm*: Because a stay intrudes into ordinary judicial review, it is generally not a matter of right even if irreparable injury might otherwise result.

3. CIVIL PROCEDURE – *Stay – Burden of Proof*: The party requesting the stay bears the heavy burden of showing the circumstances justify a stay.

4. CIVIL PROCEDURE – *Stay – Traditional Test*: Although there have been various formulations of the traditional test for granting a stay, it is generally held that the moving party must show (1) that the moving party will suffer irreparable injury if the relief is not granted, (2) the moving party will probably prevail on the merits or has a substantial likelihood of success on the merits, (3) the balance of hardships favors the moving party, and (4) the public interest favors granting relief.

5. CIVIL PROCEDURE – *Stay – Alternative Standard*: The courts have also recognized an "alternative standard" for granting preliminary relief, such a stay pending appeal. Under the "alternative standard," the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions exist and the balance of hardships tips sharply in its favor. This last formulation represents two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

6. CIVIL PROCEDURE – *Stay – Irreparable Harm*: In order to demonstrate irreparable harm, it must be shown there is an injury that is certain, great, actual, and not theoretical, and not merely serious or substantial.

7. CIVIL PROCEDURE – *Stay – Imminent Harm*: It must also be shown that the harm is imminent.

8. CIVIL PROCEDURE – *Stay – Irreparable Harm*: The key word in considering irreparable harm is irreparable, which means that mere harm — even if substantial — in terms of money, time, and energy that would be expended is not enough.

9. CIVIL PROCEDURE – *Stay – Irreparable Harm*: In short, irreparable harm, as the name suggests, is harm that cannot be undone.

Counsel

David M. Strauss, counsel for Appellee John Martin Niedenthal
Rosalie Aten Konou, Assistant Attorney-General, counsel for Appellant Robson Yashio Almen (In his capacity as Chief Electoral Officer)

NIEDENTHAL v. ALMEN, CEO

Before: CADRA, Chief Justice, and SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

ORDER DENYING "MOTION FOR STAY"

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

The Court has before it Appellant's "Second Motion for Stay of Judgment and Bond (sic)" (hereinafter "motion for stay") filed April 24, 2015.

The Court has, by previous order, determined that oral argument will not substantially aid the Court in resolving the issues raised by Appellant's "motion for stay" and has dispensed with oral argument. The parties briefing and existing record has been considered.

As discussed herein, Appellant has not demonstrated it will suffer irreparable harm. Additionally, the Court finds that any harm to Appellant does not outweigh the harm to Appellee, that the public interest favors neither party, and that Appellant has not demonstrated a substantial likelihood or probability of success on the issues raised in its underlying appeal. Therefore, Appellant's "motion for stay" is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the eligibility of Appellee, Jack Niedenthal, to run as a candidate for the Nitijela in the upcoming 2015 general election. Appellant, Robson Yashio Almen, in his capacity as Chief Electoral Officer, denied Niedenthal's eligibility based on provisions of Elections and Referenda Act (1980). Niedenthal sought relief before the High Court. On February 25, 2015, the High Court entered an Order Granting Summary Judgment in favor of Niedenthal. The High Court found that Niedenthal met all constitutional qualifications to run as a candidate for the Nitijela in the upcoming general election. The court further held that the Nitijela did not have the constitutional authority to change or add to those qualifications set forth by the Constitution by legislation (e.g., through provisions in the Elections & Referenda Act).

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

On March 26, 2015, Appellant filed a Notice of Appeal in the Supreme Court.[3] On April 2, 2015, Appellant filed a "Motion for Stay of Judgment & Bond" in the Supreme Court. On April 7, 2015, the Supreme Court denied Appellant's "Motion for Stay" without prejudice due to Appellants failure to comply with requirements of Supreme Court Rule of Procedure 8 and failure to show "good cause" for dispensing with the requirements of that Rule. Appellant then filed a "motion for stay" with the High Court. On April 24, 2015, the High Court, Associate Justice Dinsmore Tuttle, issued a thorough and well-reasoned "Order Denying Motion For Stay of Judgment." The High Court addressed each of the four factors referenced by the Supreme Court in *Nuka v. Morelik*, 3 MILR 39 (2009) and found that under either the "traditional test" or "alternative (sliding scale) test," the Republic (Appellant) had failed to demonstrate that a stay of judgment pending appeal should issue. The instant motion for stay before the Supreme Court followed on April 24, 2015.

II. LEGAL STANDARD

[1][2][3]The purpose of a stay is to preserve the status quo pending the outcome of an appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (l0th Cir. 1996). Because a stay intrudes into ordinary judicial review, it is generally not a matter of right even if irreparable injury might otherwise result. *Nken v. Holder*, 556 U.S. 418, 427 (2009). The party requesting the stay bears the heavy burden of showing the circumstances justify a stay. *Id*. at 433-34.

[4]Although there have been various formulations of the "traditional test" for granting a stay, it is generally held that the moving party must show (1) that the moving party will suffer "irreparable injury" if the relief is not granted, (2) the moving party will probably prevail on the merits or has "a substantial likelihood of success on the merits," (3) the balance of hardships favors the moving party, and (4) the public interest favors granting relief. *See, e.g.*, *Nuka v.*

[3]Niedenthal points to a deficiency in Appellant's Notice of Appeal as it was filed in the Supreme Court rather than in the High Court as is required by Supreme Court Rule of Procedure 3(a)(l). See Opposition, at 2. This procedural anomaly is not addressed in this decision.

Morelik, supra, citing Cassim v. Bowen, 824 F.2d 791, 795 (9th Cir. 1987); *Nken v. Holder*, 556 U.S. 418 (2009)[4].

[5]The courts have also recognized an alternative standard for granting preliminary relief, such a stay pending appeal. Under the "alternative standard," the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions exist and the balance of hardships tips sharply in its favor. This last formulation represents two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Nuka v. Morelik, supra,* citing *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

III. ANALYSIS

A. Appellant has failed to make a showing it will suffer "irreparable injury" if the stay is not granted.

Appellant asserts that irreparable injury will be sustained absent a stay but does not identify what that irreparable injury may be.

[6][7][8][9]In order to demonstrate irreparable harm, it must be shown there is an injury that is "certain, great, actual, and not theoretical," and not "merely serious or substantial." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (loth Cir. 2003). It must also be shown that the harm is "imminent." *Id.* The key word in considering irreparable harm is irreparable, which means that mere harm — even if substantial — in terms of money, time, and energy that would be expended is not enough. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). In short, "irreparable harm, as the name suggests, is harm that cannot be undone." *Salt Lake Tribune Publ'g Co. LLC v. AT&T Corp.*, 320 F.3d 1081, 1105 (l0th Cir. 2003).

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[4]The United States Supreme Court articulated the four-factor test as (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken*, at 434.

Appellant has not demonstrated irreparable harm. There is a remedy available to Appellant if the stay is denied and Appellant ultimately prevails on appeal. If a stay does not issue and if Niedenthal is elected into office but it is later determined that is he is constitutionally ineligible to hold office then Niedenthal's seat would be vacated and a new election for that seat would be held pursuant to Article IV, Section 6(2) of the Constitution. The Constitution, itself, provides a remedy if Niedenthal is found not eligible to hold office and, therefore, any alleged injury is not irreparable.

On the other hand, if a stay issues and Niedenthal is not allowed to be on the ballot and if this appeal is later determined in his favor, there is irreparable injury to Niedenthal and to those voting members of the public who would have chosen Niedenthal as their representative. In such a case there is no mechanism for a re-do of the election.

Because there is a remedy if the stay does not issue, the Court finds Appellant has failed to demonstrate irreparable injury.

B. Appellant Has Failed To Make A Showing of Probable Success On the Merits.

Appellant repeatedly asserts that the Elections & Referenda Act's requirement of possession of traditional land rights and having either a mother or father of Marshallese descent with customary "jowi" is constitutional and that Niedenthal meets neither of these requirements. Additionally, Appellant asserts Niedenthal is not qualified as a candidate under the Constitution, Article IV, Sections 3 and 4. Appellant, however, cites absolutely no authority or reasoning in support of these assertions.

Appellant argues that Articles I, IV, and X of the Constitution convey the authority to the Nitijela to legislate additional requirements to matters addressed by the Constitution concerning the qualifications of Nitijela candidates.[5] Appellant cites no authority in support of its argument. While there may be a method for amending the Constitution regarding candidate qualifications,

[5] *See* 4/22115 Reply at 2-4.

the Nitijela has not utilized such methods available to it. In light of the supremacy clause of Section 1(2), the procedures for amending the Constitution found in Article XII, and in the absence of any authority in support of Appellant's argument, the Court finds Appellant's arguments do not meet the requirement of demonstrating probable success on the merits.

Under the *Nken* and *Nuka* tests, the Court does not find there is a probability or substantial likelihood Appellant will prevail on the merits of its appeal based on the arguments presently before the Court.

C. Balance Of Hardships

Appellant does not address the balance of hardships criteria. Because Appellant will not suffer irreparable harm if a stay does not issue and because Niedenthal may be left without remedy should a stay issue and he later prevail on appeal after the election is held, the balance of hardship favors Niedenthal.

D. The Public Interest Favors Neither Party.

The final factor under Nken and Nuka asks for a determination of where the public interest lies. There is undoubtedly great public interest in how this appeal is resolved. It cannot be said, however, that the public interest favors one litigant over the other. The public interest is rather that the election and all candidates' qualifications to run for office be determined and comply with the Constitution and other laws as may be applicable. Appellant has failed to show that the public interest supports its stay application.

III. CONCLUSION

Appellant has failed to demonstrate it is entitled to a stay of judgment pending resolution of this appeal. Appellant's motion for stay is **DENIED**.

Because a stay is not issued, unless the Supreme Court rules otherwise on the merits of the pending appeal before the election, Neidenthal shall not be prohibited from running in the November 2015 general election.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

JOSEPH JORLANG, in his official capacity as Chief Electoral Officer, Plaintiff-Appellee,
v.
FLORENCE SIMEON, *et al.*, Defendants-Appellants.

SCT CN2011-001 (HCT CN 2008-068)

APPEAL FROM THE HIGH COURT

Argued July 8, 2015
Filed October 12, 2015

Summary

The Supreme Court ruled that the Administrative Procedures Act ("APA") does not apply to the Chief Electoral Officer's new definition of the "date of election"; therefore, the High Court's decision is affirmed. Prior to the 2007 general election, the CEO had accepted postal ballots postmarked in the United States on the "date of the election" — a day after the election in the Marshall Islands, given that the United States is on the other side of the dateline. For the 2007 general election, the CEO rejected postal ballots postmarked in the United States on the "date of the election," having re-defined "date of the election" for postal ballots as the day of election in the Marshall Islands. Appellants did not argue that the CEO's interpretation was not reasonable, but instead they argued that in adopting the new interpretation, the CEO violated the APA's requirements (notice-and-comment period, Cabinet approval, and publication of effective rules, all of which the CEO did not do), so their ballots should be counted. The Supreme Court, citing *Bien v. MI Chief Electoral Officer*, 1 MILR 94 (S.Ct. Civil 90-01), held that where the Elections and Referenda Act sets forth a specific and distinct procedure that the CEO must follow for the decision at issue, the CEO must follow the Elections and Referenda Act, not the APA. As appellants did not argue whether the CEO complied the requirements of the Election and Referenda Act, the Supreme Court rejected the appellants' limited argument made on appeal that the CEO did not comply of the APA.

Digest

1. APPEAL AND ERROR – *Mootness*: The questions raised are not moot. As the High Court aptly explained, there will be future elections involving overseas postal voters whose votes may be affected by the matter at issue, and it is a matter of significant public interest, as it

involves both the right to vote for postal voters residing outside the country, and the integrity of the electoral process.

2. ELECTIONS AND VOTING – *Conduct of Elections*: he RMI APA does not apply where the Election and Referenda Act sets forth a separate and distinct procedure for CEO to follow.

Counsel

Natan Brechtefeld, Attorney-General, counsel for Appellee Joseph Jorlang, in his official capacity as Chief Electoral Officer
David M. Strauss, counsel for Defendants-Appellants Florence Simeon, *et al.*

Before: CADRA, Chief Justice, and SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

OPINION

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

I. INTRODUCTION

During the November 19, 2007 General Election, the Republic of the Marshall Islands ("RMI") Chief Election Officer ("CEO") refused to count certain absentee postal ballots because they were post-marked in the United States on or after November 19, 2007 — a day after the RMI election given that the United States is on the other side. of the International Date Line. The CEO came to this conclusion by construing the phrase "date of election" in 2 Marshall Islands Revised Code ("MIRC") § 162(3) as referring to the date of the election in the RMI, which differed from the established practice in previous elections allowing such ballots so long as they were postmarked on the date of the election in the United States.

Appellants are individuals whose ballots were rejected in the 2007 General Election, and they seek review of the December 6, 2010 High Court Judgment finding that the CEO's interpretation was reasonable, persuasive, and consistent with 2 MIRC § 162(3). Appellants

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

argue that the CEO failed to follow the provisions of the RMI Administrative Procedures Act ("APA") regarding such rule changes, and that the CEO therefore erred in rejecting their ballots. Based on a *de novo* review, we find that the RMI APA does not apply to the CEO's new definition of "date of election" and therefore **AFFIRM**.

II. BACKGROUND

The facts are largely undisputed. The 2007 General Election was Monday, November 19, 2007. Appellants submitted their votes via absentee ballots mailed from the United States, postmarked November 19, 2007. The CEO rejected these ballots based on a new interpretation of the phrase "date of election" found in 2 MIRC § 162(3), which provides in relevant part that absentee ballots "must be placed in the mail and be postmarked on or before the date of election . . . ." The CEO construed the phrase "date of election" to mean the date of election in the RMI, such that ballots were required to be postmarked on the date of the election in the RMI, not the date where the postal ballot was mailed. Thus, ballots postmarked November 19, 2007, in the United States were late because it was November 20, 2007, in the RMI when they were postmarked.

The CEO's construction differed from previous elections — in all previous General Elections, postal ballots postmarked on the date of the General Election in the United States were accepted and counted by the CEO. Further, in adopting this change, the CEO did not consider or comply with the provisions of the RMI APA. Regardless, counting the excluded votes would not have changed the results of the General Election.

After Appellants challenged the CEO's rejection of their ballots, the CEO filed this action seeking a declaratory judgment that the High Court uphold the CEO's "decision not to count postal ballots US postmarked on or after November 19, 2007." In its December 6, 2010 Judgment, the High Court found that although the CEO's actions were not consistent with the RMI APA, the interpretation was nonetheless entitled to respect as persuasive and "consistent with the language of the statute and the legislative intention to protect the integrity of the

electoral process by not allowing postal votes to be cast after the closing of the polls in the Marshall Islands." Judgment at 2. On January 5, 2011, this appeal was filed.

III. ANALYSIS

Appellants do not dispute that the CEO's new interpretation of the phrase "date of election" found in 2 MIRC § 162(3) is reasonable. Rather, at issue is whether the CEO violated the RMI APA in adopting this new interpretation, and if so, whether Appellants are entitled to have their votes counted in the November 19, 2007 General Election.

A. Mootness

[1]As an initial matter, although the November 19, 2007 General Election has long passed and the excluded votes at issue would not have changed the result, the questions raised are not moot. As the High Court aptly explained, the potential for recurrence of this issue is high — "[t]here will be future elections involving overseas postal voters whose votes may be affected by the matter at issue, and it is a matter of significant public interest, as it involves both the right to vote for postal voters residing outside the country, and the integrity of the electoral process." Judgment at 4; *see also Heine v. Radio Station WSZO & GM*, 1 MILR (Rev.) 122, 124 (1988)) (providing that the court should retain jurisdiction in the face of mootness when the matter involves the likelihood of recurring controversy and is of great public interest). Further, although the parties have submitted some evidence suggesting that the CEO provided notice interpreting the phrase "date of election" for the upcoming November 16, 2015 General Election, whether the CEO has complied with the RMI APA is a separate issue. This opinion, however, is limited to the 2007 General Election and should not in any way be construed as impacting the 2015 General Election.

B. Applicability of the RMI APA

Turning to the substance of Appellants' argument, the RMI APA outlines a detailed procedure to be followed "[p]rior to the adoption, amendment or repeal of any rule." *See* 6 MIRC § 104. This procedure includes a notice-and-comment period, *id.*, Cabinet approval, 6 MIRC § 106, and publication of effective rules, 6 MIRC § 107, none of which CEO did in

adopting the new definition of "date of election" in 2 MIRC § 162(3). Appellants reason that the CEO's new definition is subject to the APA in light of the RMI APA's broad definition of term "rule," which encompasses "each agency statement of general applicability that implements, interprets, or regulates conduct or action, prescribes policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule. . . ." 6 MIRC § 102(g).

[2]Appellants' argument, although simple enough, rests on the assumption that the RMI APA is the only statute that might apply to the CEO's decision in adopting this new definition. But the RMI APA is not the only statute at issue — rather, as *Bien v. Ml Chief Electoral Officer*, 2 MILR 94 (S. Ct. Civil 90-01), recognized, the RMI APA does not apply where the Election and Referenda Act sets forth a separate and distinct procedure for CEO to follow. At issue in *Bien* was whether the CEO properly denied a petition for recount, and in giving deference to the CEO's decision, *Bien* found that the RMI APA's procedure for "contested cases" did not apply where the Elections and Referenda Act set forth a specialized and different procedure for recounts. *Id*. at 98 (comparing 2 MIRC § 180 with 6 MIRC § 11).

Similar to *Bien*, the Elections and Referenda Act sets forth a specific and distinct procedure the CEO must follow for the decision at issue in this action. In particular, 2 MIRC § 142(1), titled "Proclamation of dates and referenda," provides:

> Except in the case of an election by consensus, the Chief Electoral Officer shall give as much notice as is reasonably practicable of the holding of an election and its date:
>
> (a) by press and radio, in both Marshallese and English;
>
> (b) throughout the area concerned:
>
> (i) by written notices, in Marshallese and English, posted on public buildings and in other convenient places, and
>
> (ii) in whatever manner is customary in the area concerned for the announcement of important news; and
>
> (c) in such other manner as he thinks proper.

Applied here, the CEO changed the long-standing interpretation of the date of the General Election for purposes of mail ballots, which falls within 2 MIRC § 142(1) setting for the procedure the CEO must take in giving notice of "the holding of an election and its date." As a result, 2 MIRC § 142(1) requires the CEO to provide notice of this change through the press, radio, written notices, and any other manner the CEO believed proper. This procedure differs from the one outlined in the RMI APA for the "the adoption, amendment or repeal of any rule," *see* 6 MIRC § 104, which means that the CEO must follow 2 MIRC § 142(1), and not the APA.[3]

Appellants did not argue, much less address, whether the CEO complied with 2 MIRC § 142(1) in adopting a new definition of "date of election" for mail ballots for the 2007 General Election. Rather, we simply reject the limited argument made on appeal — that the CEO did not comply with the RMI APA — on the basis that the RMI APA does not apply to the CEO's new definition.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the High Court's Judgment, although based on different reasoning.

[3]We may affirm on any basis supported by the record, even if such basis was not raised below. *See Gonzalez v. Planned Parenthood of L.A.*, 159 F.3d 1112, 1114 n.l (9th Cir. 2014); *United States v. State of Washington*, 969 F.2d 752, 755 (9th Cir. 1992).

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IN RE: THE CITIZENSHIP OF LAUREANO LOPEZ SAMPANG, Petitioner-Appellee,
v.
RMI GOVERNMENT, Respondent-Appellant.

SCT CN 2014-002 (HCT CN 2014-017)

APPEAL FROM THE HIGH COURT

Argued June 3, 2015
Filed October 27, 2015

Summary

The Supreme Court affirmed the High Court's judgment that Sampang is qualified to register as a citizen of the Marshall Islands for the following reasons: (i) Sampang met the three year residency required by the Constitution; (ii) there is no ten-year requirement for citizenship by registration, as argued by the Republic; and (iii) Republic waived its argument that the "R-1" visa is required to commence the three-year residency period by not raising the issue at trial.

Digest

1. CONSTITUTIONAL LAW – *Citizenship by Registration – Article XI, Section 2(1)(b)*: The High Court's finding of three years of residency in the Republic is supported by the record and is one of fact to which this court gives deference and will not set aside absent an abuse of discretion. We find no abuse of discretion in making this factual finding of residency within the Republic as required by the Constitution, Article XI, Section 2.

2. CONSTITUTIONAL LAW – *Citizenship by Registration – Article XI, Section 2(1)*: There is no ten-year requirement for citizenship by registration.

3. APPEAL AND ERROR – *Questions Reviewable — Asserted Below*: Issues not raised in the court below are considered waived on appeal.

Counsel

Witten T. Philippo, counsel for Petitioner-Appellee Laureano Lopez Sampang

IN RE: THE CITIZENSHIP OF SAMPANG

Assistant Attorney-General Rosalie Aten Konou, counsel for Respondent-Appellant RMI Government.

Before: CADRA, Chief Justice, and SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

OPINION

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

I. INTRODUCTION

Appellant, the RMI Government, seeks review of a July 11, 2014 decree of the High Court finding appellee, Laureano Lopez Sampang, qualified to register as a citizen under Article XI, Section 2(1) of the Constitution.

Appellant contends the High Court erred in finding Sampang qualified to register as a citizen questioning whether Sampang has "truly" met the three year actual residency requirement of the Constitution. There is no factual dispute that Sampang has been physically present in the Republic in excess of the three years required by the Constitution, Article XI, Section 2(1) for "citizenship by registration." Instead, Appellant argues that Sampang was not "lawfully" in the Republic because Sampang, who entered the Republic as an "alien worker" for employment purpose, failed to acquire an "R-1 Visa" under the "Immigration Act," 43 MIRC Section 130. Therefore, Appellant reasons that the three year period of residency has yet to commence.

Appellant further contends the High Court erred in not honoring a certificate from the Minister of Justice opposing Sampang's registration as a citizen. Appellant argues 43 MIRC Section 410 requires the High Court to accept the Minister of Justice's certificate without question.

For the reasons that follow, we reject the Government's assertions and affirm the decree of the High Court.

II. BACKGROUND

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

It is undisputed that Appellee Sampang, a citizen of the Republic of the Philippines, first arrived in the Republic of the Marshall Islands in 1990 and has physically been present in the Republic for more than three years. Appellee was married in the Republic of the Marshall Islands to a Marshallese citizen, Winny Daniel, and is the biological father of a Marshallese citizen, Wayne Sampang, who holds land rights in Mill. Appellee Sampang has no criminal record in the Republic and does not have any communicable disease which would pose a health risk to the public health and welfare. Sampang is gainfully employed as a skilled carpenter and electrician earning an income sufficient to support the needs of his family thus presenting no welfare risk or economic burden on the country. These :facts as found by the High Court are not challenged on appeal and are supported by the testimony and documentary evidence adduced before the High Court at the July 11, 2014 hearing on Sampang's petition to register as a citizen.

In the proceedings before the High Court, the Government opposed Sampang's petition on the theory that he did not meet a "10 year" residency requirement imposed by Section 403(7)(b) of the Citizenship Act 1984, 43 MIRC Chpt. 4, which applies to citizenship by "naturalization." Section 403(7)(b) excludes periods for which the applicant was granted entry under the Labor (Non-Resident Workers) Act, 2006, from being counted towards the requisite ten years of residency for "citizenship by naturalization." The Government argued that Sampang did not meet the ten years residency requirement under 43 MIRC Sec1ion 403(7)(b) because he was never issued an "immigration" visa, and was in violation of the immigration laws for failing to register with the immigration office.

The High Court considered Appellant's arguments and concluded Sampang was not required to meet the "10-year" residency requirement set forth by Section 403(7)(b) because Section 403 applies to "citizenship by naturalization," not "citizenship by registration" as sought by Sampang.

The High Court reasoned that residency for "citizenship by registration," as applied for by Sampang, is addressed by Section 410(3) of the Citizenship Act. Section 410(3) excludes any period during which the person was not legally in the Republic as an immigrant in meeting the

three year residency requirement of the Constitution, Article XI, Section 2(1)(b). The High Court concluded that the residency requirement for "citizenship by registration" under Article XI, Section2(1)(b) of the Constitution does not exclude the period during which a person is granted entry under the Labor Act. There is no such exclusion contained in Section 410(3), and the High Court would not read into the statute a requirement which was not there.

The High Court further noted that the Immigration Act does not provide for the status of "immigrant" as distinguished from the status of any other non-citizen resident under a visa or visa exemption. The High Court stated that until the Republic provides for an "immigrant visa" separate from other visas, the Court will continue to look to see if a petitioner was lawfully in the Republic under a visa or visa exemption.

The High Court considered the Minister of Justice' certificate opposing citizenship and found it did not disqualify Sampang from registration on grounds of national security. The certificate merely stated Sampang was subject to a removal order and that he did not meet the 10-year residency requirement. The High Court found that Sampang had a pending application for a visa on which the Republic had yet to rule, that no charges had been filed against Sampang for violation of the immigration laws, and that Sampang's deportation had not been sought by the Republic.

The High Court concluded Sampang is qualified to register as a citizen under Article XI, Section 2(1)(b). This appeal followed.

III. THE APPEAL ISSUES AS FRAMED BY APPELLANT

On appeal, the Government abandons its theory raised below that 43 MIRC 403 (7)(b) governs this case. Rather, the Government questions whether Sampang has "truly met" the three year residency requirement of Article XI, Section 2. The Government also claims the High Court erred in not giving deference to the "Certificate for/against Citizenship" by the Minister of Justice.

IV. ANALYSIS

A. *Sampang met the three years of residency required by the Constitution*

The RMI Constitution, Article XI, Section2(1)(b) provides that a person who is not a citizen of the Marshall Islands shall become a citizen upon application if the High Court is satisfied that the person has been a resident in the Marshall Islands for a period of not less than three years, is the parent of a child that is a citizen of the Marshall Islands, and is not disqualified on grounds of national security. Article XI, Section 2 of the Constitution read as follows:

> Section 2. Persons Who May Be Registered as Citizens.
> (1) Unless disqualified pursuant to paragraph (3) of this Section, any person who is not a citizen of the Republic of the Marshall Islands shall become a citizen by registration if, upon application, the High court is satisfied either:
> (a) That he has land rights; or
> (b) That he has been resident in the Republic for not less than 3 years, and is the parent of a child who is a citizen of the Republic; or
> (c) That he is of Marshallese descent, and in the interests of justice his application should be granted.
> (2) A person who has attained the age of 18 years shall not be registered pursuant to this Section as a citizen of the Republic, until he has taken an oath or made an affirmation of allegiance to the Republic.
> (3) In the interests of national security or policy with respect to dual citizenship, the Nitijela may by Act provide for the disqualification of any class of persons who would otherwise be entitled to be registered as citizens pursuant to this Section, but who have not already been so registered.

Residency for citizenship by registration is covered by Section 410(3) of the Citizenship Act, which .provides:

> For the purposes of determining the period of residence of any person in the Republic for citizenship by registration under Article XI, Section 2 of the Constitution of the Marshall Islands, any period during which the person was not legally in the Republic as an immigrant shall be disregarded.

And neither the Constitution nor Section 410(3) of the Citizenship Act excludes from the three-year residency requirement any period during which the person was granted entry under the "Labor Act." To the contrary, evidence was introduced at the July 7, 2014 High Court hearing that Sampang was a legal resident of the RMI from 2006 through 2009, and was also legally resident in the RMI from 2011-2012 until May 5, 2014. The Government's Exhibit A, "Immigration Clearance" indicates Sampang had a "valid registration, employed by IBC" from 2006 to 2008; had a "valid registration, changed employers to KBE Local Gov't" in 2009; failed to register with Immigration in 2010; had a "valid change of status, registered as a spouse (visa: GENERAL) under Mrs. Winny Sampang. Valid until S 4114;" but failed to register in 2014. Despite the failure to register in 2014, the Government's Exhibit E indicates Sampang was granted a work permit from the Ministry of Foreign Affairs on May 9, 2013, with an expiration date of May 9, 2015. The High Court found, based on Sampang's testimony and the documentary evidence, that Sampang has been a lawful resident of the Republic for at least three years prior to the date of the hearing. (Decree at 3, finding 4).

[1]The High Court's finding of three years of residency in the Republic is supported by the record and is one of fact to which this court gives deference and will not set aside absent an abuse of discretion. We find no abuse of discretion in making this factual finding of residency within the Republic as required by the Constitution, Article XI, Section 2.

B. *The High Court did not err in refusing to give deference to the late filed Certificate for/against Citizenship by the Minister of Justice*

Section 410(2) of the Citizenship Act 1984 provides:

> (2) In a case where any person applies for citizenship be registration under Article XI, Section 2 of the Constitution of the Marshall Islands, the Cabinet shall, within such time as may be prescribed by the High Court, submit to that Court a certificate stating whether in the opinion of the Cabinet such person is a fit and proper person to be registered as a citizen in the interests of national security; provided however, that the Cabinet may delegate its power under this Section to the Minister who shall submit the required certificate to the Court. A certificate under the hand of the Cabinet, or the Minister as the case may be, shall be

> conclusive proof of the matters therein stated and shall not be called in question in any court whether by way of writ or otherwise.

On April 9, 2014, the High Court issued an order requiring the Cabinet or the Minister of Justice to submit its national security certificate by May 7, 2014. That certificate was not filed until July 7, 2014, the day of the hearing on Sampang's petition. The High Court would have been justified under Section 410(2) in not considering the certificate because it was not timely filed. Nevertheless, the High Court did consider the certificate and found it did not disqualify Sampang on the basis of national security. The certificate merely states that Sampang does not meet the criteria for citizenship and passport issuance due to (1) subject to removal order due to no immigration record, and (2) that there is a 10-year requirement for citizenship by registration.

[2]We, like the High Court, find the certificate does not disqualify Sampang from registration on the grounds of national security. The Government conceded at hearing that Sampang was not subject to a removal order nor is there any evidence that Sampang was subject to a removal order; there is no ten-year requirement for citizenship by registration; and there is no reference in the certificate as to Sampang presenting a national security risk. Based on a *de novo* review of this predominately legal issue, we find no error in the High Court's refusal to deny Sampang's petition on the grounds of the certificate.

C. *Appellant waived the argument that an "R-1" visa is required for commencement of the three year period of residency*

In this appeal, the Government abandons its argument that Section 403(7)(b) governs this case and introduces a new argument not raised below -- that pursuant to 43 MIRC Section 130, Sampang must have acquired a "R-1 Visa" and only after acquiring an "R-1 Visa" does the three-year period of actual residency begin to run. And, because Sampang never acquired an "R-l Visa" the Government concludes the three years of actual residency has yet to commence.

[3] It is well settled that issues not raised in the court below are considered waived on appeal. *Nashion v. Enos*, 3 MILR 83, 88 (2008); *Jeja v. Lajikam*, 1 MILR (rev.) 200, 205 (1990); *Clanton v. MI Chief Elec. Off*, 1 MILR (Rev.) 146, 153 (1989); *Tibon v. Jihu*, 3 MILR 1, 5 (2005). We will thus not entertain this new argument on appeal.

V. CONCLUSION

For the foregoing reasons, we **AFFIRM** the High Court's July 11, 2014, Decree finding Laureano Lopez Sampang qualified to register as a citizen of the Republic of the Marshall Islands.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

JURELANG ZEDKAIA &
TOBWIJ TORING, Plaintiffs-Appellants,
v.
MARSHALLS ENERGY COMPANY, INC., ET AL., Defendants-Appellees.

SCT CN 2012-001 (HCT CN 2006-157)

APPEAL FROM THE HIGH COURT

Argued June 3, 2015
Filed November 18, 2015

Summary

In its Opinion, the Supreme Court affirmed the High Court's summary judgment that the Government, not the traditional owners of Lotola Weto, Utuwe Weto, and Lobotin Weto, Dalap Island, Majuro Atoll, Marshall Islands, owned the land reclaimed by the Government, upon which the Government erected structures include a fuel farm. The High Court held that (a) to the extent the disputed land was created by the Government on submerged areas below the high water mark, the Government owns that land, and (b) to the extent the disputed land was not below the high water mark when the Government entered the land, Plaintiffs' claims are time-barred by the statute of limitations.

Digest

1. Under Section 103(1) of the Public Lands and Resources Act, 9 MIRC § 103(1), the Government owns the submerged land below the highwater mark.

2. Notwithstanding 9 MIRC § 103(1)(c), the Government has the right of government to fill in areas owned by it below high-water mark and retain ownership of the land so made.

3. 24 MIRC § 119, which prior to its repeal stated: "All public land currently held by the National or Local Government in the Republic of the Marshall Islands, shall be returned to the rightful landowners," did not apply to land rightfully owned by the Government.

4. 2008 Public Lands and Resources (Reclamation Amendment) Act, Public Law 2008-02, 9 MIRC § 105, which provides that land-fill on areas below the high water mark belong to the owner of the adjacent land may not be applied retroactively absent a clear indication from the Nitijela that it intended such a result.

5. Where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.

6. Under Section 117 of the Civil Procedures Act, 29 MIRC § 117(1), the limitations period for actions for the recovery of land is within twenty years after the cause of action accrues. Plaintiffs allege that Defendants entered the land in 1979 to fill the land and commence construction of fuel storage tanks. Thus, the claim accrued in 1979 and should have been brought within twenty years of that date. This lawsuit was filed on November 14, 2006, well outside of the limitations period for the unlawful taking claim.

7. Under Section 120 of the Civil Procedures Act, 29 MIRC §120, the limitation period for actions based upon trespass, among others, is six years. *See* 29 MIRC § 120 ("All other actions than those covered in the preceding sections of this Part shall be commenced within six (6) years after the cause of action accrues.").

8. Whether a trespass is permanent or continuing in nature is important when determining the applicability of the statute of limitations. If the trespass is permanent, the statue begins to run from the time the trespass commences.. A trespass of a permanent nature, as distinguished from continuing trespass, permanently changes the physical condition of the land. If a trespass or nuisance is caused by a structure that is permanent and the injury is permanent, the statute of limitations runs from the time the structure is built.

9. Defendants entered the land to fill it and to erect structures in 1979. Filling the land and constructing buildings and fuel tanks permanently changed the condition of the land. Even though these permanent changes may have resulted in continuing harm, these actions by Defendants constitute a permanent, not continuing, trespass. Consequently, the statute of limitations began to run from the time the trespass commenced in 1979. We conclude that Plaintiffs' claim for trespass filed in 2006 falls outside of the six year limitation window.

Counsel

John Masek, counsel for Plaintiffs-Appellees Jurelang Zedkaia and Tobwij Toring
Gregory Danz, counsel for Defendants-Appellants Marshalls Energy Company, Inc., et al.

MARSHALL ISLANDS, SUPREME COURT

Before: CADRA, C.hief Justice, and SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

OPINION

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

I. INTRODUCTION

This case presents a dispute over land that was originally submerged below the ordinary high water mark. Plaintiffs' ancestors owned the property abutting the submerged land. In 1979, the Government began to fill the submerged land and erect structures and fuel tanks on the new land. The Government later leased the land to Defendant Marshalls Energy Company, Inc. ("MEC"), which in turn mortgaged its interest in the property. Plaintiffs brought suit in 2006 against MEC and the Government, claiming ownership over the disputed land.

Specifically, Plaintiffs asserted claims for unlawful taking and trespass. The High Court granted summary judgment in favor of Defendants. The court held that (1) to the extent the disputed land was created by the Government on submerged areas below the high water mark, the Government owns that land, and (2) to the extent the disputed land was not below the high water mark when the Government entered the land, Plaintiffs' claims are time-barred. We affirm.

II. BACKGROUND

The predecessors of Plaintiffs Jurelang Zedkaia and Tolbwij Toring owned land described as "LOTOLA Weto and a small island now non existent formerly known as UTUWE Weto, Dalap Island, Majuro Atoll [and] a small island now non existent, that was once a portion of the land known as LOBOTIN Weto, Dalap, Majuro Atoll." In 1975, Plaintiffs' predecessors entered into a quitclaim with the Trust Territory Government of the Pacific Islands, entitled "Quitclaim

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

New Port Development, Majuro, Marshall Islands."[3] In the quitclaim, Plaintiffs' predecessors granted to the Government "[a]ll land within the New Port Subdivision except Lot 'B' and Lot 'D' as depicted on Survey Map Number 8010174, Dalap Island, Majuro, Marshall Island." The survey map shows the area on the lagoon side of the roadway where a port would be constructed.

According to Plaintiffs, the land at issue in this case is on the ocean side of the roadway and was created in 1979 when the Government filled areas submerged below the ordinary high water mark. Plaintiffs allege that the Government constructed fuel storage tanks and other facilities on the filled land. Plaintiffs contend the disputed land is a part of Lobo tin weto and they own that land.

In 1997, the Government leased the land at issue to MEC. The land was to be primarily used for a power generating station and a fuel tank farm. MEC later mortgaged its leasehold interest in the property to the United States of America Rural Utilities Service.

In 2004 and 2006, Plaintiffs sent demand letters to MEC, asking that MEC enter into a lease with Plaintiffs for its use of the disputed land and for back rent. After these requests went unfulfilled, Plaintiffs filed a Complaint for unlawful taking and trespass against MEC on November 14, 2006. On July 21,2008, Plaintiffs filed the Amended Complaint, which added the Republic of the Marshall Islands as a Defendant. The Amended Complaint prayed for general damages and interest, and an order requiring Defendants to either enter into a lease agreement with Plaintiffs or vacate Plaintiffs' property.

MEC filed a Motion for Summary Judgment, in which the Government joined. On June 13,2012, the High Court issued its Order Granting Motion for Summary Judgment. The High Court concluded: "to the extent the disputed land is land created by the government on submerged areas below the high water mark prior to 2008, such land belongs to the government" and "to the extent the disputed land was not below the high water mark when defendants or their

[3]The Trust Territory Government of the Pacific Islands is the predecessor in interest to the Republic of the Marshall Islands. In this opinion, the Trust Territory Government of the Pacific Islands aud the Republic of the Marshall Islands are referred to as "the Government."

predecessors entered the area in dispute, plaintiffs' claims are barred by the applicable statute of limitations."

Plaintiffs now appeal the High Court's ruling.

III. ANALYSIS

A. The Government Owns the Disputed Land That Was Previously Submerged Below the Ordinary High Water Mark

At the heart of this case is the ownership of the disputed land. If Plaintiffs own the land, we must decide whether Defendants are liable for unlawful taking and trespass. If, on the other hand, the Government owns the disputed land, then Plaintiffs' claims for unlawful taking and trespass fail. The parties rely on various statutes in arguing that they each own the disputed land.

Pursuant to Section 103 of the Public Lands and Resources Act, 9 MIRC § 103, the Government owns "all marine areas below the ordinary high watermark," subject to certain exceptions. Specifically, section 103 provides:

> (1) That portion of the law established during the Japanese administration of the area which is now the Republic, that all marine areas below the ordinary high watermark belong to the government, is hereby confirmed as part of the law of the Republic, with the following exceptions:
>
> . . . .
>
> > (c) The owner of land abutting the ocean or lagoon shall have the right to fill in, erect, construct and maintain piers, buildings, or other construction on or over the water or reef abutting his land and shall have the ownership and control of such construction; provided, that said owner first obtains written permission of the Chief Secretary before beginning such construction.

It is undisputed that the land at issue was submerged below the ordinary high water mark before the Government filled it. As a "marine area[] below the ordinary high watermark," section 103(1) indicates that the submerged land belonged to the Government.

[1][2]Plaintiffs argue that the exception in section 103(1)(c) applies to the disputed land because the submerged land was filled in. Assuming that Plaintiffs are the owners of land abutting the previously submerged land, section 103(1)(c) granted them the right to fill in the nearby reef and erect buildings atop it. That section also provides that Plaintiffs would have had ownership and control of "such construction." Indeed, had Plaintiffs filled the submerged areas and erected the structures and tanks now on the land, then the exception in section 103(1)(c) would apply and Plaintiffs would have ownership over the land and structures. However, the Government — not Plaintiffs — filled the submerged land and erected structures on it. Pursuant to the general rule in section 103(1), the Government owned the submerged land prior to filling it. The Government continued to own the land after it was filled. In no way does the exception in section 103(1)(c) vest Plaintiffs with ownership of land the Government owned and filled. Simply put, the exception does not apply, and under the general rule, that the Government owned the "marine area" prior to filling it and continues to own it today. *See Protestant Mission of Ponape v. Trust Territory of the Pacific Islands*, 3 TTR 26, 32 (High Ct. 1965) (since 1934, the Japanese Administration recognized in what is now the Republic of the Marshall Islands "the right of government to fill in areas owned by it below high-water mark and retain ownership of the land so made").

[3]In arguing that Plaintiffs own the filled land, they also rely on a 1997 law previously codified at 24 MIRC § 119, which stated: "All public land currently held by the National or Local Government in the Republic of the Marshall Islands, shall be returned to the rightful landowners." This law did not specify particular lands that should be returned to rightful owners. Importantly, no claim was made by a "rightful landowner" as to the disputed land. Furthermore, this law was repealed in 2004 and while it was in effect, the Government leased the land to MEC and MEC mortgaged the property to the United States of America Rural Utilities Service. However, no objection was made to the lease or the mortgage. Moreover, as discussed above, 9 MIRC § 103(1) establishes that the Government is the rightful landowner of the disputed land and, thus, even if 24 MIRC § 119 applied to this case, the land would not have been returned to

Plaintiffs. The Court finds that the 1997 law does not support Plaintiffs' claim to the disputed land.

Plaintiffs also rely on the 2008 Public Lands and Resources (Reclamation Amendment) Act, Public Law 2008-02, 9 MIRC § 105, in arguing that they own the land at issue. Section 105 provides:

> Notwithstanding the provisions of any law to the contrary, title to new land created through "land-fill" or other land reclamation processes, from marine areas below the ordinary high water mark, by the government, or by any other person, corporation or other legal entity, for any purpose whatsoever, shall vest in the owners of the adjoining land or lands.

Plaintiffs argue that this law should be applied retroactively by pointing to legislative history that they say indicates "this law clarified the existing law and confirmed that all 'land fill' areas are in fact owned by the traditional owners of adjoining lands."

[4][5]Section 105 may not be applied retroactively absent a clear indication from the Nitijela that it intended such a result. *See Immigration & Naturalization Servo v. Cyr*, 533 U.S. 289, 316 (2001) ("A statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result."). "[W]here the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 278 (1928).

Section 105 states that "title to new lands created through 'land-fills . . . from marine areas below the ordinary high water mark, by the government, . . . shall vest in the owners of the adjoining lands." It does not include any language reflecting the Nitijela's intent to apply this law retroactively. Absent a clear indication to the contrary, we conclude that Public Law 2008-02 does not have retroactive effect. Accordingly, this statute does not support Plaintiffs' position that they own the disputed land.

In sum, we conclude that, pursuant to 9 MIRC § 103(1), the Government owned the previously submerged areas and continues to own it even after it filled the submerged land and built atop it. The Court is not convinced that 9 MIRC § 103(1)(c), former 24 MIRC § 119, or 9 MIRC § 105 establish otherwise.

B. Even if the Disputed Land Was Not Originally Below the Ordinary High Water Mark, the Statute of Limitations Bars Plaintiffs' Claims

The survey map attached to the 1975 quitclaim shows what Plaintiffs say is a narrow strip of land between the road and the ordinary high water level. Plaintiffs contend that this map "establishes that the lots quitclaimed to the Trust Territory did not extend to the ocean side of the road" and, thus, this narrow strip of land was not quitclaimed to the Government in 1975. Assuming Plaintiffs' claims apply to this narrow strip of land, we conclude these claims are barred by the statute of limitations.

[6]Plaintiffs' Amended Complaint asserts a claim for unlawful taking and prays for an order requiring Defendants to vacate the property. Section 117 of the Civil Procedures Act, 29 MIRC § 117(1) sets forth the limitations period for this claim: "The following actions shall be commenced only within twenty (20) years after the cause of action accrues: . . . (b) actions for the recovery of land or any interest therein[.]" Plaintiffs allege that Defendants entered the land in 1979 to fill the land and commence construction of fuel storage tanks. Thus, the claim accrued in 1979 and should have been brought within twenty years of that date. This lawsuit was filed on November 14, 2006, well outside of the limitations period for the unlawful taking claim.

[7]The Amended Complaint also asserts a claim for trespass. The statute of limitations for this claim is six years. *See* 29 MIRC § 120 ("All other actions than those covered in the preceding sections of this Part shall be commenced within six (6) years after the cause of action accrues."). Plaintiffs contend that Defendants' actions constitute a "continuing trespass" that tolls the accrual date for their trespass claim.

[8]Whether a trespass is permanent or continuing in nature is important when determining the applicability of the statute of limitations. *In re Hammen*, 339 B.R. 867, 881 (S. D. Iowa

2009). "If the trespass is permanent, the statue begins to run from the time the trespass commences." *Id*. "A trespass of a permanent nature, as distinguished from continuing trespass, permanently changes the physical condition of the land." *Id*. at 880; *see also Dombrowski v. Gould Elec., Inc*" 954 F.Supp. 1006, 1012 (M. D. Penn. 1996) (noting permanent trespass "effects a permanent change in the condition of the land . . . while resulting in a continuing harm" (citation omitted)). "If a trespass or nuisance is caused by a structure that is permanent and the injury is permanent, the statute of limitations runs from the time the structure is built." *Id*.

[9]According to Plaintiffs, Defendants entered the land to fill it and to erect structures in 1979. Filling the land and constructing buildings and fuel tanks permanently changed the condition of the land. Even though these permanent changes may have resulted in continuing harm, these actions by Defendants constitute a permanent, not continuing, trespass. *See In re Hammen*, 339 B.R. at 880-81; *Dombrowski*, 954 F. Supp. at 1012. Consequently, the statute of limitations began to run from the time the trespass commenced in 1979. In re *Hammen*, 339 B.R. at 881. We conclude that Plaintiffs' claim for trespass filed in 2006 falls outside of the six year limitation window.

In sum, even if the disputed land includes land not originally below the ordinary high water mark, Plaintiffs' unlawful taking and trespass claims are barred by the statutes of limitations.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the High Court's June 13, 2012 Order Granting Motion for Summary Judgment.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (CHINA) COMPANY LTD, et al., plaintiffs,
v.
ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.

SCT CN 2016-002 (HCT CN 2014-050)

* * *

CHUBB INSURANCE (THAILAND) COMPANY LTD, ET AL., plaintiffs,
v.
ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.

SCT CN 2016-002(HCT CN 2014-110)

* * *

FEDERAL INSURANCE COMPANY KOREA, et al., plaintiffs,
v.
ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.

SCT CN 2016-002 (HCT CN 2015-194)

REMOVED FROM THE HIGH COURT

Argued April 12, 2017
Filed June 6, 2017

Summary

The Republic is, and at all relevant times was, a signatory to both the Convention on the Limitation of Liability for Maritime Claims, 1976 ("1976 Convention"), and the 1996 Protocol of

the Convention on the Limitation of Liability for Maritime Claims, 1976 ("1976 Protocol"). The 1996 Protocol incorporates higher liability limitations than the 1976 Convention. At the time this suit was commenced, Hong Kong had only acceded to the 1976 Convention, with its lower liability limitations. Given Hong Kong's lower liability limitations, the defendants filed a limitation suit and established a limitation fund in Hong Kong under the 1976 Convention. The defendants argued that under Article 9(4) of the 1996 Protocol, the Republic must defer to the Hong Kong limitation suit and fund. However, while legislating some of the provisions of the 1996 Protocol into the domestic law, the Nitijela did not enact Article 9(4). Consequently, the Supreme Court ruled that Article 9(4) did not have legal effect within the Republic, which operates as a "dualist jurisdiction." Therefore, the High Court was not obliged to defer to the Hong Kong limitation suit and the limitation fund established under the 1976 Convention. Furthermore, the Supreme Court affirmed that the Defendants had the option to avail themselves of the procedures outlined in the Marshall Islands Limitation of Liability for Maritime Claims Act, found in the Marshall Islands Revised Code Title 47, Sections 501 and onward, which incorporates the provisions of the 1996 Protocol. This allowed the Defendants to limit their liability in the High Court proceedings within the Republic.

Digest

1. CONSTITUTIONAL LAW – *Construction – Dualist Jurisdiction*: Marshall Islands is a "dualist jurisdiction" by virtue of Article V, Section 1(4). In a "dualist jurisdiction" the country remains sovereign in adopting its own legislation. On the domestic level, the courts will apply only the legislation in effect — that is, the laws passed by the competent legislative bodies (e.g., the Nitijela) — and they will not consider intrinsic treaty provisions.

2. CONSTITUTIONAL LAW – *Construction – Dualist Jurisdiction*: The Nitijela, while legislating some of the provisions of the 1996 Protocol of the Convention on the Limitation of Liability for Maritime Claims, 1976, into the domestic law, did not enact Article 9(4) into the LLMCA. Because Protocol Article 9(4) has not been legislated into the Marshall Islands domestic law, it has no effect in these proceedings by private litigants.

3. STATUTES – *Construction and Operation – Rules of Interpretation*: Nitijela was aware of the presence of Article 9(4) when legislating portions of the 1996 Protocol into domestic law because the Marshall Islands had acceded to the 1996 Protocol and other specific provisions of that Protocol were incorporated into the domestic law, the LLMCA. The absence of Protocol Article 9(4) from the LLMCA was a conscious decision by the Nitijela not to incorporate or transform that provision into the domestic law.

4. STATUTES – *Construction and Operation – Rules of Interpretation*: The broad incorporation provision of 47 MIRC § 155 and listing pursuant to 47 MIRC § 156 is insufficient to incorporate Protocol Article 9(4) into the domestic law.

5. STATUTES – *Construction and Operation – Rules of Interpretation*: Under the canon of statutory construction "*generalia specialbus non derogard*" — the "principle that the specific overrides the general," courts are to assume the legislature intended specific provisions to prevail over more general ones when statutes conflict.

6. STATUTES – *Construction and Operation – Rules of Interpretation*: The defendants may limit liability even without constitution of a second limitation fund provided they pay any judgment in the Marshall Islands up to the amount required under the 1996 Protocol and the LLMCA, Section 510, subject to any credit or offset paid out under the Hong Kong limitation fund.

Counsel

Dennis Reeder and Christopher Hannan, of Baker Donelson Bearman Caldwell & Berkowitz, PC, counsel for plaintiffs
David Lowe and Tatyana, of Lowe & Cerullo, counsel for defendants.

Before CADRA, Chief Justice, and SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

OPINION ON REMOVED QUESTION

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

I. INTRODUCTION

On July 27, 2016, the High Court referred the following questions to this Court:

> Pursuant to Article V, Section 1(4) of the Constitution and the Limitation of Liability for Maritime Claims Act, 47 MIRC Chpt. 5, is the High Court to defer to a Hong Kong limitation suit and its limitation fund constituted under the Convention on the Limitation of Liability for Maritime Claims, 1976, or, if the defendants are to limit their liability in the High Court are they required to constitute a limitation fund under the 96 Protocol relating to the 76

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

> Convention, or otherwise be subject to the limits set forth in the 96 Protocol in their assertion of a limitation defense absent the constitution of a fund in the High Court?

July 27, 2016 Order Denying Motion to Reconsider, and Amending the Question Removed (footnote omitted).

The High Court defined the dispute between the parties as follows:

> Although both the plaintiffs and the defendants agree that the Marshall Islands is a "dualist jurisdiction" — that, is, international treaties and conventions have no effect unless legislation is in force to give effect to them — the parties strongly disagree as to whether Article 9.4 of the 96 Protocol can or cannot be deemed to be domestically incorporated into Marshall Islands law as required by Article V, Section 1(4) of the Constitution.

Id. For the reasons set forth below, we hold that the High Court need not defer to the Hong Kong limitation suit and the limitation fund constituted under the "Convention on the Limitation of Liability for Maritime Claims, 1976." We further hold that defendants can avail themselves of the procedures provided by the Marshall Islands Limitation of Liability for Maritime Claims Act ("LLMCA"), Marshall Islands Revised Code ("MIRC") Title 47, Sections 501, et seq., should they choose to limit liability in these High Court proceedings.

II. FACTS AND PROCEEDINGS

For purposes of this Opinion only, we provide a brief statement of how this dispute arose to provide context for our decision.

On November 7, 2013, a collision occurred between the M/V HUENG A DRAGON, a Korean flagged container ship, and the M/V ELENI, an RMI registered vessel, off the Vietnamese port of Phu My. The M/V ELENI, having discharged its cargo at Phu My port, off Vung Tau, was in the process of leaving Vung Tau port when it strayed from the main navigational channel. A buoy chain located outside the main navigational channel became entangled about the M/V ELENI's rudder and propeller causing loss of steering control. The

M/V ELENI then collided amidship with the M/V HUENG A DRAGON. As a result of the collision, cargo aboard the M/V HUENG A DRAGON was washed overboard, flooded or otherwise damaged.

On November 13, 2013, the owners of the M/V ELENI effected an order of arrest against the sister-ship of the M/V HUENG A DRAGON, the M/V HUENG A BANKOK, in Hong Kong. On the same date, the owners of the M/V ELENI filed an action in Hong Kong to limit liability arising out of the November 2013 collision. A limitation fund was constituted in Hong Kong in accordance with "Article II of the Convention on Limitation of Liability for Maritime Claims" (hereinafter the "1976 Convention").

Various proceedings were subsequently commenced by cargo owners and subrogated insurers against the M/V ELENI in jurisdictions outside of Hong Kong where the limitation fund had been established. Hanwha General Insurance Co., Ltd., a subrogated insurer of certain cargo interests, filed an action in the High Court of Judicature at Bombay (India) Admiralty and Vice Admiralty Jurisdiction. The record references a suit also being instituted in South Africa, although we do not know the status of that case. There may be other cases pending in other jurisdictions that arise out of the subject collision.

The plaintiffs herein, certain cargo owners or subrogated, insurers, filed complaints in personam against defendants, ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED, both Marshall Islands non-resident domestic corporations, in the Marshall Islands High Court.

On December 8, 2014, plaintiffs filed, a motion seeking a declaratory judgment that the 1976 Convention does not govern the plaintiffs' claims in this case but, rather, that the Protocol of 1996 to amend the 1976 Convention, as enacted by the Marshall Islands, applies to plaintiffs' claims.

Defendants opposed plaintiffs' motion for declaratory judgment on April 14, 2016, arguing, *inter alia*, that the Marshall Islands and Hong Kong have only the 1976 Convention in common and that, pursuant to Article 9, Section 4, of the 1996 Protocol ("Protocol Article 9(4)")

to which the Marshall Islands is a party, the High Court must defer to the Hong Kong limitations proceeding and limitation fund established under the 1976 Convention.

Soon thereafter, on April 29, 2016, defendants filed a motion for summary judgment which was opposed by plaintiffs on June 6, 2016.

The issue pivotal to both plaintiffs' motion for declaratory judgment and defendants' motion for summary judgment is whether Protocol Article 9(4) has been incorporated into the domestic law of the Marshall Islands — the parties agree that if Protocol Article 9(4) is part of the domestic law then the High Court would be required to defer to the Hong Kong limitation proceedings and limitation fund established under the 1976 Convention.

Oral argument on the issues presented by the High Court's Removal Order was held on April 12, 2017. Christopher Hannan, of Baker Donelson Bearman Caldwell & Berkowitz, PC, New Orleans, LA, argued on behalf of the plaintiffs. David Lowe, Lowe & Cerullo, Honolulu, ill, argued on behalf of the defendants.

Ill. DISCUSSION

A. The High Court need not defer to the Hong Kong limitation proceeding and limitation fund established under the 1976 Convention.

The Marshall Islands is a signatory to both the 1976 Convention and the 1996 Protocol. Neither the 1976 Convention nor the 1996 Protocol has been denounced by the Marshall Islands. Thus, international obligations under these conventions may be owed to other signatory States by the Marshall Islands. And where a nation is signatory to the 1976 Convention but not the 1996 Protocol, Protocol Article 9(4) provides:

> Nothing in this Protocol shall affect the obligations of a State which is a party both to the Convention and to this Protocol with respect to a State which is a party to the Convention but not a Party to this Protocol.

The issue in this case arises because Hong Kong, where defendants limited liability, is a signatory to the 1976 Convention but not a signatory to the 1996 Protocol (at least at the time the

limitation fund was established). Plaintiffs subsequently filed the instant lawsuits in the Marshall Islands which is signatory to both the 1976 Convention and the 1996 Protocol. Thus, pursuant to Protocol Article 9(4), the obligations of the Marshall Islands with respect to Hong Kong would be governed by the common agreement between these two nations, which would be the 1976 Convention. The parties agree that if Protocol Article 9(4) applies to this case then the court would be bound by the Hong Kong Limitation suit because the Marshall Islands and Hong Kong have only the 1976 Convention in common. The question thus becomes to what extent the Marshall Islands' treaty obligations to Hong Kong effect the rights of private parties in the instant lawsuit filed in the High Court.

1. The domestic law does not require the High Court to defer to the Hong Kong proceeding.

The Marshall Islands Constitution, Article V, Section 1(4) provides:

> No treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this Constitution shall, of itself, have the force of law in the Republic.

[1]The parties agree that the Marshall Islands is a "dualist jurisdiction" by virtue of Article V, Section 1(4). In a "dualist jurisdiction" the country remains sovereign in adopting its own legislation. On the domestic level, the courts will apply only the legislation in effect — that is, the laws passed by the competent legislative bodies (e.g., the Nitijela) — and they will not consider intrinsic treaty provisions. While applying domestic legislation may have the effect of placing a country in contravention of the provisions of a treaty, a domestic court is not obliged to consider such consequences when it hands down its decision.[3] It is the duty of the courts to apply the law as laid down by the Parliament whether that would involve the state in breach of an

[3]*See, generall*y, Daniel Dupras, NAFTA: Resolving Conflicts Between Treaty Provisions and Domestic Law (1993) discussing effect of North America Free Trade Agreement on Canada, a dualist jurisdiction's domestic law. *See also* Dr. Brahm Agrawal, Enforcement of International Legal Obligations in a National Jurisdiction (". . . India's obligations under an international treaty cannot be enforced unless such obligations are made part of the law of this country by means of appropriate legislation.")

international agreement or not.[4] Because the parties agree the Marshall Islands is a "dualist jurisdiction," our inquiry whether the 1976 Convention and the 1996 Protocol are part of the Marshall Islands' domestic law begins with an examination of the statutes enacted by the Nitijela.

[2]Although the Marshall Islands is a signatory to both the 1976 Convention and the 1996 Protocol, neither international agreement has been enacted in its entirety as part of the domestic law. The LLMCA, 47 MIRC § 501, et seq., sets forth the domestic law applicable to the rights of limitation in the Marshall Islands courts. The Nitijela, while legislating some of the provisions of the 1996 Protocol into the domestic law, did not enact Article 9(4) into the LLMCA. The inquiry ends here. Because Protocol Article 9(4) has not been legislated into the Marshall Islands domestic law, it has no effect in these proceedings by private litigants. There is no law requiring the High Court to defer to the Hong Kong limitation suit and limitation fund established under the lower limits of the 1976 Convention. We conclude the High Court need not do so.

A similar result was reached by the Bombay (India) court in *Hanwha General lnsurance Co., Ltd. v. M.V. ELENI*.[5] The court noted that India, although it had signed both the 1976 Convention and 1996 Protocol, had not enacted the entire Convention as part of the domestic law. The court found the absence of enacting the entire Convention as part of the domestic as evidence of an intent to exclude certain provisions of the convention from the domestic law. The court reasoned "Only some of the provisions of the Convention as amended have been incorporated into the MS Act. This shows that Parliament did not want to include those provisions of the Convention which are not incorporated in Part XA of the MS Act."

[3]We find the Nitijela was aware of the presence of Article 9(4) when legislating portions of the 1996 Protocol into domestic law because the Marshall Islands had acceded to the 1996 Protocol and other specific provisions of that Protocol were incorporated into the domestic

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[4]*See, R (on application of Pepushi) v. Crown Prosecution Service*, [2004] LWHC 798 (admin.).

[5]A copy of that opinion is found in the record.

law, the LLMCA. We find the absence of Protocol Article 9(4) from the LLMCA was a conscious decision by the Nitijela not to incorporate or transform that provision into the domestic law.

2. Protocol Article 9(4) is not incorporated into domestic law by virtue of 47 MIRC 155 and 156

Defendants argue that Protocol Article 9(4) is incorporated into Marshall Islands domestic law by virtue of 47 MIRC §§ 155 and 156. Section 155 provides:

> The international conventions and agreements to which the Republic is or may become a State Party, shall be complied with by all vessels documented under the laws of the Republic which are engaged in foreign trade and, to the extent determined applicable, to domestic watercraft as defined in Chapter 9 of this Title, fishing vessels and yachts. The foregoing international conventions and agreements, as may be amended, shall have effect as if specifically enacted by statute and fully set forth herein.

Section 156 requires the Maritime Administrator to publish a list of all the international treaties, conventions, protocols, codes, regulations, and agreements that have come into force and to which the Republic is a party. Both the 1976 Convention and the 1996 Protocol appear on that list.

[4][5]We find that the broad incorporation provision of Section 155 and listing pursuant to Section 156 is insufficient to incorporate Protocol Article 9(4) into the domestic law. First, Section 155 deals with "vessels,'' not "shipowners" or "salvors" within the meaning of the LLMCA. Second, the Nitijela's specific incorporation of the limitation limits and other sections of the 1996 Protocol to the exclusion of other sections, such as Article 9(4), indicates a clear intent not to adhere to the lower limits of the 1976 Convention or adopt the provisions of Protocol Article 9(4) which would require the court to defer to the Hong Kong proceeding and limitation fund. Under the canon of statutory construction "*generalia specialbus non derogard*" — the "principle that the specific overrides the general," courts are to assume the legislature intended specific provisions to prevail over more general ones when statutes conflict. That is,

the more specific of two conflicting provisions "comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." *See, e.g., Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016). The Nitijela legislated specific statutes in the LLMCA governing the right to limit liability in the Marshall Islands. If the Nitijela intended to incorporate the entirety of the 1976 Convention and the 1996 Protocol by virtue of the general provisions of Sections 155 and 156 it would not have needed to have legislated the LLMCA at all. Again, we find the Nitijela intended the LLMCA to govern limitation of liability in the Marshall Islands. There is no statutory provision that the court defer to a limitation proceeding with lower limits pending in some foreign court.

B. Defendants are subject to the limits set forth by the LLMCA should they avail themselves of the limitation defense.

Section 525(1) of the LLMCA provides:

> This Chapter shall apply whenever any person referred to in Section 502 of this chapter, seeks to limit his liability before a Court of the Republic or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of the Republic.

Defendants argue that the LLMCA does not even apply to this case because they have not sought affirmatively to limit liability in the Marshall Island courts. While it is true the defendants have not invoked the defense of limitation of liability under the LLMCA in these proceedings, it is clear they are seeking to reduce their exposure to the claimed damages by seeking the High Court's deference to the limitation fund established by the Hong Kong limitation proceeding and seeking dismissal of plaintiffs' claims. That is, Defendants are clearly seeking to limit liability in the Marshall Islands based on the Hong Kong action. They do, in fact, seek to limit their liability in this jurisdiction.

[6]While defendants are not required to avail themselves of the defense of limitation of liability in these Marshall Islands cases, they may do so pursuant to Section 520 of the LLMCA.

Plaintiffs concede that defendants may limit liability even without constitution of a second limitation fund provided they pay any judgment in the Marshall Islands up to the amount required under the 1996 Protocol and the LLMCA, Section 510, subject to any credit or offset paid out under the Hong Kong limitation fund.

IV. CONCLUSION

We conclude that the 1976 Convention and the 1996 Protocol may obligate the Marshall Islands to treaty obligations with Hong Kong. The domestic law of the Marshall Islands, however, is that specifically codified in the LLMCA, 47 MIRC §§ 501, et seq. Protocol Article 9(4) has not been made part of the domestic law and the High Court need not defer to the Hong Kong limitation proceeding or fund.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

BERNIE HITTO and HANDY EMIL,
Plaintiffs-Appellee,
v.
RAEIN TOKA and NANCY CALEB, a.k.a. NANCY PIAMON, on behalf of BILLY PIAMON, Defendant-Appellants.

SCT CN 2015-003 (TTPI HCT CN 21-80)

* * *

BERNIE HITTO and HANDY EMIL,
Plaintiffs-Cross Appellants,
v.
ALDEN BEJANG, AUN JAMES, AMON JEBREJREJ, and CALORINA KINERE, Defendants-Cross Appellees.

SCT CN 2015-004 (HCT CN 1986-149)

APPEAL FROM THE HIGH COURT

Argued April 12, 2017
Filed July 28, 2017

Summary

The Supreme Court has upheld the rulings made by the High Court in three specific cases. First, concerning Aibwij Weto, it was determined that Bernie Hitto holds the alap interest, and Hand Emil holds the senior dri jerbal interest. Second, in the case of Monke Weto, Alden Bejang holds the alab interest, while Aun James holds the senior dri jerbal interest. Third, regarding Lojonen Weto, Amon Jebrejrej holds the alab interest, and Calorina Kinere holds the senior dri jerbal interest. In affirming these decisions made by the High Court, the Supreme Court clarified that the High Court was not bound by the "law of the case doctrine," meaning it was not obligated to follow prior High Court decisions related to Traditional Rights Court opinions and answers. Instead, the High Court's findings were considered reasonable and supported by credible evidence, and they were not found to be clearly erroneous.

Digest

HITTO and EMIL v. TOKA, et al.; and HITTO and EMIL v. BEJANG, et al.

1. COURTS – *Law of the Case Doctrine – Previous Decision in the Case as the Law of the Case*: The law of the case doctrine originated in the courts as a means of ensuring the efficient operation of court affairs. 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. But it is not an inexorable command. That is, the doctrine is discretionary, not mandatory and is in no way a limit on a court's power. Courts throughout the United States agree that the doctrine is discretionary.

2. COURTS – *Law of the Case Doctrine – Grounds to Reconsider*: 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 circumstance exist; or 5) a manifest injustice would otherwise result.

3. COURTS – *Law of the Case Doctrine – Power to Reconsider Subject to Loss of Jurisdiction*: The law of the case doctrine 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.

4. LAND RIGHTS – *Morjinkot – Termination of Rights*; The nature of *morjinkot* is such that only a severe violation could constitute good cause.

5. APPEAL AND ERROR – *Traditional Rights Court*: 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*.

6. APPEAL AND ERROR – *Finding of Fact*: The Supreme Court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision.

7. APPEAL AND ERROR – *Finding of Fact*: High Court findings supported by credible evidence are reasonable and not clearly erroneous.

Counsel

Scott H. Stege, counsel for Plaintiffs-Appellants and Plaintiffs-Cross Appellants Bernie Hitto and Handy Emil
David Lowe, counsel for Defendants-Appellants Raein Toka and Nancy Caleb, a.k.a. Nancy Piamon, on Behalf of Billy Piamon
James McCaffrey, counsel for Defendants-Cross Appellees Alden Bejang, Aun James, Amon Jebrejrej, and Calorina Kinere

MARSHALL ISLANDS, SUPREME COURT

Before JAMES PLASMAN,[1] Acting Chief Justice, and SEABRIGHT[2] and KURREN,[3] Acting Associate Justices

OPINION

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

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, a.k.a. 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,

[1]James Plasman, High Court Associate Justice, sitting by appointment of the Cabinet.

[2]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[3]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

> 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 ("RC 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.
>
> 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.[4]

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

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[4]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 a 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 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 appear 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' 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 hall in any event give substantial weight to such opinion.

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 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,[5] the descendants of Abner, complained their asserted land rights in Aibwij weto on Bikej Island in Kwajalein Atoll were no longer recognized by the Iroij, who recognized the descendants of Jibke.[6] 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[7] and Lojonen[8] wetos, which they claimed were separate wetos from Aibwij, while the Abner plaintiffs maintained those wetos were not distinct from Aibwij.

[5]The plaintiffs, descendants 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.

[6]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 descendants of Jibke. They assert no claim to Monke and Lojonen wetos. They are the appellants in S.Ct. No. 2015-003.

[7]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.

[8]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.

Plaintiffs' claim is that Aibwij weto, as well as Monke and Lojonen wetos, were *morjinkot*[9] 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 *Morjinkot* was described by the Traditional Rights Court as "an award (inheritance) given to a man for his bravery." (TRC 2002 Opinion at 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

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

[1]"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.").

[2]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 circumstance 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.

[3]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 Soil'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 Soil'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 fit 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 circumstance, new evidence or something the court overlooked earlier"); *Robinson*, 720 F.2d at 1550 ("New development 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.[10] With that understanding, it is clear that this 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

[10]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 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).

since the 2007 remand and thirteen years had passed since Justice Johnson issued his Opinion and Judgment. Circumstances had changed and he 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.

> 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 "AIBW1J WATO, Bikej Island, Kwajalein Atoll"[11] 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 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.)

[4]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.[12] 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 with "That is all." This analysis contrasted sharply with the careful reasoning and examination of evidence

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[11]8 TRC 2002 Opinion, at p. 2.

[12]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 in so far 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.)

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.

[5]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.[13] 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.[14] This court finds the conclusion of the High Court that Handy Emil was senior the [sic] dri jerbal on Aibwij weto is not clearly erroneous.

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."[15]

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

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[13]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)).

[14]"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' decision." (citations omitted) (*Kramer and PII v. Are and Are*, 3 MILR 56, 61 (2008).)

[15]*See* footnote 10.

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.[16] 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 not exist.[17] 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 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

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[16]*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.

[17]Plaintiffs contended that "shortly after the filing of this litigation, Aibwij was illegally and arbitrarily divided into three small er 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 1-9, dated October 31, 1959, with a similar listing.

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 dri 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 *morjinkot*, 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 plaintiff on Aibwij. If the court had similarly concluded Monke and Lojonen to be *morjinkot* land, it would have so stated. It did not.

[6]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 weto 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.[18] This court finds Justice Tuttle' logic to be reasonable and not clearly erroneous.

The High Court then turned to the claim 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 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.

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

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.[19] 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.[20] Amon Jebrejrej testified he was the alab on Lojonen weto[21] and Calorina the dri jerbal.[22] 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.[23] 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:[24]

> As to Aibwij Weto, Bernie Hitto holds the alab interest and Handy Emil holds the senior dri jerbal interest.

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

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

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

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

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

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

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.

[7]We find the High Court's conclusions are consistent with Traditional Rights Court Rule 14 then in effect.[25] The High Court's findings are reasonable and are supported by credible evidence. They are not clearly erroneous. Based on the forgoing, the High Court Judgment is **AFFIRMED**.

[25]As well as with current Rule 9.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MUDGE SAMUEL,
Plaintiff-Appellant,
v.
ROBSON YASIWO ALMEN, et al.,
Defendants-Appellees.

SCT CN2017-002 (HCT CN 2017-037)
Submitted July 21, 2017
Filed September 20, 2017

Summary

The Supreme Court determined that the mere act of a judicial officer administering an oath to the declared winner of an election under protest, without additional circumstances, does not create any inference of bias or conflict of interest. The underlying purpose of disqualifying judges who have previously "played a role in the case," as outlined in Article VI, Section 1(6) of the Constitution and the Judiciary Act 1983 (as amended) within 27 MIRC, Chapter 2, Section 267, is to prevent situations where conflicts of interest or bias could potentially impact impartial decision-making. In this case, the petitioner failed to present clear and compelling evidence of actual bias or conflict of interest on the part of the trial judge that would warrant the issuance of a writ of mandamus.

Digest

1. WRITS, EXTRAORDINARY – *No Other Adequate Remedy*: A mandamus petition is the proper way to challenge the denial of a recusal motion.

2. WRITS, EXTRAORDINARY – *Power to Issue*: Under RMI law, mandamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised.

3. WRITS, EXTRAORDINARY – *Requirements – In General*: For a writ of mandamus to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy.

4. United States decisional authority provides guidance in resolving the constitutional and procedural issues raised by petitioner's application for a writ of mandamus, although we are not bound by those decisions. Const., Art. I, Sec. 3(1).

5. The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.

6. The treatment of mandamus as an extraordinary remedy is not without good reason. Mandamus actions "have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case.

7. To justify the issuance of the extraordinary writ of mandamus, the movant must"satisfy the burden of showing that (his) right to issuance of the writ is clear and indisputable.

8. A writ of mandamus compelling recusal of a judicial officer will issue only where the party seeking the writ demonstrates a clear and indisputable right to relief.

9 The clear language of the Constitution, Article VI, Section 1(6) and 27 MIRC, Chapter 2, Section 267, imposes "a non-discretionary duty mandated by law" for a judge to disqualify him or herself" if a judge played a role in a case or if he is disabled by any conflict of interest."

10 Judiciary Act 1983, as amended, 27 MIRC, Chapter 2, Section 267, likewise, provides for disqualification of a judge who previously "played a role" in a case.

11. A judge's the duty to disqualify is mandatory even if not raised by a litigant.

12. In construing the Constitution and interpreting statutes, the Supreme Court's task is to give effect to the clear, explicit, unambiguous, and ordinary meaning of language.

13. When read in context, the phrase "played a role" in the case is aimed at preventing actual or apparent conflicts of interest. Article VI, Section 1(6)'s prohibition or disqualification of a judge in a case in which he "has previously played a role" is followed by the phrase "or is otherwise disqualified by a conflict of interest."

14. The goal of the judicial disqualification statute is to foster the appearance of impartiality.

15. The administration of the oath by a judge does not involve any sort of adjudicatory function or decision making. Even if it did, and even if petitioner believes the administration of the oath was some sort of ruling against him (which it isn't), a judge is not ordinarily disqualified on the basis of adverse rulings against a party alone.

16. A motion for recusal or disqualification, in the absence of a showing of actual bias or conflict of interest, must be governed by an objective standard.

17. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable."

18. Only where a reasonable person, were he to know all the circumstances, would harbor doubt about the judge's impartiality, should the judge recuse himself or be disqualified.

Counsel

Roy Chikamoto, counsel for Plaintiff-Appellant Mudge Samuel
Filimon Manoni, Attorney-General, counsel for Defendants-Appellees Robson Yashio Almen, *et al.*

Before CADRA, Chief Justice, and SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

ORDER DENYING WRIT OF MANDAMUS

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

I. INTRODUCTION

Plaintiff-Appellant Mudge Samuel ("petitioner") seeks a writ of mandate ordering the High Court Chief Justice (the "High Court Chief Justice" or "trial judge") to disqualify or recuse himself from all further proceedings in this election case. Because the trial judge administered the oath of office to the declared winner of the Majuro Atoll Local Government ("MALGOV'') mayoral election while a challenge to the election by petitioner was pending, petitioner contends that the trial judge "previously played a role" in the case thus disqualifying that judge from further participation in the decision of this case by virtue of Article VI, Section 1(6) of the Constitution and the Judiciary Act 1983, as amended, 27 MIRC, Chapter 2, Section 267.

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

Petitioner further contends that because disqualification under the Constitution is mandatory or self-executing, the High Court erred by dismissing his recusal motion as untimely.

As discussed below, we **DENY** the requested writ of mandamus because petitioner has not clearly demonstrated that the trial judge has an actual or apparent conflict of interest, is biased or has created an appearance of bias sufficient to require mandatory disqualification under the Constitution, Article VI, Section 1(6) or the Judiciary Act 1983, as amended, 27 MIRC, Chapter 2, Section 267. We further find that the petitioner has an adequate remedy on appeal from a final judgment to address his constitutional challenge to the trial judge conducting further proceedings in this case.

II. THE PROCEEDINGS BELOW

We do not make factual findings but accept petitioner's version of the facts for purposes of deciding the instant petition. Defendant-Appellee Robson Yasiwo Almen ("respondent"), represented by the Office of the Attorney General, has filed no briefing and we are unaware of respondent's position on the issues raised by the instant writ application.

In short, this case arises out of the November 20, 2015, election for the mayor of MALGOV.

On December 15, 2015, petitioner filed a petition for recount alleging violations of the Elections and Referenda Act 1980 as well as constitutional issues. On December 18, 2015, petitioner filed what might be characterized as a protective filing of two civil actions (Case Nos. 2015-233/234) in the High Court because petitioner believed the Chief Electoral Officer ("CEO") would not respond to the December 15, 2015 petition for recount before certifying the final results of the election. On December 19, 2015, the CEO certified the final results of the election for MALGOV's mayor despite having been served with the petition for recount and the two High Court civil actions.

On December 22, 2015, the High Court Chief Justice administered the oath of office to Ladie Jack as the new mayor of MALGOV.

MARSHALL ISLANDS, SUPREME COURT

It is unclear from the briefing what activity occurred on petitioner's cases pending in the trial court in 2016. On February 13, 2017, the High Court Chief Justice remanded one of petitioner's civil actions back to the CEO to respond in writing to petitioner's December 15, 2015 petition for a recount On February 27, 2017, the CEO denied the recount petition. Petitioner alleges he tried to file his appeal of the CEO's denial or rejection of the petition for a recount under then existing High Court Case No. 2015-233 but was instructed to file a new civil action, which he did by filing High Court Case No. 2017-037.

A status conference was noticed and held by the trial court on April 26, 2017. Counsel for petitioner was unable to attend due to medical reasons. The High Court Chief Justice issued an order on April 27, 2017, establishing the record on appeal (from the CEO's denial of the recount petition). On that same day, April 27, 2017, before receiving the High Court's order, petitioner filed a request for rescheduling of the conference which had been held on April 26, 2017. That request was denied. The parties submitted their versions of the record on appeal on May 10, 2017.

On May 30, 2017, petitioner filed a motion to recuse the High Court Chief Justice from further participation in the case. Citing Article VI, Section 1(6) of the Constitution, petitioner argued that because the High Court Chief Justice administered the oath to Ladie Jack in December 2015, the judge previously "played a role" in the case and therefore cannot preside over the case. On June 14, 2017, the High Court Chief Justice issued an order denying the motion to recuse on two grounds: (1) the motion was untimely, and (2) the affidavit supporting the motion was legally insufficient.

On June 26, 2017, petitioner filed the instant "Application For Writ of Mandamus-Appeal From Order Denying Motion For Recusal." On July 21, 2017, the petitioner filed a supplemental memorandum in support of his application for writ of mandamus. There has been no briefing submitted by respondent.

Ill. THE ISSUES PRESENTED

Petitioner frames a three-step analysis of his constitutional challenge to the trial judge's further participation in this case. First, if the administration of an oath of office is legally significant in the certification process, is the judge who administers the oath prohibited by Article VI, Section 1(6) from adjudicating a case involving a challenge to the election, qualification and certification process for having "played a role" in the case? Second, is there an inherent conflict of interest in a judge hearing an election challenge to the candidate for whom the judge administered the oath of office? Finally, does Article VI, Section 1(6) require affirmative action by one asserting the disqualification or is the prohibition self-executing, requiring the judge to disqualify himself after realizing his role in the matter which is the subject of the lawsuit (election challenge)?

Petitioner further requests the Court to review certain rulings made by the trial judge relating to the denial of referral of certain constitutional issues to this Court and to resolve certain issues relating to the record on appeal. Because these issues have not been briefed and because those issues do not pertain to the requested writ of mandate requiring the disqualification of the trial judge, we will not decide those issues. The petitioner has a remedy on appeal from a final judgment as to those issues.

IV. DISCUSSION

A. The Standard for Issuance of the Writ

[1][2][3]"A mandamus petition is the proper way to challenge the denial of a recusal motion." *In re City of Milwaukee*, 788 F.3d 717, 719 (7th Cir. 2015). Under RMI law, "[m]andamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised. *Kabua, et al v. High Court Chief Justice, et al.*, 1 MILR (Rev.) 33, 34-35 (March 20, 1986). For a writ of mandamus to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy. *Kabua v. Kabua, et al.*, 1

MILR (Rev.) 247, 253 (Dec. 20, 1991)." *In the Matter of the Estate of Peter*, 2 MILR 68, 74 (1995).

[4][5][6][7][8]United States decisional authority provides guidance in resolving the constitutional and procedural issues raised by petitioner's application for a writ of mandamus, although we are not bound by those decisions. Const., Art. I, Sec. 3(1). The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385 (1953). The treatment of mandamus as an extraordinary remedy is not without good reason. Mandamus actions "have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case. *Bankers Life & Cas. Co.*, 346 U.S. at 384-85; *see also*, *Kayser-Schillegger v. Ingram*, 3 MILR 92, 94 (2008). To justify the issuance of the extraordinary writ of mandamus, the movant must "satisfy the burden of showing that (his) right to issuance of the writ is 'clear and indisputable."' *Kerr v. U.S. Dist. Court for N Dist. of Cal.*, 426 U.S. 394, 403 (1976) (some quotation marks omitted); *Bankers Life & Cas. Co.*, 346 U.S. at 384; *First Fed. Sav. & Loan Ass'n*, 860 F.2d 135, 138 (4th Cir. 1998) (explaining that mandamus relief is available only when the petitioner has "a clear right to the relief sought"). A writ of mandamus compelling recusal of a judicial officer will issue only where the party seeking the writ demonstrates a clear and indisputable right to relief.

B. Petitioner Has Not Demonstrated a "Clear and Indisputable" Right to Disqualification of the Trial Judge

I. The Constitution and Judiciary Act disqualifies a judge from presiding over a case in which the judge previously "played a role"

[9]In applying the standards for issuance of a writ of mandamus enunciated in *In the Matter of the Estate of Peter*, *supra*, we find the clear language of the Constitution, Article VI, Section 1(6) and 27 MIRC, Chapter 2, Section 267, imposes "a non-discretionary duty mandated

by law" for a judge to disqualify him or herself" if a judge played a role in a case or if he is disabled by any conflict of interest."

The Constitution, Article VI, Section 1(6) provides:

> No judge shall take part in the decision of any case in which that judge has previously played a role or with respect to which he is otherwise disabled by any conflict of interest.

[10]Similarly, the Judiciary Act 1983, as amended, 27 MIRC, Chapter 2, Section 267, likewise, provides for disqualification of a judge who previously "played a role" in a case.

We have recognized a mandatory duty to recuse under the circumstances specified by the Constitution and Judiciary Act. *In Balos v. High Court Chief Justice Tennekone*, 1 MILR (rev.) 137 (1989), we stated that "[i]f a judge played a role in a case or if he is disabled by any conflict of interest, he must recuse himself." *Id*. at 145 (emphasis added). Under analogous United States federal law (28 USC 455(a)) a judge has an independent duty to disqualify or recuse which is self-executing and mandatory which the judge must observe *sua sponte*. *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980).

[11]Thus, in answering the question posed by petitioner as to whether the prohibitions contained in the Constitution, Article VI, Section 1(6) require affirmative action by one asserting that disqualification or is the prohibition self-executing, requiring the judge to disqualify himself after realizing his role in the matter that is subject to the lawsuit, we hold the duty to disqualify is mandatory even if not raised by a litigant. Because petitioner is raising the issue of mandatory disqualification, we need not address the timeliness of the motion to recuse. This, however, does not resolve the issue of whether the trial judge had a mandatory duty to disqualify himself in the instant election cases.

2. The disqualification mandated by the Constitution and Judiciary Act of a judge who previously "played a role" in the case is aimed at preventing actual or apparent conflicts of interest and ensuring the impartiality of the decision maker

The ultimate question posed by petitioner's application for a writ of mandamus is whether the trial judge previously "played a role" in the case by administering the oath to the declared winner of the MALGOV mayoral election. Neither the Constitution nor the Judiciary Act define what is meant by the phrase "played a role" in the case.

[12]In construing the Constitution and interpreting statutes, our "task is to give effect to the clear, explicit, unambiguous, and ordinary meaning of language." *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 114, 117 (2009). The meaning of "played a role" in the case is not obvious, clear or explicit. That phrase is susceptible to multiple interpretations, and in *Balos, supra*, we did not explore the contours of what it means to have "played a role" in a case. Notably, petitioner has cited no precedent or authority disqualifying a judge from hearing an election appeal merely because that judge may have administered an oath to the challenged winner of the election. We are unaware of any authority directly on point.

[13][14]When read in context, the phrase "played a role" in the case is aimed at preventing actual or apparent conflicts of interest. Article VI, Section 1(6)'s prohibition or disqualification of a judge in a case in which he "has previously played a role" is followed by the phrase "or is otherwise disqualified by a conflict of interest." The framer's use of the word "otherwise" suggests the purpose of the prohibition of a judge participating in a case in which he "previously played a role" is aimed at preventing actual or apparent conflicts of interest. "Otherwise" is a word of common usage that has a plain and natural meaning. *See Smoldt v. Henkels McCoy*, Inc., 53 P.3d 443, 445 (Or. 2002). "Otherwise" is a comparative word; that is, to construe properly the meaning of the word that "otherwise" is modifying, we must examine the concept or word to which that modified word is being compared. *See, e.g.*, Webster's Third New Int'l Dictionary 1598 (unabridged ed. 1993) (defining "otherwise," *inter alia*, as "in a

different way or manner," "in different circumstances, under other conditions," and "in other respects"). Thus construed, the concept modified by the phrase "otherwise disqualified by a conflict of interest" is "previously played a role in the case." The necessary implication is that the framer's intent by requiring disqualification of a judge who had "previously played a role in the case" was to avoid actual or apparent conflicts of interest. This conclusion is further supported by decisional authority regarding the purpose of mandatory disqualification or recusal. "[T]he goal of the judicial disqualification statute is to foster the [a]ppearance of impartiality." *Potashnick v. Port City Constr. Co*., 609 F.2d 1101, 1101 (5th Cir. 1980). So the question becomes whether the trial judge acquired a conflict of interest by administering the oath to the challenged victor in the MALGOV mayoral election.

3. Petitioner has failed to make a "clear showing" that the trial judge acquired an actual or apparent conflict of interest by administering the oath to the declared winner of the MALGOV election

It is undisputed that the trial judge administered the oath to Ladie Jack, the declared winner of the MALGOV mayoral election, when a petition for recount and court actions challenging the election were pending. We are not convinced, however, that the mere administration of an oath under those circumstances gives rise to an actual or implied bias, partiality or conflict of interest. Petitioner has not made a clear showing that the trial judge should be disqualified.

[15]We note that administration of an oath from the standpoint of one administering the oath consists of little if anything more than reading from a prepared text (or reciting from one's memory if sufficient) and having the oath-taker either recite back the words or affirm he accepts the oath. While, as petitioner contends, the oath may have legal significance to the one taking the oath, the mere administration of the oath, without more, does not clearly implicate the judge as having "played a role" in the conduct challenged in the election appeal(s) or petition for recount so as to have acquired an actual or apparent conflict of interest. By administering the oath, the trial judge does not vouch for the results of the election or that the election process comported with the law. There is no requirement that a judge or other person administering the oath make

any sort of decision or predetermination that the person taking the oath is indeed the rightful winner or is otherwise qualified to hold the office. The administration of the oath by a judge does not involve any sort of adjudicatory :function or decision making. Even if it did, and even if petitioner believes the administration of the oath was some sort of ruling against him (which it isn't), a judge is not ordinarily disqualified on the basis of adverse rulings against a party alone. *See, e.g., Liteky v. United States*, 510 U.S. 540, 555 (1994).

[16]A motion for recusal or disqualification, in the absence of a showing of actual bias or conflict of interest, must be governed by an objective standard. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 872 (2009). Only where a reasonable person, were he to know all the circumstances, would harbor doubt about the judge's impartiality, should the judge recuse himself or be disqualified. *See, e.g., Salt Lake Tribune Pub. Co. v. AT&T Corp.*, 353 F. Supp. 2d 1160, 1172 (D. Utah 2005). Petitioner has not demonstrated an actual conflict of interest or bias on the part of the trial judge. We do not believe reasonable persons could conclude the trial judge cannot act impartially in this case simply because he administered the oath of office to the declared winner of the MALGOV mayoral election.

V. CONCLUSION

In conclusion, we find the evil to be avoided by requiring the disqualification of judges for previously having "played a role in the case" is to prevent conflicts of interest and bias which might influence impartial decision making. Petitioner has not made a "clear showing" of actual bias or conflict of interest by the trial judge. Likewise, we find the mere administration of an oath by a judicial officer to the declared winner of an election under protest, without more, does not give rise to any implication of bias or conflict of interest. We, therefore, **DENY** petitioner's application for a writ of mandamus disqualifying the trial judge from further participation in the cases below.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

In re: MICHAEL SAMMONS
Petitioner

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MICHAEL SAMMONS,
Plaintiff,
v.
GEORGE ECONOMOU and DRYSHIPS, INC.,
Defendants.

SCT CN 2017-004 (HCT CN 2017-131)
Submitted October 20, 2017
Filed November 15, 2017

Summary

The Supreme Court denied the petitioner's application for writ of mandamus to allow telephonic appearance. The Court determined that the trial judge did not have a "non-discretionary" duty under either the Constitution (Cont. Art. II, Sec. 4(1) and Sec. 14(1)) or under the MIRCP, Rule 1, to allow telephonic appearance and therefore to support a writ of mandamus.

Digest

1. WRITS, EXTRAORDINARY – *Requirements – In General*: Under RMI law, mandamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised. For a writ of mandamus to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy.

2. WRITS, EXTRAORDINARY – *Power to Issue*: The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.

3. WRITS, EXTRAORDINARY – *Requirements – In General*: The treatment of mandamus as an extraordinary remedy is not without good reason. Mandamus actions have the unfortunate consequence of making the judge a Iitigant, obliged to obtain personal counsel or to leave his defense to one of the litigants appearing before him in the underlying case.

MARSHALL ISLANDS, SUPREME COURT

4. WRITS, EXTRAORDINARY – *Requirements – Burden of Proof*: To justify the issuance of the extraordinary writ of mandamus, the movant must satisfy the burden of showing that (his) right to issuance of the writ is 'clear and indisputable.

5. CONSTITUTIONAL LAW – *Due Process – In General*: The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Due process requires reasonable access to courts but not that a particular means of access be made available.

6. CONSTITUTIONAL LAW – *Due Process – Procedural*: It is well recognized that in general, courts have broad discretion to determine whether to order litigants to appear m person.

7. CONSTITUTIONAL LAW – *Due Process – Procedural*: Due process does not require a trial court to hold a hearing on a party's motion. And if due process doesn't require a hearing, it certainly doesn't require a telephonic one.

8. CONSTITUTIONAL LAW – *Due Process – Procedural*: The Court concludes that, although telephonic appearances by parties may further the inexpensive determination of cases and is a practice which should be encouraged, there is no due process right to a telephonic appearance by a party and the trial judge has discretion whether to allow telephonic participation.

9. WRITS, EXTRAORDINARY – *Requirements – In General*: There being no "non-discretionary" duty of the trial judge to grant a party s request for telephonic participation, a writ of mandamus does not provide a remedy to Petitioner.

10. COURTS – *Disqualification – Cause, Proof of*: There being no showing of bias, actual or apparent, the request to disqualify or recuse the trial judge and transfer the case to another High Court Associate Justice is denied.

Counsel

Michael Sammons, Plaintiff-Petitioner, *pro se*
Arsima Muller, counsel for Defendant George Economou
Dennis Reeder, counsel for Defendant Dryships Inc.

SAMMONS v. ECONOMOU and DRYSHIPS, INC.

Before CADRA, Chief Justice, and SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

ORDER DENYING PETITIONER FOR WRIT OF MANDAMUS

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

I. INTRODUCTION

Plaintiff-petitioner Michael Sammons seeks a writ of mandamus requiring the High Court trial judge the Hon. Colin R. Winchester to comply with "MIRCP, Rule 1, and the RMI constitutional rights to due process and access to the courts."

The instant petition arises in the context of the trial judge denying a request by Petitioner to appear telephonically at oral argument on pending motions to dismiss.

Petitioner's requested relief is that "mandamus should issue advising all lower courts: (1) that telephone appearances should be encouraged for non-resident *pro se* litigants for non-evidentiary hearings if requested, and (2) this Court should, given the appearance of possible animosity towards the Petitioner as a result of the Petitioner's '*extrajudicial*' act of firing the presiding judge's friend and neighbor, order that this case be transferred to another High Court Associate Justice to avoid even the appearance of bias."

This Court construes the instant petition as requesting an order or mandate that (l) the trial judge allow Petitioner to participate telephonically at a hearing on the pending motions, and (2) the trial judge be recused or disqualified for an appearance of bias.

For the reasons set forth below, the Petition for Writ of Mandamus is DENIED.

II. FACTS/PROCEDURAL BACKGROUND

The record before this Court consists of Petitioner's "Petition for Writ of Mandamus" and attached exhibits which include an e-mail from the trial judge to Mr. Sammons, Ms. Muller, and Mr. Reeder dated October 16, 2017 (Exhibit A); "Plaintiff's Motion to Reconsider Order of

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

October 16, 2017 Prohibiting Appearance by Telephone" (unmarked Exhibit B); and "Order Denying Plaintiffs Motion to Reconsider'‘ (Exhibit C). Defendants, George Economou and DryShips, Inc., have filed no responsive briefing to the "Petition for Writ of Mandamus."

The record demonstrates that:

On October 16, 2017, the trial judge sent an e-mail to Petitioner and Defendants' counsel regarding the scheduling of oral arguments on three pending motions: Plaintiff Sammon's motion for a declaration that the action may proceed as a direct action, DryShips' motion to dismiss the second amended complaint, and Economou's motion to dismiss the second amended complaint. In that e-mail, the trial judge stated "I anticipate in-person participation only. I am not interested in telephonic or video-conference appearances for these motions."

Characterizing the October 16, 2017, e-mail as an "order," Petitioner filed a "Motion to Reconsider Order of October 16, 2017 Prohibiting Appearance by Telephone." Alternatively, Petitioner moved "for leave to waive his right to personally appear for oral argument on the pending motions to dismiss."

On October 18, 2017, the trial judge issued an "Order Denying Plaintiffs Motion to Reconsider." The trial judge further ordered "if plaintiff elects not to appear and participate in oral arguments, his previously filed oppositions to the motions will be given due consideration." That order was accompanied by a caveat that "non-participation in oral arguments on significant substantive motions will likely place him at a considerable disadvantage." In explanation of the denial of the motion for reconsideration the trial judge stated "plaintiff once had local counsel, but elected to terminate local counsel and proceed pro se. I am not therefore overly sympathetic to plaintiff's self-created disadvantage."

On October 20, 2017, Petitioner filed the instant "Petition for Writ of Mandamus.'

III. DISCUSSION

A. The Alternative Relief Requested by Petitioner Was Granted by the Trial Judge

The instant dispute has its genesis in an e-mail concerning scheduling of oral argument on pending motions sent to Petitioner and defense counsel by the trial judge. Whether construed as an "order" or not, the trial judge expressed his intent not to allow telephonic participation in oral argument.[3] In seeking reconsideration of the trial judge's expressed intent, Petitioner sought permission to appear telephonically and moved "in the alternative . . . for leave to waive his right to attend oral argument."[4] Petitioner argued that "his personal appearance for oral argument is not necessary for a correct decision in this matter'' noting "plaintiff knows of no facts or arguments in support of his position not already clearly expressed in the pleadings" and '"the key issues appear straightforward and solely a matter of law."[5] The trial judge granted the requested alternative relief ordering "if plaintiff elects not to appear and participate in oral arguments, his previously filed oppositions to the motions will be given due consideration."[6] Because the trial judge granted Petitioners request not to appear and participate in oral arguments in lieu of appearing in person, Petitioner should not now be heard to complain that his request to appear telephonically was denied. Petitioner was granted the relief he requested.

B. The Petition for Writ of Mandamus is Denied

1. The Standard for Issuance of the Writ

[1]Under RMI law,

> [m]andamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised. *Kabua, et al. v.*

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[3]"E-mail" from trial judge to parties dated October 16, 2017..

[4]"Plaintiff's Motion to Reconsider Order of October 16, 2017 Prohibiting Appearance by Telephone," p. 1,3.

[5]*Id*. at 2.

[6]"Order Denying Plaintiff's Motion To Reconsider," p. 2.

> *High Court Chief Justice, et al.*, 1 MILR (Rev.) 33, 34-35 (March 20 1986). For a writ of mandamus to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy. *Kabua v. Kabua, et al.* 1 MILR (Rev) 247, 253 (Dec. 20 1991).

In the matter of the Estate of Peter, 2 MILR 68, 74 (1995).

[2][3][4]The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385 (1953). The treatment of mandamus as an extraordinary remedy is not without good reason. Mandamus actions "have the unfortunate consequence of making the judge a Iitigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case. *Bankers Life & Cas. Co.*, 346 U.S. at 384-85; *see also, Kayser-Schillegger v. Ingram*, 3 MILR 92, 94 (2008). To justify the issuance of the extraordinary writ of mandamus, the movant must "satisfy the burden of showing that (his) right to issuance of the writ is 'clear and indisputable.'" *Kerr v. US. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (some quotation marks omitted); *Bankers Life & Cas. Co.*, 346 U.S. at 384; *First Fed. Sav. & Loan Ass 'n*, 860 F.2d 135, 138 94th Cir. I 998) (explaining that mandamus relief is available only when the petitioner has "a clear right to the relief sought").

Thus, the question becomes whether the trial judge had a "non-discretionary" duty to grant Petitioner's request to appear telephonically.

2. The Trial Judge Did Not Have a "Non-discretionary" Duty Under the Constitution or MIRCP, Rule 1, To Allow Telephonic Appearance

The RMI Constitution, Article Il, Section 4(1), provides "[n]o person shall be deprived of life, liberty or property without due process of law." Article II, Section 14(1) provides for the right to access the courts: "Every person has the right to invoke the judicial process as a means of vindicating any interest preserved or created by law, subject only to regulations which limit

access to courts on a nondiscriminatory basis." The Rules of Civil Procedure (MIRCP), Rule 1, provides "[t]hese 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."

The gist of Petitioner's argument is that the constitutional rights to due process, access to the courts and MIRCP, Rule 1, require that his request for telephonic appearance be granted; that the trial judge has no discretion but to order his request for telephonic appearance.

[5][6]"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Due process requires reasonable access to courts but not that a particular means of access be made available. *See generally Asegan v. Henry*, 981 F.2d 313, 314 (8th Cir 1992) (stating that the right to access courts did not require state to eliminate policy prohibiting prisoners from making toll-free phone calls). It is well recognized that in general, courts have broad discretion to determine whether to order litigants to appear m person. *See, e.g., Estrada v. Speno & Cohen*, 244 F.3d 10050, 1052 (9th Cir. 2001) (finding no abuse of discretion in district court's decision to grant default judgment for repeated failure to comply with court orders, including order to appear in person); *Bartholomew v. Burger King Corp.*, No. l:l1-CV-00613-JMS-BMK, 2014 WL 7419854, at *1 (D. Haw. Dec. 30 2014 (affirming magistrates order granting sanctions for failure to personally appear at settlement conference as ordered); *Winters v. Jordan*, No. 2:09-CV-0522-JAM-KJN, 2013 WL 57 0819, at *6, 10 (E.D. Cal. Oct. 25, 2013) (noting that the mere fact that plaintiffs are proceeding in forma pauperis does not entitle them to make telephonic appearances" and recommending dismissal for repeated failure to comply with court orders).

[7]Although telephonic appearances have become routine, even encouraged in many United States federal and state courts, as well as before administrative tribunals, the decision whether to allow such appearances remains within the discretion of the trial judge. For example, California Rules of Court, Rule 3.670 favors telephonic appearances (subsec. a) but allows the court to require a party to appear in person if the court determines that a personal appearance

would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case (subsec. (1)(2)). Similarly Nevada Rules of Court, Supreme Court Rules, Part IX-b(a), Rules Governing Appearance By Telephone Transmission Equipment for Civil and Family Court Proceeding, Rule 2, favors use of telephonic equipment to improve access to the courts and reduce litigation costs, but Rule 4.3(b) specifically allows the court to require personal appearances if the court determines that a personal appearance would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case. Alaska Rules of Civil Procedure, Rule 99, provides that the court may allow telephonic participation in any hearing by a party, counsel or witness upon a showing of good cause. United States federal courts also provide discretion to the courts in whether to grant telephonic appearances. *See, e.g.*, Judge Kimberly Mueller, Standing Order, Civil Law and Motion, United States District Court, Eastern District of California, http://www.caed.uscourts.gov/caednew/index.cfin/judges/all-judges/5020/standing-orders/ (site last visited Nov. 13, 2017) (providing procedure for requesting telephonic appearance and procedure if request is approved). It is not possible to catalogue here each state's or federal district court's rules regarding telephonic appearances by a party but the point is that the court retains discretion in whether to allow such appearance. Due process does not require a trial court to hold a hearing on a party's motion. *See Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015). And if due process doesn't require a hearing, it certainly doesn't require a telephonic one.

[8][9]The Court concludes that, although telephonic appearances by parties may further the inexpensive determination of cases and is a practice which should be encouraged, there is no due process right to a telephonic appearance by a party and the trial judge has discretion whether to allow telephonic participation. There being no "non-discretionary" duty of the trial judge to grant a party s request for telephonic participation, a writ of mandamus does not provide a remedy to Petitioner. The petition is, accordingly, denied.

C. Grounds For Recusal or Disqualification of the Trial Judge Have Not Been Demonstrated

Petitioner seeks an "order that this case be transferred lo another High Court Associate Justice." Petitioner argues this relief is warranted "given the appearance of possible animosity towards the Petitioner as a result of the Petitioner's "extrajudicial" act of firing the presiding judge's friend and neighbor."[7] Throughout the petition, Petitioner repeatedly attributes the following quote to the trial judge: "Plaintiff once had local counsel (my friend and neighbor John Masek) but elected to terminate local counsel and proceed pro se. I am not therefore overly sympathetic to plaintiff's self-created disadvantage." *See* Exhibit C attached.[8]

From this alleged quote, Petitioner infers the trial judge is 'defending a wronged friend . . . , even avenging him" thus demonstrating a "palpable animosity toward the Petitioner'' and "demonstrating a bias that would make a fair and impartial judgment most unlikely."[9]

[10]The quote attributed to the trial judge and which forms the basis for Petitioner's argument regarding apparent bias is found nowhere in the record. There is no reference to "my friend and neighbor John Masek" in Exhibit C or elsewhere. There is nothing in the record to support Petitioner's inference that the trial judge denied the request for telephonic participation out of any animosity arising from Petitioner's terminating Masek's services. There being no showing of bias, actual or apparent, the request to disqualify or recuse the trial judge and transfer the case to another High Court Associate Justice is **DENIED**.

IV. CONCLUSION

For the reasons set forth above, the Petition for Writ of Mandamus is **DENIED**.

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[7]Petition for Writ at 6.

[8]See, Petition for Writ. p. 2, 3.

[9]See e.g., Petition for Writ. p. 4.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

LITO MARTINEZ ASIGNACION,
Plaintiff/Appellant,
v.
RICKMERS GENOA SCHIFFAHRTGESELLSCHAFT MBH & CIE, KG,
Defendants-Appellees.

SCT CN 2016-003 (HCT CN 2016-026)

APPEAL FROM THE HIGH COURT

Argued June 20, 2018
Filed June 20, 2018

Summary

On October 27, 2010, Plaintiff-Appellant Asignacion sustained serious injuries while working aboard the *M/V Rickmers Dalian*. Five years after the injury, and a lawsuit in Louisiana and arbitration in the Philippines, Asignacion filed suit against the defendants in the High Court. The High Court dismissed the suit, siting, among other reasons, that the Asignacion's claims were barred by the Republic's two-year statute of limitation under 47 MIRC § 862 (2)(c). On appeal, Asignacion's sole argument was that the statute is equitably tolled based on his prosecution of the suit in Louisiana. He argued that equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time. The Supreme Court denied the appeal determining that Asignacion had not satisfied either prong of the two-part test. There was not wrongful conduct by the defendants, nor were there any extraordinary circumstances beyond his control that made it impossible to file on time.

Digest

1. STATUTE OF LIMITATIONS – *Equitable Tolling*: Equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time. A third exception can exist if a plaintiff mistakenly files in a court with incorrect venue.

SAMMONS v. ECONOMOU and DRYSHIPS, INC.

Counsel

Tatyana Cerullo and Melvin Narruhn, counsel for Plaintiff/Appellant Lito Martinez Asignacion
Dean Robb, Arsima Mull, and Peter B. Sloss (pro hac vice), counsel for Defendants-Appellees Rickmers Genoa Schiffahrtgesellschaft MBH & CIE, KG

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

Plaintiff Lito Martinez Asignacion ("Asignacion") was employed by Defendant Rickmers Genoa Schiffahrgesellschaft MbH & Cie Kg ("Rickmers") as a fitter aboard Rickmers' vessel, the *M/V Rickmers Dalian* ("Vessel") from February 2010 to October 2010. On October 27, 2010, Asignacion sustained serious injuries while working aboard the Vessel.

On November 12, 2010, Asignacion filed a civil action in Louisiana State Court against Rickmers seeking damages for his October 27, 2010 injuries. Asignacion alleged claims for Jones Act negligence and unseaworthiness under U.S. maritime law.

On May 16, 2012, the Louisiana State Court action was stayed pending arbitration in the Phillippines, as required by Asignacion's employment contract. After the February 15, 2013 arbitration award, Asignacion filed a new action in Louisiana, seeking to have the Phillippines arbitration award set aside. Ultimately, on April 16, 2015 the Fifth Circuit Court of Appeals found the award valid and enforceable.

On February 9, 2016, more than five years after his injury, Asignacion filed the present suit seeking damages under RMI law.

By Order dated November 10, 2016, High Court Chief Justice Carl B. Ingram dismissed the complaint under MIRCP 12(b)(6) on the grounds that it was barred by the RMI's two-year

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

statute of limitation under 47 MIRC § 862(2)(c) and the doctrine of *res judicata*. Because we agree the case is barred by the statute of limitations, we do not address the applicability of *res judicata*.

[1]Asignacion admits that he failed to file suit within the two-year RMI statute of limitations. His sole argument is that the statute is equitably tolled based on his prosecution of the suit in Louisiana. "Equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time." *Soll v. Runyon,* 165 F. 3d 1238, 1242 (9th Cir. 1999).[3]

Asignacion satisfies neither prong. First, there is no evidence that Rickmers prevented Asignacion from filing a timely claim in the RMI. And second, there was no extraordinary circumstances beyond Asignacion's control that made it impossible for him to file a timely claim. He easily could have filed a claim in the RMI and then sought a stay of either the RMI or Louisiana action. Or he could have simply filed in the RMI and not Louisiana. In short, the decision to file or not file in the RMI within the two-year statute rested with Asignacion. He cannot now claim that any circumstance beyond his control made it impossible to file a timely claim.

[3]A third exception can exist if a plaintiff mistakenly files in a court with incorrect venue. *See Burnett v New York Cent. R. Co.*, 380 US 424 (1965). No such exception exist here.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (THAILAND) COMPANY, LTD.,
TOKIO MARINE & NICHIDO FIRE INSURANCE CO., LTD., ET AL.,
Plaintiffs-Appellees,
v,
ELENI MARITIME LIMITED IN PERSONA AND
EMPIRE BULKERS LIMITED,
Defendants-Appellants.

SCT CN 2018-005 (HCT CN 2-14-050, 2014-110, and 2015-194)

ON APPEAL FROM THE HIGH COURT
Submitted June 26, 2018
Filed July 18, 2018

Summary

In its Order Denying Request to Vacate and/or Modify "Order Dismissing Interlocutory Appeal," the Supreme Court, through a single judge procedural order, made the following determinations. First, the High Court's partial summary judgment order is not a "final decision" from which an appeal lies as of right. It is an interlocutory order. Marshall Islands precedent has held the Supreme Court is without power to entertain an interlocutory appeal absent certification by the High Court pursuant to MIRCP Rule 54(b). In this case, certification was not sought or obtained. Second, in accordance with established case law, an interlocutory order or judgment may be appealable if it places the defendant "effectively out of court." However, such is not the case here. Third, unlike in the United States, the RMI has not adopted any statute recognizing this traditional admiralty practice of separate trial and appeal on the issue of liability, with subsequent trial of the damage issue before a commissioner. Fourth, in the instant case, a substantive maritime right of defendants/appellants is not being modified or displaced by following long established RMI procedures which allow appeal only from final judgments or which allow interlocutory appeal only upon certification of the trial court. For these reasons, the Supreme Court, through a single-judge procedural order, dismissed the interlocutory appeal without prejudice to appeal upon entry of a final judgment.

Digest

1. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: Supreme Court Rules of Procedure (SCRP), Rule 4(a)(l) allows an appeal where "permitted by law as of

right or at the discretion of the Supreme Court from any 'final decision' of any court or by an order of a court granting an interlocutory appeal permitted by statute or rule."

2. JUDGMENTS – *Conclusiveness and Finality*: The RMI Supreme Court has consistently held that a final judgment or order is one that disposes of the case, whether before or after trial.

3. JUDGMENTS – *Conclusiveness and Finality*: The RMI's approach to "finality" is consistent with that of the United States federal courts and those state courts whose rules are modeled after the federal rules of appellate and civil procedure. A final decision, generally, is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

4. JUDGMENTS – *Conclusiveness and Finality*: As a general rule, a partial summary judgment order is considered interlocutory and non-appealable unless there is a specific statutory provision providing for appeal. However, in order to assess finality the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment, and focus primarily on the operational or 'decretional' language therein. The basic thrust of the finality requirement is that the judgment must be one that disposes of the entire case . . . one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

5. JUDGMENTS – *Conclusiveness and Finality – Out of Court*: Defendants, argue the High Court PSJ Order is final for purposes of appeal because that order places defendant "effectively out of court." Both cases are distinguishable from the situation presented by the instant case.

6. JUDGMENTS – *Conclusiveness and Finality*: Final judgments in admiralty cases are appealable in accordance with the rules applicable to other civil cases. The basic standard is that in order for a decree to be final, it must necessarily dispose of the entire controversy and leave nothing further for the court to do in the cause.

7. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: The RMI Supreme Court has held that when the High Court issues an order granting partial summary judgment the Supreme Court is without power to entertain an interlocutory appeal absent certification by the High Court pursuant to MIRCP Rule 54(b) that the partial ruling is severable from remaining issues in the case and that there is no just reason to delay consideration of the order on appeal.

8. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: A Rule 54(b) certification is an essential prerequisite to an appeal of a partial order.

CHUBB INS (THAILAND), ET AL. v. ELENI MARITIME LTD, ET AL.

9. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: Unlike in the United States, the RMI has not adopted any statute recognizing this traditional admiralty practice of separate trial and appeal on the issue of liability, with subsequent trial of the damage issue before a commissioner. There is no RMI Supreme Court procedural rule allowing such an appeal.

10. MARITIME LAW – *In General*: "General maritime law" is a "term of art" which denotes federal judge-made maritime law.

11. MARITIME LIENS – *Procedure*: When a maritime claim is brought in state court or at law in federal court, the applicable procedure is that procedure used in processing other claims in the same courts, with one important exception: if there is an admiralty procedural rule which is an integral part of the substantive maritime right, that rule must be applied when the claim is processed in other courts.

12. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: The Eleni defendants' right to appeal is preserved by existing procedural rules and defendants can appeal the Partial Summary Judgment Order upon entry of a final judgment.

Counsel

Dennis Reeder, counsel for Plaintiffs-Appellees
Tatyana Cerullo and David Lowe, counsel for Defendant-Appellants

Before CADRA, Chief Justice, Single Judge Procedural Order

ORDER DISMISSING INTERLOCUTORY APPEAL

CADRA, C.J.:

Defendants-Appellants, Eleni Maritime Limited and Empire Bulkers Limited, appeal a May 11, 2.018, Partial Summary Judgment Order by the High Court. Plaintiffs-Appellees, Chubb Insurance (Thailand), Tokio Marine & Nichido Fire Insurance Co., Ltd., et al., have moved to dismiss the appeal.

For the reasons set forth below, the undersigned, dismisses the instant appeal without prejudice to an appeal upon the entry of a final judgment.

MARSHALL ISLANDS, SUPREME COURT

I. FACTUAL BACKGROUND & PROCEEDINGS BELOW

The basic facts underlying this case have been previously summarized in the Supreme Court's June 3, 2017, "Opinion on Removed Question," and are not reiterated here. The following procedural background is gleaned from the parties' filings relative to defendants' present appeal.

On May 11, 2018, the High Court issued an "Order Granting Plaintiff's Motion for Partial Summary Judgment" ("PSJ Order"). The High Court found that the Eleni defendants were 70% at fault in causing the collision and, therefore, concluded that under the United States general maritime law "innocent cargo rule" the Eleni defendants are liable to claimants for the full amount of all provable damages. The High Court set a scheduling conference for May 22, 2018. "to establish dates for further litigation in this matter (up to and including a trial on the merits as may be necessary)." At the May 22, 2018, scheduling conference and in a subsequent written order, the High Court stated that it had not directed the entry of a "final appealable judgment."

On June 11, 2018, the Eleni defendants filed a Notice of Appeal of the High Court's May 11, 2018, PSJ Order.

On June 21, 2018, plaintiffs filed a "Motion to Strike and/or Dismiss Defendant's June 11, 2018 Notice of Appeal." Plaintiffs argue that the Eleni defendants improperly attempt to appeal a non-final interlocutory order which the High Court expressly characterized as non-appealable and which was not certified as appealable under MIRCP 54(b). Plaintiffs further requested an award of attorney fees for a "frivolous appeal."

The Eleni defendants filed a SCRP Rule 3(c)(3) Supplement on June 21, 2018, arguing the May 11, PSJ Order was final as "it establishes the rights and liabilities of the parties even though the precise amount of damages is not yet settled." Because the method of calculating damages has been established by the Supreme Court's prior decision and because the damages calculation is fairly simple, there is no practical benefit that would accrue by delaying appeal until the damages issue is determined.

On June 26, 2018, defendants filed an opposition to plaintiff-appellee's motion to strike and/or dismiss the Notice of Appeal. Defendants incorporated their Rule 3(c)(3) supplement regarding the "finality" of the PSJ Order. In the alternative, defendants argue that the general maritime law (GML) of the United States, which is made applicable to the Republic by virtue of 47 MIRC Sec. 113, permits an interlocutory appeal of liability decisions. Defendants point out that it would be a waste of the High Court's time to determine damages on hundreds of cargo claims and then entertain an appeal on liability, which results in the damages order being overturned.

II. DISCUSSION

A. Absent Statute or Rule, the RMI Supreme Court Only Has Jurisdiction to Hear Appeals from "Final Decisions."

[1]Supreme Court Rules of Procedure (SCRP), Rule 4(a)(l) allows an appeal where "permitted by law as of right or at the discretion of the Supreme Court from any 'final decision' of any court or by an order of a court granting an interlocutory appeal permitted by statute or rule." Thus, the first inquiry is whether the High Court's May 11, 2018, PSJ Order is a "final decision" from which an appeal is authorized.

1. The May 11, 2018, PSJ Order Is Not a "Final Decision" Because it Does Not Dispose of All Claims "Leaving Nothing for the Trial Court to Do."

[2]The RMI Supreme Court has consistently held that "a final judgment or order is one that disposes of the case, whether before or after trial." *Lemari, et al., v. Bank of Guam*, 1 MILR (Rev.) 299, 301 (1992) citing prior decisions.

[3][4]The RMI's approach to "finality" is consistent with that of the United States federal courts and those state courts whose rules are modeled after the federal rules of appellate and civil procedure. A final decision, generally, is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945). "As a general rule, a partial summary judgment order is considered 'interlocutory' and

non-appealable unless there is a specific statutory provision providing for appeal. However, in order to assess finality the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment, and focus primarily on the operational or 'decretional' language therein. The basic thrust of the finality requirement is that the judgment must be one that disposes of the entire case . . . one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Williams v. City of Valdez*, 603 P.2d 483,487 (Alaska 1979).

The High Court's May 11, 2018, PSJ Order is interlocutory because, although it determines liability, the entire case is not disposed of. The issue of damages still needs to be determined as to the multiple cargo claimants. There is not a judgment leaving nothing for the High Court to do but execute the judgment.

While defendants point out that delaying an appeal on the liability issue may result in wasted resources if a trial proceeds as to damages, the same might be said of every civil action where a motion for summary judgment as to liability is issued prior to determination of damages. The undersigned sees no reason to depart from past Supreme Court practice in not entertaining interlocutory appeals absent certification by the High Court as per MIRCP 54(b).

2. The High Court's PSJ Order does not effectively put the Eleni Defendants "out of court."

[5]Defendants, relying on *Moses H. Cone Mem'I Hospital v. Mercury Constr. Corp*, 460 U.S. 1 (1983) and *Bagdasarian Prads. LLC v. Twentieth Century Fox Film Corp.*, 673 F.3d 1267 (9th Cir. 2012) argue the High Court PSJ Order is final for purposes of appeal because that order places defendant "effectively out of court." Both cases are distinguishable from the situation presented by the instant case.

In *Moses Cone, supra*, the District Court had issued a stay of federal proceedings pending resolution of a state action involving the identical issue of arbitrability. The concern was that the federal (stay) order would be entirely unreviewable if not appealed immediately because once the

state court decided the issue of arbitrability the federal court would be bound to honor that determination as res judicata. The United States Supreme Court found the stay order amounted to a dismissal of the suit. *Id*. at 10. Because defendant had been effectively put out of court with no opportunity for review of the stay order, appeal was permitted.

In *Bagdasarian, supra*, the district court issued a stay order pending submission of the parties' dispute to a referee as per the parties' written agreement. The plaintiffs sought an interlocutory appeal arguing the referral put them "out of court." The Ninth Circuit found the appeal was premature because an appeal would lie upon any final judgment in the district court and, thus, the plaintiffs were not put effectively "out of court." The Ninth Circuit also discussed the "collateral order doctrine" the application of which requires that the challenged order is "effectively unreviewable on an appeal from a final judgment."

In the instant case, defendants are not "effectively out of court" because they retain the right to appeal the High Court's PSJ Order regarding liability upon entry of a final judgment.

B. Under Marshall Islands Procedural Rules "Interlocutory" Appeals Are Not Permitted Absent Certification by the Trial Court Pursuant to MIRCP 54(b).

[6]Final judgments in admiralty cases are appealable in accordance with the rules applicable to other civil cases. The basic standard is that "[i]n order for a decree to be final, it must necessarily dispose of the entire controversy and leave nothing further for the court to do in the cause." *Anastasiadis v. S.S Little John*, 339 F.2d 538,539 (5th Cir. 1964); *Albatross Shipping Corporation v. Stewart*, 326 F.2d 208, 210 (5th Cir. 1964). Rule 54(b) is also applicable to admiralty cases so that an order disposing of all of the claims of one party in a multiparty suit, or an order disposing of one of several claims between the same parties, is appealable upon certification of the district (trial) court. *Schoenbaum, Admiralty and Maritime Law*, 5th Ed., Sec. 14-13 Appeals at 936-938 text.

[7]The RMI Supreme Court has held that when the High Court issues an order granting partial summary judgment the Supreme Court is without power to entertain an interlocutory appeal absent certification by the High Court pursuant to MIRCP Rule 54(b) that the partial

ruling is severable from remaining issues in the case and that there is no just reason to delay consideration of the order on appeal. *Labwidrik, et al. v. Candle*, 2 MILR 1, 2 (1993).

[8]A Rule 54(b) certification is an "essential prerequisite to an appeal" of a partial order. *See* 10 Wright, Miller & Kane, Federal Prac & Pro, Section 2660 at 144 text; *see also, e.g., Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006); *S.E.C. v. Capital Consultants LLC*, 463 F.3d 1166 (9th Cir. 2006).

In the instant case, there is no Rule 54(b) certification and the High Court judge specifically characterized the PSJ Order as not a final, appealable judgment.

The undersigned concludes that under the Supreme Court Rules of Procedure, as interpreted by its precedent, the May 11, 2018 PSJ Order is not a final judgment and cannot be reviewed as an interlocutory order absent a Rule 54(b) certification.

C. The maritime nature of the present lawsuit does not require the supreme court to depart from its established appeals procedure.

1. The provisions of 28 USC 1292(a)(3) reflect traditional admiralty practice and procedure before the courts.

28 USC 1292(a)(3) allows appeals from "interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

The purpose of this statute is to allow a party found liable in an admiralty proceeding to take an immediate appeal without submitting to a protracted trial of the damages issue. *See, Schoenbaum*, Admiralty & Maritime Law, 5th Ed., Section 1202 at 938 text. This statute continues "the traditional admiralty practice of separate trial and appeal on the issue of liability, with subsequent trial of the damage issue before a commissioner." *See, Maraist, Galligan, Maraist & Sutherland*, Admiralty, 7th Ed. (Nutshell series) at 430.

[9]There is little, if any, doubt that the High Court's May 11, 2018, PSJ Order would be immediately appealable under 28 USC 1292(a)(3). The RMI, however, has not adopted any

statute recognizing this traditional admiralty practice of separate trial and appeal on the issue of liability, with subsequent trial of the damage issue before a commissioner. There is no RMI Supreme Court procedural rule allowing such an appeal.

The issue (which the undersigned does not believe has been fully briefed) is whether the traditional admiralty practice of allowing an appeal of a liability determination prior to proceeding with a trial on the issue of damages has been incorporated into Marshall Islands law by virtue of 47 MIRC Sec. 113.

47 MIRC Sec.113 provides: "Insofar as it does not conflict with any other provisions of this Title or any other law of the Republic, the non-statutory general maritime law of the United States of America is hereby declared to be and is hereby adopted as the general maritime law of the Republic."

[10]"General maritime law" is a "term of art" which denotes federal judge-made maritime law. *See, e.g., Coto v. J. Ray McDermott, S.A.*, 709 So.2d 1023, 1028 (La. 1998) citing *Schoenbaum*, Admiralty & Maritime Law, sec. 5-1 ("The General Maritime Law of the United States is a branch of federal common law that furnishes the rule of decision in admiralty and maritime cases in the absence of preemptive legislation.").

Thus, the relevant inquiry is whether the traditional admiralty practice of separate trial and appeal on the issue of liability, with subsequent trial or determination of the damage issue before a commissioner or master was part of the "general maritime law" of the United States of America and, therefore, adopted as the general maritime law of the Republic. It is here, in the opinion of the undersigned, that a distinction must be drawn between federal judge-made law that provides rules of decision in determining the substantive rights of parties in maritime disputes and procedural rules which guide the progress of cases through the courts.

2. The traditional maritime practice or procedure of allowing an appeal of a liability determination prior to trial of the damages issue is not an integral part of any substantive right of defendants recognized by the GML.

It is instructive to review those preemption cases where state procedural rules conflict with traditional admiralty practices of the federal courts. State procedure is followed so long as substantive maritime rights under the general maritime law (GML) are not altered. By analogy, RMI procedural rules in admiralty cases can be followed so long as no substantive maritime right under the GML is compromised. In the instant case no substantive maritime right of defendants is affected or altered by reserving appeal until the entry of a final judgment or certification by the High Court pursuant to Rule 54(b).

[11]When a maritime claim is brought in state court or at law in federal court, the applicable procedure is that procedure used in processing other claims in the same courts, with one important exception: if there is an admiralty procedural rule which is an integral part of the substantive maritime right, that rule must be applied when the claim is processed in other courts. *See, e.g., Maraist, Galligan, Maraist & Sutherland*, Admiralty, 7th Ed., (Nutshell Series-West Publishing), Chpt. XIX, E, Procedure in Maritime Claims at 421-22 text.

In *Lavergne v. Western Company of North America*, 371 So.2d 807 (La. 1979), the plaintiff brought a Jones Act claim against his employer, a ship-builder and their insurers in state court. Louisiana law provided for a right to jury trial whereas actions for personal injury brought under the GML do not entitle the injured plaintiff to a jury trial. The court recognized that "regardless of which court the action is brought, the federal substantive admiralty or maritime law applied if the claim is one cognizable in admiralty (citations omitted)." The court noted that "[i]t has long been established that a state court having jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies and attach to them such incidents so long as it does not attempt to modify or displace essential features of the substantive maritime law. (citations omitted)." The court concluded that the state provision for a jury trial did not

conflict with "substantive federal admiralty law" stating "affording a litigant a right to jury trial in our state courts does not, therefore, modify or displace essential features of the substantive maritime law. (citations omitted)." The court, thus, allowed trial by jury in when an in personam suit based upon the general maritime law is brought in state court even though jury trials were not allowed under the general maritime law.

[12]Although *Lavenge, supra*, involved the "saving to suitors" clause of 28 USC 1333, the point is that the court drew a distinction between procedures for enforcing a substantive right (e.g., a jury trial) and procedures which modify or displace a substantive maritime law. In the instant case, a substantive maritime right of defendants-appellants is not being modified or displaced by following long established RMI procedures which allow appeal only from final judgments or which allow interlocutory appeal only upon certification of the trial court. The Eleni defendants' right to appeal is preserved by existing procedural rules and defendants can appeal the PSJ upon entry of a final judgment.

Ill. CONCLUSION

For the reasons set forth above, the instant appeal of defendants is dismissed without prejudice to appeal upon entry of a final judgment.

Plaintiffs-Appellees request for sanctions is denied.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MYJAC FOUNDATION, PANAMA,
Plaintiff-Appellee,
v.
SYLVIA MARIA VEGA ARCE and
JUAN BAUTISTA ALFARO
ALFARO, Defendants/Appellants.

SCT CN 2017-006 (HCT CN 2016-139)

APPEAL FROM THE HIGH COURT

Argued June 20, 2018
Filed July 30, 2018

Summary

The Supreme Court affirmed the High Court's order denying two Costa Rican defendants' motion to set aside a default judgment. The Supreme Court's ruling was based on the following. First, the Supreme Court held that the complaint's explicit allegations of fraud against a Polish lawyer were sufficient to support a reasonable inference that the two Costa Rican defendants had also engaged in fraudulent or deceitful behavior. This conduct was found to have an impact on two RMI corporations, thus bringing them within the reach of the RMI's long-arm jurisdiction statute, 27 MIRC 251(1)(n). Second, the Supreme Court determined that the Costa Rican defendants failed to show that they did not understand the language of the summons and complaint, both of which were written in English. Third, The Supreme Court found that neither the method of service nor the use of the English language in the summons and complaint violated Costa Rican laws.

Digest

1. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)(4)*: MIRCP 60(b) allows a party to seek relief from a final judgment under a limited set of circumstances. Rule 60(b)(4) authorizes the court to relieve a party from a final judgment if the judgment is void.

2. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)(4)*: A void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. The list of qualifying infirmities is '"exceedingly short. It is not enough, for

example, for a judgment to have been erroneous. Rather, Rule 60(b)(4) applies only in '"the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.

3 APPEAL AND ERROR – *Review – Questions of Law – Judgment Void*: Rulings on motions for relief under Rule 60(b) are ordinarily reviewed for abuse of discretion. Because, however, the validity of a judgment is a question of law, a ruling on a Rule 60(b)(4) motion to set aside a '"void'" judgment is reviewed *de novo*.

4. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)(4)*: Courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction.

5. CIVIL PROCEDURE – *Personal Jurisdiction – Jurisdiction over Nonresident – § 251(1)(n)*: Any person who '"commits an act or commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic; is subject to the civil jurisdiction of the courts of the Republic as to any cause of action arising from any of those matters.'" 27 MIRC § 251(1)(n).

6. CIVIL PROCEDURE – *Personal Jurisdiction – Burden of Proof*: The plaintiff bears the burden of proving the existence of personal jurisdiction and, in attempting to carry that burden, is entitled to favorable inferences from the pleadings, affidavits, and other documents submitted on the issue.

7. CIVIL PROCEDURE – *Personal Jurisdiction – Jurisdiction over Nonresident*: Merely being a shareholder of a Marshall Islands corporation was not enough to make one subject to civil jurisdiction under the Republic's long-arm statute.

8. CIVIL PROCEDURE – *Personal Jurisdiction – Jurisdiction over Nonresident – § 251(1)(n)*: It is reasonable and consistent with due process for the court to exercise jurisdiction over individuals who: (1) claim to be shareholders of corporations that can only be considered to be at home in the Marshall Islands; and (2) allegedly committed acts affecting those corporations.

9. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)(4)*: The defendants have failed to demonstrate that this is one of the exceptional cases in which the court that rendered judgment lacked even an arguable basis for jurisdiction.

10. SERVICE OF PROCESS – *In General*: A court may not exercise personal jurisdiction over a defendant unless that defendant has been served in accordance with Rule 4. Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the

complaint. Without substantial compliance with the rule, however, neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction.

11. SERVICE OF PROCESS – *Due Process*: Service of process also has its own due process component, and must be notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

12. SERVICE OF PROCESS – *In Foreign Country*: Under MIRCP 4(f)(2)(C)(i), where there is no internationally agreed means of service, personal service is permitted as long as it is not prohibited by the foreign country's law.

13. SERVICE OF PROCESS – *In Foreign Country – Translation Required*: The court permitted the plaintiff to serve a summons and complaint on a Russian defendant by email as long as service included a certified Russian translation of the summons and complaint. It did so, however, only after finding no evidence the defendant could speak or understand English or would understand what a summons and complaint written in English were if they were emailed to him.

14. CIVIL PROCEDURE – *Parties – Real Party in Interest*: The real party in interest rule is procedural, not substantive, and aims to protect defendants from subsequent similar actions by a party actually entitled to recover. While an action must be prosecuted by the real party in interest, a court '"may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. MIRCP Rule 17(a)(3).

Counsel

Arsima Muller and Klaus Dimigen, counsel for Plaintiff-Appellee Myjac
David M. Strauss, counsel for Defendants-Appellees Arce and Alfaro

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

MYJAC v. ARCE AND ALFARO

I. INTRODUCTION

Defendants Sylvia Maria Vega Arce ('"Arce"') and Juan Bautista Alfaro Alfaro ('"Alfaro"') seek reversal of a December 2017 Order by the High Court denying their motion to set aside a default judgment. In support of their appeal, they assert the court lacked personal jurisdiction over them and that the High Court erred in concluding they were properly served. On the latter issue, they specifically contend plaintiff's service in English did not comply with the language

requirements of Marshall Islands Rule of Civil Procedure (MIRCP) 4(o) and was not conducted in a manner reasonably calculated to provide notice as required by Marshallese law. For the reasons explained below, the High Court's order is AFFIRMED.

II. BACKGROUND[3]

Plaintiff Myjac Foundation ('"Myjac"') is a private interest foundation domiciled in Panama. In 2011, Myjac retained a Polish lawyer named Robert Nogacki to arrange the incorporation of two Marshall Islands corporations: Oceanus Holding Gesellschaft Mit Beschrankter Haftung ('"Oceanus"'); and Chronos Investment Advisors Limited ('"Chronos"'). Both Oceanus and Chronos were incorporated as holding companies for entities that ultimately held property and real estate in Poland.

At the outset, Arce, a Costa Rican citizen and resident, was named as the sole shareholder, director, and secretary for Oceanus. Alfaro, also a Costa Rican citizen and resident, occupied the same role for Chronos. On May 23, 2011, both defendants transferred their shares in the two companies to Myjac. Then, in 2013, they resigned or were removed from their positions. This sequence of events should, in the ordinary course, have left Myjac as the sole shareholder for both Oceanus and Chronos.

Not long after, however, Nogacki submitted counterfeit declarations of incumbency for both Oceanus and Chronos to the Marshall Islands Registrar of Corporations. Relying on these

[3]The factual background is based on the averrnents in the complaint and is supplemented with relevant contextual information gleaned from the parties' subsequent filings.

false declarations, the Registrar issued Certificates of Incumbency in 2015 that incorrectly named Nogacki as director of each of the corporations, Arce as the sole shareholder of Oceanus, and Alfaro as the sole shareholder of Chronos.

When Myjac became aware of Nogacki's actions, it contacted the Registrar to request re-issuance of new and corrected Certificates of Incumbency. The Registrar informed Myjac, however, that it would only correspond with the individual listed in the address on record — i.e., Nogacki — and refused to make the correction. Nogacki then used the false Certificates to gain control of Oceanus and Chronos and to transfer property in Poland (valued at approximately EUR 20,000,000.00) to a foundation he controlled.

Several criminal and professional ethics proceedings have since been initiated against Nogacki in Poland. Myjac filed this action in order to clarify the shareholding situation and leadership structure for both Oceanus and Chronos. It sought a declaratory judgment finding, most importantly, that: (1) Nogacki was never appointed as a director or officer of Oceanus or Chronos; and (2) Myjac has been the sole shareholder in both companies since May 23, 2011.

Myjac filed its complaint on August 3, 2016. On September 30, 2016, a notary public served Arce and Alfaro in Costa Rica with English copies of the summons and complaint. Neither defendant filed a responsive pleading nor otherwise took action and the court entered a default judgment on January 30, 2017. Eight months later, in September of 2017, the defendants moved pursuant to MIRCP 60(b) to set aside the default judgment. The High Court denied that motion and, on December 27, 2017, the defendants filed a notice of appeal.

III. LEGAL STANDARD

[1]MIRCP 60(b) allows a party to seek relief from a final judgment under a limited set of circumstances. Rule 60(b)(4), at issue in this case, authorizes the court to relieve a party from a final judgment if '"the judgment is void.'" *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010).

[2]A void judgment is '"one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final.'" *Id*. The list of qualifying infirmities is

‘”exceedingly short.’” *Id*. It is not enough, for example, for a judgment to have been erroneous. Rather, Rule 60(b)(4) applies only in ‘”the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.’” *Id*. at 271 (citations omitted).

[3]Rulings on motions for relief under Rule 60(b) are ordinarily reviewed for abuse of discretion. *Agostini v. Felton*, 521 U.S. 203,256 (1997). Because, however, the validity of a judgment is a question of law, a ruling on a Rule 60(b)(4) motion to set aside a ‘”void’” judgment is reviewed *de novo*. *Exp. Grp. v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995).

IV. DISCUSSION

The defendants assert the default judgment entered against them is void due to lack of personal jurisdiction and defective service of process. They also raise a procedural issue related to MIRCP 17's real party in interest requirement. Each issue is addressed in turn below. None merits relief.

A. Personal Jurisdiction

[4]Courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief ‘”only for the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction.’” *United Student Aid Funds*, 559 U.S. at 271 (internal quotation omitted) (citing *United States v. Boch Oldsmobile*, Inc., 909 F.2d 657, 661-62 (1st Cir. 1990) (‘”[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a judgment void’” (brackets and internal quotation marks omitted)).’”) *See also DiRaffael v. California Military Dep’t*, 593 F. App’x 679, 680 (9th Cir. 2015).

[5][6]Here, the defendants contend the default judgment is void for lack of personal jurisdiction. As a threshold matter, the parties do not dispute that the defendants are non-residents. As such, whether they are subject to the court’s jurisdiction is governed by the Republic’s long-arm statute. The pertinent portion of that statute provides that any person who ‘”commits an act or commission or omission of deceit, fraud or misrepresentation which is

intended to affect, and does affect persons in the Republic; is subject to the civil jurisdiction of the courts of the Republic as to any cause of action arising from any of those matters.'" 27 MIRC § 251(1)(n). The plaintiff bears the burden of proving the existence of personal jurisdiction and, in attempting to carry that burden, is entitled to favorable inferences from the pleadings, affidavits, and other documents submitted on the issue. *See Combs v. Bakker*, 886 F.2d 673,676 (4th Cir. 1989).

The defendants attack the court's exercise of personal jurisdiction on two primary fronts. They argue: (1) Myjac's complaint did not adequately plead a statutory basis for jurisdiction; and (2) even if it did, exercising jurisdiction over the defendants did not comport with due process.

With regard to the first attack, the defendants assert the allegations in the complaint, even when viewed in the light most favorable to Myjac, do not give rise to claims against either named defendant based on deceit, fraud or misrepresentation as required by the long-arm statute. All of the allegations of wrongdoing, they insist, are against Nogacki, not against them. Moreover, the complaint does not explicitly allege they assisted Nogacki in any way or were even aware of his actions. In the absence of such allegations, they argue, Myjac cannot show either defendant committed a tortious act or is properly subject to the court's jurisdiction.

[7]With regard to the second attack, the defendants assert even if the complaint adequately alleged a statutory basis for jurisdiction, the exercise of such jurisdiction would violate due process. In particular, they contend Myjac has not alleged facts sufficient to establish that Arce or Alfaro: (1) have the '"minimum contacts'" needed to be subject to the jurisdiction of the Republic's courts; or (2) have purposefully availed themselves of the protections made available by Marshall Islands law. In support of these arguments, the defendants largely rely on a recent Marshall Islands High Court decision, *Samsung Heavy Industries Co., Ltd. v. Focus Investments, Ltd.*, (High Court Civil No. 2017-081 (Feb. 7, 2018)), in which the court found that merely being a shareholder of a Marshall Islands corporation was not enough to make one subject to civil jurisdiction under the Republic's long-arm statute.

Myjac has compelling responses to both of defendants' attacks. As an initial matter, Myjac argues the High Court, in denying the motion to set aside the default judgment, correctly found the defendants waived their right to assert a defense of lack of personal jurisdiction by failing to respond to the complaint in a timely manner. The High Court's decision on this point, Myjac asserts, was within the discretion provided by Rule 60[4] and was not clear error justifying reversal. It is doubtful personal jurisdiction can be waived merely by failing to respond in a timely manner in the context of a motion for default judgment; to so hold would mean the issue could never be raised in a default setting. In the end, waiver notwithstanding, the defense fails on the merits.

First, the complaint's allegations do support jurisdiction over Arce and Alfaro under the long-arm statute. While Arce and Alfaro are correct that the complaint's allegations most explicitly accuse Nogacki of wrongdoing, it is reasonable to infer from these same allegations that they were involved in, or at least aware, of his actions. The complaint makes clear both Arce and Alfaro transferred all of their shares in Oceanus and Chronos, respectively, to Myjac on May 23, 2011. The complaint also alleges the Certificates of incumbency issued in 2015, which name the defendants as the sole shareholders in Oceanus and Chronos, were fraudulent to the extent either defendant is seeking to claim he or she is rightfully listed as a shareholder in either corporation based on the allegedly fraudulent Certificates, the reasonable inference arises that they were somehow involved in the deceitful behavior leading to the Certificates' issuance and are therefore properly subject to the court's jurisdiction.

Second, as to due process, the *Samsung* decision recently issued by the High Court is distinguishable. In *Samsung*, the plaintiff sought to enforce an English judgment against a non-resident who indirectly owned shares in a Marshall Islands corporation which, in turn, owned shares in a separate company. The plaintiff did not allege the defendant had engaged in any conduct that would subject him to civil jurisdiction under 27 MIRC § 251. By contrast, the

[4]Rule 60(b)(4) provides that '"the court may relieve a party"' from a judgment that is void. (emphasis added). Rule 60(b)(3)(1) also provides that a motion '"must be made within a reasonable time."' (emphasis added).

complaint here supports an inference the defendants engaged in conduct covered by the long-arm statute. Arce and Alfaro's inferred involvement in the issuance of the false Certificates, as discussed above, affected two Marshall Islands corporations (Oceanus and Chronos)[5] by essentially nullifying their transfer of shares to Myjac in May 2011.

[8][9]Moreover, Oceanus and Chronos are holding companies and as such have no principal places of business. They are only at home in the Marshall Islands. Accordingly, it is reasonable and consistent with due process for the court to exercise jurisdiction over individuals who: (1) claim to be shareholders of corporations that can only be considered to be at home in the Marshall Islands; and (2) allegedly committed acts affecting those corporations. At the very least, the defendants have failed to demonstrate that this is one of the '"exceptional cases'" in which '"the court that rendered judgment lacked even an arguable basis for jurisdiction.'" *United Student Aid Funds*, 559 U.S. at 271.

B. Service of Process

[10][11]Service of process under Marshallese law is governed by MIRCP 4. A court may not exercise personal jurisdiction over a defendant unless that defendant has been served in accordance with Rule 4. *Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009). '"Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint.'" *United Food & Comm. Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir.1984). Without substantial compliance with the rule, however, neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction. *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). In addition to Rule 4, service of process also has its own due process component, and must be '"notice reasonably calculated . . . to apprise interested parties of the

[5]A Marshall Islands company is a '"person'" as contemplated by the long-arm statute. Section 15 of the Business Corporations Act, 52 MIRC Chapter 1, provides in pertinent part that: '"Every corporation . . . shall have power in furtherance of its corporate purposes [to:] . . . (b) sue and be sued in all courts of competent jurisdiction of the Republic . . . as natural persons . . . ."'

pendency of the action and afford them an opportunity to present their objections.'" *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

he defendants raise two arguments related to service of process: (1) service in English did not comply with MIRCP 4(o) because Myjac did not make a sufficient effort to determine what language Arce and Alfaro were likely to understand; and (2) service was not in accordance with the rules for serving a foreign defendant as dictated by MIRCP 4(:t) and Costa Rican law. Neither argument is persuasive.

> i. Compliance with MIRCP 4 as to Language of Summons & Complaint
>
> MIRCP 4(o) states:
>
> (o) Language of Summons, Complaint.
> In each instance **an effort shall be made** to see that the copy of the summons and of the complaint delivered, left for, or sent to each defendant, is in **a language that the defendant is likely to understand or can easily have explained to the defendant. Unless it is certain** that the defendant understands a particular language, the copy or translation delivered, left for or sent to the defendant shall be **either in English or in Marshallese**. The decision as to what language shall be used shall be made by the clerk or judge signing the summons, subject to any order made by the court on the matter.

(emphasis added).

Arce and Alfaro contend, because they are Costa Rican citizens, Myjac could not reasonably assume they would understand English. Defendants also assert Myjac made no effort to determine what language they were '"likely to understand'" nor did it obtain a decision from the clerk or judge signing the summons regarding what language should be used for service. These failures, according to the defendants, are plain violations of Rule 4(o).

Myjac offers a number of arguments in response. First, documents filed in tandem with the complaint indicated the defendants could understand English. Most notably, both defendants signed share certificates and share transfer documents drafted entirely in English. The only

evidence either defendant does not understand English is an affidavit submitted after service by Arce stating she is '"not fluent in legal English.'" This, Myjac contends, is not enough to support a finding that service in English was improper. Second, the lack of a determination by a clerk or judge as to the proper language for service impliedly authorized the use of English as the Rule provides that English or Marshallese should be the default where the language of the defendant is uncertain. Third, the notary public who served the documents explained them to the defendants and thereby went above and beyond the requirements of MIRCP 4(o).

Myjac gets the better of these arguments. While neither party has pointed to a great deal of legal authority in support of its position, Myjac's arguments are rooted more strongly in common sense. It is not clear, and the Court does not here hold, that the existence of documents indicating a defendant understands English will always satisfy the '"effort shall be made'" language in Rule 4 when the country in which the defendant resides is not predominantly English speaking. Here, however, the documents in question and the surrounding context indicate Myjac's efforts were sufficient. Both Alfaro and Arce had previously signed legally significant documents written entirely in English. Accordingly, it makes sense that the level of investigation required into their language ability under MIRCP 4(o) would be less than that required for the average Costa Rican citizen who has given no prior indication of an ability to understand any language other than Spanish.

At bottom, it is difficult to see how service in English under the circumstances violated the letter or spirit of MIRCP 4(o). The defendants appear to have been involved in what was a relatively sophisticated corporate arrangement and had previously signed documents, in English, related to their involvement. It was therefore reasonable for Myjac to believe that even if Alfaro and Arce were '"not fluent in legal English,'" they could at least understand that the documents with which they were served were important and could obtain help in getting them translated and '"explained.'" As discussed above, the purpose of Rule 4 is to ensure parties receive sufficient notice of the lawsuit against them. Arce and Alfaro's arguments that they did not receive such notice here purely because the service was in English (one of two default languages approved for

use when the defendant's language is uncertain, and also a language in which they had previously transacted business) are unconvincing.

ii. Lack of Proper Service on Foreign Defendants

The manner in which parties outside the Marshall Islands are to be served is addressed by the Republic's Judiciary Act, which states in pertinent part:

> (1) Service of process may be made upon any person subject to the jurisdiction of a court of the Republic under this Division by personally servicing the process on him outside the territorial limits of the Republic.
> (2) Service shall be made, in the same manner as service is made within the territorial limits of the Republic, by an officer or person authorized to service process in the jurisdiction where service is made.

27 MIRC § 252. A later section in the same chapter states:

> Nothing in this Division limits or affects the right to serve process in any other manner provided by law or by the Rules of Court, or allowed by order of the court concerned.

27 MIRC § 255.

Elaborating on this statutory basis, MIRCP 4(f) provides that an individual in a foreign country may be served by any '"internationally agreed means of service"' (e.g., the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents) or, if there is no internationally agreed means, by a method reasonably calculated to give notice. One such approved method is any method prescribed by the foreign country's laws for service in that country. MIRCP 4(f)(2)(A). The Rule also states, however, that personal service is adequate as long as it is not '"prohibited by the foreign country's law."' MIRCP 4(f)(2)(C)(i).

Here, the defendants argue service was improper because: (1) it did not meet the requirements set forth in the Hague Convention or other internationally agreed upon means of service; and (2) it did not comply with the service requirements of Costa Rican law. The fatal flaw with the service, according to Arce and Alfaro, was that the summons and complaint were not properly translated.

These arguments, too, are unavailing. Service did not need to comply with the Hague Convention. The Marshall Islands is not a party to the Convention and Costa Rica, which recently became a party, did not have the Convention enter into force until October l, 2016 — after Arce and Alfaro had already been served.

[12]Moreover, Myjac convincingly argues the statutory framework laid out above in the Judiciary Act and MIRCP 4(f) did not require that service comply with Costa Rican law. Under MIRCP 4(f)(2)(C)(i), where there is no internationally agreed means of service, personal service is permitted as long as it is not '"prohibited by the foreign country's law."' The defendants do not point to any such prohibition in Costa Rica. They also fail to offer any compelling alternative interpretation of the statutory framework.[6]

The defendants' final attack on service is mostly a rehash of their arguments regarding why English service violated MIRCP 4(o). The minor twist is, here, Alfaro and Arce contend that by neglecting to translate the summons and complaint into Spanish, Myjac failed to satisfy the constitutional due process requirement enshrined in MIRCP 4(f)(2) that service be '"reasonably calculated to give notice."'

As discussed at length in the previous section, there is little reason to believe failure to translate deprived the defendants of reasonable notice of the lawsuit against them. The two cases relied upon by the defendants in their reply brief do not alter this conclusion.

[13]*In Epic Games, Inc. v. Mendes*, 2018 WL 582411 (N.D. Cal. Jan. 29, 2018), the court permitted Epic Games to serve a summons and complaint on a Russian defendant by email as long as service included a certified Russian translation of the summons and complaint. It did so, however, only after finding no evidence the defendant could '"speak or understand English or would understand what a summons and complaint written in English were if they were emailed

[6]In light of this framework, the back and forth in the briefing regarding the legal opinions offered by the parties as to whether service complied with Costa Rican law — and whether the High Court weighted those opinions properly — is largely academic. Myjac acknowledges that had it attempted to serve defendants under MIRCP 4(t)(2)(A) it would have been subject to additional requirements under Costa Rican law. I t was not required to go that route, however, and did not choose to do so. Thus, those additional requirements do not apply.

to him.'" *Id*. at *3. Notably, the court did not require translation for service on a second Russian defendant who had previously responded in English to Epic's emails and indicated he understood the language well enough to know that the summons and complaint were documents initiating a lawsuit against him. *Id*. Arce and Alfaro's situation is more akin to that of the second Russian defendant than the first.

Montana Trucks, LLC v. UD Trucks N. Am., Inc., 2013 WL 39228634 (D. Mont. July 29, 2013); is similarly inapposite. There, the court ordered the plaintiff to serve the defendant, a Japanese corporation, with a certified translation of the complaint and summons in Japanese. The context for that order, however, was that both Japan and the United States were signatories to the Hague Convention and the plaintiff was seeking an order under Rule 4(f)(3) authorizing service by mail and courier — a means not specified by the Convention. The court found service by mail and courier was appropriate but that plaintiff's objections to the delay and added expense of obtaining translation were not sufficient reasons to justify setting aside the Hague Convention's general requirement (and the nation of Japan's interest) in '"providing service of process to its citizens in Japanese.'" *Id*. at *4.

Here, the Hague Convention does not apply and Myjac did not seek to serve the defendants by court-ordered means pursuant to Rule 4(f)(3). Accordingly, the same concerns regarding respect for international law 'are not applicable and, as discussed above, defendants' arguments that service in English did not provide them with reasonable notice are unpersuasive.

C. Compliance with MIRCP 17 - Real Party in Interest

Defendants identify as an additional ground for reversal Myjac's failure to comply with MIRCP 17's requirement that '"[a]n action must be prosecuted in the name of the real party in interest.'" MIRCP 17(a)(l). In short, they contend the listed plaintiff, '"Myjac Foundation, Panama,'" appears to be a pseudonym or nonexistent entity and point to the fact that Myjac is referred to in different ways in different documents (e.g., as Myjac International Foundation or simply as Myjac Foundation),

[14]The real party in interest rule is procedural, not substantive, and aims to protect defendants from subsequent similar actions by a party actually entitled to recover. *See BP Oil, Inc. v. Bethlehem Steel Corp.*, 536 F. Supp. 396 (E.D. Pa. 1992). While an action must be prosecuted by the real party in interest, a court '"may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.'" MIRCP Rule 17(a)(3).

Here, it is not clear the defendants' objection to Myjac's name, nine months after entry of the default judgment, was timely. In any event, the argument lacks merit. The documents attached to the complaint establish that Arce and Alfaro transferred their respective interests in Oceanus and Chrones to '"Myjac Foundation, domiciled in the Republic of Panama.'" *See* Comp., Exs. 4 and 12. Accordingly, '"Myjac Foundation, Panama,'" appears to be the Myjac entity in a contractual relationship with the defendants such that it could sue them. To the extent another Myjac entity should also be involved, it is a factual issue that may have been relevant at an earlier juncture but is insufficient on its own now to justify reversal.

V. CONCLUSION

Based on the foregoing, the High Court's December 18, 2017 Order Deny Motion to Set Aside Default Judgment is **AFFIRMED**.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MERVY LLOYD MONGAYA,
Plaintiff-Appellant,
v.
AET MCV BETA LLC, AET INC. LED, and AET SHIPMANAGEMENT PTE LTD,
Defendants-Appellees.

SCT CN 2017-003 (HCT CN 2017-044)

APPEAL FROM THE HIGH COURT

Argued September 18, 2018
Filed August 10, 2018

Summary

The Supreme Court affirmed the High Court's Order Granting Defendants' Motions to Stay Action Pending Arbitration. This case involves a Filipino sailor who, before commencing employment on a vessel registered in the Republic of the Marshall Islands ("RMI"), entered into a Philippine Overseas Employment Administration Contract (POEA). This contract stipulated that, in the event of injury, the sailor must engage in arbitration in the Philippines. Notably, the vessel owner and vessel operator were not signatories on the POEA contract. Following the sailor's injury, the defendants sought to enforce the arbitration provisions outlined in the POEA contract. At the time of the High Court decision, the RMI had acceded to but had not yet enacted the Convention of the Recognition and Enforcement of Foreign Arbitral Awards. The Supreme Court held that non-signatories can indeed enforce a contractual arbitration provision under the doctrine of equitable estoppel. This is contingent upon three factors: (1) a close relationship between the parties involved; (2) a connection between the alleged wrong and the non-signatories' obligations and duties; and (3) claims are intertwined with the underlying contractual obligations. Additionally, the Supreme Court also upheld that the choice of law provision in the POEA contract.

Digest

1. APPEAL AND ERROR – *Review – Questions of Law*: Questions of law are reviewed *de novo*.

2. CONSTITUTIONAL LAW – *Construction – Dualist Jurisdiction*: The RMI is a "dualist jurisdiction," where "the courts will only apply the legislation in effect — that is, the laws passed by the competent legislative bodies (e.g., the Nitijela) — and they will not consider intrinsic treaty provisions." And although the RMI acceded to the Convention in 2006, it never enacted the Convention into domestic law. Thus, the Convention simply does not apply to this case.

3. EQUITY – *Principles – Estoppel – Application*: Although under the Arbitration Act of 1980 ("Act") only "a party to an arbitration agreement" may compel arbitration, 30 MIRC Ch. 3 § 305(1), nothing in the Act's language precludes the application of the common law doctrine of equitable estoppel.

4. ARBITRATION – *Agreement to Arbitrate*: A court may compel arbitration under the Act if it determines that a written agreement to arbitrate the controversy exists.

5. EQUITY – *Principles – Estoppel – Application* United States courts recognize the common law doctrine of equitable estoppel, which may permit a nonsignatory to an arbitration agreement to compel a signatory to arbitrate.

6. COMMON LAW – *In General*: The Supreme Court must follow this common law if it is not precluded by an RMI constitutional provision, statutory provision, treaty, customary law, or traditional practice.

7. EQUITY – *Principles – Estoppel – Application*: The common law doctrine of equitable estoppel permits nonsignatories to compel signatories to arbitrate in some situations.

8. EQUITY – *Principles – Estoppel – Application*: After a careful review of cases holding that equitable estoppel permits nonsignatories of a contract to compel signatories to arbitrate, the Supreme Court adopted the *Mundi* test — requiring (1) a "close relationship between the entities involved," (2) a relationship between "the alleged wrongs" and the nonsignatory' s "obligations and duties in the contract," and (3) the claims be "intertwined with the underlying contractual obligations" — as the law in the RMI.

9. CONTRACT – *Choice of Law*: Choice of law provisions in international commercial contracts are an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction, and should be enforced absent strong reasons to set them aside.

10. CONTRACT – *Construction:* The Supreme Court cannot read the plain language of the Merchant Seafarers Act to lead to this absurd result suggested by Mongaya.

MONGAYA v. AET MCV BETA LLC, et al.

11. APPEAL AND ERROR – *Questions Reviewable – Asserted Below*: The Supreme Court will not consider arguments made for the first time during oral argument.

Counsel

Tatyana Cerullo, Melvin Narruhn, Richard J. Dodson, and Kenneth Hook, III, counsel for Plaintiff-Appellant Mervy Lloyd Mongaya
Dennis J. Reeder and Nenad Drek, counsel for Defendants-Appellees AET MCV Beta LLC, AET Inc. LED, and AET Shipmanagement Pte Ltd

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

I. INTRODUCTION

This appeal involves a maritime personal injury action brought by a seafarer, Mervy Lloyd Mongaya ("Mongaya") who signed an employment contract with Defendant AET Shipmanagement Pte Ltd ("ASP") to work on a vessel registered in the Republic of the Marshall Islands (the "RMI"). The contract included an arbitration clause and a choice of law clause. The registered owner of the vessel, Defendant AET MCV Beta LLC ("MCV"), and the operator of the vessel, Defendant AET Inc., Ltd., ("AIL") were not signatories to this contract (collectively referred to as the "nonsignatory Defendants").

The first issue before us is whether the nonsignatory Defendants may compel Mongaya to submit to arbitration under the employment contract's arbitration clause. Mongaya argues that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), to which the RMI has acceded, precludes nonsignatories from compelling arbitration. We hold that the Convention does not apply because it has not been adopted into

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

RMI domestic law, and under common law doctrine of equitable estoppel, the High Court properly determined that the nonsignatory Defendants could compel Mongaya to submit to arbitration.

The second issue on appeal is whether the employment contract's choice of law clause, mandating use of Philippine law, is unlawful under the Merchant Seafarers Act. We hold that the employment contract's choice of law clause is valid.

Accordingly, we affirm the High Court's August 10, 2017 Order Granting Defendants' Motions to Stay Action Pending Arbitration.

II. BACKGROUND

A. POEA Contract

On March 1, 2016, Mongaya, a citizen of the Republic of the Philippines, entered into a Philippine Overseas Employment Administration Contract of Employment (the "2016 POEA Contract") with ASP. Neither MCV nor AIL were signatories to the 2016 POEA Contract. Section l .A. of the 2016 POEA Contract requires the "Principal/Employer/Master/Company" to provide "a seaworthy ship for the seafarer and take all reasonable precautions to prevent accident and injury to the crew including provision of safety equipment, fire prevention, safe and proper navigation of the ship and such other precautions necessary to avoid accident, injury or sickness to the seafarer."

> Section 20.J. of the 2016 POEA Contract provides for employer liability when a seafarer suffers work-related injuries: The seafarer or his successor in interest acknowledges that payment for injury, illness, incapacity, disability or death and other benefits of the seafarer under this contract . . . shall cover all claims in relation with or in the course of the seafarer's employment, including but not limited to damages arising from the contract, tort, fault or negligence under the laws of the Philippines or any other country.

And Section 29 of the 2016 POEA Contract includes a mandatory arbitration clause:

> In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of voluntary arbitrators.

Finally, Section 31 of the 2016 POEA Contract includes a choice of law clause:

> Any unresolved dispute, claim or grievance arising out of or in connection with this contract including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants to which the Philippines is a signatory.

Mongaya was employed on the MT Eagle Texas under this contract. The vessel is registered in the RMI. MCV is the owner of the vessel and ASP managed the vessel. AIL is alleged by Mongaya to be the operator of the vessel.

B. High Court Proceedings

On March 14, 2017, Mongaya filed a complaint for declaratory judgment and damages in the High Court. Mongaya asserted causes of action for negligence, unseaworthiness, and maintenance and cure against ASP, MCV, and AIL, and alleged that the "Defendants" employed him on board the vessel. Mongaya described the relationship between the Defendants — MCV was the registered owner of the vessel, ASP was the managing agent, AIL and ASP "operated and/or controlled" the vessel.

Mongaya alleged the following facts: (1) that on or about August 4, 2016, he was working in the vessel's hold when a bag, being raised from the hold, broke loose, fell, and hit Mongaya on the head; (2) Mongaya was airlifted to a medical center in Florida, underwent surgery, and was hospitalized for approximately two weeks; (3) as a result of his injuries, Mongaya is totally and permanently disabled, suffering from permanent paralysis from the chest down, severely limited use of his arms, memory loss, and "diminished thought process."

Mongaya further alleged that "Defendants had the absolute duty to provide the Plaintiff with a safe and seaworthy vessel," and that "this duty was breached and violated by the Defendants . . ." Mongaya claimed that the unseaworthiness of the vessel was the direct and

proximate cause of the accident. Also, Mongaya claimed that the accident resulted from "the direct and vicarious acts of negligence of the Defendants," including failing to provide a safe workplace, appropriate safety equipment, supervision of crewmembers, and a properly staffed vessel. Mongaya does not differentiate between the individual Defendants in making these allegations.

On May 15, 2017, MCV filed a Motion to Stay Action and Compel Arbitration. Mongaya subsequently filed an opposition to MCV's motion. MCV filed a reply, and then Mongaya filed a sur-reply. On June 12, 2017, AIL filed a Motion to Stay Action and Compel Arbitration. Mongaya subsequently filed an opposition to AIL' s motion. On August I 0, 2017, the High Court issued an Order Granting Defendants' Motions to Stay Action Pending Arbitration. Mongaya timely appealed to this Court.

III. STANDARD OF REVIEW

[1]Questions of law are reviewed de novo. *Jack v. Hisaiah*, 2 MILR 206, 209 (2002); *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991).

IV. DISCUSSION

In our view, Mongaya presents two issues on appeal: (1) whether the High Court erred when it allowed, under the doctrine of equitable estoppel, nonsignatories to the arbitration agreement, AIL and MCV, to compel Mongaya to arbitrate with them; and (2) whether the High Court erred under the 2016 POEA Contract's choice of law clause when it ordered Mongaya to arbitrate his claims against Defendants in the Republic of the Philippines applying Philippine law.

A. The Arbitration Clause

1. The Convention Does Not Apply Because It Was Never Enacted Into Domestic Law

As an initial matter, we must determine what law is applicable in determining whether nonsignatories to an arbitration agreement can compel a signatory to arbitrate. Mongaya argues that the Convention applies, and that under the Convention, nonsignatories cannot compel a

signatory to arbitrate. We hold that, under *Chubb Insurance (China) Co. v. Eleni Maritime Ltd.*, Supreme Court Case No. 2016-002, slip op. at 6 (June 6, 2017), the Convention does not apply.

[2]The RMI is a "dualist jurisdiction," where "the courts will only apply the legislation in effect — that is, the laws passed by the competent legislative bodies (e.g., the Nitijela) — and they will not consider intrinsic treaty provisions." *Chubb*, slip op. at *6; *see* Marshall Islands Const. Art. V, §1(4) ("No treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this Constitution shall, of itself, have the force of law in the Republic."). And although the RMI acceded to the Convention in 2006, it never enacted the Convention into domestic law. *See Chubb*, slip op. at 6. Thus, the Convention simply does not apply to this case.

2. The Arbitration Act 1980 Does Not Answer Whether Nonsignatories Can Compel Signatories to Arbitrate

Mongaya also argues that the Arbitration Act 1980 precludes nonsignatories to an arbitration agreement from compelling a signatory to arbitrate. We disagree and hold that the Arbitration Act 1980 is silent on this issue.

The Arbitration Act 1980 provides:

> A written agreement to submit to arbitration an existing controversy or a controversy arising after the agreement, is valid, enforceable and, except on such grounds that exist for the revocation of any contract, irrevocable.
> . . . .
>
> [O]n the petition of a party to an arbitration agreement alleging that a *party to the agreement* refuses to arbitrate a controversy in accordance with the agreement, the High Court shall order the petitioner and the respondent to arbitrate the controversy, *if it determines that a written agreement to arbitrate the controversy exists*.

30 MIRC Ch. 3 §§ 304-305 (emphases added).

The Arbitration Act 1980 defines relevant terms as follows:

> (b) "arbitration agreement" means . . . a written agreement to submit a controversy to arbitration . . .
>
> . . . .
>
> (g) "party", in relation to an arbitration agreement, means a party to the agreement:
>
> (i) who seeks to arbitrate a controversy to the agreement;
>
> (ii) against whom the arbitration of a controversy pursuant to the agreement is sought . . . .

30 MIRC Ch. 3 § 302.

Mongaya argues that, because there was no written agreement to arbitrate between Mongaya and the nonsignatory Defendants, the nonsignatory Defendants cannot compel arbitration under the Arbitration Act 1980. We do not interpret the Arbitration Act 1980 so narrowly.

[3][4]First, the Act defines "arbitration agreement" as "a written agreement to submit a controversy to arbitration." 30 MIRC Ch. 3 § 302(b). It is undisputed that there is a written agreement between Mongaya and ASP to submit this controversy to arbitration. Second, although only "a party to an arbitration agreement" may compel arbitration under the Act, 30 MIRC Ch. 3 § 305(1), nothing in the Act's language precludes the application of the common law doctrine of equitable estoppel. And third, a court may compel arbitration under the Act "if it determines that a written agreement to arbitrate the controversy exists." *Id*. Again, there is no dispute as to the existence of a written agreement to arbitrate between Mongaya and ASP.[3] In

[3]Mongaya also argues that in *Air Marshall Islands, Inc. v. Dornier Luftfahrt, GMBH*, 2 MILR 211, 216 (2002), we refused to compel arbitration in the absence of a written agreement between the parties. In Air Marshall Islands, we held that "because the very existence of the agreement [was] challenged by one of the parties, the court may not compel such party to arbitrate." *Id*. Here, there is no challenge as to whether there was an agreement between Mongaya and ASP. *See id*. Thus, *Air Marshall Islands* provides no assistance to Mongaya.

sum, we reject Mongaya's argument that the Arbitration Act 1980 precludes nonsignatories from compelling arbitration.[4]

3. Under the Common Law, Equitable Estoppel May Permit a Nonsignatory to an Arbitration Agreement to Compel a Signatory to Arbitrate

[5][6]United States courts recognize the common law doctrine of equitable estoppel, which may permit a nonsignatory to an arbitration agreement to compel a signatory to arbitrate. *See, e.g., Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629-31 (2009). And we must follow this common law if it is not precluded by an RMI constitutional provision, statutory provision, treaty, customary law, or traditional practice. *See Republic v. Waltz*, I MILR (Rev.) 74, 77 (1987) ("Our holding is in accord with the greater weight of judicial authority based upon the common law, which we are obliged to follow in the absence of any provision in the Republic of the Marshall Islands Constitution, or in any custom or traditional practices of the Marshallese people or act of the Nitijela to the contrary."); *Likinbod and Alik v. Kejlat*, 2 MILR 65, 66 (1995) ("The 1979 Marshall Islands Constitution set forth 'the legitimate legal framework for the governance of the Republic.' . . . That framework continued the common law in effect as the governing law, in the absence of customary law, traditional practice or constitutional or statutory provisions to the contrary.") (footnote omitted).

[7]In *Carlisle*, the United States Supreme Court recognized the common law doctrine of equitable estoppel in the context of nonsignatories to arbitration agreements. 556 U.S. at 629-31. Carlisle found that, " 'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Id*. at 631

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[4]Mongaya also relies heavily on cases interpreting the Convention's specific language. But the Convention, unlike the Arbitration Act 1980, more narrowly defines "agreement in writing" as an agreement "signed by the parties." *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II,§ 2, June 10, 1958, 21 U.S.T. 2517; *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd*, 186 F.3d 210,214 (2d Cir. 1999), abrogated on other grounds by *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775 (2d Cir. 2013). Cases interpreting the Convention thus provide little guidance to interpretation of the Arbitration Act 1980.

(quoting 21 Richard A. Lord, *Williston on Contracts* § 57:19 (4th ed. 2001) (footnotes omitted)).[5] After determining that no provisions in the relevant statute the Federal Arbitration Act) "alter[ed] background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)," *Calisle* held that nonsignatories cannot be categorically barred from enforcing an arbitration agreement under the Federal Arbitration Act. *Id*. at 630-31.

Other courts have similarly held. For example, *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177-78 (2nd Cir. 2004), stated that "[o]ur cases have recognized that under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute." And *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999), stated that:

> Although arbitration is a contractual right that is generally predicated on an express decision to waive the right to trial in a judicial forum, this court has held that the lack of a written arbitration agreement is not an impediment to arbitration. This is because there are certain limited exceptions, such as equitable

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[5] *Williston on Contracts* states the following, in relevant part:

> [T]raditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver, and estoppel. Thus, a nonsignatory may acquire rights under or be bound by an arbitration agreement if so dictated by the ordinary principles of contract and agency. While a nonsignatory attempting to bind a signatory to an arbitration agreement is distinct from a signatory attempting to bind a nonsignatory, courts often consider both scenarios under a similar legal framework. According to principles of contract and agency law, arbitration agreements may be enforced by or against nonsignatories under any of six theories: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third party beneficiary. In deciding whether a party, despite being a nonsignatory to an arbitration agreement, may be equitably bound to arbitrate under traditional principles of contract and agency law, the court must expressly consider whether the relevant state contract law recognizes the particular principle as a ground for enforcing contracts against third parties.

Williston on Contracts § 57: 19 (July 2018 Update) (footnotes omitted).

> estoppel, that allow nonsignatories to a contract to compel arbitration.

(quotation marks and citations omitted), *abrogated on other grounds by Carlisle*, 556 U.S. at 631. *See also Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 358-59 (2nd Cir. 2008). Likewise, *Aggarao v. MOL Ship Management Co.*, 675 F.3d 355,373 (4th Cir. 2012), a case also involving a POEA contract, held that "[w]ithout a doubt . . . 'a nonsignatory to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack an agreement to arbitrate.'" (quoting *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623,627 (4th Cir. 2006)); *see also Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) ("General contract and agency principles apply in determining the enforcement of an arbitration agreement by or against nonsignatories. Among these principles are . . . estoppel." (citations and quotation marks omitted)); *Riley v. EMO Harris Bank, N.A.*, 61 F. Supp. 3d 92, 98 (D.D.C. 2014) ("Courts in the District of Columbia Circuit have held that non-signatories to an arbitration agreement, such as Defendants, may compel a signatory to the agreement to arbitrate a dispute pursuant to the doctrine of estoppel." (footnotes omitted)).

Thus, the common law doctrine of equitable estoppel permits nonsignatories to compel signatories to arbitrate in some situations. We now turn to the various tests that have developed to determine when the doctrine applies, and adopt the test used in *Mundi*, 555 F.3d at 1045, as the law of the RMI.

Mundi reasoned that a signatory may be required to arbitrate with a nonsignatory "because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations." 555 F.3d at 1046 (citations and quotation marks omitted).

Other tests are substantially similar. *JLM Industries* held that the estoppel doctrine applied "where a careful review of the relationship among the parties, the contracts they signed,

and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." 387 F .3d at 177 (internal editorial marks omitted); *see also Sokol Holdings*, 542 F.3d at 361-62 (discussing *JLM Industries*). In *MS Dealer Service Corp.*, the Eleventh Circuit discussed two different circumstances when equitable estoppel applies:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

177 F .3d at 94 7 (citations and internal editorial marks omitted).

And Aggarao set forth the following requirements:

> Although we have not specifically required allegations of collusion, we agree that, at a minimum, there must be allegations of coordinated behavior between a signatory and a nonsignatory defendant, and that the claims against both the signatory and nonsignatory defendants must be based on the same facts, be inherently inseparable, and fall within the scope of the arbitration clause.

675 F.3d at 374 (quotation marks and citations omitted).

[8]After a careful review of these cases, we adopt the *Mundi* test — requiring (1) a "close relationship between the entities involved," (2) a relationship between "the alleged wrongs" and the nonsignatory' s "obligations and duties in the contract," and (3) the claims be "intertwined with the underlying contractual obligations" — as the law in the RMI. 555 F.3d at 1046.

4. Applying the Doctrine of Equitable Estoppel, the Nonsignatory Defendants May Compel Mongaya to Arbitrate

We determine that: (1) a close relationship exists between ASP, MCV, and AIL; (2) a relationship exists between the wrongs alleged by Mongaya and the obligations and duties in the 2016 POEA Contract; and (3) Mongaya's claims are intertwined with the contractual obligations arising from the 2016 POEA Contract. Thus, we hold that the nonsignatory Defendants may compel Mongaya to arbitrate.[6]

Aggarao is a case that is both similar factually to the instant case and uses a test similar to our own to determine if equitable estoppel applies. In that case, Aggarao entered into a POEA contract, which contained an arbitration clause identical to the clause in the instant 2016 POEA Contract. 675 F.3d at 360-61. While working on the vessel, Aggarao was injured by a deck lifting machine. *Id*. at 362. Aggarao filed a motion seeking a preliminary injunction against two nonsignatories to the agreement — the manager of the vessel and the operator of the ship — to provide maintenance and cure in the United States. *Id*. at 364. On appeal, the Fourth Circuit held that Aggarao must arbitrate his claims against the nonsignatory defendants in the Republic of the Philippines. *Id*. at 380.

The court held that Aggarao' s claims against both the signatory and nonsignatory defendants "allegedly arose from the same occurrence or incident, i.e., the tragic circumstances on the Asian Spirit . . . resulting in his injuries." *Id*. at 374 (quotation marks and citations omitted). The court also determined that the conduct of the defendants "was coordinated by virtue of each defendant's alleged involvement in that incident— instigating and contributing to one another." *Id*. For example, one defendant carried out the orders of another. *Id*. Also, the

[6]Mongaya relies heavily on *Yang*, 876 F.3d at 999, to argue that equitable estoppel does not apply to this case. *Yang*, in dicta and applying California law, refused to compel a nonsignatory to arbitrate because Yang "would have a claim independent of the existence of the agreement containing the arbitration provision," namely that the defendant furnished an unseaworthy vessel and crew. 876 F.3d at 1002-03 (emphasis omitted). Further, the court determined that Yang's Death on the High Seas Act claims, general maritime law claims, and Jones Act claims did not require proof of a written employment agreement. *Id*. The court concluded that equitable estoppel did not apply because the plaintiff had claims that did not rely on obligations arising from the employment contract. *Id*. In our view, *Yang* applied an overly restrictive view of equitable estoppel, one inconsistent with general common law.

unsafe conditions were exacerbated by the design defects of the ship, which was owned by a third defendant. *Id*. The court said, "[i]n short, Aggarao's claims against [the signatory defendant] depend, in some part on the nature of tortious acts allegedly committed by [the nonsignatory defendants]." *Id*. (quotation marks and citation omitted).

The court also found important that Aggarao "emphasize[d] in his claims against [the defendants] that his injuries occurred while he was acting in the scope of his employment," which were covered under the POEA contract. *Id*. at 375. That contract, which contained the arbitration clause, also included obligations to provide a seaworthy vessel as well as maintenance and cure. *Id*.

The facts in *Aggarao* are nearly identical to the facts here. Mongaya, like the plaintiff in Aggarao, is a citizen of the Republic of the Philippines and signed a POEA contract before being subsequently injured while performing that employment contract. The 2016 POEA Contract, like the contract in Aggarao, requires the "Principal/Employer/Master/Company" to provide a seaworthy ship as well as to provide other safety precautions to "avoid accident, injury or sickness to the seafarer."

While Mongaya's complaint does not explain in detail how the Defendants interacted, as did the plaintiff in Aggarao, Mongaya does describe the Defendants' relationships (owner, operator, and manager). Further, Mongaya brings all his claims uniformly against all the Defendants, without making specified allegations as to certain Defendants. Mongaya claimed that all Defendants failed to provide Mongaya with a safe place to work, appropriate safety equipment, a properly supervised crew, a properly staffed vessel, or a seaworthy vessel.

A close relationship — that of owner, operator, and manager of the vessel — exists between MCV, AIL, and ASP. A relationship exists among the wrongs alleged by Mongaya, such as the failure to provide a seaworthy vessel and utilize proper safety precautions, and the obligations and duties in the 2016 POEA Contract, which required the employer to provide a seaworthy vessel and safety precautions. Further, Mongaya' s claims of negligence,

unseaworthiness, and maintenance and cure are intertwined with the contractual obligations arising from the 2016 POEA Contract, such as the obligations to provide a seaworthy vessel and safety precautions. We thus hold that the doctrine of equitable estoppel applies, and accordingly, the nonsignatory Defendants may compel Mongaya to participate in arbitration.

B. The Choice of Law Provision

Mongaya next argues that RMI law should govern Mongaya's claims rather than Philippine law, which is required by the choice of law clause in the 2016 POEA Contract. Citing §§ 853 and 858 of the Merchant Seafarers Act, Mongaya argues that the RMI has "strong public policy that favors the application of the laws of the Republic to disputes between seafarers and their employers on vessels registered in and flying the flag of the Republic." Mongaya also argues that "[t]he laws of the Republic prohibit any provision in a labor contract that attempts to set aside the application of the laws of the Republic . . . . "

The Merchant Seafarers Act provides:

> **§853. Contracts for seafaring labor.**
>
> . . . .
>
> All contracts relating to service aboard a vessel registered under this Title shall be governed in interpretation and application by the Laws of the Republic, including this Chapter and any Regulations thereunder.
>
> . . . .
>
> **§858. Provisions prohibited in labor contracts.**
>
> It shall be unlawful for any employer . . . to enter into, any labor contract containing any provision which attempts to set aside the application of or is inconsistent with or is violative of the laws of the Republic or which prescribes terms or conditions of employment less favorable to seafarers than those set forth in this Chapter . . . and any such prohibited provisions shall be deemed null and void.

30 MIRC Ch. 8 §§ 853, 858.

First, Mongaya appears to argue that the 2016 POEA Contract's choice of law provision that requires application of Philippine law must be declared null and void because it "sets aside" application of RMI law.

[9][10]But if we were to follow this interpretation, every RMI flag vessel could be compelled to arbitrate under RMI law, no matter whether the parties had agreed to a choice of law provision that said otherwise. Choice of law provisions "in international commercial contracts are 'an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction,' and should be enforced absent strong reasons to set them aside." *See Northrop Corp. v. Triad Int'l Mktg. SA.*, 811 F.2d 1265, 1270 (9th Cir. 1987), modified on other grounds, 842 F .2d 1154 (9th Cir. 1988) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-20 (1974), and *MIS Bremen v. Zapata Off -Shore Co.*, 407 U.S. 1, 15 (1972)). We cannot read the plain language of the Merchant Seafarers Act to lead to this absurd result suggested by Mongaya. *See Dribo v. Bondrik*, 3 MILR 127, 138 (2010) ("It has long been recognized that the literal meaning of a statute will not be followed when it produces absurd results.") (citing *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004), *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941), and *Sorrells v. United States*, 287 U.S. 435, 446 (1932)).

[11]Second, Mongaya argues that Philippine law "is inconsistent with or is violative of' RMI law, but nowhere identifies any such specific law. Nor does Mongaya present any facts showing how Philippine law sets terms or conditions of employment less favorable than RMI law. And we will not consider arguments made for the first time during oral argument. *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229,232 (5th Cir. 2004) (argument deemed waived when first asserted at oral argument); *Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008) (same); *Veluchamy v. F.D.I.C.*, 706 F.3d 810, 817 (7th Cir. 2013) ("[A]rguments raised for the first time at oral argument are waived.").

Thus, we have no basis to find, even under Mongaya' s interpretation of the statute, that the choice of law clause violates the Merchant Seafarers Act because Philippine law is somehow at odds with RMI law. Accordingly, we hold that the choice of law provision stands.

V. CONCLUSION

For the foregoing reasons, we **AFFIRM** the High Court's August 10, 2017 Order Granting Defendants' Motions to Stay Action Pending Arbitration.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (THAILAND) COMPANY, LTD.,
TOKIO MARINE & NICHIDO FIRE INSURANCE CO., LTD., ET AL, ,
Plaintiffs-Appellees,
v,
ELENI MARITIME LIMITED IN PERSONAM AND
EMPIRE BULKERS LIMITED,
Defendants-Appellants.

SCT CN 2018-005 (HCT CN 2014-050, 2014-110, and 2015-194)

ON RECONSIDERATION OF FROM SINGLE JUDGE ORDER
Submitted July 30, 2018
Filed September 5, 2018

Summary

In an unanimous *en banc* decision, the Supreme Court denied the motion by defendants-appellants to vacate a procedural order by a single supreme Court justice. The procedural order had dismissed an interlocutory appeal from the High Court due to the absence of certification as required by MIRCP Rule 54(b). Furthermore, the Supreme Court clarified that while the common admiralty practice permits appeals of liability determinations before assessing damages (as codified under 28 U.S.C. § 1292(a)(3) in the United States), it considers this practice as procedural rather than substantive. As such, Supreme Court asserted that it is not obligated to allow the present interlocutory appeal under the general maritime law.

Digest

1. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: The Supreme Court is without power to entertain an interlocutory appeal absent certification by the High Court pursuant to MIRCP Rule 54(b).

2. MARITIME LAW – *In General*: The "general maritime law" is a term of art which denotes federal judge made maritime law.

3. MARITIME LAW – *In General*: Secondary sources indicate that the term "general maritime law" refers to "substantive" rules of maritime law.

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4. MARITIME LIENS – *Procedure*: The common admiralty practice of allowing appeal of a liability determination before determination of damages (which in the U.S. is codified at 28 U.S.C. § 1292(a)(3)) is procedural, not substantive. Because it is not substantive the RMI Supreme Court is not convinced that it is bound to allow the instant interlocutory appeal under the general maritime law.

Counsel

Dennis Reeder, counsel for Plaintiffs/Appellees
Tatyana Cerullo and David Lowe, counsel for Defendant/Appellants

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

ORDER DENYING REQUEST TO VACATE AND/OR MODIFY "ORDER DISMISSING INTERLOCUTORY APPEAL"

On July 30, 2018, Defendants-Appellants timely filed a "Request to Vacate and/or Modify" a single judge order "Dismissing Interlocutory Appeal" by C.J. Cadra dated July 16, 2018.

The full panel, having considered this matter DENIES Appellants' "Request to Vacate and/or Modify" for the reasons set forth below and as stated in the July 16, 2018, single judge order.

[1]In summary, the High Court's partial summary judgment order is not a "final decision" from which an appeal lies as of right. That order is interlocutory. Marshall Islands precedent has held the Supreme Court is without power to entertain an interlocutory appeal absent certification by the High Court pursuant to MIRCP Rule 54(b). Certification has not been obtained. We concur in the result of the single judge procedural order and do not engage in an extensive analysis of the above stated findings.

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

Further, we are not convinced that the historic admiralty practice of allowing an appeal of a liability determination prior to a trial on the damages issue is part of the "general maritime law." Appellant flatly asserts, without citation of authority, that 28 U.S.C. 1292(a)(3) is a codification of the general maritime law of the United States which this Court is to follow under 47 MIRC 113. Appellant argues the single judge erred because 47 MIRC 113 makes no distinction between substantive and procedural "general maritime law." But, as discussed below and discussed in the single judge procedural order, the very definition of"general maritime law" suggests that distinction.

[2]The "general maritime law" is a term of art which denotes federal judge made maritime law. *See, e.g., Coto v. J Ray McDermott, S.A.*, 709 So.2d 1023, 1028 (La. Ct. App. 1998) ("The General Maritime Law . . . of the United States is a branch of federal common law that furnishes the rule of decision in admiralty and maritime cases in the absence of preemptive legislation.") (citing Thomas J. Schoenbaum, Admiralty & Maritime Law§ 5.1).

[3]Secondary sources indicate that the term "general maritime law" refers to "substantive" rules of maritime law. Robert Force, *Admiralty and Maritime Law*, Federal Judicial Center, 2013, at pp. 22-23, observes:

> ***The General Maritime Law***
>
> Like Congress, federal courts have created *substantive* rules of maritime law. These court-made rules are referred to as "the general maritime law," which has two dimensions. To some extent, the general maritime law applies rules that are customarily applied by other countries in similar situations. This reflects that certain aspects of the general maritime law are transnational in dimension, and custom is an important source of law in resolving these disputes. The other aspect of the general maritime law is purely domestic. Because Congress has never enacted a comprehensive maritime code, the courts from the outset, have had to resolve disputes for which there were no congressionally established *substantive* rules. In the fashion of common-law judges, the courts created substantive rules out of necessity.

Id. (emphasis added).

The distinction between substantive and procedural maritime rules is further brought out by William Tetley's definition of the "general maritime law:"

> **"General maritime law"** — A term used particularly in the United States to refer to the non-statutory sources of American admiralty law. The general maritime law of the United States is derived from the historic lex maritima common to all Western European nations, with its fundamentally civilian nature and origin. The general maritime law includes such concepts and institutions as the maritime attachment; the theory of abandonment in shipowners' limitation of liability; the legislative treatment of maritime liens *as substantive rights, rather than procedural remedies* dependent upon jurisdiction; remedies for wrongful death; the ocean carrier's possessory lien for bill of lading freight, charter hire and demurrage, maintenance and cure rights of the sick or injured seaman; the role of equity in admiralty law; general average; maritime insurance and pre-judgment interest.

William Tetley, Q.C., Glossary of Maritime Law Terms, 2nd Ed. 2004 (citing Tetley, "The General Maritime Law — The Lex Maritima" (1994) 20 Syracuse J. Int'l L. & Com. 105-145 at pp. 121-128 and *RMS Titanic, Inc. v. Haver*, 171 F.3d 943, 960, 1999 AMC 1330, 1344 (4th Cir. 1999)). (emphasis added).

Thus, it would appear that the very definition of"general maritime law," being a term of art, encompasses the *substantive* law created by the courts. The general maritime law, being *substantive* law, would not necessarily include all procedural rules or practices which may have been historically utilized by courts sitting in admiralty.

In determining whether a procedural rule violates the general maritime law, it is worthwhile to examine the preemption cases dealing with a state's obligation to follow the general maritime law.

The United States Supreme Court in *American Dredging Company v. Miller*, 510 U.S. 443 (1994) drew a distinction between *substance* and *procedure* in reaching its conclusion that

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Louisiana's forum non conveniens doctrine did not work "material prejudice to a characteristic feature of the general maritime law." *Id.* at 450. The Court noted at 453-54:

> Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: *it is procedural rather than substantive*, and it is most unlikely to produce uniform results . . . But venue is a matter that *goes to process rather than substantive rights* . . . Uniformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all the courts of the world . . . Because the *doctrine is one of procedure rather than substance*, petitioner is wrong to claim support from our decision in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), which held that Pennsylvania courts must apply the admiralty rule that contributory negligence is no bar to recovery. The other case petitioner relies on, *Garrett v. MooreMcCormack Co.*, 317 U.S. 239, 248-249 (1942), held that the traditional maritime rule placing the burden of proving the validity of a release upon the defendant preempts state law placing the burden of proving invalidity upon the plaintiff. In earlier times, burden of proof was regarded as "procedural" for choice-of-law purposes such as the one before us here[.] For many years however, it has been viewed as a matter of substance — which is unquestionably the view that the Court took in *Garrett*, stating that the right of the plaintiff to be free of the burden of proof "inhered in his cause of action," "was part of the very substance of his claim and cannot be considered a mere incident of a form of procedure." 317 U.S. at 249. Unlike burden of proof (which is a sort of default rule of liability) and affirmative defenses such as contributory negligence (which eliminate liability), *forum non conveniens does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct — how to manage their business and what precautions to take.*

Id. (emphasis added and some internal citations omitted).

While we recognize that "[i]t has always been the practice in courts of admiralty, in certain cases, to first determine the liabilities of the parties to the suit and then refer the case to a commissioner to take evidence and fix the measure of damages . . . to avoid delay and the expense of taking further evidence, that might prove to be useless, if the decree as to liability should be reversed . . . ," *see, e.g. Starkv. Texas Co., et al*., 88 F.2d 182, 183 (1937), we cannot conclude that this procedural practice was or is part of the general maritime law which we are bound to apply under 47 MIRC 113.

The preemption cases generally stand for the proposition that procedural rules which do not affect substantive rights granted by the general maritime law can differ from those employed by the federal courts in admiralty cases. As noted by Justice Souter in his concurring opinion "[t]he distinction between substance and procedure will, however, sometimes be obscure." *American Dredging*, 510 U.S. at 458.

[4]It appears to us that the practice of allowing appeal of a determination of liability prior to determination of damages by a commissioner or a court is a matter of procedure affecting no substantive right under the general maritime law. Using the factors referenced in *American Dredging*, we reason that this practice is (1) not part of an affirmative defense which can be relied upon by Appellants and (2) would not seem to be the sort of rule upon which maritime actors (such as Appellants) would rely upon in making decisions as to how to manage their business. Therefore, in the absence of any authority cited by Appellants otherwise, we conclude that the common admiralty practice of allowing appeal of a liability determination before determination of damages (which in the U.S. is codified at 28 U.S.C. § 1292(a)(3)) is procedural, not substantive. Because it is not substantive we are not convinced that we are bound to allow the instant interlocutory appeal under the general maritime law.

For the foregoing reasons, we **DENY** Appellants' motion and **DISMISS** the Appeal of the High Court's partial summary judgment order without prejudice to appeal upon entry of a final judgment.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

SAMSUNG HEAVY INDUSTRIES CO., LTD., a Korean corporation,
Plaintiff-Appellant,
v.
FOCUS INVESTMENTS, LTD., a Marshall Islands corporation, and MEHMET EMIN KARAMEHMET,
Defendants-Appellees.

SCT CN 2018-002 (HCT CN 2017-081)

APPEAL FROM THE HIGH COURT

Argued June 11, 2018
Filed September 6, 2018

Summary

The Supreme Court affirmed the High Court's order dismissing Samsung's action for enforcement of a foreign judgment. The High Court rejected the enforcement request for two primary reasons: (i) it lacked personal jurisdiction over the debtor, Karamehmet, and (ii) Karamehmet's property, namely shares of stock in Focus, was not located in the Republic. Mere ownership of shares in a Marshall Islands corporation does not constitute ownership of property in the Marshall Islands. In this context, the Supreme Court determined that the High Court did not err by incorporating Section 8-112 of the Uniform Commercial Code into the common law of the Republic. Section 8-112, in relevant part, provides that the "interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy." This underscores that the situs of certificated shares or stock is where the certificated shares are located.

Digest

1. APPEAL AND ERROR – *Review – Questions of Law*: Dismissal of a complaint, where no factual matters have been determined, is reviewed *de novo*.

2. APPEAL AND ERROR – *Review – Questions of Law*: A trial court's jurisdictional rulings and statutory interpretations are reviewed *de novo*.

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4. ENFORCEMENT OF JUDGMENTS – *In General*: It appears clear that in order to execute upon a foreign judgment there must be some property within the forum jurisdiction subject to attachment pursuant to the Enforcement of Judgments Act.

5. ENFORCEMENT OF JUDGMENTS – *In General*: The court must have control of the property in order to enforce a judgment under the procedures allowed by the EJA, it does not follow that the court must necessarily have control by attachment, seizure, or otherwise, of a debtor's property to exercise *in rem* or *quasi in rem* jurisdiction at the outset of the action.

6. ENFORCEMENT OF JUDGMENTS – *Foreign Judgment*: Attachment, garnishment, seizure or use of some other procedural device to gain control over a foreign debtor's property would, however, be necessary to ultimately enforce a foreign judgment recognized under the Uniform Foreign Money Judgments Recognition Act.

7. JURISDICTION – *Quasi in Rem*: The Supreme Court held that for purposes of initially adjudicating a claim on its merits, *quasi in rem* jurisdiction — that is, jurisdiction based solely on the presence of the defendant's property in the forum state — may be exercised only where that property is the subject matter of the litigation, or the underlying cause of action is related to the property, so as to conform to the standard of fairness and substantial justice.

8. JURISDICTION – *Personal – Minimum Contacts*: For a defendant to be subject to jurisdiction in the forum, due process requires that he have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

9. JURISDICTION – *Personal – Minimum Contacts*: The "minimum contacts" test is satisfied when (1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable. If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law.

10. ENFORCEMENT OF JUDGMENTS – *Foreign Judgment*: The presence of a judgment debtor's assets in the forum remained a jurisdictional basis for proceedings to enforce a previously rendered foreign judgment, even if the forum state and the defendant's property therein had no connection to the claim underlying the judgment.

MARSHALL ISLANDS, SUPREME COURT

11. ENFORCEMENT OF JUDGMENTS – *Foreign Judgment*: In order to recognize and enforce a foreign judgment, a court must generally have (1) personal jurisdiction over the judgment debtor or (2) jurisdiction over the judgment debtor's property in the forum state.

12. COMMON LAW – *In General*: In the absence of a substantially similar statute or prior decisional authority, the RMI Supreme Court looks to the common law of the United States.

13. COMMON LAW – *In General*: Where this Court must follow common law, it cannot do so blindly. Instead, if unclear or outdated common law has been abandoned in favor of statutory clarity, this Court is free to adopt that modem statutory framework as the law of the RMI.

14. CORPORATIONS – *Situs of Shares*: The situs of shares in a Marshallese non-resident domestic corporation is where the share certificates are located, whether with the shareholder, a clearing house, or secured party, and may be reached by a creditor only by actual seizure of the security certificate or by one of the other methods allowed by UCC § 8-112 or the Marshall Islands Enforcement of Judgments Act.

Counsel

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Dennis J. Reeder, John G. Kissane, and Neil A. Quartaro, counsel for Defendants-Appellees Focus Investments, Ltd., a Marshall Islands corporation, and Mehmet Emin Karamehmet

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

AMENDED OPINION

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

I. INTRODUCTION

Plaintiff-Appellant Samsung Heavy Industries Co. Ltd. (Samsung) appeals an Order of the High Court dismissing its complaint to recognize and enforce a foreign judgment obtained in

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

England against Defendant-Appellee Mehmet Emin Karamehmet (Karamehmet), a Turkish citizen/resident. Samsung's complaint also sought to execute its judgment on Karamehmet's alleged ownership of shares in Focus Investments, Ltd. (Focus), a non-resident Marshall Islands domestic corporation.

In dismissing Samsung's complaint, the High Court found that it lacked personal jurisdiction over Karamehmet and that property belonging to Karamehmet (namely his indirect beneficial ownership of corporate stock or shares in Focus) was not shown to be present in the Marshall Islands.

Samsung presents two questions on appeal: (1) whether the High Court erred by dismissing this action to enforce a foreign judgment based on the conclusion that ownership of shares in a Marshall Islands corporation does not constitute ownership of property in the Marshall Islands; and (2) whether the High Court erred by purporting to incorporate Section 8-112 of the Uniform Commercial Code into the common law of the Republic.

For the reasons set forth herein, we AFFIRM the High Court's dismissal order.

II. BACKGROUND, FACTS & PROCEDURAL HISTORY

Samsung, a Korean corporation, obtained a judgment against Karamehmet, a Turkish citizen and/or resident, for approximately $44.3 million in an English court (the "English judgment"). That judgment, obtained by default, arose out of an action for breach of shipbuilding contracts between Samsung and several companies owned by Karamehmet. Karamehmet was a personal guarantor on those contracts. Karamehmet was served with the English judgment on June 17, 2016. Samsung alleges that Karamehmet and/or his companies have not paid any portion of the English judgment to date.

On April 19, 2017, Samsung filed its "Original Complaint to Enforce Foreign Judgment and for Injunctive Relief" along with a "Motion for Temporary Restraining Order and Preliminary Injunctive Relief" in the RMI High Court. Samsung sought recognition of the English judgment against Karamehmet pursuant to the Marshall Islands' version of the Uniform Enforcement of Foreign Money Judgments Act, 30 MIRC Ch. 4, and enforcement of that

judgment against Karamehmet' s alleged interest in shares of stock in Focus pursuant to the Marshall Islands' Enforcement of Judgments Act, 3 0 MIRC Ch. 1.

Samsung alleged the following facts in support of its claims: Samsung obtained an approximately $44.3 million judgment against Karamehmet in an English court by default; that judgment has not been satisfied; Karamehmet indirectly owns 100% of Focus, a non-resident Marshall Islands domestic corporation. Focus, in turn, holds 100% of Karamehmet's beneficial interest in Genel Energy, PLC, a Jersey corporation.

Based on Karamehmet' s ownership of shares or stock in Focus, Samsung sought to execute its judgment against Karamehmet's shares in Focus reasoning: money judgments are liens against the personal property of the judgment debtor; Karamehmet' s stock or shares in Focus are personal property; the situs of the stock or shares is in the Marshall Islands; and, therefore, the Focus stock is subject to execution in satisfaction of the English judgment.

On June 30, 2017, Karamehmet filed a motion to dismiss Samsung's complaint. Karamehmet argued that there was no personal jurisdiction over him as a matter of law because the complaint alleges no contacts, acts or presence of Karamehmet with the Marshall Islands sufficient to satisfy the requirements of the Republic's Judiciary Act, 27 MIRC § 201, et seq.; the complaint contained no alter ego allegations regarding Karamehmet's relationship with Focus; and the situs of Karamehmet's shares in Focus was not in the Marshall Islands. Karamehmet further argued that Delaware General Corporation Law (DGCL) § 169 should not be adopted by the court as urged by Samsung and that prior case law had rejected the proposition that the place of incorporation of a non-resident corporation is the legal situs of that company's stock, citing the High Court's decision in *Yandal Investments Pty Ltd. v. White Rivers Gold Ltd., et al.*, C.A. No. 2010-158. Karamehmet contended that, even if DGCL § 169, were to be incorporated into Marshall Islands law, jurisdiction would still not exist because Delaware courts have rejected the notion that mere ownership of stock in a Delaware corporation permits the exercise of jurisdiction over the shareholder, citing *In re Dissolution of Arctic Ease, LLC*, 2016 WL 7174668

(stating that "[a] party's ownership of interests in a Delaware entity alone does not constitute sufficient minimum contacts for Delaware courts to exercise personal jurisdiction"), and other Delaware decisional authority. Finally, Karamehmet argued the case should be dismissed on *forum non conveniens* grounds.

On August 11, 2017, Samsung filed its opposition to the motion to dismiss arguing that in an action to enforce a foreign judgment under 30 MIRC Ch. 4, the presence of the judgment debtor's property is all that is necessary to provide a basis for jurisdiction, citing *Shaffer v. Heitner*, 433 U.S. 186 (1977), and post-*Shaffer* decisional authority including *Arbor Farms, LLC v. GeoStar Corp.*, 853 N.W.2d 421 (Mich. Ct. App. 2014) and *Lenchyshyn v. Pelko Elec. Inc.*, 723 N.Y.S.2d 285 (N.Y. App. Div. 2001). Samsung argued that the situs of corporate stock, in the absence of statute, is the place of incorporation. Samsung contended that under the Republic's Business Corporations Act (BCA), 52 MIRC § 15, the courts should harmonize its law with that of the State of Delaware. Samsung contends that DGCL § 169 codifies the common law rule that the situs of the ownership of capital stock of all corporations existing under the laws of a state shall be regarded as that state for purposes of title, action, attachment, garnishment and jurisdiction. Finally, Samsung requested jurisdictional discovery and opposed dismissal on *forum non-conveniens* grounds.

Supplemental briefing on the motion to dismiss was subsequently filed by both parties.

On February 7, 2018, the High Court dismissed Samsung's complaint concluding that Samsung failed to demonstrate personal jurisdiction over Karamehmet or establish that his property can be found in the Republic. The High Court went through a thorough jurisdictional analysis finding it had neither general nor specific jurisdiction over Karamehmet sufficient to satisfy due process. More significantly to the instant appeal, the High Court held that Samsung failed to demonstrate that Karamehmet has property in the Marshall Islands. In arriving at this latter holding, the High Court reasoned that the Republic does not have an express statute establishing the legal situs of shares of domestic corporations; in the absence of statute the court must look to the common law in effect at the time of adoption of the RMI Constitution; that the

common law rule that the situs of shares for purposes of attachment or execution is the domicile of the corporation was not in effect at the time the Constitution was adopted, rather, the law in effect was statutory law; that in the absence of an express statute the court has the authority under the Enforcement of Judgments Act, 30 MIRC § 105, as well as its authority to advance the common law, by looking to how courts in the United States enforce judgments against shares in a domestic corporation. The High Court, accordingly, adopted Section 8-112 of the Uniform Commercial Code (UCC) as the Republic's common law governing the enforcement of judgments on shares of domestic corporations.

On February 22, 2018, Samsung timely filed a Notice of Appeal claiming the High Court erred in dismissing its complaint (1) by adopting Section 8-112 of the UCC as the common law of the Republic with regard to procedures that must be followed to execute judgment against shares in a Marshall Islands corporation; (2) by declining to apply U.S. common law with regard to the situs of shares in a corporation for purposes of executing judgment; (3) by finding Karamehmet owns no property located in the Republic; and (4) by dismissing the complaint for lack of jurisdiction.

The parties, by stipulation, requested expedited briefing and hearing of the instant appeal which was granted by a single judge order dated April 25, 2018. Oral argument before the Supreme Court was held on June 11, 2018.

III. STANDARD OF REVIEW

[1][2]Dismissal of a complaint, where no factual matters have been determined, is reviewed *de nova*. *See, e.g., Rosenquist v. Economou*, 3 MILR 144, 151 (2011); *Jack v. Hisaiah*, 2 MILR 206, 209 (2002); *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991) (stating that questions of law are reviewed *de novo*). A trial court's jurisdictional rulings and statutory interpretations are reviewed *de novo*. *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874, 880 (Mich. Ct. App. 2003).

IV. DISCUSSION

A. Mere Ownership of Shares in a Marshall Islands Non-Resident Corporation Does Not Constitute Ownership of Property in the Marshall Islands

1. The Marshall Islands' Statutory Scheme for the Recognition and Enforcement of Foreign Money Judgments

The Republic has adopted the "Uniform Foreign Money-Judgments Recognition Act" (UFMJRA), codified at Title 30 MIRC Ch. 4, §§ 401-409, and the "Enforcement of Judgments Act" (EJA), codified at Title 30, Ch. 1, § 101, *et seq*. The UFMJRA, 30 MIRC § 408, states "[t]his Chapter shall be so construed as to effectuate its general purpose to make uniform the law of those jurisdictions which enact it." We therefore look to decisional authority of other jurisdictions which have construed the UFMJRA and statutes similar to the Republic's EJA.

[3]The UFMJRA and EJA are two separate statutes with different purposes. The UFMJRA deals with "recognition" of a foreign judgment. The EJA deals with "enforcement" of a judgment which includes a foreign judgment once recognized by the UFMJRA. These statutes read together provide for a two-step process to gain ultimate enforcement of a foreign judgment. The first step in the enforcement process is the recognition or registration of the foreign judgment under the UFMJRA. The Act permits the raising of certain defenses to recognition, none of which was raised in the instant proceeding. Courts have been liberal in recognizing foreign judgments based on the principal of comity as announced in *Hilton v. Goyot*, 159 U.S. 113 (1895). After recognition of a foreign judgment, the judgment creditor can then execute against any property of the judgment debtor that the judgment creditor may find within the Republic under the EJA.

It has been recognized by commentators that the interplay between these two Acts may be confusing where, as here, recognition and enforcement of a foreign judgment is sought in the same action:

> [W]hen a judgment creditor seeks both recognition and enforcement of the foreign judgment, there is sometimes confusion over the interrelationship between the laws governing recognition

> of foreign judgments and those governing enforcement. . . . Confusion about the interaction of the 1962 Recognition Act and the Enforcement Act has resulted in conflicting decisions as to whether recognition and enforcement of a foreign judgment may be accomplished through a simple registration procedure under state law or whether there must first be a separate action brought seeking a decision recognizing the foreign judgment. Most courts require that a separate action be brought for the recognition of a foreign judgment. A successful action then becomes a local judgment that is both enforceable under local law and entitled to full faith and credit in other courts in the United States.

Ronald A. Brand, *Recognition and Enforcement of Foreign Judgments*, Federal Judicial Center International Litigation Guide, Apr. 2012, at 1-2.

[4]A potential source of confusion created by seeking both recognition and enforcement in a single action may be that there are different jurisdictional or procedural requirements for a court to recognize a foreign judgment and for a court to ultimately enforce such a judgment by one of the procedures allowed by the EJA. It appears clear that in order to execute upon a foreign judgment there must be some property within the forum jurisdiction subject to attachment pursuant to the EJA. It is less clear whether it is a jurisdictional requirement for property to be within the forum, when personal jurisdiction is lacking, for the mere recognition of a judgment.

2. In the absence of personal jurisdiction over the judgment debtor, the Court must have in rem or quasi in rem jurisdiction over the judgment debtor's property to enforce a foreign judgment

Karamehmet argues that in order to enforce a judgment in a jurisdiction where there is no personal jurisdiction over the judgment debtor (as is conceded in this case), one must bring an *in rem* or *quasi in rem* action against the property of the judgment debtor. Relying on *Pennoyer v. Neff*, 95 U.S. 714 (1877), Karamehmet contends that property must first be seized, attached, or otherwise in control of the court to maintain such jurisdiction. Samsung has not seized or attached Karamehmet's property (e.g. shares in Focus) so the High Court lacks *in rem* or *quasi in rem* jurisdiction and this case should therefore be dismissed.

[5][6]While we agree that the court must have control of the property in order to enforce a judgment under the procedures allowed by the EJA, it does not follow that the court must necessarily have control by attachment, seizure, or otherwise, of a debtor's property to exercise *in rem* or *quasi in rem* jurisdiction at the outset of the action. Attachment, garnishment, seizure or use of some other procedural device to gain control over a foreign debtor's property would, however, be necessary to ultimately enforce a foreign judgment recognized under the UFMJRA.

Samsung cites us to 4A Wright, Miller, Steinman, *Federal Practice and Procedure* § 1070, at 465-66 , which observes:

> [A]ttachment or garnishment at the outset does not appear to be necessary in true-in-rem actions inasmuch as the Court in *Pennoyer* recognized that in a true-in-rem action acts equivalent to seizure are not a necessary prerequisite to the effective assertion of jurisdiction.
>
> There is considerable doubt, however, as to whether the requirement of attachment at the outset in quasi-in-rem actions is constitutionally based or exists only because jurisdictional statutes usually so provide or because it is administratively convenient and provides a degree of certainty that jurisdiction actually exists. Neither *Pennoyer* nor *Pennington* articulated the rule as a constitutionally mandated requirement. Commentators have pointed out that analytically it is the presence of the property within the jurisdiction and not its seizure that endows the court with jurisdiction over it.

Id. (emphasis added, footnotes omitted).

At the outset of a case, the court need not have attached or garnished the property at issue to assert *quasi in rem* jurisdiction. Rather, it is the presence of the property in the forum which gives rise to the court's jurisdiction. *Id*.; *but see* Silberman & Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. Rev. 344, 353 ("Institution of an action [for recognition and enforcement of a foreign country judgment] traditionally does require personal jurisdiction or attachment of the debtor's

property . . . . Maintaining a recognition and enforcement action in the United States has traditionally required personal jurisdiction over the debtor or the attachment of the debtor's property.").

Regardless of whether attachment is necessary for a court to attain *quasi-in rem* jurisdiction at the outset of an action, it would seem axiomatic that in order to execute a recognized foreign judgment against property belonging to a judgment debtor the court must have gained control by attachment, seizure or other device allowed by the EJA over the debtor's property. Otherwise, as noted by Wright, Miller, & Steinman, *supra*, the *res* may have vanished and the judgment creditor be left without a remedy.

The relevant inquiry in the instant case is not whether there is *quasi in rem* jurisdiction at the outset of this case but, rather, whether there is *quasi in rem* jurisdiction at all. The question is whether Karamehmet has property within the Marshall Islands which would support an assertion of *quasi in rem* jurisdiction at some point by attachment; i.e. whether the *res* (Karamehmet's stock in Focus) is present in the Marshall Islands.

3. In Order to Recognize and/or Enforce a Foreign Money Judgment the Court Must Have Either Personal Jurisdiction over the Judgment Debtor or Jurisdiction over the Judgment Debtor's Property

a. Shaffer v. Heitner and the recognition/enforcement of foreign judgments

Both Samsung and Karamehmet rely on the United States Supreme Court case of *Shaffer v. Heitner*, 433 U.S. 186 (1977) as supporting their respective positions.

[7][8][9]In *Shaffer*, *supra*, the Supreme Court held that for purposes of initially adjudicating a claim on its merits, *quasi in rem* jurisdiction — that is, jurisdiction based solely on the presence of the defendant's property in the forum state — may be exercised only where "that property is . . . the subject matter of th[e] litigation, [or] . . . the underlying cause of action [is] related to the property," 433 U.S. at 213, so as to conform to "the standard of fairness and substantial justice," *id*. at 206, established by *International Shoe Co. v. Washington*, 326 U.S.

310, 316 (1945). *International Shoe, supra*, held that for a defendant to be subject to jurisdiction in the forum, due process requires that "he have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." The "minimum contacts" test is satisfied when "(1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (citing *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). "If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Id*. (citation omitted).

In the case before us, Samsung concedes personal jurisdiction does not exist over Karamehmet. The question is whether Karamehmet has property in the Marshall Islands which would support an assertion of jurisdiction.

[10]At the same time the Supreme Court announced the restriction of *quasi in rem* jurisdiction for purposes of hearing an original or plenary action, the Supreme Court stated in *Shaffer* that the presence of a judgment debtor's assets in the forum remained a jurisdictional basis for proceedings to enforce a previously rendered foreign judgment, even if the forum state and the defendant's property therein had no connection to the claim underlying the judgment:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

433 U.S. at 210 n.36.

Shaffer's continuation of property-based jurisdiction to enforce a foreign judgment is supported by the consideration that a "wrongdoer 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in

personam suit." *Id*. at 210 (quoting the Restatement [Second] of Conflict of Laws, § 66, Comment a); *see also* Silberman & Simowitz, 91 N.Y.U.L. Rev. at 379 ("The Restatement observes that, without post-judgment asset jurisdiction, a debtor could easily render itself judgment-proof simply by removing its assets to a place where it [is] not subject to personal jurisdiction"). In view of the need to foreclose avenues by which duly rendered judgments might be defeated, *Shaffer* recognized that it is not "unfair" to allow execution on a judgment in any state where the defendant's property is found — provided that the defendant was afforded notice and a fair opportunity to mount a defense upon the original adjudication of the original claim "by a court of competent jurisdiction." 433 U.S. at 210 n.36; *see also* Restatement (Third) of Foreign Relations Law§ 481, cmt. h ("The rationale behind wider jurisdiction in enforcement of judgments is that once a judgment has been rendered in a forum having jurisdiction, the prevailing party is entitled to have it satisfied out of the judgment debtor's assets wherever they may be located."); *Albania BEG Ambient Sh.p.k. v. Enel Sp.A.*, 160 A.D.3d 93 (2018 N.Y. Slip Op. 00928).

b. The law regarding recognition/enforcement of foreign judgments post Shaffer

Ronald A. Brand, Recognition and Enforcement of Foreign Judgments, Federal Judicial Center International Litigation Guide, Apr. 2012, at 10-11, succinctly summarizes the case law regarding jurisdiction to hear a recognition action post Shaffer:

> [C]ourts have split over the parameters of the due process requirements for jurisdiction in a recognition action. On one end of the spectrum are cases such as *Lenchyshyn v. Pelko Electric, Inc.*, [723 N.Y.S.2d 285 (2001)] . . . [which] allows a recognition action to be brought whether or not the defendant had contacts with the forum state or had assets within the state against which the judgment could be enforced. In *Lenchyshyn*, the New York court . . . state[d] that the judgment creditor "should be granted recognition of the foreign country money judgment," and "thereby should have the opportunity to pursue all such enforcement steps *in*

> *futuro*, whenever it might appear that defendants are maintaining assets in New York." [*Id*. at 291].
>
> On the other end of the spectrum are cases in which courts have held that attachment of assets of the judgment debtor within the state is not sufficient to provide jurisdiction, and that personal jurisdiction over the judgment debtor is necessary. [*See, e.g., Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory*," 283 F.3d 208 (4th Cir. 2002)].
>
> In the middle are cases that find jurisdiction to be proper when either the defendant has sufficient personal contacts to satisfy the standard minimum contacts analysis or there are assets of the defendant in the forum state, even if those assets are unrelated to the claim in the underlying judgment. [*See, e.g., Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 910 (N.D. Iowa 2002); *Electrolines v. Prudential Assurance Co.*, 677 N. W.2d 874, 885 (Mich. Ct. App. 2003)]. This is the position followed by both the Restatement (Third) of Foreign Relations Law and the ALI Proposed Federal Statute.

[11]We adopt this last approach as the law in the RMI — that is, in order to recognize and enforce a foreign judgment, a court must generally have (1) personal jurisdiction over the judgment debtor or (2) jurisdiction over the judgment debtor's property in the forum state. *See, e.g., Electrolines, Inc.*, 677 N.W.2d at 885; *Arbor Farms, LLC v. GeoStar Corp.*, 853 N.W.2d 421, 427 (Mich. Ct. App. 2014); Restatement (Third) of Foreign Relations Law,§ 481, cmt. g (noting that a foreign "judgment creditor must establish a basis for the exercise of jurisdiction by the enforcing court over the judgment debtor or his property").

Because Samsung concedes there is no personal jurisdiction over Karamehmet, the issue thus becomes whether Karamehmet owns property in the Marshall Islands sufficient to support an assertion of *in rem* or *quasi in rem* jurisdiction.

B. The High Court Lacks In Rem or Quasi In Rem Jurisdiction over Focus Shares Because it Has Not Been Shown That Those Shares are Located in the Marshall Islands

1. The common law regarding the situs of corporate stock for jurisdictional purposes was unsettled

The Republic's Business Corporations Act (BCA), 52 MIRC § 13, provides:

> This Act shall be applied and be construed to make the laws of the Republic with respect to the subject matter hereof, uniform with the laws of the State of Delaware and other states of the United States of America with substantially similar legislative provisions. Insofar as it does not conflict with any other provisions of this act, the non-statutory law of the State of Delaware and of those other states of the United States of America with substantially similar legislative provisions is hereby declared to be and is hereby adopted as the law of the Republic, provided however, that this section shall not apply to resident domestic corporations.

We are thus to look to the non-statutory law of Delaware and other states with substantially similar legislative provisions in interpreting the BCA as it 18 applies to non-resident domestic corporations such as Focus. Delaware, by statute, considers the situs of the ownership of the shares of any Delaware corporation to be the State of Delaware. Del. Gen. Corp. Law§ 169 ("For all purposes . . .[except] taxation, the situs of the ownership of the [shares of any Delaware corporation] . . . shall be regarded as in this State.").

The Marshall Islands does not have a statute (or any prior decisional authority) establishing the situs or location of a Marshall Island's nonresident domestic corporation's stock for purposes of jurisdiction, levy, attachment or execution. Notably absent from the BCA is a statute modeled after or analogous to Delaware Corporations Act § 169. The Nitijela could have incorporated that or a similar provision into the BCA, but did not do so.

[12]In the absence of a substantially similar statute or prior decisional authority, we therefore look to the common law of the United States. As recently reiterated by our decision in *Mongaya v. AET MCV Beta LLC, et al.* , S.Ct. No. 2017-003 (Aug. 7, 2018),

> [We] must follow th[e] common law if it is not precluded by an RMI constitutional provision, statutory provision, treaty, customary law, or traditional practice. *See Republic v. Waltz*, 1 MILR (Rev.) 74, 77 (1987) ("Our holding is in accord with the greater weight of judicial authority based upon the common law, which we are obliged to follow in the absence of any provision in the Republic of the Marshall Islands Constitution, or in any custom or traditional practices of the Marshallese people or act of the Nitijela to the contrary."); *Likinbod and Alik v. Kejlat*, 2 MILR 65, 66 (1995) ("The 1979 Marshall Islands Constitution set forth 'the legitimate legal framework for the governance of the Republic.' . . . That framework continued the common law in effect as the governing law, in the absence of customary law, traditional practice or constitutional or statutory provisions to the contrary.")

Id. at 9-10 (footnote omitted).

The parties offer differing views and conflicting authorities on what the common law of the United States was regarding the situs of stock for purposes of execution prior to the adoption of the RMI Constitution.

Karamehmet cites numerous authorities and commentary that under the common law, corporate stock was generally regarded . . . as in the nature of a chose in action, and therefore within the rule that choses in action are not, at common law, subject to execution." Shares of Corporate Stock as Subject to Execution or Attachment, 1 A.L.R. 653 (citing cases); *Gulf Mortg. & Realty Invs. v. Alten*, 422 A.2d 1090, 1094 (Pa. Super. Ct. 1980) ("It is true that at common law, corporate shares of stock were not subject to levy and sale upon execution[.]") (citing *Moys v. Union Tr. Co.*, 276 Pa. 58, 60, 119 A. 738 (1923)); Pierre R. Loiseaux, *Liability of Corporate Shares to Legal Process*, 1972 Duke L. J. 947, 949 ("At common law the ownership interest in the legal fiction called a corporation was classified as an intangible chose in action and was not subject to legal process."); Robert Laurence, *Enforcing a Money Judgment Against the Defendant's Stock and Bonds: A Brief Foray into the Forbidding Realms of Article Eight and the Fourth Amendment*, 38 Ark. L. Rev. 561, 569 (1985) ("At the common law corporate stock could not be reached, as it was intangible and incapable of physical seizure."). The same was true in

Delaware — in *Fowler v. Dickson*, 24 Del. 113, 74 A. 601 (Del. Super. Ct. 1909), the court stated:

> At common law shares of stock in an incorporated company could not be the subject of attachment or levy. They were considered neither a specific chattel not a debt; but as Chief Justice Parker said, in *Howe v. Starkweather*, 17 Mass. 240, 243: "They have more resemblance to chooses in action, being merely evidence of property." Being intangible entities incapable of caption by execution and levy, and not being debts due and collectible from the corporation to the stockholder at his will, shares of stock cannot be subjected to legal process *without specific legislation providing in substance all necessary procedure*.

Id. (emphasis added).

Samsung also cites numerous authorities supporting its position that the common law considered the situs of shares to be the state of incorporation, regardless of the location of the share certificates or the business operations of the company. *See, e.g. State ex rel N Am. Co. v. Koerner*, 211 S.W.2d 698, 701 (Mo. 1948); *Haughey v. Haughey*, 9 N.W.2d 575 (Mich. 1943); *Mills v. Jacobs*, 4 A.2d 152, 155 (Pa. 1939); *Thompson v. Terminal Shores*, 89 F.2d 652, 656 (8th Cir. 1937); *Hynson v. Drummond Coal Co. Inc.*, 601 A.2d 570, 576 (Del. Ch. 1991).

If any conclusion can be drawn by examination of the parties' authorities it is that the common law was by no means settled or uniform within the fifty states. The various conflicting common law approaches regarding the situs of stock proved unworkable. Because those common law approaches were unworkable, states sought a workable solution by adopting uniform acts such as the Uniform Stock Transfer Act (UTSA) and, ultimately, the Uniform Commercial Code (UCC).

We do not believe it necessary to reconcile conflicting common law authorities or chose between competing ancient common law doctrines regarding the situs of stock because those approaches have proven unworkable given the evolving demands of modem commerce. The High Court aptly noted that "[t]his court does not accept the abandoned historical United States

common law regarding the situs of shares . . . . It makes no sense to this Court to apply abandoned 19th Century common law in the 21st Century." *Samsung Heavy Indus. Co. v. Focus Invs., Ltd.*, C.A. 2017-081, at 10. We agree.

C. The High Court Did Not Err By Incorporating UCC § 8-112 Into the Common Law of the Marshall Islands

[13]Where this Court must follow common law, it cannot do so blindly. Instead, if unclear or outdated common law has been abandoned in favor of statutory clarity, this Court is free to adopt that modem statutory framework as the law of the RMI. To hold otherwise, we would forever be bound to common law repudiated by the states in favor of a statutory fix. We cannot condone such an absurd result.

The modem statutory rule is that the situs of certificated shares or stock is where those certificated shares are located. This is the view expressed by the Uniform Commercial Code § 8-112 which provides in relevant part:

> (a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate
> has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.
> (b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).
> . . .
> (d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

The goal of the Uniform Commercial Code is, as the title implies, to bring uniformity to the laws of the States thus fostering ease and speed of commerce. To date, all fifty states,

including Delaware, have adopted UCC § 8-112 or a version thereof. *See, e.g.*, https://uniformcommercialcode.uslegal.com. UCC § 8-112 has as its primary theme the negotiability of the certificates of stock. *See, e.g., Calista Corp. v. DeYoung*, 562 P.2d 338, 346 (Alaska 1977). This negotiability cannot exist unless there is only one certificate for given shares, carrying with it the ownership of the shares themselves. *Id*. (citing *Austin & Nelson, Attaching and Levying on Corporate Shares*, The Business Lawyer, vol. 16, at 336 (1991)). To this end this uniform statute requires that to attach or levy upon a security, actual seizure must be had to avoid a situation where securities could be traded that are subject to liens not appearing on the face of the instrument. *Id*. In the instant case, it is alleged that approximately 90% of Focus shares have been pledged as security. Those secured interest holders are not before this court and a purported execution on Focus shares to satisfy Samsung's English judgment against Karamehmet has the potential of causing economic loss to third parties, spurring litigation in any number of jurisdictions resulting in conflicting judgments. Further, as pointed out by Karamehmet, RMI corporations are often used to hold assets in shipping and other international business. Were we to hold that the situs of corporate shares is the place of incorporation, as does the Delaware statute, the courts of this jurisdiction might be overburdened with litigants attempting to circumvent traditional, well established maritime remedies such as i*n rem* arrest of vessels to satisfy judgments. Rather than effectuating an *in rem* arrest or attachment, such judgment creditors might chose to simply seek enforcement of judgments against a judgment debtor's shares in an RMI non-resident corporation. A lax rule which places the situs of shares of non-resident RMI corporations in the Marshall Islands for jurisdictional purposes is likely to encourage foreign judgment creditors to forum shop resulting in the proverbial flood of litigation requiring debtors with no contacts with the Marshall Islands to litigate in a distant inconvenient forum.

Samsung argues that the EJA does not provide authority for the court to create a new jurisdictional rule and, further, that the EJA has no application at this stage of the proceeding. We agree that the EJA has no application at this stage of the proceedings because Samsung has

not obtained recognition of its foreign judgment. As previously discussed, there must be some property belonging to Karamehmet in the Marshall Islands over which the court can assert jurisdiction. There has been no showing that Karamehmet has any property in the Marshall Islands over which *quasi in rem* jurisdiction can be perfected, even making allowance for the view that attachment is not necessary at the outset to establish jurisdiction. The *res* still has to be within the jurisdiction to support *quasi in rem* jurisdiction at the outset of the action regardless of whether attachment has been accomplished. The Court must have ultimate control of the property for enforcement. The EJA, 30 MIRC § 102, provides the process to enforce a judgment as a writ of execution or order in aid of judgment. Section 106 requires attachment and safe keeping of personal property subject to the writ. If stock certificates are not present in the Republic then there is nothing to attach for purposes of execution. IF the ultimate goal of Samsung is to enforce its English judgment in this jurisdiction then it would seem a waste of time to seek recognition of its judgment in the Marshall Islands if it cannot be enforced here unless, of course, Samsung's strategy is to obtain a Marshall Islands judgment with the intent of obtaining some other country's recognition of it.

[14]The better approach to the thorny issue of where the situs of shares of a nonresident Marshall Islands corporation is, is the one adopted by the High Court and which is consistent with UCC § 8-112. We therefore hold that the situs of shares in a Marshallese non-resident domestic corporation is where the share certificates are located, whether with the shareholder, a clearing house, or secured party, and may be reached by a creditor only by actual seizure of the security certificate or by one of the other methods allowed by UCC § 8-112 or the Marshall Islands Enforcement of Judgments Act. This holding, we believe, brings the Marshall Islands into conformity with the majority of U.S. States and into accordance with modem practice and contemporary commercial expectations.

V. CONCLUSION

For the foregoing reasons, we **AFFIRM** the High Court's February 7, 2018 Order Granting Motion to Dismiss.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

BERNIE HITTO and HANDY EMIL,
Plaintiffs-Appellees,
v.
JERAKOJ J. BEJANG, AUN JAMES; and
HERING DREBON, GEORGE INOK, Defendants-Counterclaimants-Appellants.

SCT CN 2017-005 (HCT CNs 1986-149 and 1980-021)

APPEAL FROM THE HIGH COURT

Argued August 15, 2019
Filed September 5, 2019

Summary

The Supreme Court affirmed the High Court's decision denying the Appellants' request for an award of post-judgment interest on their portion of money distributed from a trust account. Section 102 of the Enforcement of Judgments Act, 30 MIRC Ch. 1, provides "[a] judgment for the payment of money shall be a lien upon the personal property of the judgment debtor and shall bear interest at the rate of nine percent (9%) a year from the date it is filed." In this case, the money in question was held by a third party to be paid to the appropriate landowners. The Appellants were determined to be the appropriate landowners and, as such, received moneys held in trust. However, the Appellees were not required to pay any money to the Appellants. Therefore, the Appellees could not be classified as"judgment debtors," nor could the money disbursed to the Appellants be considered a "money judgment" for purposes of Section 102. For these reasons, the Supreme Court affirmed the High Court's decision.

Digest

1. ENFORCEMENT OF JUDGMENTS – *In General*: For the purposes of Section 102 of the Enforcement of Judgments Act, the 2015 Judgment regarding Kwajalein Atoll Land Use Payments was not a judgment for the payment of money. Appellees were not required to pay any money to the Appellants. Appellees do not "owe" Appellants money pursuant to the judgment.

2. ENFORCEMENT OF JUDGMENTS – *Money Judgment*: The 2015 Judgment is not a "money judgment." The requirement that there be a party against whom payment may be demanded has not been met.

3. ENFORCEMENT OF JUDGMENTS – *Money Judgment*s: In order to qualify as a "money judgment" or "judgment for money," a judgment must include a "definite and certain designation of the amount which plaintiff is owed."

4. ENFORCEMENT OF JUDGMENTS – *Money Judgment*s – *Post Judgment Interest*: Post judgment interest is predicated not just upon the denial of use of the money to the prevailing party, but also upon the use of the money by the losing party. In the present case, neither Appellants nor Appellees had use of the money during the period of the appeal.

5. ENFORCEMENT OF JUDGMENTS – *Money Judgment*s – *Post Judgment Interest*: If the policy to award post judgment interest is to apply to a judgment which falls outside of the existing statute for enforcement of a judgment for money, it is a decision for the Nitijela, not the courts, to make.

Counsel

Scott H. Stege, counsel for Plaintiffs-Appellees Bernie Hitto and Handy Emil
James McCaffrey, counsel for Defendants-Appellees Jerakoj J. Bejang, Aun James; and Hering Drebon, George Inok

Before PLASMAN, Acting Chief Justice,[1] and SEABRIGHT[2] and SEABORG,[3] Acting Associate Justices

OPINION

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

I. INTRODUCTION

This appeal arises out of post-judgment proceedings in a case involving land rights in Kwajalein Atoll and the consequent distribution of money held in trust during the pendency of the case. Specifically, Defendants-Counterclaimants-Appellants (hereafter "Appellants") appealed the High Court's decision of October 23, 2017 denying their request for an award of

[1]James H. Plasman, Associate Justice of the High Court, sitting by appointment of Cabinet.

[2]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[3]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

post-judgment interest on their portion of the money distributed from the trust account. The decision of the High Court is affirmed.

II. PROCEDURAL BACKGROUND

The underlying case began in the courts in 1980, disputing land rights on certain parcels in Kwajalein Atoll. These lands were leased by the United States for use as part of its base located in Kwajalein, and the lease money was subject to a preliminary injunction to hold the funds in trust during the pendency of the action. After a lengthy battle that shuttled between the trial and appellate courts, judgment was entered on May 22, 2015. That decision was affirmed by this court on July 28, 2017. Subsequently in response to post-judgment motions, the High Court responded in two orders on October 23, 2017: an Order Partially Lifting Preliminary Injunction and Approving Partial Distribution of Trust Funds, and an Order Denying Defendants-Counterclaimants' Motion for Post-Judgment Interest. Appellants filed their notice of appeal with regard to the second order on November 21, 2017.

III. THE MAY 22, 2015 HIGH COURT JUDGMENT WAS NOT A "JUDGMENT FOR THE PAYMENT OF MONEY" FOR THE PURPOSES OF 30 MIRC CH. 1 § 102, ENFORCEMENT OF JUDGMENTS ACT

Section 102 of the Enforcement of Judgments Act provides for the award of post-judgment interest. The May 22, 2015 High Court judgment did not fall under the provisions of Section 102 of the Enforcement of Judgments Act because the judgment did not identify a "judgment debtor" and because the judgment did not include a quantification of the amounts to be paid to the prevailing parties.

A. The May 22, 2015 Judgment Did Not Identify A "Judgment Debtor"

30 MIRC § 102, "Money Judgments," of the Enforcement of Judgments Act states: A judgment for the payment of money shall be a lien upon the personal property of the judgment debtor and shall bear interest at the rate of nine percent (9%) a year from the date it is filed. The process to enforce a judgment for the payment of the money may be a writ of execution or an order in aid of judgment, as provided in Part II of this Chapter.

Appellants contend the 2015 Judgment was such a judgment for payment of money because it directed that the money held in trust pursuant to court order be distributed in accordance with the determination of land rights of the disputed wetos. They argue "Determining the holder of the land interest automatically determines who is entitled to any money derived from the land. The money does follow the land." (Appellants Reply Brief, at p. 2).

[1]While Appellants focus on the mandatory language regarding the imposition and rate of interest, Appellants ignore the portion of the statute that the judgment "shall be a lien upon the personal property of the judgment debtor."[4] In this case, the Appellees are not judgment debtors. The dispute was about money held in trust from a third party to be paid to the appropriate landowners. In the event funds were not available for distribution, the judgment would not be a lien against the Appellees in this case. There was no determination or judgment that the Appellees owed money to the Appellants. For the purposes of Section 102, the 2015 Judgment was not a judgment for the payment of money. Appellees were not required to pay any money to the Appellants. Appellees do not "owe" Appellants money pursuant to the judgment.

United States law supports this conclusion. In the United States, the enforcement of money judgments in federal court is addressed at 28 U.S.C. § 1961(a) which states in relevant part: "Interest shall be allowed on any money judgment in a civil case recovered in a district court." There, as here, the term "money judgment" is not defined in statute. *In Miminco, LLC v. Democratic Republic of the Congo*, 79 F. Supp. 3d 213, 218 (2015), this provision was interpreted:

> In using the words "enforcement of a money judgment," Congress did not provide any definition for that term. Its meaning must therefore be gleaned from the commonly accepted usage and from whatever indications of congressional intent we find persuasive. "Where Congress uses terms that have accumulated settled

[4]Appellants, in their Opening Brief, apparently relied upon language in the relevant section as it existed prior to 2009, which did not include the "judgment debtor" language. Appellees pointed this out in their Answering Brief and Appellants acknowledged the error in their Reply Brief.

> meaning under either equity or common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 101 S. Ct. 2789, 2794, 69 L. Ed. 2d 672 (1981). In attempting to arrive at a working definition of "enforcement of a money judgment," therefore, we must look to legal custom and practice to determine what was traditionally understood to be a recovery for money damages. This empirical approach is mandated by the fact that, in using the term "enforcement of a money judgment," Congress left us with a term whose words, standing alone, do not convey the legislative intent, and indeed are merely a shorthand notation for common practice as it has gradually developed in our legal history.
>
> In common understanding, a money judgment is an order entered by the court or by the clerk, after a verdict has been rendered for plaintiff, which adjudges that the defendant shall pay a sum of money to the plaintiff. Essentially, it need consist of only two elements: (1) an identification of the parties for and against whom judgment is being entered, and (2) a definite and certain designation of the amount which plaintiff is owed by defendant. It need not, and generally does not, contain provisions for its enforcement. *See generally* 49 C.J.S. Judgments, §§ 71-82 (describing proper form of money judgment).

Again, there must be a designation of an amount "which plaintiff is owed by defendant." See *also In re Dow Corning Corp.*, 237 B.R. 380, 386 (Bankr. E.D. Mich. 1999) (in determining whether order pursuant to § 502(b) of Bankruptcy Code constituted "money judgment" from which post-judgment interest would run, court stated "[a]s one might expect, a 'money judgment' consists of three elements: it must be a judgment; entitling the plaintiff to a specified sum of money; and such entitlement must be against an identifiable party") (emphasis added); *Eaves v. Cty. of Cape May*, 239 F.3d 527, 533 (2001) (quoting *In Re Dow Corning Corp.*).

[2]Based upon this analysis, the 2015 Judgment is not a "money judgment." The requirement that there be a party against whom payment may be demanded has not been met. Specifically, there is no designation of an amount which "plaintiff is owed by defendant." In this

case, Justice Tuttle determined Appellants were the proper landowners for the disputed wetos. However, there was no determination that Appellees "owed" appellants any amount of money. The appropriate amount of money from the trust account was ordered to be distributed to appellants. The fund consisted of rent money due the proper landowners from the United States, through the Republic of the Marshall Islands ("RMI") government. It was not money from appellees. Appellees were not required to pay Appellants any money and did not have use of the money.

While the United States statute differs slightly from the RMI statute in speaking of a "money judgment" rather than a "judgment for the payment of money," the language of the RMI law suggests a similar construction is appropriate in this case. 30 MIRC § 102, "Money Judgments," provides in relevant part: "A judgment for the payment of money shall be a lien upon the personal property of the judgment debtor . . . ." The statute specifically speaks to a burden placed on the "judgment debtor." There is no judgment debtor in the present case. While Appellants prevailed in the case and received the money from the trust fund representing the rent paid for their land by the United States through the RMI government, there was no finding of monetary liability on the part of Appellees to Appellants. Appellees are not judgment debtors to Appellants. The 2015 Judgment was not a judgment for the payment of money for the purposes of 30 MIRC § 102.

B. The 2015 Judgment Did Not Identify A Quantifiable Amount of Money to Be Paid to Appellants

[3]As noted above, in order to qualify as a "money judgment" or "judgment for money," a judgment must include a "definite and certain designation of the amount which plaintiff is owed." *Penn, Terra Ltd.*, 733 F.2d at 275 (citing 49 C.J.S. Judgments, §§ 71-82) (emphases omitted). The 2015 Judgment did not include a quantification of the amount to be paid to the prevailing parties. Appellants argue in their Opening Brief, Section III at page 7 that because the funds were divided into equal shares, the amount due was "certain." However, the determination that each weto was entitled to a third of the balance in the fund was not made until Justice

Winchester's October 23, 2017 Distribution Order, which stated "[e]ach of the wetos is entitled to one-third of the balance." That determination was based upon counsel's agreement that the three wetos were approximately the same size, referenced in Justice Winchester's October 23 Order at footnote 2 (cited by Appellants in their Opening Brief). Appellants suggest the calculation was "ministerial in nature" (Opening Brief, Section II, page 6) and thus the amount due was certain at the time of the 2015 Judgment. However, the determination that the wetos were of approximately the same size and that the area would serve as the basis for allocation was not made until Justice Winchester's October 23 Order. Appellees remark on this at page 12 of their Answering Brief, noting that the division of funds was divided in a manner not provided in Justice Tuttle's Judgment. Because the 2015 Judgment did not identify a specific amount to be paid to Appellants, it did not constitute a "judgment for the payment of money" for the purposes of 30 MIRC § 102.

[4]Appellants argue equity favors their position, that it is not fair for them to be denied the use of the money following the entry of judgment. *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288 (1995), cited by Appellants, speaks to this issue. "Costs of the loss of use of a money judgment should not be borne by the injured plaintiff, but by the 'defendant whose initial wrongful conduct invoked the judicial process and who has had the use of the money judgment throughout the period of delay.'" *Id*. at 290 (internal cite omitted.) Post judgment interest is predicated not just upon the denial of use of the money to the prevailing party, but also upon the use of the money by the losing party. In the present case, neither Appellants nor Appellees had use of the money during the period of the appeal.

[5]The equities in the determination of post-judgment interest were addressed in *Eaves*, where the Third Circuit considered the lower court's award of post-judgment interest on attorney's fees dated from the date of the judgment on the jury's verdict (which awarded attorney's fees in an amount to be determined) as opposed to the later date when the amount of attorney's fees was quantified. 239 F.3d at 529-541. In holding interest ran from the later date, when the amount was quantified, the appellate court stated: "Even though denial of interest from

verdict to judgment may result in the plaintiff bearing the burden of the loss of the use of the money from verdict to judgment, the allocation of the costs accruing from litigation is a matter for the legislature, not the courts." *Id*. at 536 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 834-35 (1990)). Similarly, in the present case, if the policy to award post judgment interest is to apply to a judgment which falls outside of the existing statute for enforcement of a judgment for money, it is a decision for the Nitijela, not the courts, to make.

IV. CONCLUSION

The 2015 Judgment is not a "judgment for payment of money" for the purposes of 31 MIRC § 102, "Money Judgments." The 2015 Judgment does not identify a judgment debtor and does not quantify the amounts to be paid pursuant to the judgment.

In light of the forgoing, the October 23, 2017 Order Denying Defendants-Counterclaimants' Motion for Post-Judgment Interest of the High Court is **AFFIRMED**.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, et al.,
Plaintiffs-Appellants,
v.
DRYSHIPS INC., et al.,
Defendants-Appellees.

SCT CN 2018-010 (HCT CN 2017-198)

APPEAL FROM THE HIGH COURT

Argued August 16, 2019
Filed September 9, 2019

Summary

The Supreme Court affirmed the High Court's decision dismissing the plaintiffs' complaint for lack of standing to sue. The High Court, in turn, granted comity to and recognized a Cayman Islands insolvency order restructuring of Ocean Rig UDW, Inc., a subsidiary of defendant Dryships. As part of the restructuring, the plaintiffs' claims against UDW were extinguished, leading to their cessation as UDW creditors. In their capacity as UDW creditors, the plaintiffs could have pursued legal action against Dryships and others for fraudulent conveyances from UDW. However, following the extinguishing of their creditor status, the plaintiffs lost their lost their ability to assert fraudulent conveyance claims against Dryships and others. Consequently, they no longer had standing to sue Dryships and its co-defendants. Furthermore, the High Court rejected the plaintiffs' assertion that Section 128(5) of the Business Corporations Act preserved their creditor rights as UDW creditors indefinitely after UDW re-domiciled from the Marshall Islands to the Caymen Islands. The High Court ruled that although the mere re-domiciling did not extinguish the plaintiffs' creditor rights in UDW, corporate actions taken by UDW 18 months later under the Cayman Islands insolvency laws could, and did, extinguish their creditor rights as part of a restructuring. The Supreme Court did not address the other grounds upon which the High Court dismissed the case, as it affirmed the High Court dismissal of the case for lack of standing.

HIGHLAND FLTG RATE OPP'S FUND, et al., v. DRYSHIPS INC., et al.

Digest

1. APPEAL AND ERROR – *Review – Questions of Law*: The Supreme Court reviews *de novo* dismissal of a complaint.

2. APPEAL AND ERROR – *Review – Question of Law – Dismissal of Complaint*: When reviewing complaints on a motion to dismiss, plaintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences. The Court does not blindly accept as true all allegations, and inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor.

3. APPEAL AND ERROR – *Review – Question of Fact– Clearly Erroneous*: Factual findings are reviewed for clear error. A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

4. CIVIL PROCEDURE – *Dismissal, Grounds for – Lack of Standing – Burden of Proof*: On a Rule 12(b)(1) motion for lack of standing, the plaintiff bears the burden of establishing standing.

5. CIVIL PROCEDURE – *Dismissal, Grounds for – Lack of Standing – Burden of Proof*:: In a facial attack on standing, courts draw all facts—which we assume to be true unless contradicted by more specific allegations or documentary evidence—from the complaint and from the exhibits attached thereto.

6. CIVIL PROCEDURE – *Dismissal, Grounds for – Lack of Subject Matter Jurisdiction*: In a factual challenge, on the other hand, a court may look beyond the complaint to determine whether subject matter jurisdiction exists.

7. CIVIL PROCEDURE – *Standing*: It is undisputed that only creditors have standing to bring claims for fraudulent conveyance.

8. COMITY – *In General*: Comity has long been invoked by courts worldwide to give effect to the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation.

9. COMITY – *In General – Foreign Insolvency Proceedings*: Comity is often accorded in the context of foreign insolvency proceedings.

MARSHALL ISLANDS, SUPREME COURT

10 JUDGMENTS – *Foreign Judgments – Recognition of*: Deference to [foreign] proceedings is inappropriate, however, in the limited circumstances where those proceedings clash with domestic law and public policy. While foreign laws need not be identical to their domestic counterparts, they must not be repugnant to the laws and policies of the jurisdiction where comity is sought.

11. JUDGMENTS – *Foreign Judgments – Recognition of*: Although Sections 105 and 106 of the BCA are silence on the topic of restructuring, it does not equate to a finding that those proceedings are repugnant to RMI public policy.

12. CORPORATIONS – *Creditor Rights – Transfer of Domicile*: The High Court did not err in holding BCA § 128(5) protects creditor rights that are immediately affected by virtue of the "transfer of domicile," but does not protect creditors from the effects of subsequent actions or proceedings in the new jurisdiction.

Counsel

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Dennis Reeder, William S. Haft, Daniel a. Rubens, and Emmanuel B. Fua, counsel for Defendants/Appellees Dryships Inc., Ocean Rig Investments Inc., TMS Offshore Services, Ltd., SIFNOS Shareholders Inc., and Agon Shipping Inc.
Arsima Muller, counsel for defendants Economou and Kandylidis

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

HIGHLAND FLTG RATE OPP'S FUND, et al., v. DRYSHIPS INC., et al.

I. INTRODUCTION

Appellants in this fraudulent conveyance action ("Highland" or "the Highland Plaintiffs')[3] were creditors of a Republic of the Marshall Islands ("RMI") company named Ocean Rig UDW, Inc. ("UDW"). Highland accuses Appellee George Economou— the CEO and chairman of UDW— of orchestrating a series of transactions from 2015 to 2016 that siphoned money away from the company while it was in financial distress, thereby depleting the assets available to creditors. Appellee Antonios Kandylidis, Economou's nephew, allegedly served as Executive Vice President of UDW and assisted in the execution of these transactions. Highland also seeks to recover damages from various entities that were party to the allegedly fraudulent transactions (collectively, with Economou and Kandylidis, "Appellees").[4] UDW is not named as a defendant in this action.

The High Court dismissed the Complaint with prejudice based on two primary grounds. First, the High Court found Highland was barred from pursuing the present action because it failed to comply with a no-action clause to which it was bound. Second, the High Court dismissed the Complaint because Highland is no longer a creditor and therefore lacks standing to pursue claims for fraudulent conveyance. The High Court also found partial dismissal appropriate with respect to (a) claims for "constructive" fraudulent conveyance, (b) the claim for aiding and abetting fraudulent conveyance, and (c) all claims against Economou and Kandylidis (the "Individual Appellees"). This appeal followed. Because the High Court correctly held that Highland lacked creditor standing to pursue its claims, the High Court's order is AFFIRMED.

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[3]Appellants are Highland Floating Rate Opportunities Fund, Highland Global Allocation Fund, Highland Opportunistic Credit Fund, Highland Loan Master Fund, L.P., and NexPoint Credit Strategies Fund.

[4]The entities named as defendants in this action are DryShips Inc. ("DryShips"); Ocean Rig Investments Inc. ("ORI"); TMS Offshore Services Ltd. ("TMS"); Sifnos Shareholders Inc. ("Sifnos"); and Agon Shipping Inc. ("Agon").

II. BACKGROUND

A. The UDW Notes

In 2014, UDW issued 7.25% Senior Unsecured Notes (the "UDW Notes"). These notes are governed by a New York law indenture (the "Notes Indenture"), which includes the following no-action clause:

> Except to enforce the right to receive payment of principal, premium, if any, or interest or Additional Amounts, if any, when due, ***no holder may pursue any remedy with respect to this Indenture or the Notes unless:***
>
> (1) such Holder has previously given the Trustee notice that an Event of Default is continuing;
>
> (2) Holders of at least 25% in aggregate principal amount of the then outstanding Notes have made a written request to the Trustee to pursue the remedy;
>
> (3) such Holders have offered the Trustee, and the Trustee has received (if required), security or indemnity (or both) satisfactory to it against any loss, liability or expense;
>
> (4) the Trustee has not complied with such request within 60 days after its receipt of the request and the offer of security or indemnity (or both) satisfactory to it; and
>
> (5) Holders of a majority in aggregate principal amount of the then outstanding Notes have not given the Trustee a direction inconsistent with such request within such 60-day period.

S.A.239 § 6.06 (emphasis added).[5] The Notes Indenture also identifies the Cayman Islands as a "Permitted Jurisdiction" to which UDW may move its domicile; a transfer subsequently

[5]Citations to "S.A." refer to the Supplemental Appendix filed by Appellees. Citations to "A." refer to Appellants' Appendix.

undertaken by UDW. At the time this lawsuit was filed, Highland held $74 million of the UDW Notes.

B. UDW's Allegedly Fraudulent Transactions

During the relevant time period, UDW operated and leased ultra-deepwater drillships and semi-submersible drilling rigs to provide drilling services for oil companies. In 2014, UDW saw a decline in the market for its services and began experiencing financial strain. Highland alleges Economou orchestrated a series of transactions which siphoned money away from UDW and into his own pocket. Highland identifies four transactions occurring between mid-2015 and April 2016 which resulted in the transfer of hundreds of millions of dollars from UDW to Economou and his companies.

First, UDW loaned its parent company, Appellee DryShips, $120 million in late 2014. Economou was CEO, president, and controlling shareholder of Dryships during the relevant period. By mid-2015, UDW had forgiven the loan. In exchange for forgoing payment, UDW received its own shares which, for the purposes of the transaction, were priced at approximately 30% above their trading price. Second, in 2016 UDW signed a new management agreement (the "TMS Management Contract") with Economou's management company, Appellee TMS. This new contract obliged UDW to make an up-front payment of $2 million and then to pay $835,000 per month (more than $10 million annually) in management fees for the next ten years. The agreement also subjected UDW to a $150 million early termination fee. In January 2017, the TMS Management Contract was amended such that TMS's monthly fee was increased to nearly $1.3 million. The amendment also provided for TMS to receive up to $10 million in an annual performance fee at the discretion of UDW's board of directors and retroactively awarded TMS a performance award of $7 million for 2016.

Third, also in 2016, UDW created a subsidiary called ORI (also an Appellee in this action) and transferred $180 million in cash to the company for no apparent value. ORI used $49.9 million of this cash to purchase the remaining UDW shares owned by DryShips. DryShips then used $45 million of these funds to pay an outstanding debt to Appellee Sifnos, which was

beneficially owned by Economou. Finally, in April 2016, UDW used another subsidiary named Agon (also an Appellee in this action) to purchase a drillship for $65 million in a Brazilian bankruptcy proceeding. Around that same time, UDW embarked on the costly process of cold stacking three of its drillships and experienced numerous contract terminations on the part of its customers. Notwithstanding those setbacks, UDW transferred $65 million to Agon so it could purchase the drillship. The bankrupt Brazilian entity which sold the drillship owed management fees to Economou and used the proceeds from the drillship sale to pay off that debt.

C. Redomiciliation and Beginning of the Cayman Islands Proceeding

At the time of the four allegedly fraudulent transactions, UDW was an RMI company. In April 2016, the UDW board transferred the company's domicile to the Cayman Islands, and the following month, initiated insolvency proceedings in that venue. At some point the Cayman Debtors[6] concluded that corporate restructuring was preferable to liquidation. In March 2017, a duly constituted Court in the Cayman Islands appointed two joint provisional liquidators ("JPLs") to oversee restructuring of these companies. A few months later, the Cayman Debtors petitioned the Cayman Court for permission to convene the affected creditors ("Scheme Creditors") to vote on the proposed restructuring (the "Schemes of Arrangement").[7]

The Cayman Court held a hearing on whether it should permit the Cayman Debtors to convene such meetings (the "Creditor Meetings"). Highland appeared at the hearing and objected to the UDW Scheme of Arrangement. Among other things, Highland complained that approval of this scheme would deprive Highland of the ability to prosecute its fraudulent conveyance claims. Despite Highland's objection, the Cayman Court authorized the Debtors to convene the Creditor Meetings. On August 11, 2017, the UDW Scheme was approved by all Scheme Creditors who voted, with the exception of Highland. This scheme provided for the

[6]"Cayman Debtors" or "Debtors" refers to UDW and its affiliates/subsidiaries Drill Rigs Holdings Inc., Drillships Financing Holding Inc., and Drillships Ocean Ventures Inc.

[7]Schemes of Arrangement under Cayman Islands law are similar to Chapter 11 plans under United States bankruptcy law.

discharge of all UDW debt in exchange for new equity in UDW or, alternatively, a cash payment. The UDW Scheme also discharged all claims against UDW arising from (1) the UDW Notes or (2) any guarantees UDW had made with respect to the obligations of its subsidiaries. Finally, the scheme provided for the establishment of a litigation trust (the "Preserved Claims Trust" or "PCT") for the benefit of creditors. All claims held by UDW, Appellee Agon, or Appellee ORI arising from the allegedly fraudulent transactions were assigned to the PCT. Any recovery by the PCT trustees is to be distributed for the benefit of all UDW Scheme Creditors, including Highland.

D. Cayman Court Sanctions the UDW Scheme

In early September 2017, the Cayman Court conducted a hearing to determine whether it should sanction (i.e., approve) the Schemes of Arrangement (the "Sanction Hearing"). Again, Highland was the only creditor to object. One of the concerns Highland expressed was that the UDW Scheme would cancel and release all claims under the UDW Notes, thereby depriving Highland of the creditor standing needed to pursue its fraudulent conveyance claims. Over Highland's objections, the Cayman Court issued an order later that month (the "Sanction Order") approving the UDW Scheme of Arrangement. The Cayman Court also issued a Judgment on September 18, 2017, setting forth its reasons for sanctioning the Schemes of Arrangement. The Cayman Court specifically found that "[t]he restructuring of all four schemes put together is the best way of maximising value for the creditors." S.A.483 ¶ 130. Furthermore, "[u]nder each of the four Schemes the creditors achieve a better result than in a liquidation." *Id*.

The UDW Scheme went into effect shortly after the Cayman Court issued the Sanction Order on September 22, 2017, thereby discharging all creditor claims arising from either the UDW Notes or UDW's guarantees of the obligations of its subsidiaries. The trustees discussed in the Notes Indenture ("Notes Trustees") were also discharged at that time. Neither Highland nor any other party to the proceeding appealed the Sanction Order.

E. New York Bankruptcy Proceeding

In March 2017, prior to approval of the UDW Scheme, the Cayman Court-appointed JPLs commenced a Chapter 15 bankruptcy proceeding in the federal bankruptcy court located in New York (the "New York Bankruptcy Proceeding") and requested that the court recognize the Cayman restructuring proceedings (the "Cayman Proceedings"). The JPLs also moved the New York Bankruptcy Court for a temporary restraining order and provisional relief (the "Provisional Relief Motion") enjoining Scheme Creditors from "commencing or continuing any actions against the [Cayman] Debtors or their property within the territorial jurisdiction of the United States." The New York Bankruptcy Court granted the temporary restraining order on March 27, 2017, and scheduled a hearing on the Provisional Relief Motion for April 3, 2017. Then, in August, the JPLs petitioned the New York Bankruptcy Court for an order granting comity to the Cayman Schemes of Arrangement and enforcing them in the United States. Highland was given notice of this motion, but did not appear to oppose it. The New York Bankruptcy Court granted the request for recognition and issued an order giving full force and effect to (1) the Cayman Court's Sanction Order, (2) the Schemes of Arrangement, and (3) the Cayman Debtors' restructuring documents.

F. The Present Action and the High Court's Decision

On August 31, 2017, the Highland Plaintiffs filed a Complaint with the High Court in their capacities as creditors of UDW. The Complaint advances nine Causes of Action. The First, Third, Fifth, and Seventh Causes of Action are for "actual" fraudulent conveyance. The Second, Fourth, and Sixth Causes of Action are for "constructive" fraudulent conveyance. The Eighth Cause of Action, which is asserted exclusively against the Individual Appellees, is for aiding and abetting fraudulent conveyance. Highland subsequently dismissed the Ninth Cause of Action for declaratory relief.

Appellees filed a joint motion to dismiss the Complaint. The Individual Appellees filed an additional motion to dismiss based on issues that applied only to them. On September 27, 2018, the High Court granted the motions to dismiss on several different grounds. First, the High

Court granted comity to the UDW Scheme and held that it extinguished Highland's creditor status, thereby depriving Highland of standing to assert its fraudulent conveyance claims. Accordingly, the court granted dismissal of all claims under Marshall Islands Rule of Civil Procedure ("MIRCP") 12(b)(1). Second, the High Court held Highland was barred from pursuing its claims because it failed to comply with the no-action clause of the Indenture. The High Court also found dismissal appropriate (a) with respect to the Individual Appellees for lack of personal jurisdiction, (b) with respect to the "constructive" fraudulent conveyance claims for failure to state a claim, and (c) with respect to the aiding and abetting claim for failure to state a claim.

III. STANDARD OF REVIEW

[1][2]This Court reviews *de novo* dismissal of a complaint. *Rosenquist v. Economou*, 3 MILR 144, 151 (2011). When reviewing complaints on a motion to dismiss, "'[p]laintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences.'" *Id*.
(citing *White v. Panic*, 783 A.2d 543, 549 (Del. 2001)). "The Court does not blindly accept as true all allegations," and "[i]nferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." *Id*. (internal citations omitted).

[3]Factual findings are reviewed for clear error. *Lobo v. Jejo*, 1 MILR 224, 225-26 (1991); *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985).

IV. DISCUSSION

A. Rule 12(b)(1): Lack of Creditor Standing Based on the UDW Scheme

[4][5][6]On a Rule 12(b)(1) motion for lack of standing, the plaintiff bears the burden of establishing standing. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir.

2009). In a facial attack on standing, courts "draw all facts—which we assume to be true unless contradicted by more specific allegations or documentary evidence—from the complaint and from the exhibits attached thereto." *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). In a factual challenge, on the other hand, a court may look beyond the complaint to determine whether subject matter jurisdiction exists. *Apex*, 572 F.3d at 443-44 (citations omitted).

[7]As recounted above, the High Court held that Highland lacks standing to pursue its fraudulent conveyance claims because it is no longer a creditor of UDW. It is undisputed that only creditors have standing to bring claims for fraudulent conveyance. *See Eberhard v. Marcu*, 530 F.3d 122, 130-31 (2d Cir. 2008); *Carr v. Guerard*, 616 S.E.2d 429, 430-31 (S.C. 2005). Highland contends the High Court nonetheless erred in holding the company lacked creditor standing for two reasons. First, Highland argues the High Court should have declined to recognize and enforce the UDW Scheme which extinguished its creditor standing. Second, Highland argues the RMI Business Corporations Act ("BCA") § 128(5) preserves its creditor standing notwithstanding the UDW Scheme.

1. Whether the High Court Erred in Granting Comity to UDW Scheme and Sanction Order

[8][9][10]Comity has long been invoked by courts worldwide to give effect to "the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation." *Asignacion v. Rickmers*, H. Ct. Civ. No. 2016-26, at 18 (Nov. 10, 2016) (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 371 (5th Cir. 2003)). Indeed, comity is often accorded in the context of foreign insolvency proceedings. *See Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987). Deference to such proceedings is inappropriate, however, in the limited circumstances where those proceedings clash with domestic law and public policy. *See In re Schimmelpenninck*, 183 F.3d 347, 365 (5th Cir. 1999). While "foreign laws need not be identical to their" domestic counterparts, they "must not be repugnant to" the laws and policies of the

jurisdiction where comity is sought. *Id.*; *see also In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1044 (5th Cir. 2012).

[11]The High Court did not err in recognizing and enforcing the UDW Scheme and the Cayman Court's Sanction Order. First, the High Court correctly concluded the RMI does not have a policy against corporate restructuring, "be the restructuring under Chapter 11 of the United States bankruptcy code or the Cayman Islands court-supervised restructuring." A.30. Highland argues this was error because the BCA expresses a clear public policy against the type of corporate reorganization at issue in this case. This argument is based primarily upon the fact that the BCA does not provide for the type of restructuring UDW pursued in the Cayman Islands. BCA §§ 105, 106.[8] Sections 105 and 106 of the BCA authorize the High Court to supervise liquidation of a dissolved corporation and set out the procedures for resolving creditor claims. Although these provisions do not provide for the precise sort of restructuring accomplished in the Cayman Proceeding, the statute's silence on this topic does not equate to a finding that those proceedings are repugnant to RMI public policy. *Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route.").

Moreover, the Nitijela's recent enactment of the United Nations Commission on International Trade Law ("UNCITRAL") 2018 Model Law on Cross-Border Insolvency Implementation Act evinces a public policy in favor of recognizing foreign insolvency proceedings. 30 MIRC Ch. 7 §§ 700 et seq. The stated objectives of this enactment are to (1) promote cooperation between RMI and foreign States in cases of cross-border insolvency, (2) protect the interests of all creditors and otherwise interested parties, (3) protect and maximize the value of debtor's assets, and (4) facilitate the rescue of financially troubled businesses. *Id.* Moreover, the legislative history of the Model Law shows the Nitijela intended to empower courts to dismiss cases in favor of foreign proceedings rather than allowing disgruntled creditors

[8]Appellees contend Highland abandoned this public policy argument at oral argument before the High Court. A.914:7-10 ("The notion that the public policy of the Marshall Islands is somehow hostile to restructuring is not the point. We have never argued that."). Highland responds that, regardless of what was said at oral argument, it continues to advance the public policy argument in its post-hearing briefing and therefore did not waive it. S.A.640.

a second or third bite at the apple. Model Law, N.B. No. 12, Bill Summary (stating that creditors in insolvency cases are often looking for "another bite at the apple" and explaining that the Model Law "give[s] the High Court the statutory authority to stay or dismiss cases in favor o[f] foreign proceedings," thereby empowering the court to manage its time and resources effectively). In light of the foregoing analysis, the High Court correctly concluded the RMI does not have a policy against corporate restructuring as reflected in the Cayman Proceeding.

The decision to give full force and effect to the UDW Scheme and the Cayman Court's Sanction Order also had the effect of destroying Highland's standing to pursue its fraudulent conveyance claims against the non-debtor third parties, including Appellees Economou and Kandylidis. As the High Court acknowledged, although the UDW Scheme did not "expressly release[]" these fraudulent conveyance claims against non-debtor third parties, "the UDW Scheme did eliminate Highland's status as a UDW creditor upon which its fraudulent conveyance claims are based." A.27. Highland appears to have conceded as much when arguing before the Cayman Court that "the effect of the UDW Scheme is to remove Highland's status as a creditor capable of pursuing the Draft Complaint, ***or any other claim arising out of the matters alleged therein which is conditional upon its creditor status.***" S.A.356 ¶ 57 (emphasis added); *see also* S.A.374:20-25. Because a party must be a creditor to have standing to bring any fraudulent conveyance action, *Carr*, 616 S.E.2d at 430-31, the fact that Highland is no longer a UDW creditor strips Highland of the ability to bring fraudulent conveyance claims against Appellees Economou and Kandylidis related to UDW.

In a last-ditch attempt to preserve its claims against these non-debtor third parties, Highland argues in the alternative that, even if this Court affirms the grant of comity to the UDW Scheme and Sanction Order generally, this Court should not also "extend[] its grant of comity to provide releases to the non-debtor third parties that received the hundreds of millions of dollars in fraudulent transfers at issue in this case in violation of RMI public policy." Appellant Br. 19. In effect, Highland requests a carve-out from the otherwise complete recognition of the Cayman proceedings so as to allow Highland to pursue its fraudulent conveyance claims in our courts

against the non-debtor third parties. This Court declines Highland's invitation to grant only "partial comity" and thereby allow Highland to pursue its claims against non-debtor third parties separate and apart from the other Scheme Creditors. Such a ruling would undermine the entire UDW Scheme by placing Highland on unequal footing with the other creditors who would have been similarly impacted by the alleged fraudulent transfers. As the Cayman Court concluded:

> There is nothing inherently unfair to Highland in the fact that the Scheme results in **all** creditors losing their ability to pursue these claims themselves. It is clear from the expert evidence served on both sides that all creditors have the same right to bring these claims . . . . I find that the [Preserved Claims Trust]" is a much fairer way of dealing with any claims that may properly be asserted against officers of UDW and their affiliate[]s. It treats all of UDW's Scheme Creditors rateably and does not give priority to anyone."

S.A.482 ¶ 125 (emphasis in original). There is nothing inequitable, therefore, about granting comity to the Scheme and Sanction Order, and the fact that it puts Highland on equal footing with the other parties who lost money is neither "unconscionable" nor contrary to RMI public policy. We therefore affirm the High Court's decision to recognize and give full force and effect to the UDW Scheme and the Sanction Order, which has the effect of destroying Highland's standing to pursue even its claims against non-debtor third parties including Appellees Economou and Kandylidis.

2. Whether BCA § 128(5) Preserved Creditor Status Despite the UDW Scheme

In the alternative, Highland contends the High Court's dismissal for lack of standing was improper because BCA § 128(5) preserved its creditor standing. This statute states:

> Obligations prior to transfer of domicile. The transfer of domicile of any corporation out of the Republic shall not affect any obligations or liabilities of the corporation incurred prior to such transfer, nor affect the choice of law applicable to obligations or rights prior to such transfer, nor adversely affect the rights of creditors or shareholders of the corporation existing immediately prior to such transfer.

BCA § 128(5). The High Court interpreted this provision to mean "any creditor action [Highland] could have brought immediately before the transfer [of UDW's domicile], it could have brought immediately after the transfer." A.30. The court concluded, however, that a creditor's rights may be affected by subsequent actions or proceedings in the new domicile. Ultimately, the High Court held that, because Highland lost its creditor status a year and a half after transfer as a result of the Cayman Islands court-supervised restructuring (rather than as a direct result of the redomiciliation), Section 128(5) does not apply. Moreover, the High Court reasoned, because Highland had contractually agreed the Cayman Islands was a "Permitted Jurisdiction" to which UDW could be redomiciled according to the Notes Indenture, the company has no basis to complain about being subject to Cayman Islands law.

The High Court further concluded that, even assuming BCA § 128(5) shields creditors from the effects of subsequent proceedings in a new domicile, Highland failed to show the redomiciliation actually caused the corporate restructuring that extinguished Highland's creditor status. Indeed, Appellees' Cayman law expert states that, "[h]ad UDW not domesticated to the Cayman Islands, it could nevertheless have been subject to restructuring in the Cayman Islands because it had property and conducts business in the Cayman Islands." S.A.611 ¶ 10; *see also* S.A.612 ¶ 11 . Although Highland's experts countered that "a foreign company with limited connection to Cayman" would have difficulty convincing the Cayman courts to exercise jurisdiction over its debt restructuring, A.572 ¶ 37, Highland makes no attempt to argue that UDW had only a "limited connection" to the Cayman Islands.[9]

[9]Highland argues that the High Court erred in finding Highland had failed to establish a causal connection between the redomiciliation and the subsequent restructuring of UDW. According to Highland, Appellees' challenge to jurisdiction was a facial attack, therefore the High Court should have drawn all facts from the complaint, rather than relying on extrinsic evidence. *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). Highland further contends questions of "proximate cause" are not generally adjudicated at the motion to dismiss stage. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). The High Court's primary interpretation of BCA § 128(5) does not, however, incorporate a causation element. Rather the court construed the statute narrowly to mean that a change of domicile, without more, cannot strip a creditor of any of its rights. The High Court explored the question of causation as a secondary basis for its holding. Furthermore, Highland's characterization of the present challenge as a facial attack is dubious at best. Finally, the High Court's ruling on a question of foreign law

In Highland's view, however, BCA § 128(5) "stop[s] the clock at the time of redomiciliation" such that creditors' rights cannot be prejudiced by any subsequent action taken in the new jurisdiction. Appellant Br. 24. This argument is unpersuasive. First, the High Court's interpretation is consistent with the plain meaning of the statute, which simply states that a "transfer of domicile" may not "adversely affect the rights of creditors . . . existing immediately prior to such transfer." BCA § 128(5). The statute says nothing about a company's ability subsequently to restructure debt under the laws of the new jurisdiction. Furthermore, *Indep. Inv'r Protective League v. Time, Inc.*, 50 N.Y.2d 259 (N.Y. 1980), on which Highland relies in support of its position, in fact supports the High Court's interpretation.

[12]In *Time*, the New York Court of Appeals construed the New York Business Corporation Law ("NYBCL") § 1006(b), which states: "[t]he dissolution of a corporation shall not affect any remedy available . . . against such corporation, its directors, its officers or shareholders for any right or claim existing or any liability incurred before such dissolution." The court interpreted this to mean "the rights and remedies of the shareholders existing prior to dissolution are viewed as if the dissolution never occurred." *Time*, 50 N.Y.2d at 264. The court went on to hold that "dissolution, without more, did not deprive the shareholders of their derivative remedy." *Id*. (emphasis added). In other words, "corporate dissolution in itself cannot preclude a qualified plaintiff from being deemed a shareholder." *Id*. (emphasis added); *see also Snyder v. Pleasant Valley Finishing Co*., 756 F. Supp. 725, 730 (S.D.N.Y. 1990). This holding is analogous to the conclusion the High Court reached with respect to BCA § 128(5)—that transfer of domicile, in itself, does not strip creditors of their rights. Accordingly, the High Court did not err in holding BCA § 128(5) protects creditor rights that are immediately affected by virtue of the "transfer of domicile," but does not protect creditors from the effects of subsequent actions or proceedings in the new jurisdiction.

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based on expert opinions is treated as a ruling on a question of law. MIRCP 44.1.

B. Dismissal Based on Other Grounds

In addition to finding Highland lacked creditor standing to bring its claims, the High Court concluded there were several other, independent grounds for dismissal. Because dismissal was appropriate under Rule 12(b)(1) due to a lack of standing, however, we need not address the High Court's other grounds for dismissal.

V. CONCLUSION

Based on the foregoing, the High Court's September 27, 2018 Order Granting Motion to Dismiss is **AFFIRMED**.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MUDGE SAMUEL,
Plaintiffs-Appellants,
v.
ROBSON YASIWO ALMEN, in his capacity as Chief Electoral Officer;
MINISTRY OF INTERNAL AFFAIRS;
REPUBLIC OF THE MARSHALL ISLANDS; and
LADIE JACK,
Defendants-Appellees.

SCT CN 2018-001 (HCT CN 2016-121)

APPEAL FROM THE HIGH COURT

Argued August 15, 2019
Filed September 26, 2019

Summary

The Supreme Court affirmed the High Court's decision in HCT CA 2016-121 on other grounds. Appellant Samuel was a candidate in the November 2015 election for mayor of the Majuro Atoll Local Government ("MALGOV"). However, he received fewer votes than one of his opponents, appellee Laddie Jack. Samuel petitioned appellee Chief Electoral Officer ("CEO") for a recount. Without ruling the recount petition, the CEO certified that Jack had won the race. According to the MALGOV Constitution, Section 8(1), the term of office of mayor commences on the day after the day on which his election or appointment is certified. After the certification, Jack assumed office as the mayor of MALGOV. Samuel sued the CEO for certifying the results before his recount petition was resolved. Samuel argued that he should be considered the holdover mayor of Majuro until his recount petition was resolved, and that allowing Jack to serve as mayor on a "premature certification" would be an absurd result. He asked the Court to interpret Section 8(1) to avoid such a result. Although the High Court Associate Justice found that the CEO's certification was premature, he ruled that under a superior rule of statutory construction, known as the "preeminent" rule, the court should not interpret the law when it is unambiguous. Since Section 8(1) was clear and unambiguous, he refused to interpret or rewrite it as Samuel had requested. Therefore, he denied Samuel's motion for a summary judgment and granted the CEO's motion to dismiss, holding that Jack became the mayor of Majuro the day after the certification. The Supreme Court rejected the High Court Associate Justice's decision in

HCT CA 2016-121. The Supreme Court determined that the CEO's certification of the election prior to resolving the recount petition was invalid. However, this finding did not conclude the matter. In February 2017, on remand from the Chief Justice of the High Court, the CEO rejected Samuel's petition for a recount in writing. In a subsequent High Court case, HCT CA 2017-037, Samuel challenged the CEO's rejection. In that case, the Chief Justice found that the CEO had not made an error in rejecting Samuel's petition for recount. After this ruling, the CEO did not re-certify Jack's election. Nonetheless, the Supreme Court concluded that since Jack was unquestionably elected mayor, there was no basis whatsoever for removing Jack from office and reinstating Samuel. As such, Samuel had no possible relief available. Based on these ground, the Supreme Court affirmed the High Court's decision in HCT CA 2016-121 on other grounds.

Digest

1. APPEAL AND ERROR – *Questions Reviewable – Question of Law*: The High Court's interpretation of the Malgov Constitution and the Ejections and Referenda Act are questions of law reviewed *de novo*.

2. STATUTES – *Rules of Interpretation*: When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.

3. STATUTES – *Rules of Interpretation*: The courts must read texts in a way that will "harmonize apparently conflicting or ambiguous provisions so that no provision is rendered meaningless.

4. STATUTES – *Rules of Interpretation*: While the plain language rule is a foundational principle of statutory interpretation, it is not absolute. Here, this means that a "certified election" under Section 8(1) of the Malgov Constitution should be read only to encompass public announcements of official election results that are valid under the ERA (and any other applicable laws).

5. PUBLIC OFFICERS – *Duties, Failure to Perform*: Because the CEO failed to comply with his duties under Section 185 of the ERA, the election certification was invalid.

6. STATUTES – *Rules of Interpretation*: The plain meaning of the word "shall" in Section 185 of the ERA is clear—the CEO must comply with these § 185 requirements in certifying an election; they aren't discretionary.

7. ELECTIONS AND VOTING – *Conduct of Election – Recounts*: Faithful execution of the ERA's recount procedures is necessary to ensure the integrity and the finality of elections. One

procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. A recount of votes is an integral part of the electoral process. Here, the CEO's failure to follow basic statutory requirements has undermined confidence in the fairness of the electoral process.

8. ELECTIONS AND VOTING – *Conduct of Election – Certifications*: The High Court's August 31 order leaves no doubt that Jack was chosen as mayor by the people of Majuro Atoll. Given this fact, the only remaining basis for Samuel's claim is the failure of the CEO to recertify the (now undisputed) election results. To unseat Jack due to this oversight would only further undermine the integrity of the electoral process. And, as should be obvious, elections are intended to effectuate the will of the voters.

9. ELECTIONS AND VOTING – *Conduct of Election – Certifications*: In short, that Jack's election remains uncertified is not a sufficient reason to upend the judicially affirmed validity of the election results and ignore the will of the voters. Rather, in light of the resolution of the substance of Samuel's claim with the High Court's August 31, 2018 order, that claim no longer has any possible merit.

10. ELECTIONS AND VOTING – *Conduct of Election – Recounts – Timeliness*: Swift completion of a recount eases the tension between the principle of presumed validity and the importance of procedural safeguards. Unlike many other jurisdictions, however, there is no timeliness requirement in the ERA for the CEO to respond to a recount petition or for the High Court to decide an appeal. Because courts cannot add words to a statute, we are unable to impose either.

Counsel

Roy Chikamoto, counsel for Plaintiff-Appellant Mudge Samuel
Richard Hickson, Attorney-General, counsel for Defendants/Appellees Robson Yasiwo Almen, in his Capacity as Chief Electoral Officer; Ministry of Internal Affairs; Republic of the Marshall Islands
Alanso Elbon, counsel for Defendant/Appellee Ladie Jack

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

MARSHALL ISLANDS, SUPREME COURT

OPINION

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

I. INTRODUCTION

In issuing this opinion, this Court will— nearly four years after the fact — at last resolve a dispute arising from the November 2015 election for mayor of Majuro Atoll. Defendant-Appellee Ladie Jack ("Jack") ran as a new candidate in the 2015 mayoral election against the incumbent, Plaintiff-Appellant Mudge Samuel ('"Samuel"). A few weeks after the election was held, Defendant-Appellee Robson Yasiwo Almen, then Majuro's Chief Electoral Officer ("CEO" or "Almen"), certified Jack as the victor. Jack has been serving as mayor of Majuro Atoll ever since.

In the court below, Samuel argued that because the CEO did not follow procedures mandated by the national Elections and Referenda Act of 1980 ("ERA") in certifying the election results, Jack could not have legally assumed office under the Majuro Atoll Local Government Constitution ("Malgov Constitution"). Samuel further argued that, as incumbent, he is entitled to retain the office of mayor until the required procedure is carried out. The High Court disagreed with Samuel, interpreting the language of the Malgov Constitution to mean that any election certification issued by the CEO—regardless of whether that certification was valid under the ERA—unequivocally commences the mayoral term of the victor so certified. On this basis, the High Court denied Samuel's Motion for Summary Judgment, granted the CEO's Motion to Dismiss, and later denied Samuel's Motion for Reconsideration. This appeal followed.

For the reasons set forth below, we disagree with the High Court's interpretation of the Malgov Constitution. In order to be valid under the Malgov Constitution, a certification issued by the CEO must also be valid under the ERA—free from both substantive and procedural defects. To hold otherwise would yield an impermissibly absurd result. Here, because the CEO failed to complete the process mandated by the ERA before certifying Jack's election, that

certification is invalid. That said, it does not necessarily follow that an incumbent is legally entitled to remain in office pending proper certification of the presumptive victor's election. We need not determine the consequence of improper certification here, however, because between the time of Samuel's filing this appeal and the present, all necessary process has been completed, leaving Samuel without any possibility of relief.

Because Samuel no longer has a meritorious claim, the decision granting the CEO's Motion to Dismiss is AFFIRMED ON OTHER GROUNDS. Because our decision on the Motion to Dismiss dispenses with the case entirely, we need not reach the High Court's rulings on the Motion for Summary Judgment or Motion for Reconsideration.

II. BACKGROUND

A. Factual and Procedural Background

Samuel and Jack ran as opposing candidates in the November 16, 2015 election for mayor of Majuro Atoll. Samuel ran as an incumbent while Jack was a new challenger. Almen, at the time of the 2015 election, was the CEO for Majuro Atoll responsible for the supervision, conduct, and organization of the election, including counting ballots and certifying the election results. *See* ERA, 2 MIRC § 113.

Ten days after the election and before the unofficial election results were announced, Samuel submitted an informal petition to the CEO requesting a ballot recount on the basis of numerous alleged infirmities with the election process. Without responding to Samuel's petition, the CEO publicly announced the unofficial election results on December 4, naming Jack as the winner. A few days later, on December 10, Almen rejected Samuel's informal recount petition. On December 14, Samuel timely filed a formal petition requesting a recount of the election results with the CEO under the national ERA. 2 MIRC §180. Samuel also alleged that the conduct of the election had violated the rights of certain citizens to vote under Section 188 of the ERA and requested, pursuant to that section, that the CEO refer his allegations to the High Court for review. *Id*. § 188(2). The ERA provides that the CEO "shall" respond to recount petitions before announcing official election results but that he may announce such results before resolution of requests made under Section 188. *Id*. §§ 185, 188.

On December 17 and 18, Samuel filed two civil actions against the CEO in the High Court. In the first, Civil Action No. 2015-233, Samuel sought to enjoin the CEO from certifying the election results without first responding to Samuel's formal recount petition and referral request. In the second, Civil Action No. 2015-234, Samuel alleged that the 2015 election had been plagued with a variety of constitutional and statutory errors and requested that the results not be certified at all, that the election be declared void, and that a new, special election be held.

On December 19, 2015, without responding to either Samuel's formal recount petition or his referral request, the CEO publicly announced the unofficial election result as official, certifying Jack as the new mayor of Majuro Atoll. Jack was promptly sworn into office and has been serving as mayor ever since. The next regular election scheduled for November 2019. *See* Majuro Atoll Local Gov't ("Malgov") Const. pt. III, §8.

Roughly six months after Jack assumed office, in June 2016, Samuel filed the action on appeal here: Civil Action No. 2016-121. In this case, Samuel alleges that the CEO had violated the ERA by certifying the 2015 election results before responding to Samuel's formal recount petition and referral request. Samuel further argued that without a valid certification, Jack could not have legally assumed office under the Malgov Constitution and that Samuel, as an incumbent, is entitled to "hold-over" as mayor unless and until the election results are properly certified.

While Civil Action No. 2016-121 was pending in the High Court, that court issued decisions in Samuel's two prior lawsuits. On October 15, 2016, the High Court dismissed Civil Action No. 2015-234—the case alleging constitutional and statutory defects in the election—due to Plaintiff's failure to prosecute under Marshall Islands Rule of Civil Procedure ("MIRCP") 41(b). But, in Civil Action No. 2015-233, the High Court agreed with Samuel. On February 13, 2017, the High Court issued its decision in that case, holding that the CEO was required by the ERA to respond to Samuel's recount and referral petitions and remanding to the CEO with instructions to do so. On remand, the CEO rejected both Samuel's recount petition and his

referral request. Samuel appealed the CEO's decisions to the High Court in Civil Action No. 2017-037.

Civil Action No. 2017-037 remained before the High Court for a year and a half. During the pendency of the appeal, Samuel filed a motion with the High Court and then a writ of mandamus to this Court seeking recusal of High Court Chief Justice Ingram on the grounds that Justice Ingram had issued the oath of office to Jack. This Court denied Samuel's writ of mandamus in September 2017. On August 31, 2018, the High Court issued its opinion on the merits of the appeal, concluding that the CEO had not erred in rejecting either Samuel's recount petition or his referral request. The High Court's denial of Samuel's appeal completed the recount procedures required by the ERA prior to certification of election results and leaves no doubt that Jack is the rightful victor of the 2015 election. The CEO did not re-certify the 2015 election following the High Court's decision.

When resolving Civil Action No. 2017-037, the High Court was also reviewing the action currently on appeal here, Civil Action No. 2016-121. Samuel filed a Motion for Summary Judgment in this case on February 17, 2017, relying on the argument that Jack's election was invalid because it failed to comply with the process required by the ERA. On that basis, Samuel asked the High Court to (1) remove Jack from office and reinstate Samuel as "hold-over" mayor until all necessary recount procedures are completed and the election results are properly certified; and (2) award Samuel backpay for the time during which Samuel alleges he was entitled to remain as mayor. Both defendants filed responses in opposition. The CEO simultaneously filed a counter-motion seeking either abatement pending resolution of Civil Action 2017-037 or dismissal of the case altogether. Defendants argued that the December 2015 certification was proper and that, even if it was not, Samuel has no right to remain mayor pending proper certification.

The High Court denied Samuel's Motion for Summary Judgment and granted the CEO's Motion to Dismiss. Subsequently, Samuel filed a Motion for Reconsideration with the High Court, which was denied on January 9, 2018. On appeal, Samuel challenges the High Court's decisions on the Motion to Dismiss, the Motion for Summary Judgment, and the Motion for

Reconsideration. At oral argument, however, Samuel narrowed the scope of issues before this Court. He clarified that he is no longer seeking backpay, indicating that if he wished to pursue that relief, he would file a separate civil action against Jack. Thus, in this appeal we only consider whether Samuel should be reinstated as mayor pending proper election certification.[3]

B. The High Court's Opinion

The High Court denied Samuel's Motion for Summary Judgment and granted the CEO's Motion to Dismiss based on its interpretation of the Malgov Constitution. Noting that "Section 8(1) of the Malgov Constitution is clear and unambiguous," the High Court invoked the "preeminent" rule of constitutional construction, which provides that courts must give effect to the plain meaning of unambiguous text. *Samuel v. CEO*, RMI High Court Case No. 2016-121, at 5-6 (2017). Applying this rule, the High Court[, Associate Justice Winchester] read Section 8(1) of the Malgov Constitution, which provides that the mayor's term "commences on the day after the day on which his election . . . is certified," literally to mean that the mechanical step of the CEO declaring official election results initiates the term of the prevailing candidate, regardless of whether that declaration itself violated the ERA or any other applicable law. *Id*. Guided by this reading, the High Court concluded that although the certification in this case was issued "prematurely"— before the CEO undertook the process mandated by the ERA—it nevertheless triggered Jack's assumption of office under the plain language of the Malgov Constitution. Id. at 6. As such, "Jack became the mayor on December 20, 2015, the day after the CEO prematurely

[3]In briefing submitted to this Court and at oral argument, Appellant also raised several allegations regarding the integrity of the 2015 election itself. While Samuel raised these integrity-based claims in other High Court actions (for example, the complaints in Civil Action Nos. 2015-233 and 2015-234 both allege that "[s]ituations creating the appearance of impropriety committed by the CEO and his staff have eroded the confidence that the electorate has in the electoral process because of ethical misconduct. . . ."), no such allegation was made in the complaint in this case. Where Samuel had an opportunity to litigate integrity-based claims in at least one other action, but did not even raise such claims in this case, the Court will not consider them. *Cf. Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007) (stating that a plaintiff generally has "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant") (citations and quotation marks omitted), overruled on other grounds by *Taylor v. Sturgell*, 553 U.S. 880 (2008).

certified the election results." *Id*. In so holding, the High Court rejected Samuel's argument that such an interpretation leads to an impermissibly absurd result. *Id*. at 5.

III. STANDARD OF REVIEW

[1]The High Court's interpretation of the Malgov Constitution and the ERA are questions of law reviewed *de novo*. *Dribo v. Bondrik*, 3 MILR 127, 135 (2010).

IV. DISCUSSION

A. Interpretation of the Malgov Constitution and the National ERA

The High Court's decision to dismiss appellant's case was grounded in a literal interpretation of Section 8(1) of the Malgov Constitution. On appeal, Samuel argues that in order to avoid an absurd result, the constitutional provision must be read more expansively, giving due regard to the requirements of the ERA. We agree. A reading that allows an illegal or incorrect act under the ERA to serve as a valid certification of an election under the Malgov Constitution is both absurd and odd. Rather, only a certification that is substantively and procedurally valid for the purposes of the ERA can serve as a valid certification for the purposes of the Malgov Constitution.

Section 8(1) of the Malgov Constitution provides that the mayor's term of office "commences on the day after the day on which his election or appointment is certified." Malgov Const. pt. III, § 8(1)(a). The Constitution does not define "certified" or indicate what act is necessary to achieve certification. But all the parties and the High Court agree that the certification referenced in the Malgov Constitution is found in the ERA's requirement that the CEO shall "publicly announce . . . the official result of the election." ERA, § 185. We concur and conclude that the public announcement required by the ERA is the certification required by the MalGov Constitution.[4]

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[4]In its provisions governing election results, the ERA does not use the word "certify" in relation to the CEO's public announcement of official results but does use it to require that the Counting and Tabulation Committee "certify" the unofficial ballot count to the CEO before the CEO announces official results. 2 MIRC §§ 178(4), 182(3). Nevertheless, the CEO's public announcement of official results is also a certification within the plain meaning of that word. "Certify" is defined as "to state something officially," Certify, Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/certify (last visited Sept. 24, 2019); *see also* Certify, Merriam Webster Dictionary, available at https://www.merriam-webster.com/dictionary/certify (last visited Sept. 24, 2019) (defining "certify" as "to attest authoritatively"), which is precisely what the CEO does when

With this understanding of the word "certified," the High Court determined (incorrectly) that the Malgov Constitution "clearly and unambiguously" establishes that the prevailing candidate's mayoral term begins when the CEO announces election results as official—regardless of whether that announcement was itself valid under the ERA. In the High Court's view, to consider whether the CEO completed the process required by the ERA prior to certifying election results would require reading the words "not prematurely" into Section 8(1). *Samuel*, RMI High Court Case No. 2016-121, at 5. That is, the provision would have to be read as stating that the new mayor's term "commences on the day after the day on which his election or appointment is not prematurely certified." *Id*. Such a reading, the High Court held, would contradict the "preeminent" rule of statutory and constitutional interpretation that courts must give effect to the plain meaning of the text, and thus "under no circumstances may the Constitution be interpreted to contain language or provisions that it does not contain." *Id*. (quoting *Niedenthal v. Almen*, RMI High Court Case No. 2014-263, at 5 (2015) and (citing *Lekka v. Kabua, et al.*, 3 MILR 167, 171 (2013)).

[2]We disagree. As Samuel correctly points out, "it has long been recognized" in this jurisdiction "that the literal meaning of a statute will not be followed when it produces absurd results. . . . We are to avoid constructions that produce 'odd' or 'absurd results' or that [are] 'inconsistent with common sense.'" *Dribo*, 3 MILR at 138; (citing *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'") (emphasis added) (other citations omitted)).

Here, the High Court's literal interpretation of the Malgov Constitution's term "certified" could allow an illegal act under the ERA to serve as the legal basis for assumption of public office under the Malgov Constitution. And such an outcome is obviously absurd, running

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declaring official results. Moreover, the word "certified" in the Malgov Constitution modifies the phrase "his [the prevailing candidate's] election." This phrasing suggests that the Constitution is addressing the official declaration of who won the election, which is made by the CEO, rather than the unofficial ballot count.

contrary to both common sense and an ordinary sense of justice. First, the High Court's literal interpretation of the Malgov Constitution would render the procedural requirements of the ERA meaningless. The ERA's recount procedures are "basic to the legitimacy of the government of this Republic," *Clanton v. M.I. Chief Electoral Officer*, 1 MILR 146, 151 (1987), and necessary to ensure "the integrity and the finality of elections," *Matthew v. Jorlang*, 3 MILR 174, 180 (2014) (citation and quotation marks omitted). That the Malgov Constitution could nullify such a fundamental provision simply makes no sense.

[3]And the absurdity of such a reading is further illustrated by the fact that the Malgov Constitution's authority is subordinate to that of the ERA. The Local Government Act of 1980 sets out the framework under which local governments operate, expressly stipulating that local government constitutions are inferior to national statutes and cannot contain provisions that are "inconsistent with this Chapter or any other Central Government law." 4 MIRC § 112. The High Court's literal interpretation of the Malgov Constitution upends this hierarchy of authority, allowing a local constitution to override the requirements of a national statute. Notably, by nullifying the recount provisions of the ERA, the High Court's cramped reading of the Malgov Constitution violates another cardinal rule of interpretation—that courts must read texts in a way that will "harmonize apparently conflicting or ambiguous provisions so that no provision is rendered meaningless." *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 114, 118-19 (2009); *see also Bilski v. Kappos*, 561 U.S. 593, 608 (2010).[5]

Finally, a literal interpretation of the Malgov Constitution threatens unintended results beyond those exemplified in this case. This case concerns only the ERA's procedural

[5]Here, because both the ERA and the Malgov Constitution apply to the issue of election certification, they should be considered together. *See, e.g.*, *Lekka*, 3 MILR at 171; *Branch v. Smith*, 538 U.S. 254, 281 (2003) ("And it is, of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in isolation, but in the context of the corpus juris of which they are a part." (emphasis omitted)); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." (citations and quotations omitted)); *Linquist v. Bowen*, 813 F.2d 884, 888 (8th Cir. 1987) ("A primary rule of statutory construction is that when a court interprets multiple statutes dealing with a related subject or object, the statutes are in pari materia and must be considered together.").

requirements. But if taken to its logical conclusion, the High Court's reading would permit not only procedurally but substantively defective certifications to stand. Disallowing certification of inaccurate results would, by the High Court's logic, require reading into the Malgov Constitution words that are not there, i.e., that the mayor's term "commences on the day after the day on which his election or appointment is not inaccurately certified." Thus, by the High Court's logic, the CEO could officially announce the losing candidate—or even an individual who was not in the race—as victor, and that individual would be legitimately ensconced as mayor under the Malgov Constitution. An interpretation that allows an individual other than the prevailing candidate to be certified as mayor is plainly absurd, and would effectively empower the CEO to displace the choice of the voters with his own.

[4]In short, the High Court erred. While the plain language rule is a foundational principle of statutory interpretation, it is not absolute. Here, this means that a "certified election" under Section 8(1) of the Malgov Constitution should be read only to encompass public announcements of official election results that are valid under the ERA (and any other applicable laws).

B. Conduct of the CEO

[5]Having determined that only valid election certifications under the ERA can constitute valid election certifications under the Malgov Constitution, we must next decide whether the CEO acted lawfully in certifying the official results of the 2015 election while a formal petition for recount was pending. We find that because the CEO failed to comply with his duties under Section 185 of the ERA, the election certification was invalid.

Samuel claims that the CEO failed to respond to his recount petition under Section 185 and provide him with an opportunity to appeal that response.[6] Section 185 of the ERA lays out the procedural requirements for certifying the official results of a local election. Where, as here,

[6]Samuel also claims that the CEO failed to refer his voter's right complaint to the High Court under Section 188. This argument lacks merit—section 188 provides that "no requirement or reference under . . . this Section shall be allowed to delay . . . the declaration of the official result of an election [i.e., certification]." ERA § 188(3).

the CEO receives a petition for recount, he "shall" announce the official results of the elections (i.e., certify the election) in one of four ways, depending on the circumstances. If the CEO grants the petition, he "shall" announce the results one day after the recount is conducted. 2 MIRC § 185(2)(a). If the CEO denies the petition and no timely appeal is filed, he "shall" announce the results one day after the expiration of the period allowed for appeals. *Id*. § 185(2)(b). If the CEO denies the petition and the petitioner timely files an appeal to the High Court, the CEO "shall" announce the results one day after the recount if the appeal is upheld. *Id*. § 185(2)(c)(i). And, finally, if the High Court denies the appeal, the CEO "shall" announce the results one day after the High Court announces its decision. Id. § 185(2)(c)(ii).

[6]The plain meaning of the word "shall" in Section 185 is clear—the CEO must comply with these § 185 requirements in certifying an election; they aren't discretionary. *See Lekka*, 3 MILR at 171; *see also Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress used 'shall' to impose discretionless obligations."); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573-74 (9th Cir. 2000) ("The term 'shall' is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary."); *cf. Bien v. M.I. Chief Electoral Officer*, 2 MILR 94, 99 (1997) ("The Nitijela, by use of the word[] 'must,' created a mandatory requirement . . . ."). The ERA's plain language and context leaves no doubt—the CEO had no discretion to ignore the recount petition or to certify the election results without first responding to the petition, allowing Samuel an adequate time to appeal, and receiving the outcome of that appeal. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("[D]iscretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decision making."). Thus, the certification of Jack's election issued by the CEO in December 2015 was invalid.

[7]The CEO's failure to comply with the law in this matter is extremely troubling. As the officer responsible for administering the election, the CEO understood or should have understood

the basic procedural requirements of the statute he was charged with implementing.[7] And the fallout to a fair electoral process from the error cannot be overstated. As previously stated, faithful execution of the ERA's recount procedures is necessary to ensure "the integrity and the finality of elections," *Matthew*, 3 MILR at 180; *see also Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) ("[O]ne procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. . . . A recount of votes is an integral part of the . . . electoral process."). Here, the CEO's failure to follow basic statutory requirements has undermined confidence in the fairness of the electoral process.

C. Samuel's Claims on Appeal

Having determined that the certification issued by the CEO in December 2015 was invalid, we next turn to Samuel's claim on appeal that, as incumbent, he is entitled to remain in office as "hold-over" mayor until the recount procedures required by the ERA are complete and the election is properly certified. We find that because all necessary recount procedures have at this time been completed, Samuel is clearly not entitled to the relief that he seeks.

As discussed above, the CEO's election certification, issued in December 2015, was invalid at that time because the necessary recount procedures—a response from the CEO, an opportunity to appeal, and, if that option was exercised, a decision from the High Court—had not yet been completed. After this appeal was filed in January 2018, however, all necessary recount procedures have been carried out. On, February 13, 2017, in Civil Action No. 2015-033, the High Court ruled that the CEO must respond to Samuel's recount petition under Section 185 of the ERA and remanded to the CEO with an order to do so. The CEO rejected the recount petition two days later and, pursuant to the ERA, Samuel immediately appealed, initiating Civil Action No. 2017-037. The High Court issued a decision in Civil Action No. 2017-037 on August 31,

[7]It is no excuse that the CEO had already rejected Appellant's informal recount petition prior to announcing the unofficial election results. This Court has clearly explained that, under the ERA, a formal recount petition must be filed after the unofficial election results are announced. *Matthew*, 3 MILR at 180 (explaining that pursuant to the plain language of the ERA, recount petitions must be filed after the CEO announces unofficial election results).

2018, finding that the CEO had not erred in rejecting the recount petition. This decision completed the recount procedures required by the ERA, thereby requiring the CEO to validly certify Jack's election. But, again, the CEO failed to comply with the law and did not recertify Jack's election following issuance of the High Court's August 31, 2018 order.

So, although Jack's election remains without the statutorily required certification, the High Court's August 31 order definitively concluded that a recount was not required and thus, Jack was the duly elected mayor of Majuro Atoll. Considering the principles that undergird our election laws—most prominently; fairness, equity, and upholding the will of the people—we conclude that because Jack was unquestionably elected as mayor, there is no basis whatsoever for removing Jack from that office and reinstating Samuel. As such, Samuel is left without any possible relief.

[8]The High Court's August 31 order leaves no doubt that Jack was chosen as mayor by the people of Majuro Atoll. Given this fact, the only remaining basis for Samuel's claim is the failure of the CEO to recertify the (now undisputed) election results. To unseat Jack due to this oversight would only further undermine the integrity of the electoral process. And, as should be obvious, elections are intended to effectuate the will of the voters. *See, e.g.*, Malgov Const., pt. IV, sec. 17 ("The Mayor shall be elected by the registered voters of Majuro Atoll. . . . The candidate who receives the greatest number of votes . . . shall be the Mayor."); *Niedenthal*, RMI High Court Case No. 2014-263, at 10 ("The citizens of the Republic of the Marshall Islands reserved to themselves the right to choose who will represent them . . . . They were given that power in their Constitution, and those who they elect to the Nitijela do not have the power to take that from them.").

[9]In short, that Jack's election remains uncertified is not a sufficient reason to upend the judicially affirmed validity of the election results and ignore the will of the voters. Rather, in

light of the resolution of the substance of Samuel's claim with the High Court's August 31, 2018 order, that claim no longer has any possible merit.[8]

Regardless of this outcome, the procedures required for a recount are an "integral part of the electoral process" and should not be rendered inconsequential. *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972). Ideally, recount procedures should be promptly completed before the new term is scheduled to begin in order to avoid a situation—like this one—where the election outcome remains in dispute nearly four years later. *See Matthew*, 3 MILR at 179-80 ("[C]ompliance with election laws may be assured to facilitate, not hinder by technical requirements, the quick initiation and disposition of such contests. . . . [T]he swift resolution of election contests is vital for the smooth operation of government." (citation and quotation marks omitted)); see also Principles of the Law, Election Administration § 206(a) ("[A]dministrative procedures for certifying the result of an election, including any recount necessary to verify the accuracy of the result, should be structured and administered so that they can be completed before the date upon which the term of office of the election's winner is scheduled to begin."). Indeed, in a situation where a recount ultimately proved necessary, a long delay like the one in this case could seriously undermine the legitimacy of the election results. Moreover, if a recount

[8]Samuel also claims that, under common law, he should be placed into office as a "holdover" pending proper certification. Although we need not reach this argument, it is without merit. A post-election hold-over effectively presumes that the results of a challenged election are illegitimate until proven otherwise. This logic runs contrary to our strong presumption of election regularity. *See Bien*, 2 MILR at 97. For the same reasons, the American Law Institute has also registered strong disapproval of the doctrine as an "inappropriate thwarting of the electoral process" and a "particularly pernicious way to fill the office." Principles of the Law, Election Administration § 206, cmt. a & note (Am. Law Inst. 2019). Moreover, where the "hold-over" doctrine is recognized in American law, it is justified by the policy objective of ensuring uninterrupted government operations. *See, e.g., State Bd. of Educ. v. Comm'n of Fin.*, 247 P.2d 435, 440 (Utah 1952) (explaining that the hold-over rule "is bottomed on the sound public policy of not permitting an office of trust created for the public good to cease operating for the lack of an office-holder"); *Walker v. Hughes*, 36 A.2d 47, 50 (Del. 1944) ("The purpose of [holding over] is to prevent a possible vacancy or interregnum in a public office where there is no properly qualified successor at the expiration of the usual statutory term, so that the public business will not be interrupted or subjected to doubt or dispute."). Treatises relied upon by Samuel provide the same. *See* Charles S. Rhyne, The Law of Local Government Operations § 13.11 (1980) ("The doctrine of holding over is designed to assure the continuation of public functions."); 3 Eugene McQuillin, The Law of Municipal Corporations §12.160 (2012) ("Absent provisions to the contrary, the public interest requires that public offices should be filled at all times without interruption."). Here, because Jack took office, there is no concern of uninterrupted government operations.

revealed that the election of the presumptive victor was in error, a long delay would be a gross injustice against both the true victor and the people of Majuro Atoll.

[10]Swift completion of a recount eases the tension between the principle of presumed validity and the importance of procedural safeguards. Unlike many other jurisdictions, however, *see Matthew*, 3 MILR at 179-80, there is no timeliness requirement in the ERA for the CEO to respond to a recount petition or for the High Court to decide an appeal. Because courts cannot add words to a statute, we are unable to impose either. *Niedenthal*, RMI High Court Case No. 2014-263, at 5.[9]

V. CONCLUSION

We conclude that the High Court's August 31, 2018 resolution of Samuel's recount petition—which unequivocally confirmed the propriety of Jack's election—leaves Samuel without any possible relief. Accordingly, the High Court's December 17, 2018 Order Granting the Motion to Dismiss is **AFFIRMED**. Because the Opinion dispenses with this matter, we do not address the High Court's ruling of the Motion for Summary Judgment and Motion for Reconsideration.

[9]Given the importance of quickly resolving election disputes and ensuring the integrity of the election process, we respectfully submit that the Nitijela may want to consider amending the ERA's recount provisions to include timeliness requirements both for the CEO to respond to recount petitions and for rulings by the courts.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

KEJJO BIEN and MARSHALLS JAPAN CONSTRUCTION CO.,
Defendants-Appellants,
v.
MILI ATOLL LOCAL GOVERNMENT, TOMMY LEBAN, and THE REPUBLIC OF THE MARSHALL ISLANDS,
Plaintiffs-Appellees.

SCT CN 2018-006 (HCT CN 2012-141)

APPEAL FROM THE HIGH COURT

Argued August 16, 2019
Filed October 9, 2019

Summary

The Supreme Court affirmed the High Court's decision. Defendants-Appellants Kejjo Bien ("Bien") and Marshalls Japan Construction Co. ("MJCC") (collectively, Defendants") appealed the High Court's denial of Defendants' Republic of the Marshall Islands Rule of Civil Procedure 60(b) Motion for Relief from Judgment and an associated order denying a motion to strike the opposition to that Rule 60(b) Motion. However, the Rule 60(b) Motion was filed over a year after the underlying judgment awarding $40,000 to Plaintiffs and almost a year after an order amending that judgment to add an award of $120,000 in statutory punitive damages. Defendants did not appeal either the underlying judgment or the order awarding punitive damages. All the issues Defendants raised in the Rule 60(b) Motion could have been raised on a direct appeal. Given this posture, the High Court properly denied the Rule 60(b) Motion under well-accepted waiver principles: (i) an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review; (ii) in no circumstances may a party use a Rule 60(b) motion as a substitute for an appeal that it failed to timely file; (iii) failing to present an argument in opposition to summary judgment below, fails to preserve the argument for appeal; (iv) arguments raised for the first time on appeal are deemed waived; (v) if a party fails to raise an objection to an issue before judgment, he or she waives the right to challenge the issue on appeal (citations omitted). Furthermore, the High Court did not abuse its discretion in denying the Rule 60(b) motion on the merits as to jurisdiction or in refusing to strike the opposition.

SAMUEL v. ALMEN, CEO, MOIA, RMI, and JACK

Digest

1. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)*: All the issues that Defendants raised in the Rule 60(b) motion could have been challenged on direct appeal. Given this posture, the High Court properly denied the Rule 60(b) motion under well-accepted waiver principles.

2. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)*: Defendants appeal the denial of their Rule 60(b) Motion for Relief From Judgment (and the ancillary order denying their Motion to Strike Opposition to the Rule 60(b) motion). These decisions are reviewed for abuse of discretion.

3. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)*: Most importantly, as summarized above, all the grounds for relief raised by Defendants in their Rule 60(b) motion could have been raised on direct appeal (and there was no such appeal). It is a well-settled principle that "a Rule 60(b) motion may not substitute for a timely appeal."

4. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)*: Allowing motions to vacate pursuant to Rule 60(b) after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments.

5. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)*: Defendants did not even oppose the punitive damages motion before the High Court. Accordingly, the High Court did not abuse its discretion in denying the Rule 60(b) motion.

6. CONTRACTS – *Third-party Beneficiary – Standing to Sue*: At third-party beneficiary has standing to sue on a contract.

7. CIVIL PROCEDURE – *Standing to Sue*: It is enough, for justiciability purposes, that at least one party with standing is present.

8. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 60(b)*: The High Court did not abuse its discretion in allowing (i.e., not striking) Plaintiffs' opposition to Defendant's Rule 60(b) Motion. At most, the opposition was filed two days late, but circumstances existed that gave discretion to the High Court to excuse the late filing. There was no prejudice to Defendants because the High Court allowed Plaintiffs to file a Reply memorandum. Moreover, Defendants had violated a court order by filing the motion to strike without permission.

MARSHALL ISLANDS, SUPREME COURT

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Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

I. INTRODUCTION

[1]Defendants-Appellants Keijo Bien (" Bien") and Marshalls Japan Construction Co. ("MJCC") (collectively, "Defendants") appeal the High Court's denial of Defendants' Republic of the Marshall islands Rule of Civil Procedure 60(b) Motion for Re lief from Judgment, and an associated order denying a motion to strike the opposition to that Rule 60(b) Motion. The Rule 60(b) Motion, however, was filed over a year after the underlying judgment awarded $40,000 to Plaintiffs, and almost a year after an order amending that judgment to add an award of $ 120,000 in statutory punitive damages. Defendants, however, had not appealed the underlying judgment, nor the order awarding punitive damages. All the issues that Defendants raised in the Rule 60(b) motion could have been challenged on direct appeal. Given this posture, the High Court properly denied the Rule 60(b) motion under well-accepted waiver principles. *See, e.g., Browder v. Dir.,*

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

Dep't of Corr. of Ill., 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.") (citations omitted); *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012) ("In no circumstances . . . may a party use a Rule 60(b) motion as a substitute for an appeal it failed to take in a timely fashion.") (citation omitted). Further, the High Court did not abuse its discretion in denying the Rule 60(b) motion on the merits as to jurisdiction or in refusing to strike the opposition.

II. BACKGROUND

On March 14, 2017, the High Court issued its final judgment and decision after a nonjury trial, awarding general damages of $40,000 (plus fees of $55 and post-judgment interest of 9% per annum) in favor of Plaintiffs-Appellees Mili Atoll Local Government ("MiliGov"), Tommy Leban, and the Republic of the Marshall Islands ("RMI") (collectively, "Plaintiffs") against Defendants Bien and MJCC, jointly and severally. Defendants were found liable under count one (alleging "conversion") of the amended complaint for "having wrongfully taken and converted to the defendants' own uses the [RMI's] $40,000 [Republic of China] Funds issued for the benefit of MiliGov" for use in purchasing a boat for the people of Mili Atoll. The High Court declined to find liability on the other three counts, which alleged breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and negligence. Defendants did not appeal from this judgment.

On March 28, 2017, Plaintiffs filed a "Motion to Amend the Judgment by including an award for Punitive damages." The motion to amend was filed under RMI Civ. Proc. Act § 151, which reads:

> In civil cases where the defendant has been found liable because of fraud, or deceit, or misrepresentation, the court shall add to the judgment, as punitive damages, an amount equal to three (3) times the actual amount of damages found by the trier of facts.

Defendants did not file an opposition to this motion to amend. On May 30, 2017, the High Court granted the motion to amend, having already determined in its March 14, 2017 decision that Defendants' wrongful taking and conversion "were based on fraud." Accordingly, the High

Court amended its judgment to add a $120,000 award of punitive damages. As with the prior judgment, Defendants did not appeal this order or the amended judgment.

On May 28, 2018, almost a year after the amended judgment and the order awarding punitive damages—and over a year after the original March 14, 2017 judgment and decision—Defendants filed their Rule 60(b) "Motion for Relief from Final Judgment and Order Granting Punitive Damages." Defendants argued that MiliGov lacked standing to sue, and that the RMI should have been dismissed as a Plaintiff.[3] Defendants also argued that (1) the High Court erred in adopting elements of "civil theft" from a Florida statute when ruling on the conversion claim, and (2) the punitive damage award was improperly pled and required a finding by clear and convincing evidence.

On June 13, 2018, Plaintiffs filed an opposition to the Rule 60(b) Motion. Although the opposition was apparently filed one or two days late, Defendants' counsel sought and eventually received permission to file a reply that was limited to "respond[ing] only to argument raised in the opposition," with "no further briefing . . . permitted except by order of the Court." On June 25, 2018, Defendants filed their reply, but also filed a separate motion to strike Plaintiffs' opposition as untimely. The High Court denied both the motion to strike the opposition, and the Rule 60(b) motion itself.

In denying the Rule 60(b) motion, the High Court reasoned that (1) neither Defendant filed an opposition to Plaintiffs' Motion to Amend the Judgment to add an award of punitive damages, and (2) neither Defendant filed an appeal from the March 14, 2017 final judgment nor from the May 30, 2017 order granting the award of punitive damages. Nevertheless, the High Court addressed the merits of Defendants' standing argument by concluding that MiliGov had standing, either because (1) it had a beneficial interest in the $40,000 converted by Defendants, or (2) it was a third-party beneficiary of the grant between the RMI and the Republic of China. It

[3]Earlier, the RMI had moved to be dismissed as a Plaintiff, but the High Court denied the motion because the RMI was a necessary party. After that ruling, the RMI remained as a proper Plaintiff, and it remains as an Appellee in this appeal.

also reasoned that, even if MiliGov lacked standing, it is sufficient for justiciability purposes that the RMI, a co-Plaintiff, had standing. The High Court also concluded that punitive damages were adequately pled, and the award was sufficiently supported by a finding of fraud.

III. DISCUSSION

A. Well-Settled Principles Bar Defendants' Challenge

[2]Defendants appeal the denial of their Rule 60(b) Motion for Relief From Judgment (and the ancillary order denying their Motion to Strike Opposition to the Rule 60(b) motion).[4] These decisions are reviewed for abuse of discretion. *See Pac. Basin, Inc. v. Mama Store*, 3 MILR 34, 36 (2007) (denial of a Rule 60(b) motion reviewed for abuse of discretion); *Dribo v.*

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[4]RMI Rule of Civil Procedure 60(b) provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect by the moving party, or an inadvertent mistake by the court or a clerk;
> >
> > (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> >
> > (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> >
> > (4) the judgment is void;
> >
> > (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> >
> > (6) any other reason that justifies relief.

Rule 60(c) provides:

> (c) Timing and Effect of the Motion.
>
> > (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the filing of the judgment or order or the date of the proceeding.
> >
> > (2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

Bondrik, 3 MILR 127, 135-36 (2010) ("A high degree of deference is given to a trial court's interpretation of its own rules.").

[3]Most importantly, as summarized above, all the grounds for relief raised by Defendants in their Rule 60(b) motion could have been raised on direct appeal (and there was no such appeal). It is a well-settled principle that "a Rule 60(b) motion may not substitute for a timely appeal." *United States v. O'Neil*, 709 F.2d 361, 372 (5th Cir. 1983) (citing cases). *See also, e.g., Browder*, 434 U.S. at 263 n.7 ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."); *Stevens*, 676 F.3d at 67 ("In no circumstances . . . may a party use a Rule 60(b) motion as a substitute for an appeal it failed to take in a timely fashion."); *Ojeda-Toro v. Rivera-Mendez*, 853 F.2d 25, 28 (1st Cir. 1988) ("Plaintiff may not use Rule 60(b) as a substitute for a timely appeal . . .").

[4]"Allowing motions to vacate pursuant to Rule 60(b) after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982). "The ground for setting aside a judgment under Rule 60(b) must be something that could not have been used to obtain a reversal by means of a direct appeal." *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000).

[5]Here, Defendants' asserted grounds for vacating the judgment—lack of standing, error in defining conversion as civil theft, improper award of punitive damages—fell under Rule 60(b)(1) ("mistake"), or Rule 60(b)(4) ("void"), or perhaps Rule 60(b)(6) ("any other reason"). The motion did not, for example, assert newly discovered evidence, or previously-unknown fraud, or any other reason that could not have been brought on direct appeal. Indeed, Defendants did not even oppose the punitive damages motion before the High Court. *See, e.g., Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) (recognizing that, by failing to present an argument in his opposition to summary judgment below, appellant failed to preserve the argument for appeal); *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 163 (2d Cir. 2011) ("Arguments raised for the first time on appeal are deemed waived.") (citation omitted); *Slaven*

v. Am. Trading Transp. Co., 146 F.3d 1066, 1069 (9th Cir. 1998) ("[I]f a party fails to raise an objection to an issue before judgment, he or she waives the right to challenge the issue on appeal."). Accordingly, the High Court did not abuse its discretion in denying the Rule 60(b) motion.

B. Even Assuming Defendants Could Raise Subject-Matter Jurisdiction at this Stage, Defendants' Arguments Fail

Defendants nevertheless argue that they raise MiliGov's standing to sue, which can implicate subject-matter jurisdiction. They contend that subject-matter jurisdiction can always be challenged (and if the court lacked jurisdiction, then the judgment was "void"). But even assuming that specific arguments regarding subject-matter jurisdiction "may be raised . . . at any stage in the litigation, even after trial and the entry of judgment," *Arbaugh v. Y&H Corp*., 546 U.S. 500, 506 (2006), in this case Defendants' arguments plainly fail.[5]

[6]First, MiliGov did in fact have standing. As the High Court reasoned, MiliGov had a beneficial interest in the $40,000—the boat was for its use. The money was allocated by the RMI for MiliGov. Indeed, Mili Atoll is *part of* the RMI (the co-Plaintiff). At minimum, MiliGov was a third-party beneficiary of the RMI's agreement to provide the $40,000 in funds to MJCC as payment for the boat, intending to benefit MiliGov. *See, e.g., Flexfab, LLC v. United States*, 424

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[5]It is not always true that subject-matter jurisdiction may be challenged after entry of judgment. Some courts have held that if jurisdiction could have been challenged on direct appeal—but was not—then Rule 60(b) cannot be used later to raise jurisdiction to void the judgment. See Bell, 214 F.3d at 801 ("That is why a lack of subject-matter jurisdiction is not by itself a basis for deeming a judgment void [under Rule 60(b).]"); *In re G.A.D., Inc.*, 340 F.3d 331, 336 (6th Cir. 2003) ("[A] Rule 60(b)(4) motion will succeed only if the lack of subject matter jurisdiction was so glaring as to constitute a total want of jurisdiction, or no arguable basis for jurisdiction existed.") (citations and internal quotation marks omitted). As *Bell* reasoned in addressing a Rule 60(b) challenge to subject-matter jurisdiction:

> To allow a ground that can be adequately presented in a direct appeal [such as subject matter jurisdiction] to be made the basis of a collateral attack would open the door to untimely appeals . . . . The losing party could reserve the ground until he had presented it unsuccessfully to the district court in the form of a Rule 60(b) motion. That is not permitted[.]

214 F.3d at 801. We need not, however, decide whether to adopt the reasoning in these cases because, here, the jurisdictional arguments clearly lack merit. That is, Plaintiffs plainly had, and still have, standing to bring their claims.

F.3d 1254, 1263 (Fed. Cir. 2005) (concluding that a third-party beneficiary had standing to enforce a contract); *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016) ("As the Restatement makes clear, typical third-party beneficiary situations arise when, for example, one party promises another to pay a debt to a third party. In such circumstances, the third party is a third-party beneficiary with standing to sue on the contract.") (citing Restatement (Second) of Contracts § 302 illus. 1 (1981)).

[7]Second, Defendants' argument that the RMI should not be a party is unavailing. Even if the RMI had sought dismissal earlier, the High Court refused (properly) to dismiss it because it was a necessary party to claims in the Complaint. The RMI is not challenging that refusal, and it remained a Plaintiff throughout trial, and is an Appellee here. Thus, even if MiliGov lacked standing, it would still be sufficient for justiciability purposes that the RMI has standing. *See, e.g., Kostick v. Nago*, 960 F. Supp. 2d 1074, 1089-90 (D. Haw. 2013) ("It is enough, for justiciability purposes, that at least one party with standing is present.") (citing *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999)).

C. The High Court Did Not Abuse its Discretion in Denying the Motion to Strike Plaintiffs' Opposition to the Rule 60(b) Motion

[8]Finally, the High Court did not abuse its discretion in allowing (i.e., not striking) Plaintiffs' opposition to Defendant's Rule 60(b) Motion. At most, the opposition was filed two days late, but circumstances existed that gave discretion to the High Court to excuse the late filing. There was no prejudice to Defendants because the High Court allowed Plaintiffs to file a Reply memorandum. Moreover, Defendants had violated a court order by filing the motion to strike without permission. *See, e.g., Green v. Baca*, 306 F. Supp. 2d 903, 913 n.40 (C.D. Cal. 2004) ("Because there is no indication that plaintiff was prejudiced by the one-day late filing, the court exercises its discretion to consider the declaration.") (citations omitted); *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009) ("The discretionary determination to accept the late filing was not an abuse of discretion.").

IV. CONCLUSION

Because all of Defendants' arguments in their Rule 60(b) Motion could have been brought on direct appeal (but were not), well-settled principles barred their arguments. The High Court also properly rejected Defendants' arguments challenging subject-matter jurisdiction. There was no abuse of discretion in denying Defendants' motion to strike the opposition to the Rule 60(b) motion.

AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

LEKKA, Plaintiff,
v.
KILUWE (as CEO), Defendant.

SCT CN 2019-002 (HCT CN 2019-046)

* * *

KONOU and LEHMAN, Plaintiffs,
v.
KILUWE (as CEO) and KAWAKAMI (as AAG), Defendants.

SCT CN 2019-002 (HCT CN 2019-069)

OPINION ON REMOVED QUESTION

Argued August 22, 2019
Filed October 9, 2019

Summary

In its Opinion on the Removed Question from the High Court, the Supreme Court held that P.L. 2016-28, which denied the right of Marshallese residing outside of the Marshall Islands to vote in national and local elections, is unconstitutional. Chief Justice Daniel Cadra, in agreement with Associate Justice Seeborg, and Associate Justice Seabright, who expressed concurrence through a separate opinion, concluded that a qualified Marshallese voter residing outside the Marshall Islands possesses the constitutional right to participate in Marshall Islands national or local elections. However, this right does not extend to voting by postal ballot or any other specific method unless authorized by Act or regulation.

Since P.L. 2016-028 effectively eliminates all practical means for plaintiffs and others in a similar situation to exercise their constitutionally protected right to vote without providing a reasonable alternative method, it imposes an unreasonable burden on plaintiffs' voting rights and is therefore unconstitutional. However, the Supreme Court acknowledges the challenge posed by the timing of the filing of plaintiffs' claims, which occurred in close proximity to the November 2019 elections. This timing imposes an undue burden on the government to either make postal ballots available on short notice or provide an alternative method of voting to qualified

non-resident Marshallese voters like the plaintiffs. Therefore, the Supreme Court has decided that its ruling will apply prospectively only after the November 2019 elections and has returned the case to the High Court for any necessary further proceedings to resolve the matter."

Digest

1. CONSTITUTIONAL LAW – *Construction – Rules of Interpretation*: In the absence of some textual or logical support, we will not read into the Constitution a provision not contained therein.

2. CONSTITUTIONAL LAW – *Construction – Right to Vote – Postal Ballots*: There is no language in the text of the Constitution which creates the right of qualified Marshallese voters to vote by postal ballots or by some specific alternative method.

3. CONSTITUTIONAL LAW – *Construction – Right to Vote*: It has been established beyond question that there is a fundamental right to vote. Despite the fundamental right to vote, there is no corresponding right to vote by absentee ballot.

4. CONSTITUTIONAL LAW – *Construction – Rules of Interpretation*: The Constitution should be construed so as to give effect to the intent of the framers and the people who adopted it. In arriving at the intent and purpose of a Constitutional provision the construction should be broad, liberal, or equitable, rather than technical. In construing the Constitution, the court should make "value judgments" rather than apply strict technical rules of statutory construction. In construing the Constitution, the court should make "value judgments" rather than apply strict technical rules of statutory construction.

5. CONSTITUTIONAL LAW – *Construction – Right to Vote*: The framers of the Constitution placed such a high value on the right of eligible Marshallese citizens to vote that they characterized that right as "universal" available to "all citizens"; at least as applied to national elections.

6 CONSTITUTIONAL LAW – *Construction – Right to Vote*: The framers' use of the word "universal" and the phrase "all citizens" evidences the framers' intent that all qualified voters, regardless of residence within or without the Republic, have not only the right to vote for members of the Nitijela but also that a "system" for effectuating that right be provided.

7. CONSTITUTIONAL LAW – *Construction – Right to Vote – Postal Ballots*: Postal ballot voting by nonresident qualified Marshallese voters has been the norm.

8. CONSTITUTIONAL LAW – *Construction – Right to Vote – Postal Ballots*: With appropriate protections, the Nitijela may well be within its power to eliminate postal ballot voting by non-resident eligible Marshallese citizens. The voting franchise, however, once

granted cannot later be withdrawn by disparate treatment of one class of qualified voters over that of another. There must be some alternative system to postal ballot voting provided so that one class of qualified voters is not disenfranchised.

9. CONSTITUTIONAL LAW – *Construction – Right to Vote – Postal Ballots*: With the elimination of the postal vote for non-resident eligible Marshallese citizens, there is no alternative system in place to comply with the framers' intent of universal suffrage of all qualified Marshallese voters. With no practical means for such voters to exercise their right to vote, plaintiffs have been disenfranchised of their constitutional right to vote.

10. CONSTITUTIONAL LAW – *Constitutionality of Statutes – P.L. 2016-028*: By eliminating voting by postal ballot for qualified voters residing outside the Republic, other than those "temporarily" absent from the Republic, P.L. 2016-028 creates a residency requirement not found in the Constitution because no practical means for voting is afforded to plaintiffs and those similarly situated who may be unable to afford the cost of traveling to the Marshall Islands to cast their votes.

11. CONSTITUTIONAL LAW – *Constitutionality of Statutes – P.L. 2016-028*: The basic principle of constitutional adjudication is the presumption of constitutionality; the strong presumption that all regularly enacted statutes are constitutional. This Court has previously stated that "[t]he presumption of constitutionality is a strong one, and a court must make every effort to find an interpretation of a statute that is consistent with the Constitution. This presumption of constitutionality, however, is not irrebuttable. Plaintiffs have raised equal protection and due process challenges to P.L. 2016-028 which we address below.

12. CONSTITUTIONAL LAW – *Construction – Equal Protection – Strict Scrutiny*: When a statute classifies by race, alienage or national origin, or impinges on personal rights protected by the Constitution, it will be subjected to "strict scrutiny" and will be sustained only if suitably tailored to serve a compelling government interest.

13. CONSTITUTIONAL LAW – *Construction – Equal Protection – Strict Scrutiny*: P.L. 2016-028 does not classify qualified voters on the basis of race, alienage or national origin. Therefore, strict scrutiny of P.L. 2016-028 is not required.

14. CONSTITUTIONAL LAW – *Construction – Equal Protection*: It is well settled that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.

15. CONSTITUTIONAL LAW – *Construction – Equal Protection – Rational Basis*: If a plaintiff alleges that he or she has been treated differently than similarly situated voters, without a

corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.

16. CONSTITUTIONAL LAW – *Construction – Equal Protection – Strict Scrutiny*: On the other extreme, when a classification severely burdens the right to vote, as with poll taxes, strict scrutiny is the appropriate standard.

17. CONSTITUTIONAL LAW – *Construction – Equal Protection – Strict Scrutiny*: We find that the time and expense required of plaintiffs in traveling to the Republic is a substantial burden on exercising their right to vote which requires a more exacting standard of review than the mere rational basis test. On the other hand, we find that the cost of travel and associated expenses does not rise to the level of a "poll tax" or similar governmentally imposed burden on exercising plaintiff's right to vote which would require the most exacting standard of strict scrutiny.

18. CONSTITUTIONAL LAW – *Construction – Equal Protection – Intermediate Scrutiny*: An intermediate standard between strict scrutiny and rational basis should be employed in evaluating plaintiff's Equal Protection claim. To evaluate a law respecting the right to vote –- whether it governs voter qualifications, candidate selection, or the voting process –- we use the approach set out in *Burdick*. The *Burdick* Court stated the standard as follows: "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forth by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'"

19. CONSTITUTIONAL LAW – *Construction – Access to Electoral Processes*: Plaintiffs do not need to show that they are legally prohibited from voting, but only that burdened voters have few alternate means of access to the ballot.

20. CONSTITUTIONAL LAW – *Construction – Access to Electoral Processes*: Under the *Anderson-Burdick* analysis, we find a substantial burden on plaintiffs' right to vote with no alternative means of exercising their right to vote other than to incur the expense of travel.

21. CONSTITUTIONAL LAW – *Construction – Access to Electoral Processes*: The Republic must propose an interest sufficiently weighty to justify the limitation.

22. CONSTITUTIONAL LAW – *Construction – Equal Protection – Intermediate Scrutiny*: The first interest identified by the Bill Summary to "allow Marshallese citizens who are tax-payers and residing on the Islands to determine the persons or persons to represent them in their Constituencies" does not survive an intermediate level of scrutiny under *Anderson-Burdick*

or even a less demanding "rational basis" test because the Constitution does not impose any qualification that a voter be either a "taxpayer" or "reside on the Islands."

23. CONSTITUTIONAL LAW – *Construction – Access to Electoral Processes*: The Republic is not required to provide proof, much less significant proof, of individual overseas voter fraud before the Nitijela may take steps to prevent it.

24. CONSTITUTIONAL LAW – *Construction – Equal Protection – Rational Basis*: The problem with the Bill Summary's second justification is not that the Nitijela is precluded from taking prophylactic steps to prevent voter fraud but, rather, that the method of doing so is not reasonably calculated to accomplishing that goal.

25. CONSTITUTIONAL LAW – *Construction – Equal Protection – Intermediate Scrutiny*: The third and fourth justifications provided by the Bill Summary do not survive intermediate scrutiny. The fundamental right of qualified Marshallese voters to participate in the electoral process outweighs whatever delay in tabulating ballots may be caused by postal voting and whatever minimal expense may be imposed on the Republic by making postal ballots available.

26. CONSTITUTIONAL LAW – *Construction – Equal Protection – Intermediate Scrutiny*: We conclude P.L. 2016-028 is unconstitutional under an equal protection analysis because it disenfranchises that class of nonresident voters, including plaintiffs, previously granted the right to vote by postal ballot from voting on equal terms with that class of voters who are "temporarily" absent. Defendants have offered no constitutionally permissible explanation for the disparate treatment. The reasons advanced by the Bill Summary do not survive intermediate scrutiny under *Anderson-Burdick*.

27. CONSTITUTIONAL LAW – *Construction – Access to Electoral Processes*: Expatriate Marshallese citizens do not lose their constitutional rights as Marshallese citizens *vis a vis* the Marshall Islands simply because they happen to be outside the geographical jurisdiction of the Marshall Islands.

28. STATUTES – *Construction and Operation – Extraterritoriality*: The presumption against extraterritoriality has to do with respect for the rights of sovereign nations. A state's sovereignty is built on the idea of autonomy and the ability to regulate conduct within its borders. Extraterritoriality is defined as the exercise of enforcing a law beyond the nation's boundaries.

29. STATUTES – *Construction and Operation – Extraterritoriality*: There appears to be an expansion of extraterritorial application of a nation's laws, at least as those laws pertain to crimes, as the world has become more global and the substance of many crimes have connections to more than one country. Issues regarding extraterritoriality most often arise in the areas of

international commerce or enforcement of criminal laws against actors outside the jurisdiction of the nation but which acts effect that nation.

30. STATUTES – *Construction and Operation – Rules of Interpretation – Extraterritoriality*: Defendants have cited no case which has applied the presumption against extraterritoriality in the context of voting rights of expatriates of other nations residing within the United States or elsewhere.

31. STATUTES – *Construction and Operation – Rules of Interpretation – Political Question*: The "political question" or "justiciability" doctrine does not bar the courts from hearing cases involving an individual's constitutional rights to due process or equal protection of the laws.

32. STATUTES – *Construction and Operation – Rules of Interpretation – Political Question*: The six criteria in determining whether a case is non-justiciable under the "political question doctrine are set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Counsel

Jack Jorbon and Atbi Riklon, counsel for Plaintiff Lekka
Tiantaake Beero-Sexton, counsel for Plaintiffs Konou and Lehman
Falai Taakaki, Acting Attorney-General, and Gregory Danz, counsel for Defendants Kiluwe (as CEO) and Kawakami (as AAG)

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEEBORG,[2] Acting Associate Justices

OPINION ON REMOVED QUESTION

CADRA, C.J., with whom SEEBORG, concurs; SEABRIGHT, A.J., concurring in the result by separate opinion:

I. INTRODUCTION

Pursuant to Article VI, Section 2(3) of the Constitution and Supreme Court Rules of Procedure, Rule 18 (a), the High Court has removed the following question for determination by the Supreme Court:

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, Northern District of California, sitting by appointment of Cabinet.

> Is there a constitutional right for a qualified Marshallese voter residing outside the Marshall Islands to vote in the Marshallls lands national or local elections by postal ballots, or otherwise?[3]

The parties' briefing, to which we are referred by the High Court's removal order, addresses Public Law (P.L.) 2016-028 which is the underlying basis of the parties' dispute. We find it necessary to address that law in answering the removed question.

For the reasons set forth herein, we conclude that a qualified Marshallese voter residing outside the Marshall Islands has the constitutional right to vote in the Marshall Islands national or local elections but does not have the right to vote by postal ballot or by some other specific method unless authorized by Act or regulation. Because P.L. 2016-028 eliminates all practical means for plaintiffs and others similarly situated to exercise their constitutionally protected right to vote without providing some reasonable alternative method of exercising that right, we conclude P.L. 2016-028 presents an unreasonable burden on plaintiffs' right to vote and is unconstitutional.

We return this case to the High Court for such further proceedings which may be necessary to resolve this case.

II. FACTUAL & PROCEDURAL BACKGROUND

We do not make findings of fact and are confined to the record as developed by the parties. The parties have stipulated to the following facts:

1. Plaintiffs are non-resident citizens of the Marshall Islands residing in the State of Hawaii and State of Indiana, United States of America.

2. Plaintiffs are qualified registered voters entitled to vote in the electoral districts in which they are registered to vote, having land rights in such electoral district; and

[3]Amended Removal Order, filed August 22, 2019. The issue as originally referred was "Is there a constitutional right for a qualified Marshallese voter permanently residing outside the Marshall Islands to vote in the Marshall Islands national or local elections by postal ballots, or otherwise?" Removal Order, filed August 21, 2019.

3. Each of the plaintiffs had applied for a postal ballot pursuant to the procedure set forth under Sec. 118 of the Elections and Referenda Regulations of 1993, and each application was denied based on the fact that postal ballot(s) for all RMI eligible voters permanently residing outside of the Republic is no longer available under the Election and Referenda Act, 1980, as amended by P.L. 2016-028.[4]

We take notice of the uncontested legislative fact that the Nitijela created the right of qualified nonresident Marshallese voters to vote by means of postal ballot and that has been the historical practice up to the enactment of P.L. 2016-028.

III. THE PARTIES' CONTENTIONS ON REMOVED QUESTION

A. Plaintiff's Contentions

As summarized by the High Court, plaintiffs contend that P.L. 2016-028 is unconstitutional because it deprives them of the constitutional right to participate in the electoral process as voters, as guaranteed them under Article IV, Section 3 and Article II, Section 14(2) and (3).[5]

Plaintiffs argue that Article IV, Section 3, contemplates a system of "universal suffrage" which the government must accommodate by postal ballot or some effective alternative means to all eligible voters absent from the Republic on election day. Plaintiffs claim that the Nitijela's passage of P.L. 2016-028, which eliminates the historical practice of postal voting for all eligible non-resident voters, has the effect of depriving non-resident citizens who cannot afford to "buy an airplane ticket" to be present and vote in person of their right to participate in the electoral process. Further, plaintiffs contend that the requirement that such a voter "buy an airplane ticket" constitutes an impermissible fee on the voter in contravention of Article II, Sections 14(2) and (3) and Section 18(1). Plaintiffs assert P.L. 2016-028 violates equal protection under Article II, Section 12 because that law creates a class of voters outside the Republic who can still vote

[4] *Id.*

[5] Removal Order filed 8/21/19.

via postal ballot (temporarily absent voters meeting the requirements of P.L. 2016-028) and another class which cannot (non-resident off-island voters such as plaintiffs). Further, plaintiffs argue that the class of voters "temporarily absent" from the Republic is vague which, if allowed to stand, may result in many lawsuits. Because voting is a fundamental personal right, plaintiffs assert the applicable standard of review is "strict scrutiny."[6]

B. Defendants' Contentions

As summarized by the High Court, defendants deny plaintiffs' rights have been violated by P.L. 2018-028 because plaintiffs are not permanent residents of the Marshall Islands and have no constitutional right to participate in the electoral process as voters by means of a postal ballot.[7]

Defendants argue that P.L. 2016-028 does not deprive plaintiffs and others similarly situated from voting in the upcoming elections; that there is nothing in P.L. 2016-028 which affects plaintiffs' constitutional right to vote and nothing which takes away plaintiffs' right to vote under Article IV, Section 3. Defendants argue there is nothing in the Constitution that says a voter has a right to use a postal ballot or any other particular voting method other than the right to vote by secret ballot for elections of members of the Nitijela. Defendants argue that principles of "extraterritoriality" preclude application of Article II constitutional rights anywhere outside the Republic in the absence of an international or bi-lateral agreement with the United States or other nations to do so. Defendants further assert that plaintiffs' claims involve a "political question" which the courts cannot or should not consider in the exercise of its jurisdiction. Finally, defendants argue that plaintiffs have procrastinated, acting in a dilatory and stalling

[6]*See* Plaintiffs' (Evelyn Konou and Anna Lehman) Motion for Summary Judgment filed July 1, 2019; Plaintiffs' Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment filed August 2, 2019. Plaintiff's (Betwel Lekka) Motion for Summary Judgment filed June 13, 2019; Defendant's Opposition dated July 15, 2019; Plaintiff's Reply dated July 26, 2019.

[7]Removal Order filed 8/21/19.

manner, waiting almost three years to bring their claims as the national elections are quickly approaching.[8]

IV. ANALYSIS

A. The Constitution, Article II, Section 14(2), and Article IV, Section (3) Guarantee the Right of a Qualified Marshallese Voter Residing Outside the Marshall Islands to Vote but Does Not Guarantee The Right of Such an Individual to Vote by Postal Ballot or by Any Particular Method.

The Constitution, Article II, Section 14 (2) provides:

> (2) Every person has the right to participate in the electoral process, whether as a voter or as a candidate for office, subject only to the qualifications prescribed by this Constitution and to election regulations which make it possible for all eligible persons to take part.

Article IV, Section 3, applicable to elections to the Nitijela, provides:

> (3) Elections of members of the Nitijela shall be conducted by secret ballot under a system of universal suffrage for all citizens of the Republic of the Marshall Islands who have attained the age of 18 years, and who are otherwise qualified to vote pursuant to this section.

[1]In the absence of some textual or logical support, we will not read into the Constitution a provision not contained therein. *In the Matter of the 19th Nitijela Session*, 2 MILR 134, 140 (1999.) The Supreme Court has previously made it clear that the courts may not rewrite the Constitution. *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 115, 120 (2009). If the constitutional language is clear, "judicial inquiry must cease." *Lekka v. Kabua, et al.*, 3 MILR 168, 172 (2013)(addressing statutory interpretation) quoting *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012). Our analytical starting point thus begins with the clear text of the Constitution.

1. The Constitution provides no textual basis for the right to vote by postal ballot.

[8] *See* Defendant CEO Kiluwe Answer in Opposition to Plaintiffs' Motion for Summary Judgment.

[2]There is no language in the text of the Constitution which creates the right of qualified Marshallese voters to vote by postal ballots or by some specific alternative method. The methods and means of effectuating the constitutional right to vote is vested in the Nitijela by virtue of Article IV, Section 1(2), which includes the power "to repeal, revoke or amend any law, to confer, by Act, the authority to promulgate rules, regulations, orders or subordinate instruments to further stated purposes in such Acts; and to make laws that are necessary and proper for carrying into execution any of its other powers, including powers vested by the Constitution in any other government agency or public officer." The Constitution does not require the Nitijela to adopt any particular voting system such as postal balloting. The Nitijela can implement whatever balloting process it may deem appropriate to effectuate the right to vote so long as the constitutional right to vote is not denied to an individual or class of individuals who are qualified to vote.

Because the text of the Constitution does not mandate postal voting or any particular method of voting, the next analytical step is whether some specific method of voting can be logically inferred from the text.

2. A right to vote by postal ballot cannot be logically inferred from the Constitution.

We cannot logically read into the Constitution any particular method, such as voting by postal ballot, in which the right to vote must be exercised. While the right to vote is fundamental the right to vote by any particular method, such as postal voting, is not. We look to decisional authority of the United States in reaching this conclusion.[9]

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[9]When interpreting and applying the RMI Constitution, Article I, Section 3(1) of the RMI Constitution requires that the courts of the Marshall Islands look to the decisions of courts of countries having constitutions similar in the relevant respect. In the Matter of P.L. No. 1995-118, 2 MILR 105, 109 (1997). The right to vote in the United States is considered an "implicit right" not expressed in the text of the original Constitution but secured by later amendments and further protected by extensive voting rights legislation. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665-66 (1966) (implied right to vote); U.S. Constitution, 14th and 15th Amendments; Voting Rights Act of 1965, 52 U.S.C. 10101, et seq. The RMI Constitution makes the right to vote "explicit."

[3]It has been established beyond question that there is a fundamental right to vote. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "Voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. Of Elections v. Socialist Workers' Party*, 440 U.S. 173, 184 (1979). Despite this principle, however, "there is no corresponding right to vote by absentee ballot." *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969). Specifically, the Supreme Court of the United States has held that the right to vote in any manner is not absolute. *Burdick*, *supra*, at 433. State courts have similarly held that the opportunity to vote by postal or absentee ballot is a privilege extended by the legislature and is not an absolute right. *See, e.g., Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 727 (Ky 1963); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1192 (Ill. 2004).

We conclude that the right of a qualified person to vote is a fundamental right under the Marshall Islands Constitution but the right to vote by absentee or postal ballot is not. This conclusion bears on the level of scrutiny we apply to P.L. 2016-028 in plaintiffs' Equal Protection challenge as discussed below.

3. There is no right of a qualified Marshallese voter residing outside the Marshall Islands to vote by postal ballot or by any other specific means.

Having found that neither the text of the Constitution nor a logical inference from the text creates the right to vote by postal ballot or by any other specific method, our inquiry ceases and we answer, in part, the question posed by the High Court's referral order in the negative:

> "There is not a constitutional right of a qualified Marshallese voter residing outside the Marshall Islands to vote by postal ballot."

The issue remaining to be addressed by the High Court's removed question is whether a qualified Marshallese voter residing outside the Marshall Islands has a right to vote by some reasonably practical means "otherwise" than by postal ballot.

Regardless of whether the fundamental right to vote is implicit or explicit in the two constitutional texts, the issues raised by the parties have been addressed by United States courts. We find United States caselaw provides guidance in interpreting the Marshall Islands Constitution and provides a workable framework for resolving Equal Protection and Due Process challenges to the voting laws and regulations of the Marshall Islands.

B. The Constitution Requires That Some Practical Method Be Provided Enabling Qualified Marshallese Voters Residing Outside The Marshall Islands to Vote.

1. While there is no Constitutional right to vote by postal ballot or other specific method, the Constitution contemplates that there must be some means for *all* eligible voters, regardless of residence, to exercise their right to vote because the Constitution contemplates a *system of universal* suffrage for *all* eligible Marshallese citizens.

[4]The Constitution should be construed so as to give effect to the intent of the framers and the people who adopted it. *See*, *generally*, 16 C.J.S., Constitutional Law, Sec. 20. In arriving at the intent and purpose of a Constitutional provision the construction should be broad, liberal, or equitable, rather than technical. *Id*. In construing the Constitution, the court should make "value judgments" rather than apply strict technical rules of statutory construction.

> The very nature of constitutional interpretation calls more for the making of value judgments than for the application of specific rules, principles, conceptions, doctrines or standards.

Zeller v. Donegal School District, 517 F.2d 800, 804 (3rd Cir. 1975) citing to Pound, *Hierarchy of Sources & Forms in Different Systems of Law*, 7 Tul. L. Rev. 475, 482-486 (1933).

[5]The right to participate in a representative democracy through the elective franchise granted by the Constitution is fundamental.[10] The framers of the Constitution placed such a high value on the right of eligible Marshallese citizens to vote that they characterized that right as "universal" available to "all citizens"; at least as applied to national elections. Article IV, Section 3(1) provides:

> Elections of members of the Nitijela shall be conducted by secret ballot under a system of universal suffrage for all citizens of the Republic of the Marshall Islands who have attained the age of 18 years, and who are otherwise qualified to vote pursuant to this Section. (Emphasis by italics added).

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[10] *See* discussion above.

[6][7]The framers' use of the word "universal"[11] and the phrase "all citizens"[12] evidences the framers' intent that all qualified voters, regardless of residence within or without the Republic, have not only the right to vote for members of the Nitijela but also that a "system" for effectuating that right be provided. Although the parties dispute when voting by postal ballot was first made available to non-resident eligible voters, the Nitijela implemented the intent of the framers of the Constitution that a system be provided for universal suffrage for all eligible Marshallese voters when it passed the Elections and Referenda Act as amended in 1983.[13] That Act provided for postal ballot voting by nonresident qualified Marshallese voters. Postal ballot voting by nonresident qualified Marshallese voters has been the norm since that time.

2. The voting franchise once granted to plaintiffs and those similarly situated has been withdrawn by P.L. 2016-028 with no alternative practical means being provided to exercise the right to vote.

[8]With appropriate protections, the Nitijela may well be within its power to eliminate postal ballot voting by non-resident eligible Marshallese citizens. The voting franchise, however, once granted cannot later be withdrawn by disparate treatment of one class of qualified voters over that of another. *See, e.g., Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). There must be some alternative system provided so that one class of qualified voters is not disenfranchised. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974)(The

[11]"Universal" is defined as "of, affecting, or done by all people or things in the world or in a particular group; applicable to all cases. 'universal adult suffrage.'" Oxford on-line dictionary https://www.lexico.com/en/definition/universal.

[12]"All" is defined as "used to refer to the whole quantity or extent of a particular group or thing." https://www.lexico.com/en/definition/all.

[13]As previously noted, the parties cannot seem to agree as to legislative fact. Plaintiffs contend the right to postal balloting existed from Trust Territory administration. Defendants represent "the original Elections and Referenda Act of 1980, P.L. 1980-20, did not provide separate postal votes in the statute. Since postal ballot voting was created in 1983, the Elections and Referenda Act has been amended by Nitijela on eleven (11) occasions including the present Section 162." It is not necessary to resolve this factual dispute because we find the framers' intent was to create a system of universal suffrage. It is irrelevant for purposes of resolving the removed question exactly when that system was actually implemented. The fact is that the Nitijela did grant the franchise to nonresident qualified Marshallese voters to vote by postal ballot and that has been the historical practice ever since.

procedure of disallowing absentee ballots to individuals in prison would be unconstitutional, if no other means were offered to allow them to vote.).

[9]With the elimination of the postal vote for non-resident eligible Marshallese citizens, such as plaintiffs, there is no alternative system in place to comply with the framers' intent of universal suffrage of all qualified Marshallese voters. In the absence of some practical alternative system providing for universal suffrage, the voting franchise originally granted to "all" eligible nonresident Marshallese voters has, effectively, been withdrawn because no practical means of exercising the right to vote has been provided. We find it unreasonable for qualified nonresident Marshallese voters to incur the time and expense of flying into the Marshall Islands to cast their vote. With no practical means for such voters to exercise their right to vote, plaintiffs have been disenfranchised of their constitutional right to vote.

3. P.L. 2016-028, in effect, creates a residency requirement not found in the Constitution.

[10]As applied to plaintiffs and those similarly situated, P.L. 2016-028 in effect creates a residency requirement not found in the Constitution. The government may not by indirect means eliminate a Constitutional right or impose a condition, not found in the Constitution, which unreasonably burdens the exercise of a Constitutional right. The financial and time burden imposed on plaintiffs to travel to the Marshall Islands to exercise their Constitutional right to vote is unreasonable given the intent of the framers that a system be in place affording universal suffrage to all qualified Marshallese voters. P.L. 2016-028 allows those qualified voters "temporarily" absent from the Republic the right to vote by postal ballot whereas another class of voters including plaintiffs is denied that right. As expressed in the Bill Summary, discussed below, the intent of that legislation appears to be that the right to vote be restricted to those voters who are taxpayers residing within the Republic. The Constitution, Article II, Section 14(3) sets forth no requirement of residency within the Republic as a qualification for voting. As applied, P.L. 2016-028 creates a residency requirement because no practical means for voting is

afforded to plaintiffs and those similarly situated who may be unable to afford the cost of traveling to the Marshall Islands to cast their votes.

C. P.L. 2016-028 Is Unconstitutional Under an "Equal Protection" Analysis.

1. P.L. 2016-028 is presumed constitutional but that presumption is rebuttable.

[11]The basic principle of constitutional adjudication is the presumption of constitutionality; the strong presumption that all regularly enacted statutes are constitutional. *Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Parham v. Hughes*, 441 U.S. 347 (1979); *Robinson v. Marshall*, 66 F.3d 249 (9th Cir. 1995). This Court has previously stated that "[t]he presumption of constitutionality is a strong one, and a court must make every effort to find an interpretation of a statute that is consistent with the Constitution." *In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 34 (1995). This presumption of constitutionality, however, is not irrebuttable. Plaintiffs have raised equal protection and due process challenges to P.L. 2016-028 which we address below.

2. Plaintiffs' "Equal Protection" Challenge.

a. We adopt an intermediate level of scrutiny under Anderson-Burdick in analyzing plaintiffs' equal protection claim.

Plaintiffs argue P.L. 2016-028 violates equal protection under the laws as guaranteed by the Constitution, Article II, Section 12, because that law restricts voting by postal ballot to those "temporarily" out of the Republic on the day of the election. Thus, P.L. 2016-028 creates one class of voters outside of the Republic who can still vote via postal ballot whereas another class of citizens outside the Republic cannot.

[12]When a statute classifies by race, alienage or national origin, or impinges on personal rights protected by the Constitution, it will be subjected to "strict scrutiny" and will be sustained only if suitably tailored to serve a compelling government interest. *In the matter of P.L. Nos. 1993-56 and 1994-87*, supra, at 39.

[13]P.L. 2016-028 does not classify qualified voters on the basis of race, alienage or national origin. That law, however, does impinge on the right to vote, a personal right, secured by the Constitution. A distinction between the right to vote and the right to vote by a particular manner not granted by the Constitution must be made in analyzing an Equal Protection challenge. Although plaintiffs have the right to vote, the right to vote by absentee or postal ballot is not a personal right secured by the Constitution. Therefore, strict scrutiny of P.L. 2016-028 is not required under the rule announced in *In the matter of P.L. Nos. 1993-56 and 1994-87*, supra.

[14]It is well settled that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). The Equal Protection clause applies when voters are classified in disparate ways (*see, e.g., Bush v. Gore*, 531 U.S. 98, 104-05 (2000)) or when a law places restrictions on the right to vote (*see, e.g., League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (voting system that burdens the exercise of the right to vote violates equal protection)). "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000). "Having once granted the right to vote on equal terms, the State may not, by later and disparate treatment, value one person's vote over that of another." *Bush, supra*, 104-05. *See also Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

[15][16]If a plaintiff alleges that he or she has been treated differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used. *See, e.g., McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 – 09 (1969) (applying rational basis to a statute that prohibited plaintiff's access to absentee ballots where no burden on the right to vote was shown); *Biener v. Calio*, 361 F.3d 206, 214-15 (3rd Cir. 2004) (applying rational basis where there was no showing of an infringement on the fundamental right to vote). On the other extreme, when a classification severely burdens the right to vote, as with poll taxes, strict scrutiny is the

appropriate standard. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1996) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

In this case, the uncontroverted evidence is that postal ballot voting by all eligible citizens residing outside the Republic, without classifications, has been the historical norm. P.L. 2016-028 creates a classification denying non-resident eligible voters not "temporarily absent" from the Republic from voting by the previously established method of postal ballot. The burden identified by plaintiffs is that their right to vote, as a practical matter, is denied because they must travel to the Marshall Islands to exercise that right, thus incurring the expense of airfare or other means of transportation. We also note that there is the extra burden of time expended to exercise plaintiffs' constitutional right to vote which is not incurred by resident eligible voters or members of the class of "temporarily" absent voters. Additionally, there is the factual issue of whether an influx of flying voters can be accommodated by the air carrier(s) servicing the Marshall Islands.

[17][18]We find that the time and expense required of plaintiffs in traveling to the Republic is a substantial burden on exercising their right to vote which requires a more exacting standard of review than the mere rational basis test. On the other hand, we find that the cost of travel and associated expenses does not rise to the level of a "poll tax" or similar governmentally imposed burden on exercising plaintiff's right to vote which would require the most exacting standard of strict scrutiny.[14] An intermediate standard between strict scrutiny and rational basis should be employed in evaluating plaintiff's Equal Protection claim. We therefore adopt the *Anderson-Burdick* "flexible standard" as adopted by the United States Supreme Court in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). "To evaluate a law respecting the right to vote –- whether it governs voter qualifications, candidate selection, or the voting process

[14]Plaintiffs argue the cost of airfare or some alternative means of transportation constitutes an impermissible fee on the right to vote in contravention of Art. II, Sec. 14(2),(3) and Sec. 18(1). This cost, however, is not imposed by the government.

–- we use the approach set out in *Burdick* . . . " (*Crawford, supra*, at 204, Scalia, J. concurring.). The *Burdick* Court stated the standard as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forth by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights.

Burdick, supra, at 434 (quoting *Anderson*, 460 U.S. at 789). There is no "litmus test" to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state's asserted justifications and "make the 'hard judgment' that our adversary system demands." *Crawford, supra*, at 190 (Stevens, J., announcing the judgment of the court).

b. Weighing the burdens imposed on Plaintiffs against the justifications offered for P.L. 2016-028.

[19]Having adopted the *Anderson-Burdick* intermediate level of review, we weigh the burdens imposed on plaintiffs against the burdens imposed on the Republic. Plaintiffs do not need to show that they are legally prohibited from voting, but only that "burdened voters have few alternate means of access to the ballot." *Citizens for Legislative Choice v. Miller*, 144 F .3d 916, 921 (6th Cir. 1998) (citing *Burdick*, 504 U.S. at 437-37).

[20]Plaintiffs are not legally prohibited from voting by P.L. 2016-028 as they can travel to the Republic to cast their votes. Travel to the Republic, however, undeniably places a substantial financial burden on individual plaintiffs and other non-resident or "off-island" eligible voters. Defendants do not deny this burden exists. Under the *Anderson-Burdick* analysis, we find a substantial burden on plaintiffs' right to vote with no alternative means of exercising their right to vote other than to incur the expense of travel.

[21]The individual financial and time burdens imposed on plaintiffs to exercise their only practical manner of exercising their right to vote must be weighed against the specific or

"precise" interests identified by the Republic. We must weigh "the character and magnitude of the asserted injury" against the "precise interests put forward by the State . . . taking into account the extent to which those interests are necessary to burden the plaintiff's rights." *Burdick, supra,* at 434. The Republic must propose an "interest sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

The "Bill Summary," Bill No. 06, identifies 4 objectives of the proposed legislation which was to become P.L. 2016-028:

1. allow Marshallese citizens who are tax-payers and residing on the Islands to determine the person or persons to represent them in their Constituencies;
2. to eliminate improper filing of postal affidavits in order to safeguard the authenticity of the voters ballot;
3. to expedite the counting and tabulation of ballots, to avoid prolonging the election process; and
4. to lessen the expenses for elections in the Marshall Islands.

[22]The first interest identified by the Bill Summary to "allow Marshallese citizens who are tax-payers and residing on the Islands to determine the persons or persons to represent them in their Constituencies" does not survive an intermediate level of scrutiny under *Anderson-Burdick* or even a less demanding "rational basis" test because the Constitution does not impose any qualification that a voter be either a "taxpayer" or "reside on the Islands." This interest is insufficient to justify an imposition on plaintiffs' right to vote because it suggests the purpose of P.L. 2016-028 is to disenfranchise constitutionally qualified voters who are no longer residents of the Marshall Islands which is a constitutionally impermissible purpose.

The second objective identified by the "Bill Summary," to safeguard the authenticity of the voter's ballot, might be a legitimate and compelling government interest surviving an intermediate or even strict scrutiny analysis under *Anderson-Burdick*'s sliding scale. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Burdick, supra*, at 433 (quoting *Storer v. Brown*, 415 U.S.

724, 730 (1974)). The government has a "compelling interest in preserving the integrity of the election processes, including an interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992). In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the Court observed:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. Thus, fraudulent voting effectively dilutes the votes of lawful voters. By instituting requirements to guard against abuse of the elective franchise, a state protects the right of lawful voters to exercise their full share of this franchise.

Defendants argue "it is possible that the Nitijela took the action they did in the 2016 amendment because of numerous reports of fraud that it received regarding in the delivery, administration, casting and tabulating of overseas postal ballots in national elections" stating, further, that "virtually all election cases filed with the Court appealing a decision of the Chief Electoral Officer over the past several elections involve problems with overseas postal voting." Plaintiffs counter that "there is no credible evidence of fraud but there were spoiled ballots because voters did not follow procedures." This problem, according to plaintiffs, can be easily fixed by clear instructions given over social media.

[23]Whether fraud actually exists in overseas postal ballot voting is an issue of fact on which the present record is silent.[15] The absence of proof of fraud in overseas voting might make the Nitijela's asserted justification of preventing fraud pretextual or illusory. The United States

[15]One of the draw-backs of filing these claims several years after passage of the challenged law and immediately before the scheduled elections is the obvious lack of a developed factual record. There has been no legislative history provided other than the Bill Summary, there is no factual support as to whether fraud does or does not exist, there is no evidence as to the cost of affording voters access to a postal ballot, etc.

Supreme Court has explicitly stated that "elaborate, empirical verification of the weightiness of the State's asserted justifications" is not required. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Rather, the government may take prophylactic measures to respond to potential electoral problems:

> To require States to prove actual [harm] as a predicate to the imposition of reasonable restrictions would invariably lead to endless court battles over the sufficiency of the evidence marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactivity, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro v. Socialist Workers' Party, 479 U.S. 189, 195-96 (1986). Therefore, the Republic is not required to provide proof, much less significant proof, of individual overseas voter fraud before the Nitijela may take steps to prevent it.

[24]The problem with the Bill Summary's second justification is not that the Nitijela is precluded from taking prophylactic steps to prevent voter fraud but, rather, that the method of doing so is not reasonably calculated to accomplishing that goal. P.L. 2016-028 allows those qualified voters "temporarily" residing outside the Republic to vote by postal ballot whereas the class of voters including plaintiffs are prohibited from doing so. There is no factual or logical basis for assuming that fraud is more prevalent among the class of voters residing outside the Republic from the class of those "temporarily" absent. This "fraud" justification appears purely pretextual and designed to disenfranchise that class of qualified Marshallese voters not "temporarily" absent.

[25]The third and fourth justifications provided by the Bill Summary do not survive intermediate scrutiny. The fundamental right of qualified Marshallese voters to participate in the electoral process outweighs whatever delay in tabulating ballots may be caused by postal voting

and whatever minimal expense may be imposed on the Republic by making postal ballots available.[16]

Finally, as discussed above, the class of nonresident qualified Marshallese voters including plaintiffs was previously granted the franchise to vote by postal ballot. Nonresident voters, whether temporarily absent or not, were afforded equal access to the ballot as resident voters. The franchise once granted to all nonresident qualified voters has now been withdrawn by operation of P.L. 2018-028, thus, valuing the votes of "temporarily" absent voters and resident voters over those votes of the class of nonresident voters not temporarily absent, including plaintiffs.

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later and arbitrary and disparate treatment, value one's person vote over that of another. *Bush, supra*, 531 U.S. at 104-05.

[26]We conclude P.L. 2016-028 is unconstitutional under an equal protection analysis because it disenfranchises that class of nonresident voters, including plaintiffs, previously granted the right to vote by postal ballot from voting on equal terms with that class of voters who are "temporarily" absent. Defendants have offered no constitutionally permissible explanation for the disparate treatment. The reasons advanced by the Bill Summary do not survive intermediate scrutiny under *Anderson-Burdick*.

3. Defendants' "extraterritoriality" argument.

Defendants argue that "the Constitution and laws of the Marshall Islands do not follow a citizen of the Marshall Islands who resides in another sovereign nation (in this case the United States) and do not apply with extraterritoriality in the other sovereign country. There is nothing

[16]Again, the record is devoid of any facts regarding delay or undue expense caused by affording nonresident qualified Marshallese voters the right to vote by postal ballot.

in the Constitution or laws of the Marshall Islands which remotely suggest[s] that they are applicable anywhere other than solely within the Marshall Islands."

[27]We summarily reject defendant's extraterritoriality argument because common sense dictates that expatriate Marshallese citizens do not lose their constitutional rights as Marshallese citizens *vis a vis* the Marshall Islands simply because they happen to be outside the geographical jurisdiction of the Marshall Islands.

[28][29]The presumption against extraterritoriality has to do with respect for the rights of sovereign nations. A state's sovereignty is built on the idea of autonomy and the ability to regulate conduct within its borders. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (discussing the importance of sovereignty and the ability of nations to govern their own laws). Extraterritorial jurisdiction can infringe upon a nation's sovereignty and deny a nation its full rights. *Id.* Extraterritoriality is defined as the exercise of enforcing a law beyond the nation's boundaries. *See, e.g.*, Extraterritorial Confusion: The Complex Relationship Between Bowman and Morrison and A Revised Approach to Extraterritoriality, 47 Val.U.L. Rev. 627, notes 7, 9 (explaining definition of extraterritoriality). There appears to be an expansion of extraterritorial application of a nation's laws, at least as those laws pertain to crimes, as the world has become more global and the substance of many crimes have connections to more than one country. *Id*. Issues regarding extraterritoriality most often arise in the areas of international commerce or enforcement of criminal laws against actors outside the jurisdiction of the nation but which acts effect that nation. *See, e.g., United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (extraterritoriality addressed in context of criminal law); *Morrison v. National Australia Bank, Ltd.*, 130 S.Ct. 2867 (2010) (extraterritoriality addressed in context of international trade, securities regulation); *United States v. Bowman*, 260 U.S. 94 (1992).

[30]Defendants have cited no decisional authority for the proposition that the presumption against extraterritoriality somehow precludes plaintiffs from asserting their rights as Marshallese citizens in a Marshall Islands court and/or that the allowance of external voting by postal ballot implicates a violation of the sovereignty of either the Marshall Islands or the nation in which the expatriate Marshallese voter may reside. External voting by Marshallese citizens

residing in the United States by postal ballot imposes no burden on the United States implicating its sovereignty.[17] Defendants have cited no case, and we are unaware of any, which has applied the presumption against extraterritoriality in the context of voting rights of expatriates of other nations residing within the United States or, conversely, expatriate United States citizens residing in some other nation. We observe that the United States allows postal voting in national elections for expatriate citizens residing abroad. *See, e.g.*, The Uniformed and Overseas Citizens Absentee Voting Act, 52 USC, Ch. 203, et seq. As of 2007, it was reported that there are 115 United Nations member countries and territories with provisions for external voting, including the United States, Australia, Mexico, Canada, the Philippines, the Marshall Islands and its neighboring jurisdictions of Cook Islands, Fiji, Federated States of Micronesia, Palau, Nauru, Vanuatu and New Zealand.[18] While it is not possible to perform a global search of decisional authority, it appears that there has been no challenge on extraterritoriality grounds to any of these external voting provisions.

We conclude that the presumption against extraterritoriality has no relevance to the issues before us.

4. The "political question" or "justicibility" doctrine does not preclude the courts from considering and ruling upon plaintiff's claims.

Defendants argue plaintiff's claims cannot be considered by the courts under the "political question" doctrine. We disagree.

[31][32]The "political question" or "justiciability" doctrine does not bar the courts from hearing cases involving an individual's constitutional rights to due process or equal protection of

[17]Other than providing use of the United States Postal Service (USPS) on an equal basis to other persons residing within the geographical boundaries of the United States and other areas serviced by the USPS, there is no burden on the United States and no threat to its sovereignty by the allowance of postal voting by Marshallese expatriate voters residing in the United States. Defendants have identified no threat to either Republic of the Marshall Islands or United States sovereignty or to the Marshall Islands' ability to regulate conduct within its borders by a Marshallese citizen's exercise of their right to vote, by postal ballot or otherwise.

[18]See Instituto Federal Electoral, Voting From Abroad, the International IDEA Handbook, https://www.idea.int/sites/default.

the laws. The seminal case of *Baker v. Carr*, 369 U.S. 186, 217 (1962) set forth six criteria in determining whether a case is non-justiciable under the "political question doctrine": whether there is (1) a textually demonstrable commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potential of embarrassment from multifarious pronouncements by various departments on one question.

The first Baker factor whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" is not met. The Constitution, Article I, Section 4, charges the courts of general jurisdiction with the duty of "resolving a case or controversy implicating a provision of this Constitution" subject only to "express limitations on the judicial power" found elsewhere in the Constitution. The Constitution, Article VI, dealing with "the judicial power" contains no express limitation on the power of the courts to consider claims brought under the equal protection and due process rights of individuals, such as plaintiffs, as guaranteed under Article II's Bill of Rights. The power to legislate is clearly vested in the Nitijela pursuant to the Constitution, Article IV. This case, however, does not implicate the power of the Nitijela to legislate election procedures. It may clearly do so under Article IV, Section 1. Rather this case involves the issue of whether election procedures adopted by P.L. 2016-028 violate the fundamental constitutional rights of plaintiffs. It is the province of the courts to resolve that issue. The judiciary is clearly discernable as the primary means through which an individual's constitutional rights may be enforced by virtue of Article I, Section 4(b).

The Marshall Islands Bill of Rights closely mirrors that of the United States. James Madison in presenting the Bill of Rights to the United States Congress stated:

> "If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the

> Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789) quoted in *Davis v. Passman*, 442 U.S. 228, 241-42 (1979).

While the Nitijela may enact laws, the courts remain the ultimate arbiter of whether those laws violate the rights of individuals secured by the Marshall Islands' Bill of Rights. The issue of whether an individual's constitutional rights are violated by a particular law, such as P.L. 2016-028, is vested in the courts, not the legislature. Plaintiffs' claims do not present a political question.

Political question abstention is not required under any of the other Baker factors. The standard of resolving the constitutional issues posed by plaintiffs is the Constitution itself. The court is not being asked to make a policy decision which is clearly of a kind of nonjudicial discretion. Again, it was the framers of the Constitution who made the policy decision of universal suffrage for all qualified Marshallese voters. The court is merely being asked to enforce that intent of the framers. To evaluate a challenged law under the Constitution is not a disrespect to any coordinate branch of government and it is hard to imagine some "unusual need for adherence to a political decision already made." As we note in our conclusion, our decision has prospective application only so as not to affect the rapidly approaching November 2019 elections. Finally, there is "no potential for embarrassment from multifarious pronouncements by various departments on one question." It is the role of the courts to pronounced whether a particular law passes constitutional muster, not some other department of government.

We conclude the "political question" or "non-justiciability" doctrine does not require that we refrain from addressing the constitutional issues posed by plaintiffs.

V. CONCLUSION

We answer the High Court's removed question and associated issues raised by the parties in their briefing as follows:

1. There is a constitutional right for a qualified Marshallese voter residing outside the Marshall Islands to vote in the Marshall Islands national or local elections;

2. There is not a constitutional right for a qualified Marshallese voter residing outside the Marshall Islands to vote by postal ballot;

3. The Constitution does not create the right to vote by any particular method (other than by secret ballot for members of the Nitijela);

4. The Constitution vests the power to prescribe the manner of exercising the right to vote with the Nitijela;

5. The political question or justiciability doctrine does not preclude the courts from addressing the impact of legislation, such as P.L. 2016-028, on a parties' individual rights granted under the Constitution, such as the fundamental and constitutionally protected right to vote;

6. P.L. 2016-028 is unconstitutional because its effect is to deprive plaintiffs and those similarly situated from exercising their constitutional right to vote because (a) that law eliminates the franchise once granted to all qualified Marshallese voters residing outside the Marshall Islands to vote by postal ballot and fails to provide plaintiffs a reasonable, practical alternative means of exercising their constitutional right to vote; and because (b) it creates disparate treatment among classes of voters similarly situated without adequate justification for the disparate treatment.

7. P.L. 2016-028 is an unreasonable restriction on plaintiffs' constitutional right to vote. If not by postal ballot, plaintiffs have the right to vote "otherwise" by some method authorized by Act or regulation.

We further find that plaintiffs' claims are not barred by a statute of limitations or by the equitable doctrine of laches. We do find, however, that the timing of the filing of plaintiffs' claims in close proximity to the upcoming November 2019 elections presents an unreasonable burden on the government in attempting to comply with this decision by either making postal ballots available on short notice or by providing some alternative method of voting to that class

of qualified non-resident Marshallese voters such as plaintiffs. We, therefore, make our decision prospective in application only after the November 2019 elections.

> "[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexity of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds v. Sims, 377 U.S. 533, 585 (1964).

We return these cases to the High Court for such further proceedings as may be necessary to resolve any pending issues before it.

SEABRIGHT, A.J., concurring in result:

I begin with my agreement with the majority opinion—under the RMI Constitution, "the right of a qualified person to vote is a fundamental right." This conclusion stems naturally from at least two Constitutional provisions: 1) Article II, Section 14(2) which insures that, "[e]very person has the right to participate in the electoral process . . . subject only to the qualifications prescribed by this Constitution and to election regulations which make it possible for all eligible persons to take part;" and 2) Article IV, Section 3(1) which provides that "[e]lections of members of the Nitijela shall be conducted by secret ballot under a system of universal suffrage for all citizens of the Republic of the Marshall Islands who" are at least 18 years old and qualified to vote.

But after stating this general principal, my colleagues address the wrong question. That is, the question isn't—as asked by my colleagues—whether the text of the RMI Constitution creates a right for a qualified voter to vote by postal ballot. Instead, the question we should ask is whether P.L. 2016-28, which eliminates the right to vote by postal ballot,[19] is unconstitutional under the RMI Constitution's universal right to suffrage.[20] And, correctly worded, the answer to the question is yes—P.L. 2016-28 is unconstitutional.

Even under a system of universal suffrage, the Nitijela has the ability under the Constitution to "enact reasonable regulations of parties, elections, and ballots to reduce election and campaign- related disorder." *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). But this ability isn't absolute. While the Nitijela may impose restrictions, those restrictions must be reasonable taking into account the interest of the restriction. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004); *Short*, 893 F.3d at 679. Thus, I would find as a matter of law that any restrictions on voting in the RMI by a qualified voter, given the fundamental right to vote in the RMI Constitution, must be reasonable given the interest and nature of the restrictions.

And in context, P.L. 2016-28 is unreasonable given the large number of RMI citizens living outside of the country coupled with the RMI's geographic remoteness.[21] According to the World Bank, the total RMI population in 2018 was 58,413. *See* The World Bank,

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[19]P.L. 2016-28, in relevant part, amends §161 of the Elections and Referenda Act, and limits postal ballots to a registered voter who: 1) is confined due to illness or physical disability from voting at a polling place; or 2) is "temporarily" out of the RMI on the day of the election. Previously, there were no such restrictions on postal ballots.

[20]The High Court, as well, asked the wrong question. The High Court's removed question asks: "[i]s there a constitutional right for a qualified Marshallese voter residing outside the Marshall Islands to vote in the Marshall Islands national or local elections by postal ballots, or otherwise?" Nevertheless, Article I, Section 2(1) of the RMI Constitution, stating that "[a]ny existing law and any law made on or after the effective date of this Constitution, which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be void" requires us to address whether P.L. 2016-28 is unconstitutional.

[21]This is true regardless of whether P.L. 2016-28 permits a limited class of citizens to vote by postal ballot. The problem with P.L. 2016-28 is not that it discriminates against one class of voters; instead, the law is unconstitutional because it conflicts with the Constitution and is not a reasonable restriction on voting rights.

https://data.worldbank.org/country/marshall-islands?view=chart) (last visited October 2, 2019).[22] And the 2010 United States census reports 22,434 RMI citizens living in the United States, with an estimated 27,823 living in the United States as of 2015. *See* Levin, Marshallese Migrants in the United States in 2015: A Statistical Profile Based on the American Community Survey, http://www.rmiembassyus.org/images/pdf/Marshallese-Migrants-in-the-United-States-in-201570.pdf (last visited October 2, 2019).

These census numbers show that a sizable minority of RMI citizens live in the United States, and thus will not be able to exercise their constitutional right to vote because of P.L. 2016-28. As should be obvious, traveling from the United States to the RMI to vote in person would be a tremendous financial burden and require a significant amount of time. In essence, P.L. 2016-28 disenfranchises over 25,000 RMI citizens living outside the country.

Further, the stated objectives of the legislation do not support such a draconian restriction in voting. In fact, three of the reasons given for the legislation—to permit taxpayers residing in the RMI to elect their representatives, to expedite the counting of ballots, and to lessen expenses—are either inconsistent with the Constitution or fails to provide an otherwise legitimate basis for the legislation. And the fourth basis—to eliminate improper filing of postal affidavits and to safeguard the authenticity of the ballot—is simply too conclusory to justify the banning of postal ballots for those living outside the RMI.

In sum, I would not reach the equal protection claim based on the fact that P.L. 2016-28 allows those "temporarily" out of the RMI to vote by postal ballot, but denies the right to a postal ballot to those living outside the RMI (and thus, in reality, denies the right to vote). Instead, I would find that the law acts to ban a large minority of RMI citizens in a manner inconsistent with the fundamental right to vote, and that this restriction is unreasonable. P.L. 2016-28 is unconstitutional.

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[22]According to the RMI 2011 census, the RMI's population was 53,158. See Secretariat of the Pacific Community, Republic of the Marshall Islands 2011 Census Report at 13 (2012), http://prism.spc.int/images/census_reports/Marshall_Islands_Census_2011-Full.pdf (last visited October 2, 2019).

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IROIJ MICHAEL KABUA, ET AL.,
Plaintiffs-Appellants,
v.
M/V MELL SPRINGWOOD, ET AL.,
Defendants-Appellees.

SCT CN 2016-001 (HCT CN 2015-200)

APPEAL FROM THE HIGH COURT

Argued August 16, 2019
Filed October 22, 2019

Summary

The Supreme Court affirmed the High Court's decision. The plaintiffs ("Kabua Plaintiffs") filed this action *in rem* against the vessel, the M/V Mell Springwood ("Vessel"), and *in personam* against the Vessel's owner, Tammo Shipping Company Limited, and others ("Defendants"), claiming damages resulting from the Vessel running around off shore in Kwajalein Lagoon. The High Court dismissed the in personam claim with prejudice and the in rem claim without prejudice. Regarding the former, the High Court found the Kabua Plaintiffs lacked standing to pursue their claims for two reasons: (1) the purported delegation of authority from the Environmental Protection Authority ("EPA") to the Kabua Plaintiffs was not proper because the EPA Act does not provide the EPA with authority to bring a lawsuit for civil damages; and (2) the Kabua Plaintiffs have not shown that they have a legal interest in the reef that was damaged by the Vessel's grounding. Additionally, the High Court found the Kabua Plaintiffs failed to state a claim for two reasons: (1) failure to assert a property interest in the damaged reef; and (2) failure to allege a valid delegation by the EPA to pursue a derivative action on its behalf. Regarding the *in rem* claim, the High Court found the Vessel had not been arrested within the RMI's territorial waters, and so there was no *in rem* jurisdiction.

Digest

1. APPEAL AND ERROR – *Review – Questions of Law*: The High Court dismissed the Kabua Plaintiffs' Complaint under Rule 12(b)(1) and Rule 12(b)(6) of the Marshall Islands Rules of Civil Procedure ("MIRCP") for lack of standing and for failure to state a claim, respectively. This Court reviews the High Court's ruling *de novo*.

2. CIVIL PROCEDURE – *Discovery – Jurisdictional*: A lower court's decision to permit or deny jurisdictional discovery is reviewed for abuse of discretion. The court's refusal to provide such discovery will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.

3. CIVIL PROCEDURE – *Dismissal, Grounds for – Lack of Subject Matter Jurisdiction*: The High Court correctly dismissed the Complaint under MIRCP Rule 12(b)(1) for lack of subject matter jurisdiction. The Kabua Plaintiffs lack standing to pursue their claims for two reasons: (1) the purported delegation of authority from the EPA to Kabua was not proper because the EPA Act does not provide the EPA with the authority to bring a lawsuit for civil damages; and (2) they have not shown that they have a legal interest in the reef that was damaged by the Vessel's grounding.

4. TORT – *Negligence – Breach of Duty*: A plaintiff bears the burden of demonstrating an injury-in-fact, fairly traceable to defendant's culpable conduct, that is likely, not merely speculative, and can be redressed by a favorable decision.

5. CIVIL PROCEDURE – *Dismissal, Grounds for – Lack of Subject Matter Jurisdiction*: In a Rule 12(b)(1) facial attack on jurisdiction, the allegations of the complaint are accepted as true for purposes of the motion.

Counsel

Phillip A. Okney, Daniel Berman, and Melvin C. Narruhn, counsel for Plaintiffs-Appellants Iroij Michael Kabua, et al.
Dennis Reeder, counsel for Defendant and Appellee Mariana Express Lines Pte Ltd.
Arsima A. Muller, counsel for Defendants/Appellees MV Tammo Shipping Company and M/V Mell Springwood

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

IROIJ MICHAEL KABUA, et al., v. M/V MELL SPRINGWOOD, et al.

I. INTRODUCTION

Appellants, customary and traditional owners of wetos on Ebeye (collectively the " Kabua Plaintiffs"), filed suit arising out of the grounding of the M/V MELL SPRINGWOOD (the "Vessel") in the lagoon waters in Kwajalein Atoll on May 8, 2015. The Kabua Plaintiffs seek monetary damages for injury allegedly caused to a reef in the lagoon and the associated "marine resources" by the grounding. In addition to pursuing an *in rem* action against the Vessel, the Kabua Plaintiffs filed an *in personam* action against the Vessel's owners, Tammo Shipping Company Limited ("Tammo"), Mariana Express Lines Pte., Ltd. ("MEL"), which time-chartered, the Vessel, Captain Myrta Grzegorz, and Pacific Shipping, Inc. Defendants Pacific Shipping and Grzegorz never made an appearance in the action.

The High Court dismissed the *in personam* action with prejudice and the *in rem* action without prejudice. As to the former, the High Court found the Kabua Plaintiffs lacked standing to pursue their claims for two reasons: (1) the purported delegation of authority from the Environmental Protection Authority ("EPA") to the Kabua Plaintiffs was not proper because the EPA Act does not provide the EPA with authority to bring a lawsuit for civil damages; and (2) the Kabua Plaintiffs have not shown that they have a legal interest in the reef that was damaged by the Vessel's grounding. Additionally, the High Court found the Kabua Plaintiffs failed to state a claim for two reasons: (1) failure to assert a property interest in the damaged reef; and (2) failure to allege a valid delegation by the EPA to pursue a derivative action on its behalf. As to the latter, the High Court found the Vessel had not been arrested within the RMI's territorial waters, and so there was no *in rem* jurisdiction. Prior to dismissing the Complaint, the High Court stayed the Kabua Plaintiffs' motion for jurisdictional discovery, which the subsequent dismissal effectively denied. This appeal followed. Since the High Court correctly held the Kabua Plaintiffs lack standing, its decision is **AFFIRMED**.

II. BACKGROUND[3]

As noted above, the Vessel collided and became grounded on the bottom of the reef in Kwajalein Atoll in May 2015. After investigating the damage to the Reef, the Kabua Plaintiffs purportedly secured written authorization from the EPA's Acting General Manager to pursue any environmental claims related to the Vessel's grounding, including the right to sue, in August 2015. On October 21, 2015, the Kabua Plaintiffs filed this Complaint in rem and in personam as a putative class action against defendants. They alleged the Iroij, Alap, and Senior Dri-Jerbal constituted the three levels of land ownership and represented all persons having an interest in the land and natural resources at issue in this case. The Complaint specifies five causes of action: (1) maritime negligence; (2) unseaworthiness; (3) trespass; (4) public and private nuisance; and (5) "Damages: EPA Derivation Action Right." In November 2015, MEL filed a Rule 12(b)(5) and 12(b)(1) motion to dismiss for insufficient service of process and lack of subject matter jurisdiction. In December 2015, the EPA executed the Amended Delegation of Authority ("ADOA"), purporting to delegate to the Kabua Plaintiffs the right to seek civil damages for injury to the reef and the associated marine resources, retain 90% of any recovery, and pay 10% to the EPA. (The Kabua Plaintiffs' Excerpts of Record ("ER") at 33-35.) The Kabua Plaintiffs filed several motions in January 2016, including motions for entry of default against Tammo, Pacific Shipping, and Grzegorz, and a motion for leave to conduct jurisdictional discovery. In March 2016, Tammo and the Vessel (collectively the "Tammo Defendants") filed a Rule 12(b)(6) motion to dismiss the in personam and *in rem* Complaint for failure to state a claim. The motions for entry of default were ultimately denied as to Tammo and Grzegorz, which are not on appeal.[4]

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[3]The factual background is based on the averments in the Complaint and is supplemented with relevant contextual information gleaned from the parties' subsequent filings.

[4]It is unclear from the record the status of Pacific Shipping in this action, as the High Court did not enter a default judgment against it in its Order. In any case, the issue is not on appeal.

On June 20, 2016, the High Court granted MEL's 12(b)(1) motion to dismiss, denied MEL's Rule 12(b)(5) motion for insufficient service of process, and granted the Tammo Defendants' 12(b)(6) motion to dismiss the in personam and in rem Complaint. Previously, the High Court had stayed the Kabua Plaintiffs' motion seeking jurisdictional discovery. The High Court further concluded that their failure to state a claim upon which relief can be granted affected the entire Complaint, and mandated dismissal with prejudice. The Kabua Plaintiffs filed a notice of appeal on July 20, 2016.

III. STANDARD OF REVIEW

[1]The High Court dismissed the Kabua Plaintiffs' Complaint under Rule 12(b)(1) and Rule 12(b)(6) of the Marshall Islands Rules of Civil Procedure ("MIRCP") for lack of standing and for failure to state a claim, respectively. This Court reviews the High Court's ruling *de novo*. *Momotaro v. Benjamin*, 2 MILR 237, 241 (2004).

[2]A lower court's decision to permit or deny jurisdictional discovery is reviewed for abuse of discretion. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). The court's refusal to provide such discovery "will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Id*.

IV. DISCUSSION

A. Standing

[3][4][5]The High Court correctly dismissed the Complaint under MIRCP Rule 12(b)(1) for lack of subject matter jurisdiction. The Kabua Plaintiffs lack standing to pursue their claims for two reasons: (1) the purported delegation of authority from the EPA to Kabua was not proper because the EPA Act does not provide the EPA with the authority to bring a lawsuit for civil damages; and (2) they have not shown that they have a legal interest in the reef that was damaged by the Vessel's grounding. As the Kabua Plaintiffs concede, RMI law looks to cases from the United States for interpretation and application of the standing doctrine. A plaintiff bears the burden of demonstrating an injury-in-fact, fairly traceable to defendant's culpable conduct, that is likely, not merely speculative, and can be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). In a Rule 12(b)(1) facial attack on jurisdiction, the

allegations of the complaint are accepted as true for purposes of the motion. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001) (no difference between allegations and underlying facts in assessing a 12(b)(1) motion).

1. EPA Delegation

The Kabua Plaintiffs insist the August 2015 letter[5] from the EPA's Acting General Manager authorized them to pursue any environmental claims related to the Vessel's grounding, including the right to sue, and that the delegation was valid pursuant to 35 MIRC section 109(1) ("The Authority may, by written instrument, delegate any of its powers and functions to any person or body of persons . . . ."). The High Court, however, properly considered the statute within the context of other provisions of the EPA Act. The EPA's powers are delineated in 35 MIRC section 121. The Kabua Plaintiffs rely on 35 MIRC section 121(3)(d) (allowing the EPA to obtain the advice and services of any person), section 121(3)(e) (allowing the EPA to make contracts and other instruments for the supply of goods and services), and section 121(3)(h) (allowing the EPA to accept assistance in services from any sources) as support for its assertion that the EPA had the authority to delegate to them the power to bring a civil action for damages as a form of "service." Yet, these provisions relate only to the EPA's ability to obtain goods and services, not the power to bring a civil action for damages. The Kabua Plaintiffs also point to 35 MIRC section 121(3)(i), which states that the EPA can "detect, prosecute, or cause the prosecution of, any offenses committed in contravention of the provisions of [the EPA Act] and the regulations made under [the EPA Act.]" The Complaint, however, does not allege any such

[5]They also rely on a letter dated December 2015 between the EPA Chairman, EPA General Manager, and the landowners of Kwajalein Atoll. The Complaint, however, was filed in October 2015 and was never amended to reflect the amended delegation. Such delegation would still be invalid for the reasons *inter alia*.

violations. Even if it did, 35 MIRC section 157 empowers the EPA to assess only civil penalties for such violations, not to bring a lawsuit for damages.[6]

Most damaging to the Kabua Plaintiffs' position is 35 MIRC section 118, which states the Attorney General "*shall* provide legal assistance and representation to the [EPA] in any suit or prosecution brought by or against the [EPA] . . . ." 35 MIRC § 118; *see also* 35 MIRC § 158(1) ("Where a person violates any provision of [the EPA Act], the Attorney-General may petition the High Court for a judgment awarding damages."). Therefore, only the Attorney General could have brought the present claim and the purported delegation of authority from the EPA to the Kabua Plaintiffs is invalid.[7]

The Kabua Plaintiffs intimate that the delegation of authority was approved by the Attorney General, thereby negating any requirement that the Attorney General represent the EPA in this action. They, however, identify no statutory or regulatory provision supporting such a conclusion. Indeed, the statutory provision requiring the Attorney General to represent the EPA is mandatory, leaving no discretion for the Attorney General to waive the duty. 35 MIRC § 118. The fact that the Attorney General had not filed a case at the time the Complaint was filed is irrelevant, as it is within his prosecutorial discretion to do so. 35 MIRC § 158; see also RMI Const., Art. VII, § 3(3).[8] Moreover, the Kabua Plaintiffs' assertion that the Attorney General approved the purported delegation in writing is not supported by the record. The identified

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[6]The Kabua Plaintiffs make the specious argument that the High Court erroneously interpreted the Complaint as seeking only civil damages from appellee-defendants despite the fact they also seek different relief, including an order to appellee-defendants to create a fund to repair and restore the environment, and social damages. Notwithstanding that characterization, an order adjudicating that appellee-defendants are obligated to pay money into the EPA fund and for "social damages" would constitute a judgment for civil damages.

[7]Even if the Kabua Plaintiffs had secured a proper delegation of authority from the EPA, the proper party in interest under MIRCP Rule 17 would be the EPA, not the Kabua Plaintiffs. The Complaint, however, fails to allege claims by or on behalf of the EPA and does not list the EPA as a plaintiff. Accordingly, dismissal would still be appropriate under MIRCP Rule 17.

[8]The Attorney General filed suit in May 2017 on behalf of the RMI and the EPA against appellee-defendants for the conduct at issue in this case, further undermining the Kabua Plaintiffs' contention that the EPA and/or the Attorney General delegated to them the right to bring a civil action for injury to the reef. (See MEL Supp. App'x B.) MEL's request for judicial notice of the May Complaint is granted, as the docket of the RMI High Court is part of the public record and therefore easily verifiable. 28 MIRC ch. 1, Rule 201. Further, the Kabua Plaintiffs acknowledge in their Reply that they moved to intervene in this case in September 2018.

emails show only that the Attorney General agreed "the legal counsel for Iroij Michael Kabua speak with the RMI EPA directly on this matter to resolve the outstanding claims for damages caused by the vessel." (Kabua ER at 42; see also id. ("It is clear that we agreed that the . . . claims of . . . [the Kabua Plaintiffs] and [their] legal counsel resulting from the incident proceed and be resolved by settlement or litigation.").)

The Kabua Plaintiffs further contend 35 MIRC section 116(2) authorizes the EPA to recover damages in addition to fines, emphasizing the provision's language that "any . . . fines or damages paid to or recovered by the [EPA] in any such suit or prosecution shall be credited to the Fund of the EPA." 35 MIRC § 116(2). Nothing in this statute, however, negates the statutory provisions of 35 MIRC sections 157 and 158, which provide that the EPA shall fix civil penalties and the Attorney General is the one that petitions the High Court for civil damages. Moreover, section 116(2) is in no sense inconsistent with the language of 35 MIRC section 118, which mandates that the Attorney General represent the EPA in any suit brought by that agency. When read in the context of the overall statutory scheme, section 116(2) provides only that the damages the Attorney General collects pursuant to his mandatory representation of the EPA must be deposited into the Fund. This is confirmed by 35 MIRC section 158(3), which provides that any damages resulting from the Attorney General's petition to the High Court "shall be paid into the Fund of the Authority." 35 MIRC § 158(3).

Similarly, the Kabua Plaintiffs' argument that section 158 is discretionary carries no weight, as that provision cannot be read in isolation from section 118. Simply because the Attorney General is not obligated to bring a lawsuit for civil damages on behalf of the EPA does not, on its own, empower the EPA to pursue such a lawsuit itself. Reading sections 158 and 118 together make clear that while the Attorney General is not required to petition the High Court for a judgment for damages, only the Attorney General can do so on behalf of the EPA. The

discretionary nature of section 158 is consistent with the prosecutorial discretion afforded to the Attorney General under the RMI Constitution. RMI Const., Art. VII, § 3(3).[9]

The Kabua Plaintiffs rely on numerous random legal authorities, including the Trust Territory Environmental Quality Protection Act ("EQPA"), 63 TTC section 501, 507(6), 509(2) (Supp 1980), the Federal Water Pollution Control Act ("FWPCA"), the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Solid Waste Disposal Act, to support the proposition that a citizen may commence a citizen's suit on his or her own behalf. None of these legal authorities, however, has any bearing on interpretation of the MIRC or the RMI Constitution, which decidedly foreclose such suits in this instance. Additionally, the Kabua Plaintiffs' reference to 35 MIRC section 117 does nothing to support their position, as that provision merely provides immunity to EPA members in lawsuits brought against the EPA. Cases from the United States relating to oil spills are similarly of little help to the Kabua Plaintiffs, as the Complaint does not allege how their commercial or subsistence fishing rights were harmed by the damage to the Reef. Even if it did, the RMI adopted the general maritime law of the United States, which prohibits recovery in tort for pure economic loss to persons whose property has not been physically damaged pursuant to the doctrine of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). 47 MIRC § 113; *Cf. In re Exxon Valdez*, 270 F.3d 1215, 1250-53 (9th Cir. 2001) (holding Alaska law permitting tort damages for pure economic loss was not preempted by federal general admiralty law in oil spill case). Although American jurisdictions have passed laws providing for recovery of pure economic losses for negligent torts, such as oil spills, the Kabua Plaintiffs identify no such law in the RMI. By the same token, their reliance on the Trust Territory case of *Guerrero v. Johnston*, 6 TTR 124 (Marianas 1972) is misplaced, as the court there found standing for an individual to challenge the government's allegedly illegal execution of a lease of public land to a corporation to construct a hotel, and did not address standing to sue for damage to submerged land below the high water mark. *Id*. at 127.

[9]The Kabua Plaintiffs' argument that the Attorney General's obligation under section 118 is not triggered because the EPA is not a party to this lawsuit is tenuous at best. The fifth claim of the Complaint asserts a derivative action on behalf of the EPA. Section 118 forecloses such an action because only the Attorney General can represent the EPA in any lawsuit.

2. The Kabua Plaintiffs' Interest in Marine Areas Below the Ordinary High Water Mark

The Kabua Plaintiffs conceded in the High Court and on appeal that they do not have any ownership rights in the submerged lands. Indeed, we have emphasized that section 103 of Title 9, MIRC, states that "all marine areas below the ordinary high watermark belong to the government," and not to any private person or a group of private persons. *Zedkaia & Toring v. Mashalls Energy Co., Inc.*, S. Ct. Civi. No. 2012-001, at 5 (2015). Instead, the Kabua Plaintiffs assert they have standing based on its traditional rights as Iroij, Alap, and Senior Dri-Jerbal to act to protect and pursue damages for injury to natural resources, on behalf of themselves and of all persons similarly damaged. The Kabua Plaintiffs, however, fail to identify RMI law supporting such a position.

First, they point to several provisions of the RMI Constitution. In particular, Article X, section 1(1) and (2), maintain the customary law and traditional practice concerning land tenure, issues related to land tenure, and the alienation or disposition of land in the RMI. These provisions, however, relate to the landowner's rights with respect to those lands in which he or she has an ownership interest. As discussed, the Kabua Plaintiffs acknowledge they do not have an ownership interest in the submerged lands. Moreover, to broaden the definition of "land" to include submerged lands would conflict with section 103 and Zedkaia. The Kabua Plaintiffs present no reasonable argument to do so. Similarly, their invocation of Article II, sections 5(5) and (9) of the RMI Constitution misses the mark. That section relates to just compensation when land rights are taken. Again, these provisions relate to the landowner's rights with respect to those lands in which he or she holds an ownership interest, and the Kabua Plaintiffs concede they have no such interest.

Next, the Kabua Plaintiffs attempt to find statutory support for their position by invoking sections 103(e) and (f). They maintain that, by traditional rights and custom, their land ownership includes rights to the surrounding marine resources. Section 103(1)(e), however, specifically provides that the traditional and customary right of landowners to control the use of,

or material in, marine areas below the ordinary high water mark are subject to, and limited by, the inherent rights of the RMI government as the owner of such marine areas. Furthermore, the Kabua Plaintiffs have not shown that they were specifically granted any legal interest to the submerged lands at issue, thus precluding the application of section 103(1)(f).

The Kabua Plaintiffs call upon case law to shore up their position, but each is readily distinguishable. First, *Gyosen Hoken Chuokai v. Emila Zedkaia*, RMI High Court Civil No. 1994-040, did not decide whether landowners were entitled to civil damages on account of a vessel grounding because that issue was stipulated between the parties. (*See* MEL Supp. App'x C-1 at ¶ 6.)[10] The case was an interpleader action brought solely to determine who had customary law ownership rights to Jitini Weto. (*Id*. at ¶¶ 3, 8-10.) Relatedly, the Kabua Plaintiffs' reliance on the Supreme Court of the Federated States of Micronesia's ("FSM") decision in *M/V Kyowa Violet v. People of Rull ex rel. Mafel*, 16 FSM Intrm. 49 (App. 2008) ("*Kyowa Violet*") is misplaced. That case recognized Yap's repeal of the Trust Territory Code ("TTC") provisions regarding government ownership of submerged lands and the express recognition in the Yap Constitution of the traditional rights and ownership over natural resources and the marine space. *Kyowa Violet*, 16 FSM Intrm. 49, at 58. Unlike Yap, however, the RMI has not repealed the substantive provisions of the TTC recognizing government ownership of submerged lands, but instead adopted it as its own law. *See Zedkaia*, S. Ct. Civil No. 2012-001, at 6 (noting that section 103 mirrors the substantive provisions of 67 TTC section 2). In that sense, the FSM case of *State of Pohnpei v. KSVI No. 3*, 10 FSM Intrm. 53 (Pon. Tr. Div. 2001), *aff'd sub nom. Kitti Mun. Gov't v. State of Pohnpei*, 13 FSM Intrm. 503 (App. Div. 2005) is more on point. There, the court held the law of Pohnpei incorporated the TTC provisions regarding ownership of submerged lands to find the State of Pohnpei, and not private plaintiffs, owned submerged lands within the Pohnpei lagoon. *Id*. at 65-66; *see also* 13 FSM Intrm. at 509 (noting Pohnpei had not repealed the TTC nor did its constitution contain a provision overriding the TTC provision at issue). Indeed, private ownership of submerged lands has been abolished since the

[10]MEL's request for judicial notice of the *Gyosen* Complaint is granted, as the docket of the RMI High Court is part of the public record and therefore easily verifiable. 28 MIRC ch. 1, Rule 201.

beginning of the Japanese administration of the territory in 1934. *See Zedkaia*, at 6. Since that period, ownership of the submerged land passed to the Trust Territory, and subsequently to the RMI under 67 TTC section 2. *See also* 9 MIRC §§ 102, 103 (expressly assuming government ownership of land the prior Japanese administration owned or maintained within RMI territory).

Finally, the Complaint itself contains no averments of what traditional rights the Kabua Plaintiffs are asserting and they may not now offer references to specific customs related to the use and possession of water (e.g., "*Mour Wot Lojet*," "*Mo Jojet*," "*Mo Lojet Mwo*," "*Mo* reefs," and "*Mo* land") on appeal. *See Likinbod & Alik v. Kejlat*, 2 MILR 65, 66 (1995) ("An appeal is on the record; it is not a new trial. Additional evidence, including statements of purported fact in counsel's argument, will neither be accepted nor considered."); *see also Kramer & PII v. Are & Are*, 3 MILR 56, 64 (2008) ("[E]very inquiry into the custom involves two factual determinations. First, is there a custom with respect to the subject of the inquiry? And, if so, the second is: What is it?" (quotations omitted)). The Kabua Plaintiffs also assert here, as they did below, that they claim to hold rights to fish weirs, traps, fishing rights in shallow water, and piers, buildings, and other construction over or on the reef abutting their land by customary law which were damaged by the Vessel's grounding. Section 103(1)(a) and (c) provide for such exceptions for private ownership below the ordinary high water mark, but the Complaint makes no reference to the Kabua Plaintiffs' ownership of such things, let alone any facts to suggest that any of them were damaged. The Complaint's allegations refer only to the damage to the reef, coral, and their attendant marine resources.[11] Because the Complaint was appropriately dismissed without prejudice under Rule 12(b)(1), it is not necessary to review the High Court's dismissal under Rule 12(b)(6).

[11]The Kabua Plaintiffs assert for the first time on appeal that their claim of customary rights in the reef should be determined by the Traditional Rights Court ("TRC") in a separate action. Their argument has no merit. They did not ask the High Court to refer this issue to the TRC and they make no argument to suggest a "substantial question has arisen within the jurisdiction of" the TRC within the meaning of Article VI, section 4(4) of the RMI Constitution.

B. Jurisdictional Discovery

The Kabua Plaintiffs argue the High Court erred when it stayed their motion for jurisdictional discovery in February 2016, because the court effectively denied that motion by dismissal of the Complaint with prejudice. They assert they should be given an opportunity to discover facts that would support their allegations of jurisdiction, such as the "exact nature of the relationships between the Defendants, their Agents, partners and representatives." (Opening Brief at 30.) The High Court's decision to deny jurisdictional discovery should not be reversed except upon the "clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Boschetto*, 539 F.3d at 1020. Discovery may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary. *Id*. Here, the Kabua Plaintiffs provide no explanation as to why discovery into the "Defendants, their Agents, partners and representatives" would cure any of the defects identified above. Accordingly, there are no grounds to disturb the High Court's denial of jurisdictional discovery.

C. Dismissal of the In Rem Action

The Kabua Plaintiffs contend the High Court erred in dismissing its in rem action with prejudice. Contrary to their contention, the High Court did not do so, as reflected in the language of its decision. They double down in their Reply, asserting no dismissal in rem should have been ordered. The Kabua Plaintiffs conceded at the High Court hearing, however, that the vessel was never arrested, that in rem jurisdiction was not established, and that if the vessel returned, they could re-file their lawsuit.[12] (Tr. Hrg. at 76:24–77:2.) It is hornbook law that admiralty practice requires a vessel's arrest in order to maintain an in rem action against it. *Dluhos v. Floating & Abandoned Vessel*, 162 F.3d 63, 68 (2d Cir. 1998). The High Court's dismissal of the *in rem* action without prejudice was proper.

[12]The representation in their opening brief that they did not relinquish their *in rem* cause of action and opposed dismissal threatens to undermine their duty of candor to the Court. Similarly, their assertion in Reply that requiring them to file a new complaint whenever the vessel returned to RMI's jurisdiction is "beyond reasonable," (Reply to Tammo at 10 n.6), is anything but.

V. CONCLUSION

Based on the foregoing, the High Court's June 20, 2016 Order Granting Motion to Dismiss is **AFFIRMED**.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

CECILIE KABUA,
Plaintiff-Appellant,
v.
MWEJEN MALOLO,
Defendant-Appellee.

SCT CN 2018-008 (HCT CN 2012-190)

ORDER GRANTING "REQUEST FOR ENLARGEMENT OF TIME TO FILE OPENING BRIEF"

Argued March 5, 2020
Filed March 16, 2020

Summary

The Chief Justice of the Supreme Court, acting as a single judge to address a procedural order, determined that counsel's busy schedule does not constitute "excusable neglect" for purposes of granting a request for the enlargement of time to file an opening brief. Instead, the Court held that "excusable neglect" and "good cause" for granting an enlargement of time depend on the following factors: (i) potential harm to the non-moving party; (ii) duration of the delay and its impact on proceedings; (iii) reasons for the delay, including control by the moving party; and (iv) the moving party's good faith. In the present case, the Court granted the motion for enlargement, finding "good cause" existed under the circumstances. First, the non-moving party did not object or claim prejudice. Second, the length of the delay was short and did not impact the proceedings. Third, the reasons for the delay were under the control of the moving party. However, fourth, there was no evidence that the moving party acted in bad faith or sought a tactical advantage. Moreover, there is a general policy that cases be decided on their merits rather than upon technicalities.

Digest

1. APPEAL AND ERROR – *Rules of Procedure – Enlargement of Time, Grounds*: Rule 26(b) allows granting the requested enlargement of time for "good cause" shown. "Good cause" is not defined by Rule. "Excusable neglect" would constitute "good cause."

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2. APPEAL AND ERROR – *Rules of Procedure – Enlargement of Time, Grounds*: Counsel's press of business or busy schedule does not constitute "excusable neglect."

3. APPEAL AND ERROR – *Rules of Procedure – Enlargement of Time, Grounds*: In determining whether "excusable neglect" and therefore "good cause" exists for granting the requested enlargement of time: danger of prejudice to the non-moving party; the length of the delay and impact on the proceedings; the reasons for the delay including whether it was in the reasonable control of the moving party; and whether the movant acted in good faith.

4. APPEAL AND ERROR – *Rules of Procedure – Enlargement of Time, Grounds*: There is a general policy that cases be decided on their merits rather than upon technicalities.

Counsel

John Masek, counsel for Plaintiff-Appellant Cecilie Kabua
Roy Chikamoto, counsel for Defendant-Appellee Mwejen Malolo

Before CADRA, Chief Justice, acting as a single judge addressing procedural issue pursuant to Rule 27(c):

On March 5, 2020, Appellant filed a "Request for Enlargement of Time to File Opening Brief" pursuant to Supreme Court Rules of Procedure, Rule 26(b). Appellant's counsel cites extensive briefing and hearing on unrelated case(s), as well as travel between Honolulu and Majuro, as justifying the missed deadline for filing an opening brief and the requested enlargement of time.

Appellee has filed no objection or response.

[1]Rule 26(b) allows granting the requested enlargement of time for "good cause" shown. "Good cause" is not defined by Rule. "Excusable neglect" would constitute "good cause."

[2]Counsel's press of business or busy schedule does not constitute "excusable neglect." *See, e.g., Hawks v. JP. Morgan Chase Bank*, 591 F.3d 1043, 1048 (2010) (two trials and Social Security hearing does not constitute excusable neglect); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981) cert. denied 456 U.S. 979 (solo practitioner engaged in the preparation of other cases does not establish excusable neglect.)

[3]The Court turns to balancing the four factors announced by the *United States Supreme Court in Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 395 (1993) in determining whether "excusable neglect" and therefore "good cause" exists for granting the requested enlargement of time.

A. Danger of Prejudice to Non-moving Party.

Appellee has filed no opposition to the requested extension of time and no prejudice has been demonstrated should the request be granted.

This factor weighs in favor of granting the request.

B. The Length of Delay and Impact on the Proceedings

Appellant's counsel states the opening brief was due on March 2, 2020. The instant request was, according to the Court's file stamp, promptly filed within approximately 3 days on March 5, 2020. There has not been a long delay in seeking relief.

Granting the request has no discernable impact on the proceedings because there is no hearing/oral argument date set at present and this appeal is in its early stages.

This factor weighs in favor of granting the request.

C. The Reason for the Delay Including Whether it was in the Reasonable Control of the Moving Party.

As above noted, the press of business is not excusable neglect in missing a deadline. Managing one's calendar to comply with deadlines set by Rule or Court Order is within the control of counsel.

This factor weighs against granting the request.

4. Whether the Movant Acted in Good Faith.

There is no reason to believe that Appellant's counsel has not acted in good faith in seeking an extension/enlargement of time. The undersigned cannot conceive of any tactical advantage to be gained by failure to timely file an opening brief and then seeking an enlargement of time to file.

This factor weighs in favor of granting the request.

[4]There is a general policy that cases be decided on their merits rather than upon technicalities. This policy is equally applicable to appeals to the Supreme Court. In recognition of this policy and having weighed the above enumerated factors, the Court **FINDS** "good cause" exists for granting the request and therefore **GRANTS** the requested enlargement of time and **ORDERS** that Appellant file its opening brief on or before April 6, 2020.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

GEORGESTON MOLIK and
HEMMY HISIAH,
Defendants-Appellants,
v.
AMON TIBON (for LESLIE TIBON)
Plaintiff-Appellee
and
ESKAIA DEBRUM (for CARMEN SAMSON),
Intervenor-Appellee.

SCT CN 2020-00556 (HCT CN 2003-122)

ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION

Argued June 30, 2020
Filed July 7, 2020

Summary

The Chief Justice of the Supreme Court, acting as a single judge to address a procedural issue, rendered an Opinion Dismissing Appeal for Lack of Jurisdiction. The Appellants failed to file their notice of appeal within 30 days from the date of the judgment or order, as mandated by Supreme Court Rule 4(a)(1)(A). Additionally, they did not petition the High Court for an extension of time to file a notice of appeal within 30 days after the due date, as required by Supreme Court Rule 4(a)(5). In dismissing the untimely notice of appeal, the Court affirmed that the "timely filing of a Notice of Appeal is both mandatory and jurisdictional."

Digest

1. APPEAL AND ERROR – *Rules of Procedure – Construction*: The Republic's Supreme Court Rules of Procedure are modeled after the United States Federal Rules of Appellate Procedure (FRAP). Cases construing the analogous FRAP, Rule 4 are, therefore, instructive.

2. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Timely File Notice*: Both the United States Supreme Court and the Ninth Circuit have held failure to timely file an appeal is a jurisdictional defect barring the appeal.

3. APPEAL AND ERROR – *Rules of Procedure – Enlargement of Time, Grounds*: Supreme Court Rule 4(a)(5) allows the High Court to extend the 30 day filing requirement upon a showing of "excusable neglect or good cause" if a motion is "actually filed not later than 30 days after the expiration of the time prescribed by subsections (a)(l) through (a)(4) of this Rule 4."

4. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Timely File Notice*: Appellants failed to file a timely Notice of Appeal with the Supreme Court. The Supreme Court, therefore, lacks jurisdiction to decide this appeal and the appeal must be dismissed.

5. APPEAL AND ERROR – *Rules of Procedure – Enlargement of Time, Grounds*: Because it is unclear as to the steps Appellant took to pursue this appeal after learning of the filing of the final judgment, the undersigned cannot find "good cause" for allowing a late filing of the Notice of Appeal. Additionally, there is no explanation offered for Appellant Molik's failure to take the steps necessary to timely perfect an appeal.

6. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Timely File Notice*: Finally, and more importantly as discussed above, timely filing of a Notice of Appeal is "mandatory and jurisdictional." Because there is no jurisdiction of the Supreme Court to hear the appeal it follows that the undersigned lacks jurisdiction to grant the requested relief (i.e., allowing the late filing of the Notice of Appeal).

Counsel

Russell Kun, Chief Public Defender, counsel for Defendants-Appellants Molik and Hisiah
Rosania A. Bennett, Directing Attorney, Micronesian Legal Service Corporation, counsel for Plaintiff-Appellee Tibon
Divine Waiti, counsel for Intervenor-Appellee DeBrum

Before CADRA, Chief Justice, acting as a single judge addressing procedural issue pursuant to Rule 27(c):

Appellants, Georgeston Molik and Hemmy Hisiah, filed a "Joint Notice of Appeal" on June 22, 2020. The caption of the "Joint Notice of Appeal" is addressed to the High Court. As discussed below, the High Court lacks jurisdiction to grant relief because a timely motion for an extension of the time within which to file a notice of appeal was not made to the High Court

within the time allowed by Supreme Court Rules of Procedure, Rule 4(a)(5). This matter was referred to the Supreme Court by the Clerk on or about June 29, 2020.

Appellants acknowledge that they failed to file their Notice of Appeal within 30 days of entry of the High Court's Final Judgment on September 16, 2019. Appellants offer the "Affidavit of Hemmy Hisiah" in support of Appellants' request that the Court accept late filing of the appeal.

Having considered the available record and the filings of Appellant(s) the undersigned **DENIES** allowance of the late filing of "Notice of Appeal" and **DISMISSES** this appeal for the following reasons:

1. Supreme Court Rule 4(a)(l)(A) requires filing of the notice of appeal within 30 days after the date of entry of the judgment or order appealed from.
2. **[1]**The Republic's Supreme Court Rules of Procedure are modeled after the United States Federal Rules of Appellate Procedure (FRAP). Cases construing the analogous FRAP, Rule 4 are, therefore, instructive.
3. **[2]**Both the United States Supreme Court and the Ninth Circuit have held failure to timely file an appeal is a jurisdictional defect barring the appeal. *Bowles v. Russell*, 551 U.S. 205 (2007)(taking appeal within prescribed time is mandatory and jurisdictional); *Hohn v. United States*, 524 U.S. 236 (1998)(filing of timely notice of appeal is mandatory and jurisdictional); Nguyen v. Southwest Leasing and Rental Inc., 282 F.3d 1061, 1064 (9th Cir. 2002)(failure to file timely notice of appeal deprives court of appeals of jurisdiction); *Tillman v. Association of Apartment Owners of Ewa Apartments*, 234 F.3d 1087, 1089 (9th Cir. 2000)(30-day time limit for filing notice of appeal is mandatory and jurisdictional, Ninth Circuit lacks jurisdiction to decide appeal if notice of appeal not timely filed); *Stephanie-Cardona LLC v. Smith's Food & Drug Centers, Inc.*, 476 F.3d 701, 703 (9th Cir. 2007)(timely notice of appeal is a non-waivable jurisdictional requirement.)
4. **[3]**Rule 4(a)(5) allows the High Court to extend the 30 day filing requirement upon a showing of "excusable neglect or good cause" if a motion is "actually filed not later than

30 days after the expiration of the time prescribed by subsections (a)(l) through (a)(4) of this Rule 4."

5. Review of the record available to this Court reveals Appellants did not timely seek an extension of time to file a Notice of Appeal by motion brought before the High Court. Therefore, the High Court lacks jurisdiction to entertain a motion brought under Rule 4(a)(5).

6. **[4]**Appellants failed to file a timely Notice of Appeal with the Supreme Court. The Supreme Court, therefore, lacks jurisdiction to decide this appeal and the appeal must be dismissed. *See item 3, supra*.

7. Assuming arguendo that the Supreme Court can dispense with the filing requirements of Rule 4 or ignore the late filing of Appellant's Notice of Appeal under Rule 2, the undersigned finds that Appellants have failed to demonstrate "good cause" for suspending or dispensing with the timely filing requirements of Rule 4.

Review of the record below and the Affidavit of Hemmy Hisiah reveals that Appellant was represented by counsel in the High Court proceedings which is the same counsel (Russell Kun) presently representing Appellant in this appeal. Appe1ant's affidavit indicates that appeal of the TRC and High Court decisions was discussed after the High Court had "adopted the decision of the TRC." Thus, Appellant was on notice that a final judgment would likely soon issue. The matter of representation on appeal could and should have been resolved at that time. If not resolved, Appellants trial counsel could have been instructed to fi1e a Notice of Appeal to preserve Appellant's rights and the issue of representation be resolved later by substitution or some other manner.[1] *See* Rule 3(a)(2).

Appellant avers that she traveled to the United States and did not check with counsel (Kun) upon her return as to whether the final judgment had been issued. Rather, she learned

[1]The undersigned suggests that the filing of a so-called prophylactic Notice of Appeal may bind the attorney to representation throughout the appeal.

from MLSC that the final judgment had issued. The role of MLSC in Appellant's representation is unclear but MLSC apparently took no steps to further Appellants' appeal. The Affidavit does not state the date Appellant became aware of the entry of final judgment or how long Appellant was absent from the Republic. It, therefore, is not possible to determine whether Appellant acted with reasonable diligence in securing counsel for filing a Notice of Appeal. It was not until June 12, 2020, (almost 9 months subsequent to the entry of final judgment) that Appellant met with present counsel (Kun) regarding pursuit of this appeal.

[5]Because it is unclear as to the steps Appellant took to pursue this appeal after learning of the filing of the final judgment, the undersigned cannot find "good cause" for allowing a late filing of the Notice of Appeal. Additionally, there is no explanation offered for Appellant Molik's failure to take the steps necessary to timely perfect an appeal.

[6]Finally, and more importantly as discussed above, timely filing of a Notice of Appeal is "mandatory and jurisdictional." Because there is no jurisdiction of the Supreme Court to hear the appeal it follows that the undersigned lacks jurisdiction to grant the requested relief (i.e., allowing the late filing of the Notice of Appeal).

For the above stated reasons, Appellants' request to allow late filing of their "Joint Notice of Appeal" is **DENIED** and this appeal is **ORDERED DISMISSED**.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,
Plaintiff/Appellee,
v.
ANTOLOK ANTOLOK,
Defendant/Appellant.

SCT CN 2018-011 (HCT CR CN 2017-020)

ON APPEAL FROM THE HIGH COURT
Argued October 19, 2020
Filed November 16, 2020

Summary

In its Opinion, the Supreme Court reversed the High Court's conviction of the defendant for sexual assault of a mentally-disabled woman. This reversal was issued because the Republic failed to introduce evidence sufficient to show "sexual penetration," which is an essential element of second-degree sexual assault. However, the facts the facts of the case did support a conviction of the lesser-included offense of sexual assault in the third-degree. Additionally, the trier of fact, the High Court, was aware of the lesser-included offense. Consequently, the Supreme Court instructed the High Court to enter a judgment against the defendant on the lesser-included offense of third-degree sexual assault, and to re-sentence the defendant accordingly.

Digest

1. CRIMINAL LAW AND PROCEDURE – *Sufficiency of Evidence*: A conviction is supported by the sufficiency of the evidence when after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

2. CRIMINAL LAW AND PROCEDURE – *Lesser Included Offense*: Appellate courts have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that only affect the greater offense.

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3. CRIMINAL LAW AND PROCEDURE – *Lesser Included Offense*: For an appellate court to issue a guilty verdict on an lesser-included offense, the fact-finder at trial, whether it be a jury or judge, must demonstrably have been aware of the opportunity to return a guilty verdict on the lesser-included offense, such that the greater offense conviction can be understood reliably to encompass the lesser-included offense elements.

Counsel

Richard Hickson, Attorney-General, counsel for Plaintiff/Appellee Republic of the Marshall Islands
Russell Kun, Chief Public Defender, counsel for Defendant/Appellant Antolok

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

PER CURIAM:

I. INTRODUCTION

Following a High Court bench trial, defendant-appellant Antolok Antolok ("Antolok") was convicted of the second-degree sexual assault of Tilber Hesa ("Tilber"), a mentally-disabled 19-year-old woman, in violation of 31 MIRC § 213.2(1)(b). He was subsequently sentenced to a term often years' imprisonment, with two years suspended and eight to be served at Majuro Jail. On appeal, Antolok argues the evidence admitted at trial is insufficient to sustain his conviction.[3] We agree. Because the Republic failed to introduce evidence sufficient to show "sexual penetration"— an essential element of second-degree sexual assault— Antolok' s conviction for that crime is reversed. The High Court is directed to enter judgment for the lesser-included offense of third-degree sexual assault, and to re-sentence Antolok accordingly.

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

[3]Although Antolok's briefing raised additional concerns over prosecutorial misconduct, Appellant's Opening Br. at 2, counsel explicitly abandoned that ground for appeal at oral argument.

II. BACKGROUND

A. The Republic's Charges Against Antolok

In November 2017, Tilber and her mother, Laila Hesa, filed a complaint with the Republic of the Marshall Islands police alleging that on September 24, 2017, Antolok forced Tilber into an abandoned house, where he threatened and sexually assaulted her. The Republic then brought this case, and in September 2018, Antolok stood trial for three felony offenses (sexual assault in the first, second, and third degrees) and three misdemeanor offenses (sexual assault in the fourth degree, assault, and indecent exposure).[4]

Two of those offenses, as defined by the RMI Criminal Code, bear particularly on this appeal. Under § 213.2(1)(b), a person is guilty of second-degree sexual assault if "[t]he person knowingly subjects to sexual *penetration* another person who is mentally defective, mentally incapacitated, or physically helpless . . . ." 31 MIRC § 213.2(1)(b) (emphasis added). By contrast, under § 213.3(1)(d), a person is guilty of third-degree sexual assault if "[t]he person recklessly subjects to sexual *contact* another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor . . . ." 31 MIRC § 213.3(1)(d) (emphasis added).

B. Evidence Adduced at Trial

Having waived his right to a jury, Antolok was tried before the High Court across four days in September 2018. Over that period, each side sought to prove its own version of events on Sunday, September 24, 2017: whereas the Government contended Antolok had dragged Tilber into an abandoned house in Utridrikan Village, where he threatened and raped her, sometime between 10:00 AM and noon, Antolok—while admitting to being in that specifichouse—insisted

[4]In the lead-up to trial, the Republic, relying on information gleaned from Tilber during one of her interviews with a state psychologist, also accused Antolok of having sexually assaulted Tilber prior to September 24, 2017. Antolok consequently was charged twice for each of these six crimes. After the Republic rested its case-in-chief, Antolok, pursuant to Rule 29(a) of the RMI Rules of Criminal Procedure, successfully moved for judgment of acquittal as to all counts relating to his alleged pre-September 24, 2017 conduct.

he had spent the entire morning, and early afternoon, fast asleep following a night of severe intoxication.

These efforts produced, in pertinent part, the following testimonial evidence: from Tilber's mother, a statement that she had caught Antolok throwing rocks at Tilber's window, in an apparent effort to wake Tilber up, around 7:00 AM, as well as a concession that she did not take Tilber for medical testing at any point after the alleged crime; from Tilber, the assertion that at around 11:00 AM, Antolok led her from beside the road into the abandoned house, where he forced her to disrobe, showed her his penis, and made "kiss marks" on her body with "his mouth"; from Tilber's neighbor, an account of seeing Tilber inside the abandoned house, and exhorting her to "get out," sometime before noon; from Tilber's sister, a description of photographing "kiss marks" on Tilber's neck and breasts in the early afternoon;[5] from another of Tilber's sisters—who was sent, that evening, to fetch Antolok from his residence—Antolok's supposed remark that there was no "reason of being mad about" the morning's events, because Tilber "had already lost her virginity"; and from Antolok himself, a narrative placing him at the alleged crime scene during the alleged crime (by his telling, he entered the abandoned house at 10:00 AM, and slept there until "1 or 2"), offered alongside little else in the way of a concrete alibi. Neither side took issue with the fact of Tilber's intellectual disability. As a state psychiatrist explained on the trial's opening day, her brain has not developed beyond the stage one might expect of a four-year-old.

C. The High Court's Verdict

Following closing arguments, the High Court rendered a four-pronged verdict. First, citing a lack of evidence around Antolok's use of "strong compulsion," the trial judge found Antolok innocent of the form of first-degree sexual assault requiring that element. See 31 MIRC § 213.1(1)(a). Second, finding "beyond a reasonable doubt that the defendant knowingly subjected Tilber to sexual penetration and that she is a person who is mentally defected," the trial judge observed that, pursuant to the Criminal Code, Antolok could be convicted of either first-

[5]After some dispute as to their reliability, these photographs were admitted into evidence.

degree or second-degree sexual assault. *Compare* 31 MIRC § 213.1(1)(d) (penalizing "knowing[] . . . sexual penetration [of] another person who is mentally defective"), with 31 MIRC § 213.2(1)(b) (penalizing "knowing[] . . . sexual penetration [of] another person who is mentally defective, mentally incapacitated, or physically helpless"). Third, invoking the principle that a person who "can be found guilty under two separate statutes for doing exactly the same thing [is] . . . entitled to be convicted only under the lesser offense," the trial judge held Antolok guilty of sexually assaulting a "mentally defective" person in the second, but not first, degree. Finally, the High Court determined that all remaining offenses for which Antolok stood charged—third-degree sexual assault, fourth-degree sexual assault, assault, and indecent exposure—were "lesser included offenses" of second-degree sexual assault, and therefore could not, as a constitutional matter, furnish a basis for any additional conviction.

III. LEGAL STANDARD

[1]Antolok challenges the sufficiency of the evidence that led to his conviction. Under well-settled precedent, a conviction "is supported by the sufficiency of the evidence when 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *RMI v. Kijiner*, 3 MILR 122, 124 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)). In this setting, the Court "may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal"; rather, our appellate inquiry must proceed strictly upon evidence construed "in a manner favoring the prosecution." *Id.* (quoting *United States v. Nevils*, 598 F.3d 1158, 1164-67 (9th Cir. 2010)). "Only after we have construed all the evidence at trial in favor of the prosecution do we take the second step, and determine whether the evidence at trial, including any evidence of innocence, could allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Id*. (quoting *Nevils*, 598 F.3d at 1164-65 (emphasis in original)).

IV. DISCUSSION

A. Second-Degree Sexual Assault

REPUBLIC v. ANTOLOK

Antolok stands convicted of violating § 213.2(1)(b), which proscribes "knowingly subject[ing] to sexual penetration another person who is mentally defective, mentally incapacitated, or physically helpless." 31 MIRC § 213.2(1)(b). Given the uncontested fact of Tilber's intellectual disability, the validity of Antolok's conviction therefore is a function of whether, based on the evidence at trial, "*any* rational trier of fact could have found . . . beyond a reasonable doubt" that Antolok "knowingly subject[ted] [Tilber] to sexual penetration . . . ." *Kijiner*, 3 MILR at 124 (quoting *Jackson*, 443 U.S. at 319 (emphasis in original)); 31 MIRC § 213.2(1)(b). This standard tilts strongly in the prosecution's favor: "the evidence and all reasonable inferences which may be drawn from it" are to be "viewed in the light most favorable to the government," and "any conflicts in the evidence are to be resolved in favor of the jury's verdict." *United States v. Kaplan*, 836 F.3d 1199, 1212 (9th Cir. 2016) (internal quotation marks and citations omitted). Reviewed de novo, and even approaching the issue from a maximally prosecution-friendly perspective, the Republic's case does not clear this hurdle.

With the question of "knowing . . . sexual penetration" in the foreground, a candid review of the evidence bears out this conclusion. Certain facts from Antolok's trial are beyond dispute—there is, to reiterate, no disagreement that Antolok was physically present in the abandoned house at the time of the alleged crime, or that Tilber is severely intellectually disabled. Beyond that, however, the Republic's proof distills down to the following: much to suggest a non-consensual sexual act took place between Antolok and Tilber, but nearly nothing tending to indicate the occurrence of sexual *penetration*. On appeal, this silence is deafening. No witness, for instance, claimed to have seen Antolok engaged in the act of penetration (this includes Tilber, whose inability to relate "what [Antolok] d[id] with his penis" necessitated a break in the trial, the question never to be revisited); no witness claimed to have seen Tilber unclothed, or evincing other indicia of sexual penetration; and as defense counsel managed to extract from Tilber's mother, nobody took Tilber for medical testing, thereby depriving the fact-finder of any scientific evidence that might have established sexual penetration on the morning of September 24, 2017.

Against this backdrop, Antolok's § 213.2(1)(b) conviction, like the judicial finding that "[Antolok] subjected Tilber to sexual penetration" upon which it rests, cannot be sustained. In neglecting an essential element of the convicted crime, the record on appeal is plainly deficient. To overcome this deficiency and uphold the verdict, one would have to extrapolate—from little more than Tilber's statements that Antolok "showed his penis" and made "kiss marks," photographs of those "kiss marks," and Antolok's alleged comment regarding Tilber's virginity—an instance of sexual penetration, proven beyond a reasonable doubt. Such extrapolation would trade not in the drawing of "reasonable [evidentiary] inferences," but rather the conjuring of material facts. *See Kaplan*, 836 F.3d at 1212. We decline to engage in it here.[6] Because no "rational trier of fact" could have ascertained the existence of a fact the Republic apparently did not concern itself with—let alone succeed in—establishing, Antolok's conviction is reversed for insufficient evidence. *Kijiner*, 3 MILR at 124 (internal quotation marks and citation omitted).

B. Third-Degree Sexual Assault

[2][3]That we overturn Antolok's conviction for second-degree sexual assault does not mean Antolok is entitled to acquittal on all charges. The question of what becomes of a lesser-

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[6]The trial transcript reflects one possible explanation for the High Court's contrary course of action. During her testimony, Tilber struggled to respond verbally to questioning, instead answering frequently through physical gestures. At certain points, the High Court made appropriate efforts to detail these gestures for the record. See, e.g. Trial Tr. at 27 (observing, from the bench, that one of Tilber's non-verbal responses "refers . . . [to] the chest area"). At other points, however, it is clear the trial judge failed to perfect the record. Indeed, once Tilber left the stand, he stated:

> During Tilber's testimony, there were times she nodded and showed her answer[], or as the Marshallese do, with their eyebrows, and those small answers were not verbal, but *we know the answers*. And even though she kept on looking at the clerk and signaling to him, the clerk showed the signal to the lawyers and the judges. And for the record, there were times Tilber didn't answer or show her answer to the lawyers.

Id. at 31 (emphasis added). It may be the case, therefore, that the trial judge discerned evidence within Tilber's testimony that both escaped the record and factored into his eventual sexual penetration finding. Even so, this Court simply cannot rely on a lower court's unadorned claim to "know[ing] the answers" in discharging its duty of appellate review. In order to ensure that trial testimony is reliable and reviewable on appeal, the trial court should inform witnesses to answer out loud, with words. Or, in the case that a witness is truly unable to respond verbally, the court should ensure that each non-verbal response is properly entered into the record.

included offense when a defendant's conviction for a greater offense is overturned is a matter of first impression before the Court. In such circumstances, the RMI Constitution provides that the Court may look to court decisions of the United States as well as generally accepted common law principles for guidance. RMI Const., Art. I, § 3(1); *see also In the Matter of P.L. No. 1995-118*, 2 MILR 105, 109 (1997). "[A]ppellate courts . . . have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that only affect the greater offense." *Rutledge v. United States*, 517 U.S. 292, 306 (1996) (citations omitted) (further acknowledging that the United States Supreme Court "has noted the use of such a practice with approval."). Although different courts employ different standards for when this action is warranted, two common criteria emerge from U.S. caselaw. First, and most obviously, the lesser offense must be a true "lesser-included offense—a 'subset' of the greater one," and the "the element as to which sufficient evidence was missing with respect to the greater offense must not be a requisite element of the lesser offense as well." *U.S. v. Begay*, 567 F.3d 540, 551 (9th Cir. 2009) (citation omitted), *rev'd en banc on other grounds*, 673 F.3d 1038 (9th Cir. 2011); *see also United States v. Brisbane*, 367 F.3d 910, 914-15 (D.C. Cir. 2004). Second, the fact-finder at trial, whether it be a jury or judge, must demonstrably have been aware of the opportunity to return a guilty verdict on the lesser-included offense, such that the greater offense conviction can be understood reliably to encompass the lesser-included offense elements. *See United States v. Davila-Lopez*, 107 F.3d 878 at *1 (9th Cir. 1997) (unpublished op.); *see also United States v. Franklin*, 728 F.2d 994, 1000 (8th Cir. 1994) (articulating, upon review of a bench trial, the appellate court's general need to limit its exercise of this power to what "the district court necessarily found"). Replacing Antolok's second-degree sexual assault conviction with a third-degree sexual assault conviction, both criteria are satisfied here.

Broken down to its component parts, § 213.3(1)(d) provides that a person is guilty of sexual assault in the third degree if that person (i) "recklessly engages in sexual contact"; (ii) "with another person"; (iii) "who is mentally defective, mentally incapacitated, or physically helpless . . . ." 31 MIRC § 213.3(1)(d). While the second and third of these § 213.3(1)(d)

elements are shared by § 213.2(1)(b), the latter offense differs from the former in that it targets "knowingly subject[ing]" intellectually disabled persons "to sexual penetration." Because this difference tasks the Republic with proving, for § 213.2(1)(b) purposes, all the elements of § 213.3(1)(d) and then some—namely, a higher degree of scienter and a more specific form of "sexual contact"—§ 213.3(1)(d) third-degree sexual assault is "a 'subset' of" its second-degree counterpart. *Begay*, 567 F.3d at 551; *see also,* United States Model Penal Code § 2.02(5) ("[w]hen recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly"). Nor would the defective aspect of Antolok's conviction carry over to that "subset" offense: third-degree sexual assault forgoes "sexual penetration" for "sexual contact," of which there is ample evidence in Tilber's testimony alone. As for the second criterion, the High Court unmistakably was aware of the availability of the lesser-included third-degree sexual assault option.[7] It therefore is appropriate for this Court to direct the High Court to enter judgment of third-degree sexual assault against Antolok on remand, and the High Court is so directed.

V. CONCLUSION

Based on the foregoing, the High Court's conviction of Antolok Antolok is **REVERSED**, and his sentence is **VACATED**. On remand, the High Court shall enter judgment of conviction under 31 MIRC § 213.3(1)(d), and resentence defendant-appellant promptly thereafter.

[7]Helpfully, within moments of rendering his verdict, the trial judge said so. *See* Trial Tr. at 131-32 ("counts 5, 7, 9, and 11 . . . are lesser-included offenses of charge number 3").

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,
Plaintiff-Appellee,
v.
A.P.,
Defendant-Appellant.

SCT CN 2018-003 (HCT CR CN 2017-001)

ON APPEAL FROM THE HIGH COURT

Argued October 19, 2020
Filed January 6, 2021

Summary

At trial, A.P., a juvenile, was convicted of murdering Robert Marquez, sexually assaulting his three-year-old daughter, and the burglary of the Marquez family store. The defense sought to suppress A.P.'s confession and to challenge the sufficiency of the evidence. With respect to the suppression motion, the Supreme Court adopted the United States standard of review: the trial court's "finding that waiver of Miranda rights was knowing and intelligent is reviewed for clear error, and a finding that the waiver was voluntary is reviewed de novo." Slip Op. at 8 (citations omitted). With respect to the sufficiency of evidence, the Supreme Court followed the United Standard of review it adopted in *Republic v. Antolok*, SCT 18-11 (11/18/20), Slip Op. at 4. Under the above standards, the Supreme Court found that, although a juvenile, A.P. knowingly and intelligently waived his Miranda Rights and his subsequent confession was voluntary. Further, the Court found that the evidence was sufficient to support the conviction for murder and for burglary. However, because the evidence showed that the three-year-old's body was sexually assault after her death, the evidence did not support conviction for sexually assaulting a person. Instead, the evidence would have supported a conviction for necrophilia. Accordingly, the Supreme Court affirmed the conviction for murder and burglar, reversed the conviction for sexual assault, and remanded the case to the High Court for sentencing consistent with the Supreme Court's decision, not to exceed 35 years' imprisonment.

MARSHALL ISLANDS, SUPREME COURT

Digest

REPUBLIC v. A.P.

1. APPEAL AND ERROR – *Standard of Review*: A court's finding that waiver of Miranda rights was knowing and intelligent is reviewed for clear error, and a finding that the waiver was voluntary is reviewed *de novo*.

2. EVIDENCE – *Weight and Sufficiency*: A conviction is supported by the sufficiency of the evidence when after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

3. CRIMINAL LAW AND PROCEDURE – *Waivers – Awareness and Competence*: A knowing and intelligent waiver of rights occurs when a suspect has full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon.

4. CRIMINAL LAW AND PROCEDURE – *Waivers – Voluntariness*: A voluntary relinquishment of a right occurs when a waiver is the product of a free and deliberate choice rather than intimidation, coercion, or deception. This standard of voluntariness requires that the will of the defendant not be overborne and that the statements be the product of rational intellect and free will.

5. CRIMINAL LAW AND PROCEDURE – *Waivers*: In determining both whether a waiver was knowing and intelligent, and whether a waiver and subsequent confession were voluntary, courts examine the totality of the circumstances. Factors relevant to a juvenile include the juvenile's age, experience, education, background and intelligence, prior experience with the criminal justice system, whether the questioning was repeated or prolonged, and the presence or absence of a friendly adult such as a parent or an attorney.

6. CRIMINAL LAW AND PROCEDURE – *Waivers– Juvenile*: A juvenile with "dull normal intelligence" can have the capacity to knowingly waive his Miranda rights. Behavior indicating that juvenile understood his rights and the consequences of waiving them provides persuasive evidence that the waiver was voluntary

7. CRIMINAL LAW AND PROCEDURE – *Waivers– Juvenile*: Testimony that juvenile was read each of his rights and was asked and indicated that he understood them suggested his waiver of those rights was knowing.

8. CRIMINAL LAW AND PROCEDURE – *Waivers– Juvenile*: Statements were knowing and voluntary, despite any disputed learning disabilities, because juvenile was read rights line by line, stopping at each statement, and it was clear that the juvenile made a choice willingly.

9. CRIMINAL LAW AND PROCEDURE – *Waivers– Juvenile*: If counsel is not present during the interrogation of a juvenile, the greatest care must be taken to assure that the admission was voluntary.

10. CRIMINAL LAW AND PROCEDURE – *Waivers– Juvenile*: Although the juvenile was held in police custody overnight, there was no evidence of coercion.

11. EVIDENCE – *Weight and Sufficiency*: A confession alone is insufficient evidence to find guilt beyond a reasonable doubt. But a confession is sufficient if coupled with corroborating evidence to indicate the trustworthiness of the confession.

12. STATUTES – *Construction and Operation*: A "natural person" under the sexual assault statutes only includes a living person, not a corpse.

13. STATUTES – *Construction and Operation – Rules of Interpretation*: The preeminent canon of statutory interpretation requires the court to presume that the legislature says in a statute what it means and means in a statute what it says there. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease.

14. STATUTES – *Construction and Operation – Rules of Interpretation*: Courts should construe statutory language to avoid interpretations that would render any phrase superfluous.

15. STATUTES – *Construction and Operation – Rules of Interpretation*: General language of a statutory provision although broad enough to include one term, will not be held to apply to a matter specifically dealt within another part of the same enactment.

Counsel

Richard Hickson, Attorney-General, counsel for Plaintiff/Appellee Republic of the Marshall Islands
Russell Kun, Chief Public Defender, counsel for Defendant/Appellant A.P.

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

PER CURIAM:

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

REPUBLIC v. A.P.

I. INTRODUCTION

A.P., a juvenile tried as an adult, was convicted by the High Court after a bench trial of the brutal murder of Robert Marquez ("Robert"), the sexual assault of Robert's three-year-old daughter Ashley, and the burglary of the Marquez family store.[3]

A.P. now raises three points on appeal: (i) the High Court erred in denying a motion to suppress his confession because he did not knowingly and intelligently waive his Miranda rights[4] and his waiver of those rights and subsequent confession were coerced and thus involuntary; (ii) there was insufficient evidence for the High Court to find, beyond a reasonable doubt, that he murdered Robert, sexually assaulted Ashley, or engaged in the burglary of the Marquez store; and (iii) the High Court sentence of fifty years imprisonment amounts to a life sentence and is thus excessive and in violation of A.P.'s constitutional right under Article II, Section 6 of the RMI Constitution. For the reasons stated below, we find that the High Court did not err in denying the motion to suppress A.P.'s confession. Additionally, we find that there was sufficient evidence for the High Court to convict A.P. of the murder of Robert and for the burglary of the Marquez store, but that there was insufficient evidence to convict A.P. of the sexual assault of Ashley. Accordingly, we **REVERSE** the conviction for sexual assault, **AFFIRM** the convictions for murder and burglary, **VACATE** A.P.'s sentence, and **REMAND** to the High Court for sentencing anew consistent with this Opinion.[5]

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[3]A.P. was fifteen years old at the time of the underlying offenses. By agreement of the parties, the court provided A.P. with rights that he would receive if tried as an adult, but also recognized many of his rights as a minor. For example, the court offered A.P. a jury trial (which he waived) and applied a guilty beyond a reasonable doubt standard, yet also closed the public to the proceedings. We have not been asked to consider the propriety of this hybrid system and thus offer no opinion as to its merit. Given this background, we refer to A.P. by his initials. *See, e.g.*, Marshall Islands Rule of Civil Procedure 5.2(a).

[4]As set forth *infra*, the rights afforded by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), are enshrined in the RMI Constitution and laws. *See* RMI Const. art. II, § 4(8); 32 MIRC § 120(2)(a)-(b). For the sake of brevity, we refer to these rights in the RMI as Miranda rights.

[5]Because we remand for resentencing, and because the High Court will be limited to sentence A.P. to no more than thirty-five years on remand, we do not reach A.P.'s argument that the fifty-year sentence was unconstitutional.

II. BACKGROUND

A. The Murders and A.P.'s Arrest and Interrogation

Robert lived with his three-year-old daughter Ashley in Laura, Majuro, where he operated a store out of the home.

In the early morning hours of June 25, 2017, Robert and Ashley were brutally murdered in their home while sleeping. Both were killed in the same manner—their throats were slit. Ashley's dead body was raped and then placed inside a freezer in the residence. Cigarettes, vodka, grizzly, and cash were taken from the Marquez store. At the time of the murders, A.P. was an employee at the store and resided near the Marquez home.

On July 2, 2017, the Marshall Islands Police Department ("MIPD") learned that A.P. was burning the sort of items (a vodka bottle and grizzly) stolen from the Marquez store. MIPD Officers Joy Jack and Johnny Johnson then located A.P. and his mother, both of whom voluntarily agreed to accompany them to MIPD headquarters in Uliga. A.P. was not questioned when he arrived at the headquarters; instead, he spent the night there and was then moved to a substation in Laura the next morning, where he was interviewed by Detective Royal Ceaser. Sergeant Marilyn Peter, Officers Jack and Johnson, and A.P.'s mother were present for the interview.

Before beginning the interview, Detective Ceaser advised A.P. (with his mother present) of his Miranda rights in Marshallese. The advisement took approximately 30 to 45 minutes. The rights were read orally and presented in written form to A.P. in both Marshallese and English. Detective Ceaser asked A.P. if he wanted a lawyer. A.P. answered "No" on the form, and he signed his name by the answer. Detective Ceaser then asked if A.P. was willing to discuss the offenses under investigation, if he understood each and every one of his rights as explained, and if, keeping those rights in mind, he would like to speak to law enforcement. A.P. answered "Yes" to each of the questions. Each response was documented on the form, and A.P. signed his name by each answer.

Detective Ceaser then conducted the interview in Marshallese, with A.P.'s mother present. During the interview, A.P. admitted that he entered the Marquez store through a hole near the roof; stole cartons of cigarettes, vodka, and grizzly; left the store by exiting through a door; returned to the Marquez store through the hole in the roof; and then killed Robert.[6]

Hearing these admissions, A.P.'s mother became very emotional and the interview was suspended for 45 to 60 minutes so that she could regain her composure. After the interview resumed, A.P. provided details as to how he killed both Robert and Ashley.

Neither the advisement of rights nor the interview was recorded. The advisement began at approximately 11:00 a.m., and the interview concluded at approximately 4:00 p.m.

On August 15, 2017, the RMI charged A.P. in an Amended Information with six offenses: 1) murder in the first degree[7]; 2) sexual assault in the first degree; 3) manslaughter; 4) burglary; 5) aggravated assault; and 6) robbery.[8]

On September 20, 2017, A.P. moved to suppress the statements and confessions he made during his July 3, 2017 interview. The High Court denied A.P.'s motion to suppress in a December 18, 2017 order.

The High Court first found that A.P. knowingly and intelligently waived his Miranda rights. Specifically, the High Court determined that A.P. was almost sixteen years old at the time of the confession; there was no evidence that his intelligence level was less than the average sixteen-year-old Marshallese male despite his education ending at a fourth-grade level; and A.P.

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[6]Detective Ceaser asked A.P. three times if he killed Robert—A.P. did not respond to the first two inquiries, but he admitted to killing Robert on the third.

[7]We recognize some confusion in the Criminal Code as to whether murder can be charged as murder in the first degree (which carries a life sentence) or simply murder (which carries a maximum sentence of twenty-five years). See 31 MIRC §§ 210.2 and 6.06(1) and (2). Although the Code states—in the Article setting forth maximum penalties for various offenses—that "[a] person who has been convicted of murder in the first degree shall be sentenced to a term of life imprisonment," 31 MIRC § 6.06(1), there is no corresponding offense of murder in the first degree in the Code's Article covering "Criminal Homicide." See 31 MIRC, art. 210. Thus, we conclude that even though A.P. was charged with murder in the first degree, the Code limits his maximum penalty for that offense to twenty-five years. See 31 MIRC §§ 210.2 and 6.06(2)(a).

[8]The High Court dismissed the counts for aggravated assault and robbery after the preliminary hearing and dismissed the count for manslaughter at the conclusion of the trial.

had the capacity to understand the Miranda warnings, the nature of his privilege against self-incrimination, and the consequences of waiving his Miranda rights. A.P.'s mother, a high school graduate with some limited post-high-school education, was present during the advisement and interview. She did not express concerns at the time about A.P. waiving his Miranda rights. To the contrary, she agreed with waiving and encouraged A.P. to be forthcoming.

The High Court also found that the waiver and confession were voluntary. The High Court determined that the advisement of rights and subsequent interview were not coercive because no threats were made, there was no physical abuse, the interview itself lasted approximately 3.5 hours, A.P. was not deprived of sleep or food while he stayed overnight in MIPD headquarters, and he was offered the opportunity to eat.

Accordingly, in viewing the totality of the circumstances, the High Court found that A.P. knowingly and intelligently waived his Miranda rights and the waiver of those rights and his confession were voluntary. Thus, A.P.'s motion to suppress was denied.

B. Evidence Adduced at Trial

A bench trial was held on November 20, 21, and 22 of 2017 and January 15, 16, and 18 of 2018.

1. The Murder Scene

Jeffrey Basin and Murphy Mubbun discovered the bodies of Robert and Ashley on the morning of June 26, 2017. Upon entering Robert's bedroom, they observed his body lying face down on the bed. Mr. Mubbin turned the body over "to see where the blood was coming from." Following a trail of blood, he then discovered Ashley's naked body in the freezer.

MIPD Investigator Carney Terry arrived at the Marquez residence later that morning. Among other things, Investigator Terry discovered a footprint on top of the freezer and a hole near the top of the ceiling, leading from the outside of the house to the inside. Soil found outside by the hole matched soil found by the footprint on the freezer, and the footprint also matched A.P.'s shoe.

United States Federal Bureau of Investigations ("FBI") Special Agent Brent Dana recovered a "patent" handprint[9] from the top of the freezer. Nicole Cover, an FBI forensic examiner, testified that the patent print lifted from the freezer matched A.P.'s right palm print.

2. Post-mortem Analysis of the Bodies

Dr. Marybeth Lorengatakikien, an emergency physician at Majuro Hospital, examined Robert's body on June 26, 2017. Dr. Lorengatakikien opined that Robert died from a gaping lacerated wound on his neck.

Dr. Ivy Lepidas, an OB/GYN at Majuro Hospital, conducted a gynecological exam of Ashley's body. She identified redness, a laceration, and several hymen tears. Taking into account all of her findings, Dr. Lepidas opined that she was "one hundred percent" certain that Ashley was subjected to vaginal penetration. When asked if the penetration was before or after death, Dr. Lepidas testified that "it must have been past" death because if Ashley was alive at the time of the penetration, her vaginal wall would have contracted back to its original state. Finally, Dr. Lepidas explained that she took a vaginal swab, which was then provided to the FBI for analysis.

3. DNA Testing Results

Lara Adams, an FBI forensic examiner, testified as an expert in DNA analysis. She first explained that the vaginal swabs taken from Ashley were found to contain semen. The semen was then subjected to DNA analysis and found to contain A.P.'s DNA with "the likelihood ratio" of "four hundred and seventy septillion," which falls into the highest level of identification of DNA evidence.

4. A.P.'s Arrest, Interview, and Confession

Detective Ceaser, Sergeant Peter, and Officer Jack all testified to A.P.'s initial arrest, the Miranda rights given to A.P., and his subsequent confession. Specifically, Detective Ceaser testified that A.P. confessed that he entered the Marquez residence through a hole in the ceiling, "landed on top of the freezer," and then "stole cigarettes, vodka, grizzly and money." Further,

[9]According to Special Agent Dana, a "patent" print is visible to the natural eye and can be detected without the use of any aids, such as fingerprint powder.

A.P. admitted that he killed both Robert and Ashley by cutting their throats, and that he placed Ashley's body in the Marquez store freezer.

C. The High Court's Verdict

On January 19, 2018, the High Court convicted A.P. of the murder of Robert, the sexual assault of Ashley, and the burglary of the Marquez store.[10] Based on the convictions, the High Court sentenced A.P. to a total sentence of 50 years on February 2, 2018. This sentence consisted of 25 years for murder and 25 years for sexual assault in the first degree, with these terms to be served consecutively, and 10 years for burglary, to be served concurrently with the sentences for murder and sexual assault in the first degree.

III. STANDARDS OF REVIEW

A. Motion to Suppress

Under the RMI Constitution:

> No person shall be subjected to coercive interrogation, nor may any involuntary confession or involuntary guilty plea, or any confession extracted from someone who has not been informed of his rights to silence and legal assistance and of the fact that what he says may be used against him, be used to support a criminal conviction.

RMI Const. Art. II, § 4(8).[11]

[1]We have not adopted a standard when reviewing a lower court's ruling on a motion to suppress. In the United States, a district court's finding that waiver of Miranda rights was knowing and intelligent is reviewed for clear error, and a finding that the waiver was voluntary is reviewed *de novo*. *See, e.g., United States v. Doe*, 219 F.3d 1009, 1016 (9th Cir. 2000); *United*

[10]Although the High Court first found A.P. "guilty" of these offenses, the High Court later clarified that because A.P. was a juvenile, it was more accurate to state that he was adjudicated as a delinquent child as to these offenses. For ease of reference, we refer to the High Court's finding as a conviction.

[11]These rights are also codified in the Criminal Procedures Act. Specifically, 32 MIRC § 120(2)(a)-(b) states that any arrested person shall be advised of the "right to remain silent and that anything the person says can be used against that person" and that "the person has the right to legal assistance of that person's choice and that if the persons lacks funds to procure such assistance, to receive it free of charge if the interests of justice so require."

States v. Frank, 599 F.3d 1221, 1228 (11th Cir. 2010). We agree with these standards and adopt them as the law of the RMI.

B. Sufficiency of the Evidence

[2] "A conviction is supported by the sufficiency of the evidence when 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *RMI v. Kijiner*, 3 MILR 122, 124 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In viewing the evidence in the light most favorable to the prosecution, the court 'may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal.'" *Id*. (quoting *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010)). "Instead, the court must construe evidence 'in a manner favoring the prosecution.'" *Id*. (quoting *Nevils*, 598 F.3d at 1167). "'Only after we have construed all the evidence at trial in favor of the prosecution do we take the second step, and determine whether the evidence at trial, including any evidence of innocence, could allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.'" *Id*. (quoting *Nevils*, 598 F.3d at 1164-65).

IV. DISCUSSION

A. A.P. Knowingly and Intelligently Waived his Miranda Rights and His Waiver of Those Rights and Subsequent Confession was Voluntary

A.P. argues that his waiver of Miranda rights was not knowing and intelligent, and that the waiver and subsequent confession was coerced and thus involuntary. We disagree.

[3][4]A knowing and intelligent waiver of rights occurs when "a suspect has full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon." *United States v. Carpentino*, 948 F.3d 10, 26 (1st Cir. 2020) (quotation marks and citation omitted); *Moran v. Burbine*, 475 U.S. 412, 421 (1986). And a voluntary relinquishment of a right occurs when a waiver is the "product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran*, 475 U.S. at 421; *see also RMI v. Lang et al*, Cr. No. 2010-020, at 8 (High Ct. Feb. 13, 2012) ("This standard [of voluntariness] requires that the

will of the defendant not be overborne and that the statements be the product of rational intellect and free will.").

[5]In determining both whether a waiver was knowing and intelligent, and whether a waiver and subsequent confession were voluntary, courts examine the totality of the circumstances. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). Factors relevant to a juvenile include the juvenile's age, experience, education, background and intelligence, prior experience with the criminal justice system, whether the questioning was repeated or prolonged, and the presence or absence of a friendly adult such as a parent or an attorney. *See, A.M. v. Butler*, 360 F.3d 787, 799 (7th Cir. 2004) (citing *Fare*, 442 U.S. at 725-26). Further, in assessing whether a juvenile's waiver of rights or confession was voluntary, courts have

> appreciate[ed] that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle—depending upon the age of the child and the presence and competence of parents. . . . If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

In re Gault, 387 U.S. 1, 55 (1967), overruled on other grounds by Allen v. Illinois, 478 U.S. 364, 372-73 (1986).

1. A.P. Knowingly and Intelligently Waived his Miranda Rights

[6]The High Court did not commit error, let alone clear error, when it found that A.P. knowingly and intelligently waived his Miranda rights. The findings by the High Court are amply supported by the record. First, although A.P. was a minor, he was nearly sixteen years old at the time of his arrest. And while A.P.'s formal education ended at fourth grade, the High Court correctly found "no evidence that his intelligence level [was] less than the average sixteen-year-old Marshallese male." Further, as determined by the High Court, A.P.'s answers to

questions show that he had the capacity to understand his rights, including the privilege against self-incrimination and his right to counsel. *See United States v. Male Juvenile* (95-CR-1074), 121 F.3d 34, 40 (2d Cir. 1997) (explaining that a juvenile with "dull normal intelligence" can have the capacity to knowingly waive his Miranda rights); *Garner v. Mitchell*, 557 F.3d 257, 262 (6th Cir. 2009) (explaining that behavior indicating that juvenile understood his rights and the consequences of waiving them provides persuasive evidence that the waiver was voluntary).

[7]Second, A.P.'s rights were read to him line-by-line in Marshallese and he was asked if he understood the legal effects of his waiver. A.P. acknowledged each statement before moving to the next. The rights were also presented in writing, in both Marshallese and English. At the bottom of the advisement form, A.P. was asked if he wanted a lawyer and he wrote "No" and signed his name. When asked if he understood each and every one of his rights, he wrote "Yes" and signed his name. *See Garner*, 557 F.3d at 261 (finding that testimony that juvenile was read each of his rights and was asked and indicated that he understood them suggested his waiver of those rights was knowing).

[8]Finally, A.P.'s advisement was not rushed, lasting approximately 30 to 45 minutes. And A.P.'s mother was present during this entire period. Given these circumstances, there is nothing to suggest that A.P. did not fully understand his rights or the consequences of waiving them. The High Court correctly determined that A.P.'s waiver of his Miranda rights was knowing and intelligent. *See Male Juvenile*, 121 F.3d at 40-41 (statements were knowing and voluntary, despite any disputed learning disabilities, because juvenile was read rights line by line, stopping at each statement, and it was clear that the juvenile made a choice willingly).

2. A.P.'s Waiver and Subsequent Confession Were Voluntary

A.P. argues that the waiver of his rights and subsequent confession were involuntary because (1) legal counsel was not present; and (2) they were the product of coercion. Again, the Court disagrees.

The Court considers the voluntariness of a minor's waiver and confession based on a number of factors. Specifically,

> the defendant's age, education, intelligence, experience and physical condition; the duration of the questioning; whether the defendant was advised of his constitutional rights; whether the defendant was threatened, enticed with promises, or coerced; and whether the defendant was induced to speak by police deception. For juveniles, additional considerations include the time of day during which the youth was questioned and the presence or absence of a parent or other friendly adult.

Gilbert v. Merchant, 488 F.3d 780, 787 (7th Cir. 2007).

[9]First, the court rejects A.P.'s primary argument—that the confession of a juvenile should be deemed coercive as a matter of law in the absence of legal counsel. We find no such absolute requirement. Instead, if counsel is not present for a permissible reason (as in the case here, given A.P.'s knowing and voluntary Miranda waiver), "the greatest care must be taken to assure that the admission was voluntary. . . ." *In re Gault*, 387 U.S. at 55.

And, in applying this standard, we conclude that A.P.'s waiver of his rights and confession were not the result of any coercion, but were made voluntarily. First, A.P.'s mother was present throughout both the advisement and the confession. Second, neither the advisement nor the interview took an unreasonable amount of time. Further, A.P. was offered food and water, and there is simply no evidence that the police engaged in any threatening conduct or applied any undue influence.[12]

[10]Against this evidence of voluntariness, A.P. presents very little evidence that his waiver or confession was coerced. Although A.P. was detained overnight, there is no evidence that he was mistreated in any manner while at MIPD headquarters. *See Bridges v. Chambers*, 447 F.3d 994, 999 (7th Cir. 2006) (finding a seventeen-year-old's confession voluntary where he was detained overnight but "the actual questioning . . . was relatively brief . . . [and t]here was no evidence he was not allowed to sleep between interviews"). In short, there is little evidence that

[12]A.P.'s confession was not recorded, either by video or audio. Although we do not adopt a per se rule requiring every interview to be recorded, law enforcement is strongly encouraged to record (by video and audio or audio alone) any custodial statement of an arrested person.

A.P. was coerced, intimidated, or threatened, leaving the Court to conclude that his waiver of rights and subsequent confession were voluntary—not "coerced or suggested"—and not the product of "ignorance of rights or of adolescent fantasy, fright or despair." *In re Gault*, 387 U.S. at 55.

B. Sufficiency of the Evidence at Trial

A.P. argues there was insufficient evidence to convict him of all three counts. We conclude that there was sufficient evidence as to the murder and burglary convictions, but insufficient evidence as to the sexual assault conviction. We begin with the murder and burglary convictions.

1. Murder and Burglary

A.P. argues that even if his confession to the murder and burglary offenses is admissible, there is insufficient evidence in the record to corroborate his confession. We disagree.

[11]The sufficiency of evidence needed to corroborate a confession is an issue of first impression in the RMI. We begin with a basic principle—a confession alone is insufficient evidence to find guilt beyond a reasonable doubt. But a confession is sufficient if coupled with corroborating evidence to indicate the trustworthiness of the confession. *See United States v. Waller*, 326 F.2d 314, 314 (4th Cir. 1963) ("All that is required . . . is that there be sufficient corroboration of the confession (or admission) to indicate that it is trustworthy, but the corroborating evidence need not, itself, establish every element of the offense."); *United States v. Brown*, 617 F.3d 857, 861-62 (6th Cir. 2010) (noting the "corroboration" rule is an iteration of a "sufficiency-of-the-evidence" argument, and that "[w]hen an accused confesses to a crime involving 'physical damage to person or property,' the independent corroborating evidence need only show that the crime occurred" (citing *Wong Sun v. United States*, 371 U.S. 471, 489-90 n.15 (1963)); *see also, Trust Territory v. Sokad*, 4 TTR 434, 438 (1969). We adopt this rule as the law of the RMI.

The RMI's case was largely built around A.P.'s confession, with evidence from the Marquez residence providing corroboration. For example, A.P.'s confession as to how he entered the Marquez residence was corroborated by A.P.'s handprint and footprint found on the

top of the freezer. The first witnesses to find Robert after his murder described him as lying face down in his bed, consistent with A.P.'s confession. Items (grizzly, cigarettes, and vodka) that A.P. admitted he stole from the Marquez store were later located at A.P.'s place of residence and/or appeared to be burned by him. And, finally, the swabs taken from Ashley's vagina were determined to contain semen and were a match to A.P.'s DNA with a "likelihood ratio" of "four hundred and seventy septillion" the highest level of DNA identification used by the FBI. In short, the RMI presented evidence that: 1) A.P. confessed to the murder of Robert and the burglary of his store; and 2) corroborated the trustworthiness of the confession. Put differently, the corroborating evidence presented to the High Court was fully consistent with A.P.'s confession. Thus, the confession and corroborating evidence would permit any rational trier of fact to find each essential element of these crimes beyond a reasonable doubt. We thus **AFFIRM** the convictions for murder and burglary.

2. Sexual Assault

A.P. also argues that there was insufficient evidence to support the sexual assault conviction. The court agrees, finding that because Ashley was no longer alive at the time of the sexual assault, A.P. did not commit the crime of sexual assault as defined in the Criminal Code.

[12]Under the Criminal Code, an individual is guilty of sexual assault if that person knowingly or recklessly "subjects another person" to sexual penetration or sexual contact. 31 MIRC §§ 213.1, 213.2, 213.3, 213.4 (sexual assault in the first, second, third, and fourth degree) (emphasis added). "Person," in turn, includes "any natural person." 31 MIRC § 1.13(8). The question thus becomes whether a "natural person" only includes living individuals or could include a corpse. Applying established rules of statutory construction, we conclude that a "natural person" under the sexual assault statutes only includes a living person.

The Nitijela enacted a separate criminal offense, also located in Article 213 covering sexual offenses, for "Bestiality and Necrophilia":

> A person is guilty of felony of the third degree if the person knowingly engages in any act of sexual gratification with an animal

> or a corpse, involving the sex organs of one and the mouth, anus, or sex organs of the other.

31 MIRC § 213.7 (emphasis added). Applying canons of statutory interpretation, it is clear that the Nitijela intended for a "natural person" to be different and separate from a "corpse."

[13][14][15]"'The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there.'" *Lekka v. Kabua, et al.*, 3 MILR 167, 171 (2013) (quoting *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012)). "'If the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease.'" *Id*. Further, "[i]t is a well-known canon of statutory construction that courts should construe statutory language to avoid interpretations that would render any phrase superfluous." *United States v. Cooper*, 396 F.3d 308, 312 (3d Cir. 2005), as amended (Feb. 15, 2005) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)); *see also Dribo v. Bondrik*, 3 MILR 127, 138 (2010) (explaining that courts are "to avoid constructions that produce odd or absurd results or that are inconsistent with common sense.") (internal citations omitted). "'[G]eneral language of a statutory provision although broad enough to include [one term], will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *United States v. Corrales-Vazquez*, 931 F.3d 944, 950-51 (9th Cir. 2019) (rejecting a statutory interpretation that "would have been not only superfluous but subsumed entirely within" another section) (citing *Bloate v. United States*, 559 U.S. 196, 207-08 (2010)); *see also Samuel v. Chief Electoral Officer*, Supreme Court No. 2018-01 at 10 n.3 (2019) ("A reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

The existence of a separate statute for necrophilia, covering any act of sexual gratification with a "corpse," is compelling evidence that the Nitijela intended the use of the term "person" in the sexual assault statute to refer to a living person. To hold otherwise would render the necrophilia statute superfluous.

We thus conclude that a "person" under the sexual assault statutes means a living person—any victim of a sexual assault must be alive at the time the assault occurred.

Here, Dr. Lepidas, the gynecologist who conducted Ashley's autopsy, testified at trial that she was certain that Ashley was forcefully penetrated, but she was also certain that this assault occurred after Ashley's death. There is no evidence in the record contradicting this testimony. Thus, because Ashley was deceased at the time the penetration occurred, by definition, she was not a "person" within the meaning of the statute of conviction.[13]

We are acutely aware of the gruesome facts before us—the evidence is overwhelming that A.P. killed three-year-old Ashley and then raped her. But as a matter of law, Ashley was not a "person" within the meaning of the statute at the time of rape. We thus **REVERSE** the conviction of sexual assault in the first degree.

C. A.P.'s Sentence

We **VACATE** the High Court's sentence and direct the High Court to sentence A.P. anew for the convictions of murder and burglary. Because we **REVERSE** and **REMAND** to the High Court for resentencing consistent with the Opinion, we need not address the arguments regarding the validity of A.P.'s fifty-year sentence.

The High Court is to resentence A.P. anew. That is, although the High Court will be limited to a statutory maximum sentence of 35 years, the High Court is not bound by its earlier decision to impose the sentence for the burglary conviction concurrent to the sentence for the murder conviction.

V. CONCLUSION

For the foregoing reasons, we **AFFIRM** A.P.'s conviction for the murder and burglary convictions, **REVERSE** A.P.'s sexual assault conviction, **VACATE** A.P.'s sentence, and **REMAND** the matter to the High Court for a sentencing anew consistent with this Opinion.

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[13]In its Amended Information, the RMI claimed that A.P. first sexually assaulted Ashley and then killed her. Again, as stated above, no evidence at trial was offered to support this sequence of events.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

TATIANA AKHMEDOVA,
Petitioner-Appellee,
v.
STRAIGHT ESTABLISHMENT, et al.,
Respondent-Appellant.

SCT CN 2019-003 (HCT CN 2018-169)

ORDER GRANTING "MOTION TO STAY ENFORCEMENT (of Judgment) PENDING APPEAL" CONDITIONED UPON POSTING OF BOND

Argued December 30, 2020
Filed January 20, 2021

Summary

The Chief Justice of the Supreme Court issued a procedural order as a single judge, granting the respondent-appellant's request to stay the enforcement of the judgment while the appeal is pending. The stay was conditioned upon the posting of a bond. In making this decision, the court applied the "sliding scale" or "alternative" approach for granting a stay. Under this alternative approach, the party requesting the stay can satisfy their burden by demonstrating either of the following: (1) a likelihood of success on the merits and the possibility of suffering irreparable harm; or (2) the existence of substantial legal issues and a clear advantage in their favor regarding the balance of hardships.

Digest

1. APPEAL AND ERROR – *Stay Pending Appeal – Test for Granting*: The test for granting a stay under Supreme Court Rule 8 is essentially the same as for granting a stay under High Court Rule of Civil Procedure, Rule 62.

2. APPEAL AND ERROR – *Stay Pending Appeal – Purpose*: The purpose of a stay is to preserve the status quo pending the outcome of an appeal.

3. APPEAL AND ERROR – *Stay Pending Appeal – Burden of Proof*: Because a stay intrudes into ordinary judicial review, it is generally not a matter of right even if irreparable harm

might otherwise result. The party requesting the stay bears the heavy burden if showing circumstances justifying a stay.

4 APPEAL AND ERROR – *Stay Pending Appeal – Discretionary*: The issuance of a stay is left to the court's discretion and will depend on the facts of each particular case. A motion to a court's "discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by 'sound legal principles.

5. APPEAL AND ERROR – *Stay Pending Appeal – Traditional Standard*: Four factors or "sound legal principles" are traditionally considered when determining whether to grant a stay of judgment pending appeal: (1) the likelihood of success on the merits of defendant's appeal—or at a minimum, serious questions going to the merits; (2) whether the balance of hardships tips sharply in the defendant's favor; (3) whether defendant will suffer irreparable harm in the absence of a stay; and (4) whether the stay would be in the public interest.

6. APPEAL AND ERROR – *Stay Pending Appeal – Alternative Standard*: A "sliding scale" or "alternative" approach has been recognized for the granting of a stay. Under the "alternative standard," the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions exist and the balance of hardships tips sharply in its favor. This last formulation represents two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. The greater the showing of irreparable harm the less a showing of success on the merits is required and vice versa. These two tests are not separate and unrelated; they represent "merely extremes of a single continuum."

7. APPEAL AND ERROR – *Stay Pending Appeal – Irreparable Harm, Defined*: "Irreparable harm" means that mere harm, even of substantial, in terms of money, time and injury that would be expended is not enough. "Irreparable harm" means "harm that cannot be undone." The threat of irreparable harm must be "imminent."

8. APPEAL AND ERROR – *Stay Pending Appeal – Likelihood of Success on the Merits*: In order to satisfy the first factor supporting grant of a motion to stay proceeding pending appeal, a strong showing that the moving party is likely to succeed on the merits, the moving party need not show that success on appeal is more likely than not, but must instead make a strong showing on the merits; alternatively, the moving party can attempt to satisfy the first factor by showing that its appeal raises serious legal questions, even if the moving party has only a minimal chance of prevailing on those questions (emphasis added). The above factors "are considered to be a continuum; thus, for example, a stay may be appropriate if the party moving for a stay demonstrates that serious legal questions are raised and the balance of hardships tips sharply in its favor. For a legal question to be serious, it must be a 'question going to the merits so serious,

substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation. A "serious legal issue" or "substantial case" is "one that raises genuine issues of first impression or which may otherwise address a pressing legal issue which urges that the court hear the issue.

9. APPEAL AND ERROR – *Stay Pending Appeal – Purpose of Bond*: The purpose of the supersedeas bond is to preserve the status quo during the pendency of an appeal of a money judgment.

10. COURTS – *Bonds or Security*: Factors or "sound legal principles" considered in approving stays without security in the full amount of the judgment include: (1) the complexity of the collection process, (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence the court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

11. COURTS – *Bonds or Security*: The burden is on the moving party to demonstrate the reasons for departing from the usual requirement of a full security supersedeas bond.

12. APPEAL AND ERROR – *Stay Pending Appeal – Likelihood of Success on the Merits*: The arguments raised by Respondent-Appellant on the issue of long arm jurisdiction are of "first impression" in the Republic, are supported by authorities, and there is a good faith difference of opinion between the parties on this issue. The undersigned expresses no opinion on the ultimate success of Straight Establishment's arguments but finds Straight Establishment stands more than a minimal or negligible chance of success on appeal.

13. APPEAL AND ERROR – *Stay Pending Appeal – Likelihood of Success on the Merits*: The court does find, however. that the jurisdictional issues are "issues of first impression" in this Republic on which there is no clearly dispositive precedent from this Court and/or chain of reasoning from existing RMI authorities clearly determinative of these issues. There is good faith disagreement between the parties on these issues. Both parties have made cogent arguments supported by precedent/authorities.

14. APPEAL AND ERROR – *Stay Pending Appeal – Likelihood of Success on the Merits*: The undersigned concludes that Straight Establishment has made more than a negligible or minimal showing of success on the merits and that a serious question has been raised on these jurisdictional issues sufficient to justify a more searching inquiry.

15. APPEAL AND ERROR – *Stay Pending Appeal – Irreparable Harm*: The vessel was custom designed and built; it is not a production yacht mass produced and readily available in the

marketplace. It is much like real estate which is considered unique, the disposition of which may constitute "irreparable harm" justifying the issuance of a stay. The point is that the undersigned is not convinced that money damages can redress the loss of the "M/Y Luna" if executed upon by construction of an identical or substantially equivalent replacement. If auctioned and sold, it may also be unlikely that the "M/Y Luna" itself can be recovered from a third-party purchaser. There is the further risk that Ms. Akhmedova may not be financially capable of returning the value of the M/Y Luna if sold and Straight Establishment prevails on its appeal.

16. APPEAL AND ERROR – *Stay Pending Appeal – Irreparable Harm*: If the judgment is affirmed Ms. Akhmedova can then expeditiously proceed with execution on the M/Y Luna. The hardship to Ms. Akhmedova is, thus, the time remaining to hear and decide the appeal which time can be compensated by interest accruing on the judgment should the judgment be affirmed.

Counsel

James Power, counsel for Petitioner-Appellee Akhmedova
James McCaffrey and Derek Adler, counsel for Respondent-Appellant Straight Establishment

Before CADRA, Chief Justice, acting as a single judge addressing procedural issue pursuant to Rule 27(c):

I. INTRODUCTION

On December 21, 2020, Respondent-Appellant, Straight Establishment, filed a "Motion to Stay Enforcement (of judgment) Pending Appeal" under Supreme Court Rule 8(a). Petitioner-Appellee, Tatiana Akhmedova, filed an "Opposition" on December 30, 2020. The undersigned decides this procedural motion pursuant to Supreme Court Rule 27(c).

Having considered the parties' arguments, the undersigned **GRANTS** Respondent-Appellant's "Motion to Stay Enforcement Pending Appeal" CONDITIONED UPON the posting of a bond in the amount of $250,000,000 USD (the estimated present value of the money judgment entered by the High Court in the sum of approximately $170,000,000 USD plus pre- and post-judgment interest) and subject to those conditions outlined in the High Court's Order dated December 8, 2020.

II. SUMMARY OF DECISION

The undersigned finds a stay is appropriate given this Court's decisions in *Neidenthal v. CEO* and *Nuka v. Morelik*, discussed *infra*, authorizing use of the so-called "sliding scale" approach. Respondent-Appellant has raised "serious questions going to the merits" of its pending appeal. These "serious questions" are of "first impression" in this Republic. Opposing authorities, precedents and arguments are raised by the parties on these serious questions of first impression which require "more deliberate investigation" and consideration by the fully constituted panel when deciding the pending appeal. It is not the function of the undersigned (or the full panel) to decide the merits of the pending appeal on the instant "stay motion." While no opinion is expressed on the ultimate resolution of those issues, the undersigned finds Respondent-Appellant has "more than a minimal or negligible chance of success" on these "serious questions" raised in its appeal.

The "balance of hardships" weighs sharply in favor of Respondent-Appellant. Respondent-Appellant's sole asset sought to be executed upon is the M/Y Luna (the "vessel"). That vessel is "unique," not being easily replaceable or replicable if auctioned and sold to satisfy the underlying judgment(s) prior to resolution of the pending appeal. As a practical matter, Respondent-Appellant will suffer "irreparable harm" if a stay is not granted. That harm is "imminent" if enforcement of judgment proceeds. The hardship to Petitioner-Appellee, at this late stage of appellate proceedings, consists of the delay in pursuing execution on her judgment. That delay is occasioned by awaiting a decision of the fully briefed appeal by the Supreme Court. Interest on the underlying judgment incurred by this delay can be easily calculated and awarded should Petitioner-Appellee prevail.

The undersigned finds and concludes that the requirements for granting a stay are met under the "sliding scale" approach recognized by this Court's decisions in the cases of *Neidenthal v. CEO*, *infra*, and *Nuka v. Morelik*, *infra*, as discussed further below. The next analytical step is determining the amount of a bond, if any, which should be required to protect Petitioner-Appellant's interest in her judgment.

The weight of authority is that posting of a bond in the full value of the judgment plus interest is ordinarily required to secure a stay. Respondent-Appellant has not demonstrated "good cause" to depart from this ordinary requirement. Respondent-Appellant has not demonstrated it is financially unable to post a full bond or that posting a bond will endanger its other creditors. Respondent-Appellant has not shown that its ability to satisfy the judgment is "so clear that a bond would be a waste of money." Respondent-Appellant has not shown that it is financially able to satisfy the judgment if it fails to prevail on appeal. These factors weigh in favor of requiring a full bond.

Absent posting of a full bond, Petitioner-Appellee's interest in recovering the full value of her judgment diminishes with time. The vessel is not income-generating and is depreciating while docked in Dubia, U.A.E. Respondent-Appellant maintains the vessel will produce less than the value of the judgment if sold at auction. Thus, absent a bond in the full amount of the judgment, Petitioner-Appellee's judgment diminishes in value as time passes. Given that the aim of a stay secured by a bond is to preserve the *status quo* awaiting resolution on appeal, a full bond is appropriate because it protects the present value of Petitioner-Appellee's judgment and ability to recover on that judgment.

Further, the undersigned finds the pending preliminary injunction is not sufficient to protect Petitioner-Appellee's interest in her judgment. The asset sought to be executed upon, the M/Y Luna, is not physically present in the Republic. That asset, by its very nature and intended purpose, is capable of being moved from its present location in Dubia, U.A.E., to some other location beyond the reach of the RMI courts to escape anticipated execution in aid of judgment. While there is no evidence that Respondent-Appellant has violated the terms of the pending preliminary injunction, there is suggestion of a pattern of conduct by Respondent-Appellant to avoid execution of judgment on the M/Y Luna. The potential for violating the preliminary injunction without adequate security being posted favors the posting a bond in the full value of the judgment plus interest. No alternative security device has been proposed aside from a

minimal bond in the amount of $100,000 to cover Petitioner-Appellee's cost on appeal and maintenance of the preliminary injunction.

The undersigned finds there is no reason to depart from the general rule that a full bond is required to effectuate the stay. Therefore, a stay is granted conditioned upon the posting of a bond in the amount of the judgment plus interest subject to those conditions as imposed by the High Court in its Order dated December 8, 2020, which terms are incorporated by the undersigned's Order by reference.

II. BRIEF SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

The relevant facts and procedural background have been thoroughly set forth by the parties in their submissions on this motion and in the briefing of the appeal. The facts and procedural history can be briefly summarized:[14]

This case arises out of a 2016 English divorce decree between Mr. Farkad Akhmedov and Tatiana Akhmedova. A "property division" by the English court awarded Ms. Akhmedova, the equivalent of approximately $478,278,000 USD, plus interest as against Mr. Akhmedov ("Financial Remedy Order" entered December 20, 2016.) The English court issued several subsequent orders adding, among other corporate entities, Respondent-Appellant Straight Establishment as jointly and severally liable judgment debtors for that judgment. The English court's theory being the corporate entities, including Straight Establishment, are "alter egos" (or "nominees") of Farkad Akhmedov.

On July 10, 2018, Petitioner-Appellee Ms. Akhmedova filed a "petition" in the RMI High Court against Respondent-Appellant Straight Establishment, Mr. Akhmedov and others seeking recognition of the English judgments pursuant to the Marshall Islands Uniform Foreign Money Judgments Recognition Act ("UFMJRA"), 30 MIRC Ch. 4, sec. 401 et seq and requesting that a judgment be immediately entered against the respondents in the sum of $478,278,000.00 (the non-maintenance portion of the English judgments.)

[14]The following summary is drawn from both parties' respective filings on this "motion for stay" and Exhibits appended thereto. The undersigned has also reviewed the briefing of both patties on the pending appeal.

Ms. Akhmedova's choice of the RMI as a forum and personal jurisdiction over Straight Establishment is premised upon Straight Establishment being registered as a foreign maritime entity in the RMI and the singular asset of Straight Establishment, the "M/Y Luna," being flagged in the Marshall Islands.[15]

Ms. Akhmedova then filed a motion for appointment of a receiver for the "M/Y Luna" and motion for entry of a preliminary injunction. The motion for appointment for a receiver was denied but the petition for a preliminary injunction was granted by the High Court on August 8, 2018. Straight Establishment was restrained from "disposing of, selling, transferring, encumbering, removing, paying over, conveying or otherwise interfering" with the M/Y Luna. The High Court found that the risk the M/Y Luna would be concealed or damaged constituted "immediate and irreparable harm."[16] That preliminary injunction remains in effect. It is alleged that Straight Establishment has attempted to violate that injunction.[17]

On August 8, 2018, Straight Establishment moved to dismiss Ms. Akhmedova's "petition" for lack of personal jurisdiction and on grounds of *forum non conveniens*. That motion was denied as to Straight Establishment on November 2, 2018. The High Court found the assertion of jurisdiction complied with the Republic's long arm statute because the claims against Straight Establishment were based upon activities in the Republic: to wit; the registration as a

[15]*See* Petition for Recognition of a Foreign Judgment at 3, para. 8, attached as Exhibit A to Declaration of Derek Adler in Support of Motion for Stay. Ms. Akhmedova resides in England and is an English citizen. Mr. Akhmedov is a resident of Azerbaijan. Straight Establishment is a Liechtenstein corporation. *Id*

[16]*See* Exhibit G, Order Granting Preliminary Injunction at 19, appended to Motion for Stay. "Ms. Akhmedova has shown there is a significant risk the Luna will be concealed or damaged and the Luna is Straight Establishment's sole asset. The Luna is an extremely high value asset worth hundreds of millions of dollars. The respondents, including Straight, have transferred the title to the Luna at least four times what appears to be a fraudulent attempt to conceal the asset. . . . Mr. Akhmedov has taken measures to diminish the value of or to cause the Luna to become derelict and unseaworthy . . ."

[17]Opposition to Motion for Stay at 16-18.

foreign maritime entity and flagging of the M/Y Luna in the RMI. The High Court further held that personal jurisdiction complied with due process based on these same activities.[18]

On September 17, 2019, the High Court granted a motion for summary judgment filed by Petitioner-Appellee and entered a judgment against Straight Establishment enforcing the English judgment(s) in the amount of GBP 125,569,492, plus pre- and post-judgment interest. The preliminary judgment remains in effect as per that judgment.[19]

On October 11, 2019, Straight Establishment appealed (1) the Order denying its motion to dismiss for lack of personal jurisdiction, and (2) the judgment granting enforcement of the English judgments. That appeal has been fully briefed as of May 6, 2020, and is ripe for oral argument and decision. The undersigned takes notice that oral argument and ultimate disposition of this appeal has been delayed by the on-going COVID-19 pandemic and resultant travel restrictions into the RMI.

On March 12, 2020, Petitioner-Appellee moved for an "order in aid of execution" against the "M/Y Luna." Respondent Straight Establishment cross-motioned for an order staying enforcement of the judgment during the pendency of the appeal and modification of the preliminary injunction. That modification of the preliminary injunction was sought so as to allow the "M/Y Luna" to be removed from the water, drydocked for repairs, and to allow regular sea trials within the domestic waters of the U.A.E. The High Court held a hearing on November 18, 2020, stating its intent to grant a stay pending appeal and to modify the preliminary injunction to allow the M/Y Luna to be drydocked and sea trials conducted. The High Court directed the parties to meet and confer in an effort to agree on the form of an appropriate order. The parties were unable, for whatever reason, to do so.

The parties being unable to agree as to the form of an order, the High Court then entered an Order on December 8, 2020, granting a stay conditioned on the posting of a bond in the sum of $250,000,000 USD. Upon posting of the bond, the preliminary injunction was to be dissolved

[18] *See* Order Regarding Motion to Dismiss attached as Exhibit H to Declaration of Derek Adler.

[19] *See* Exhibit 1 attached to Declaration of Derek Adler in support of instant motion for stay.

to the extent of allowing certain repairs and drydocking of the "M/Y Luna" as well as conducting sea trials in the domestic waters of the U.A.E. In the event the required bond was not posted by December 24, 2020, the parties were to appear on December 29, 2020, for a hearing pursuant to the Enforcement of Judgments Act, 30 MIRC 110, 11, to take evidence and hear submissions from the parties regarding how the Amended Judgment should be enforced.[20]

Respondent-Appellant Straight Establishment did not post the required bond by December 24, 2020. Instead, the instant "Motion to Stay Pending Appeal" was filed with this Court on December 21, 2020. Petitioner-Appellee requested an unopposed extension of time until January 4, 2020, in which to file her opposition; which motion was granted on December 24, 2020. Petitioner-Appellee filed her opposition on December 30, 2020.

III. THE PARTIES' CONTENTIONS

A. Respondent-Appellant's Arguments on the "Motion for Stay"

Respondent-Appellant Straight Establishment urges the use of the "alternative" or "sliding scale" standard for granting of a stay recognized by this Court's decisions in *Neidenthal* and *Nuka*, discussed *infra*. That alternative standard requires a showing of "serious issues" raised on appeal and a "balancing of hardships."

Straight Establishment argues the pending appeal raises "serious questions regarding matters of first impression in the Republic." These serious questions include, among others: (1) whether the High Court erred by asserting *long arm jurisdiction* over Straight Establishment where its sole contacts with the Republic is registration as a foreign maritime entity and flagging of the "M/Y Luna" as an RMI registered vessel Straight Establishment's contention is that 27 MIRC 251(1)(p) and 52 MIRC 125(2)(d) require that Ms. Akhmedova's cause of action must arise from the Straight Establishment's particular contacts with the forum. The "serious question" presented on appeal is whether Ms. Akhmedova's action to enforce a foreign money judgment based on a matrimonial property division against Straight Establishment, a foreign

[20] *See* Exhibit B attached to Declaration of Derek Adler in support of instant motion for stay.

maritime entity, "arises from" that maritime entity's act of registering as a foreign maritime entity and flagging a vessel (the M/Y Luna) under the laws of the RMI; (2) *Personal jurisdiction* comporting with the requirements of due process is challenged on these same grounds; (3) Aside from the jurisdictional issues raised on appeal, ancillary issues regarding the High Court's grant of Petitioner's motion for summary judgment are raised including (a) which party bears the burden of proving mandatory grounds for non-recognition under the UFMJRA, and (b) the amount of deference owed to a foreign court's (the English court's) jurisdictional determination over a non-resident defendant in an action to enforce a foreign money judgment.[21]

Straight Establishment argues "irreparable harm" will result if a stay is not granted because its sole asset sought to be executed upon, the M/Y Luna, is "unique" being a "singular and irreplaceable vessel." Straight Establishment further argues that its appeal will moot its appeal if the stay is denied. Thus, Straight Establishment concludes the balance of hardships tips sharply in its favor justifying issuance of the requested stay of enforcement of the judgment pending appeal.

Regarding the bond requirement, Straight Establishment contends the existing preliminary injunction is sufficient to protect Ms. Akhmedova' s interests and that, if anything, a nominal bond in the amount of $100,000 to cover her costs of appeal is appropriate.

B. Petitioner-Appellee's Arguments on the "Motion for Stay"

Ms. Akhmedova contends Straight Establishment has failed to demonstrate its entitlement to a stay under either test (traditional or alternative tests) recognized by *Neidenthal* and *Nuka*, discussed *infra*. She contends Straight Establishment has failed to meet either the "'likelihood of success" or the lower "serious questions" standards. Personal or long arm jurisdiction is argued to exist based on acts taken with respect to Straight Establishment's registration as a maritime entity and flagging of the "M/Y Luna" under RMI law. Regarding the allocation of the burden of proof of mandatory grounds for non-recognition of the English judgment under the UFMJRA and the High Court's granting of summary judgment, she argues the majority of U.S. precedents hold

[21] *See* Motion for Stay and Opening Brief on Appeal.

that the respondent must raise a disputed issue of material fact as to mandatory grounds for non-recognition. She argues Straight Establishment will not suffer "irreparable harm" should she be allowed to enforce to judgment and execute upon the "M/Y Luna." The "M/Y Luna," according to Ms. Akhmedova, is not a "unique" asset and Straight Establishment can be monetarily compensated should the judgment be reversed on appeal. Thus, Ms. Akhmedova contends the "balance of hardships" tips in her favor because "petitioner faces serious harm if the sole asset of Straight is destroyed, removed from reach or seriously depreciated." She argues the existing preliminary injunction "does not protect the Vessel from external, environmental harms or other risks such as accidental damage or destruction or other accidents causing liability." Ms. Akhmedova questions whether Straight Establishment will abide with the terms of the preliminary injunction pointing to alleged instances where Straight Establishment and/or Mr. Akhmedov has attempted to violate that injunction. Those alleged instances include an attempt to re-register the vessel in Sierra Leon during the pendency of the preliminary injunction; Straight Establishment's attempts to amend the preliminary injunction to place the vessel in the hands of third-parties potentially exposing the vessel to additional risks and liabilities, thus compromising the protections afforded by the preliminary injunction; and, generally, Straight Establishment's and Mr. Akhmedov's history of attempted "evasion of the English and RMI judgments and worldwide freezing orders." Ms. Akhmedova urges a bond in the amount of $250,000,000 as set by the High Court.

IV. THE APPLICABLE LEGAL STANDARDS

A. Requirements for a Stay Pending Appeal

[1][2][3][4]The test for granting a stay under Supreme Court Rule 8 is essentially the same as for granting a stay under High Court Rule of Civil Procedure, Rule 62. *See, e.g., Hilton v. Braunskill*, 481 U.S. 770,776 (1987). The purpose of a stay is to preserve the status quo pending the outcome of an appeal. *Neidenthal v. CEO*, S.Ct. Case No. 2015-001, slip op, at 3, (2015) citing *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (l0th Cir. 1996). "Because a stay intrudes into ordinary judicial review, it is generally not a matter of right even if

irreparable harm might otherwise result. The party requesting the stay bears the heavy burden if showing circumstances justifying a stay." *Niedenthal*, *supra* (citations omitted). The issuance of a stay is left to the court's discretion and will depend on the facts of each particular case. *Nken v. Holder*, 556 U.S. 418 at 433 (2009). A motion to a court's "discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by 'sound legal principles."' *Id.* at 434 (quoting *Martin v. Franklin Capital Corp*., 546 U.S. 132, 139 (2005))(internal quotation marks added).

[5][6][7][8]Four factors or "sound legal principles" are traditionally considered when determining whether to grant a stay of judgment pending appeal: (1) the likelihood of success on the merits of defendant's appeal—or at a minimum, serious questions going to the merits; (2) whether the balance of hardships tips sharply in the defendant's favor; (3) whether defendant will suffer irreparable harm in the absence of a stay; and (4) whether the stay would be in the public interest. *Neidenthal v. CEO, supra*, citing *Nuka v. Morelik*, 3 MILR 39 (2009); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9111 Cir. 2011). A "sliding scale" or "alternative" approach has been recognized for the granting of a stay. Under the "alternative standard," the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions exist and the balance of hardships tips sharply in its favor. This last formulation represents two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Neidenthal*, *supra*, at 4 citing *Nuka v. Morelik*, 3 MILR 39 (2009); *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). In other words, the greater the showing of irreparable harm the less a showing of success on the merits is required and vice versa. These two tests are not separate and unrelated; they represent "merely extremes of a single continuum." *Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978); *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006)(These four factors "are not prerequisites but are interconnected considerations that must be balanced together.") "Under any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury."

Oakland Tribune, *supra*, at 1376. "Irreparable harm" means that mere harm, even of substantial, in terms of money, time and injury that would be expended is not enough. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). "Irreparable harm" means "harm that cannot be undone." *Neidenthal*, *supra*. The threat of irreparable harm must be "imminent." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003.)

[8]District Court cases from within the Ninth Circuit are instructive in applying the above stated "sound legal principles" required for granting a stay. In order to satisfy the first factor supporting grant of a motion to stay proceeding pending appeal, a strong showing that the moving party is likely to succeed on the merits, the moving party need not show that success on appeal is more likely than not, but must instead make a strong showing on the merits; alternatively, the moving party can attempt to satisfy the first factor by showing that its appeal raises serious legal questions, even if the moving party has only a minimal chance of prevailing on those questions (emphasis added). *See, e.g.*, *Mohammed v. Uber Technologies*, 115 F. Supp. 3d 1024, 1028 (N.D. Cal. 2015)(reversed in part on other grounds) citing *In re Carrier IQ*, 2014 WL 2922726, at * 1 (recognizing that under Ninth Circuit law, the above factors "are considered to be a continuum; thus, for example, a stay may be appropriate if the party moving for a stay demonstrates that serious legal questions are raised and the balance of hardships tips sharply in its favor")(citing *Golden Gate Rest. Ass 'n v. City and Cnty of S.F.*, 512 F.3d 1112, 1115-16 (9th Cir. 2008)). Where only such a lesser showing (of success on the merits) is made, the appellant must further demonstrate that the balance of the hardships absent a stay tips "sharply" in its favor. *Uber Technologies*, *supra*. (citations omitted). "[F]or a legal question to be serious, it must be a 'question going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation. *Uber Technologies*, *supra*, (citations omitted). A "serious legal issue" or "substantial case" is "one that raises genuine issues of first impression within the Ninth Circuit," or which may "otherwise address a pressing legal issue which urges that the Ninth Circuit hear the issue. *Id.* (citations omitted) (emphasis added.)

B. Bond Requirement and Conditions for Bond Waiver

Assuming the moving party has met its burden for obtaining a stay, the next inquiry or step in the analysis is whether a bond or alternate security should be required and, if so, in what amount.

[9]The purpose of the supersedeas bond is to preserve the status quo during the pendency of an appeal of a money judgment.

> The purpose of a supersedeas bond is to preserve the status quo while protecting the nonappealing party's rights pending appeal. A judgment debtor who wishes to appeal may use the bond to avoid the risk of satisfying the judgment only to find that restitution is impossible after reversal after appeal. At the same time, the bond secures the prevailing party against any loss sustained as a result of being forced to forego execution in a judgment during the course of an ineffectual appeal.

Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1190-91 (5th Cir. 1979).

[10]Factors or "sound legal principles" considered in approving stays without security in the full amount of the judgment include: (1) the complexity of the collection process, (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence the court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. *Dillon v. City of Chicago*, 866 F.2d 902, 904-905 (7th Cir. 1989) quoted in *US. ex ref. Cqfasso v. General Dynamics C4 Systems, Inc.*, 2010 WL 384594 (AZ Dist. Ct. 2010.) Courts addressing motions for bond waiver have focused on and expressed a willingness to grant such requests when: (1) defendant's ability to pay is so plain that the cost of the bond would be "a waste of money" or (2) requiring a bond "would put the defendant's other creditors in undue jeopardy." *Olympia Equip. v. W Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986); *see also, Sqfoco Ins. Co. of Am. v. City of San Bernardino*, 2007 WL 9719254, at *3 (C.D. Cal. July 27, 2007).

[11]The burden is on the moving party to demonstrate the reasons for "depart[ing] from the usual requirement of a full security supersedeas bond." *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190 (5th Cir. 1979). Although a court may forego the requirement of a bond in certain circumstances, a bond is the favored form of security, and the party seeking to dispense with the requirement bears the burden of showing why an alternative form of security is appropriate. *See, e.g., Lewis v. Joint Venture*, 2009 WL 1654600 (W.D. Mich. June 10, 2009).

IV. DISCUSSION/ANALYSIS

A. A Stay Should Issue Pending Resolution of the Pending Appeal.

1. Serious issues are raised by Straiglzt Establishment on appeal

Straight Establishment raises "serious questions" on appeal. Straight Establishment's challenge to "long arm jurisdiction" and "specific jurisdiction" present questions of "[first impression" in the Republic which are "deserving of more deliberate and further inquiry." Straight Establishment contends the Republic's long arm statute, 27 MIRC 251, et seq., does not authorize the exercise of personal jurisdiction because Petitioner's claim under the UFMJRA does not assert liability for acts done within the Republic.[22] Reduced to its simplest form, Straight's jurisdictional argument is that the acts of registration and flagging within the Republic do not comprise any element of Petitioner's claim or cause of action for enforcement of its English judgment under the UFMJRA. Rather, Petitioner's claim or cause of action arises from a matrimonial property division; not from acts performed by Straight within the Republic. Straight analogizes the instant case to *Pacific International, Inc. v. United States of America*, 2 MILR 244 (2004). Straight argues that the phrase "based upon" as used in Section 125 of the Business Corporations Act, allowing an action against a foreign maritime entity only where "the action . . . is based on a liability for acts done within the Republic," means that 52 MIRC 125(2)(d) should be construed as to require that the "gravamen" of Petitioner's claim must be based on acts

[22]Opening Brief on Appeal at I0-16.

compromising elements of the Petitioner's cause of action. The "gravamen" of Petitioner's claim is the failure of Respondent to pay the English Judgments, not Straight Establishment's acts of registering as a foreign maritime entity and registering the "M/Y Luna" as an RMI flagged vessel. Thus, according to Straight Establishment, jurisdiction does not exist under the Republic's long arm statute. The High Court, however, found that "it is not the registration alone, but registration for the purpose of hindering, delaying, and avoiding satisfying English Money Judgments, which results in the respondent being liable to the Petitioner for acts done within the Republic."[23] In response, Straight Establishment argues that there is no allegation of a fraudulent transfer in Ms. Akhmedova's Petition. What must be pled under the UFMJRA, 30 MIRC 493, et seq, according to Straight Establishment, is that the foreign judgment is final and conclusive. Straight Establishment argues "all the elements of a claim for recognition, as well as all available defenses, focus on what took place in the foreign forum," not what may have occurred in the Marshall Islands after that foreign judgment (such as registration and flagging of the "M/Y Luna" in the RMI). Straight Establishment supports its theory by citing two New York federal cases, *Ackerman v. Levine*, 788 F.2d 830, 842 n. 12 (2nd Cir.) and *Bridgeway Corp. v. Citibank*, 45 F.Supp. 2d 276,286 (S.D.N.Y. 1999).

[12]The arguments raised by Respondent-Appellant on the issue of long arm jurisdiction are of "first impression" in the Republic, are supported by authorities, and there is a good faith difference of opinion between the parties on this issue. The undersigned expresses no opinion on the ultimate success of Straight Establishment's arguments but finds Straight Establishment stands more than a minimal or negligible chance of success on appeal.

Straight Establishment makes a similar argument in support of its contention that the High Court's assertion of specific jurisdiction does not comport with due process.[24] Appellant's theory, again reduced to its simplest form, is that "the elements of a claim for recognition of a foreign money judgment under the UFMJRA have little or nothing to do with a judgment

[23]December 6, 2020 "Order" at 5; Order regarding Motions to Dismiss at 16-18.

[24]Opening Brief on Appeal at 16-19.

creditor's (sic) in-forum activity. . . . Here, Straight's only purported in-forum actions were that it had registered the RMI as a foreign maritime entity, had registered the Luna in the RMI, and had operated Luna under the RMI's flag." Again, these acts are not part of Petitioner's claim or cause of action. Petitioner's cause of action arose from the entry of the English judgments and Straight's failure to pay those judgments. Straight has no assets or property in the RMI and there is no specific jurisdiction based on either acts within the RMI or property within the RMI. Relying on a law review article, Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U.L.Rev. 344,351 (2016), Respondent-Appellant questions whether the doctrine of specific jurisdiction has any application at all in the context of enforcing foreign judgments.

Petitioner-Appellee, of course, contends the acts of Straight Establishment in registering as a foreign maritime entity in the RMI, registering the vessel in the RMI, and operating the vessel under the RMI flag constitutes "acts within the Republic" as part of a fraudulent scheme to avoid payment of the English Judgments. These acts need not have been accomplished by Straight while being physically present within the Republic. These wrongful acts by Straight in an attempt to avoid the English Judgments is sufficient to support jurisdiction under the Republic's long arm statute. Further these acts are sufficient constitute "minimum contacts" with the Republic sufficient to support assertion of personal jurisdiction comporting with due process. Case1aw is cited in support of Petitioner-Appellee's arguments and Straight Establishment's authorities are discussed and/or distinguished.[25]

[13][14]The undersigned expresses no opinion on whether Straight Establishment will ultimately prevail on its jurisdictional arguments. The undersigned does find, however. that the jurisdictional issues are "issues of first impression" in this Republic on which there is no clearly dispositive precedent from this Court and/or chain of reasoning from existing RMI authorities clearly determinative of these issues. There is good faith disagreement between the parties on

[25]Answering Brief on Appeal at 5-11.

these issues. Both parties have made cogent arguments supported by precedent/authorities. The undersigned concludes that Straight Establishment has made more than a negligible or minimal showing of success on the merits and that a serious question has been raised on these jurisdictional issues sufficient to justify a more searching inquiry. Having found that Straight Establishment has raised jurisdictional issues deserving of further inquiry, the undersigned need not address the remaining bevy of issues raised on appeal.

Having found that Respondent-Appellant has made at least a minimal showing of "substantial questions" raised in its appeal, the next step in the analysis under the "sliding scale" approach becomes the "balancing of hardships."

2. The balance of hardships tips sharply in favor of Respondent-Appellant

However slight Respondent-Appellants chances for success on appeal may be, the "balance of hardships" favors granting a stay of enforcement of judgment pending resolution of the instant appeal.

The M/Y Luna is a "unique asset" in that it is not easily replaceable with a substantially identical product or reasonably replicable in the marketplace. The "M/Y Luna" is a "one of a kind superyacht," the second largest in the world, custom built and containing amenities, such as heli-pads, a mini-submarine, a 20 meter outdoor pool, and security features designed to protect against potential attacks by bombs or missiles.[26] According to the website referenced by Respondent-Appellant, https://en.wikipedia.ord/wiki/Luna (yacht), the M/Y Luna was originally constructed at a cost exceeding 400 million pounds. "The M/Y Luna is a unique and extraordinary vessel being custom built designed by NewCruise of Germany with its interior designed by Donald Starkey." *Id.* A google search of the links in the cited Wikipedia entry reveals that Donald Starkey Designs founded in Dubai, has won "no less than 26 Design Awards for his work. 'Unique and timeless elegance are synonymous with the design from this renown

[26]Motion for Stay at 15.

studio"' or so touts the website.[27] Petitioner-Appellee concedes "[t]he vessel is a superyacht measuring 115 meters (337 feet); there are only a handful of vessels like it in the world."[28] Petitioner-Appellee has also characterized the vessel as being "unique in its own right" in her application for preliminary injunction.[29] In the view of the undersigned, the extraordinary cost and custom design of the "M/Y Luna" makes it "unique" in much the same way as real estate or a work of art. It is "one of a kind" and potentially extremely difficult, if not impossible, to replace were it to be executed upon, auctioned and sold to satisfy the judgments. Respondent-Appellant is thus exposed to "irreparable harm" should a stay not issue.

[15]Ms. Akhmedova argues that "the turnover of a yacht which can be repurchased or built is a monetary harm" which fails to meet *Nuka's* requirement of "irreparable harm."[30] The problem with this argument is that it is entirely unclear (at least to the undersigned) whether this vessel can be substantially replicated or replaced should it be executed upon prior to the resolution of the instant appeal. The vessel was custom designed and built; it is not a production yacht mass produced and readily available in the marketplace.[31] It is much like real estate which is considered unique, the disposition of which may constitute "irreparable harm" justifying the issuance of a stay. The point is that the undersigned is not convinced that money damages can redress the loss of the "M/Y Luna" if executed upon by construction of an identical or substantially equivalent replacement. If auctioned and sold, it may also be unlikely that the

[27]See link for Donald Starkey Designs at https://www.supervachts.com/directozy.

[28]Opp. To Motion for Stay.

[29]Motion for Stay at 17 referencing Exhibit F appended thereto.

[30]Opp. to Motion for Stay at 14-15.

[31]Although the parties have not addressed or proffered evidence on the issue, it may certainly be possible if not probable that the interior/exterior design, layout and engineering plans of the MN Luna are protected by copyright of non-functional components, utility or design patents of functional components, hull design covered by the Vessel Hull Protection Act (VHPA Title 17 United States Code, Chpt. 13, et seq.) or some foreign equivalent, trade dress, trademark, licensing agreements or contracts preventing replication of design, etc., etc., which would make construction of a substantial equivalent legally impossible or impractical. No findings are made in this regard.

"M/Y Luna" itself can be recovered from a third-party purchaser. There is the further risk that Ms. Akhmedova may not be financially capable of returning the value of the M/Y Luna if sold and Straight Establishment prevails on its appeal. As argued by Straight Establishment, Ms. Akhmedova has no assets in the Republic and has no connection to the Republic.

[16]The hardship to Ms. Akhmedova consists of the time spent waiting for resolution of the pending appeal. The appeal has been fully briefed awaiting only oral argument and decision by the Supreme Court. If the judgment is affirmed Ms. Akhmedova can then expeditiously proceed with execution on the M/Y Luna. The hardship to Ms. Akhmedova is, thus, the time remaining to hear and decide the appeal which time can be compensated by interest accruing on the judgment should the judgment be affirmed.

The undersigned finds Straight Establishment has raised serious questions going to the merits of its appeal which require more deliberate consideration by this Court. The balance of hardships tips sharply in favor of Respondent-Appellant. Utilizing the "sliding scale" approach, the undersigned concludes a stay is appropriate.

B. Issuance of a Stay Should be Conditioned on Posting of a Bond in the Full Amount of the Judgment

As discussed above, the usual requirement is that a bond in the full amount of the judgment be posted to secure a stay. The movant, Straight Establishment, bears the burden of demonstrating a full bond is not necessary to protect Ms. Akhmedova's interest in her judgment and that some alternative security is appropriate.

The two main factors or "sound legal principles" focused upon are defendant's ability to pay the judgment if unsuccessful on its appeal and whether requiring the posting of a full bond will endanger defendant's other creditors.

First, it is entirely unclear whether Straight Establishment has the ability to pay the judgment if unsuccessful on its appeal. Straight acknowledges that the M/Y Luna is already worth less than the value of Petitioner's judgment, which continues to accrue interest, while the vessel continues to depreciate, reinforces the need for Petitioner to either obtain security in the

form of a Bond, or to immediately execute against the vessel in order to maintain her recovery.[32] Straight "maintains that the Luna would command between 110,000,000 and 200,000,000 EUR (between approximately $135,000,000 and $240,000,000 USD) at auction."[33] Thus, the sale of the M/Y Luna is unlikely to cover Petitioner-Appellant's judgment in the current estimated value of $250,000,000. As time passes, the M/Y Luna continues to depreciate in value. This factor weighs against granting a bond waiver or departure from the general rule that a bond in the full amount of the judgment plus interest must be posted to secure a stay.

Second, it is unknown whether the posting of a full bond would endanger Straight Establishment's other creditors. Straight bears the burden of proof on this issue which burden has not been met.

Turning to the other factors to be considered in setting of a reduced bond or bond waiver, "the complexity of the collection process" favors the requirement of posting a full bond. The M/Y Luna is physically present in Dubai, U.A.E. It is unclear whether *in rem* jurisdiction exists in the RMI over the vessel sufficient to order and execute a sale. This Court need not decide that issue at this juncture but the posting of a full bond to satisfy Petitioner-Appellant's judgment if affirmed on appeal would expedite the collection process avoiding further legal wrangling in this or another forum. This factor cuts in favor of requiring a full bond.

Although the M/Y Luna is Straight Establishment's sole asset there has been no showing that Straight is unable to post a bond in the full amount of the judgment. Straight Establishment has offered no alternative form of security other than the posting of a nominal bond in the sum of $100,000 USD to cover Ms. Akhmedova's costs of appeal. That suggested nominal bond is insufficient to protect Ms. Akhmedova's interest in her judgment.

Straight Establishment argues that "maintaining the Preliminary Injunction is sufficient to ensure that Petitioner can obtain what she is entitled to if the judgment is sustained on appeal —

[32]Opp. To Motion for Stay at 20.

[33]Motion for Stay at. 22.

application of the value of the Luna to the satisfaction of the judgment."[34] The problem with that argument is that the preliminary injunction might be violated leaving Petitioner with no asset, the M/Y Luna or a bond, to execute upon should she prevail on appeal. Ms. Akhmedova alleges Mr. Akhmedov has taken "steps to violate the RMI injunction and physically remove the Vessel to a place where the English money judgments are difficult or impossible to enforce, thereby insulating Straight's sole asset from collection by Petitioner."[35] Specific examples of such conduct including an attempt to re-flag the "M/Y Luna" in Sierra Leon and attempting to enter into a towage contract with Mubarak Marine are cited by Petitioner-Appellee.[36] Whether those allegation by Appellee are true or not, there is the possibility that the Preliminary Injunction might be violated leaving no asset to execute upon should the High Court's judgments be affirmed on appeal. The posting of a bond in the value of the judgment plus interest eliminates that possibility.

Finally, posting of a bond in the full amount of the judgment plus interest is the ordinary requirement to secure a stay and maintain the status quo. The undersigned finds no reason to depart from that ordinary practice or "sound legal principle."

V. CONCLUSION & ORDER

For the reasons set forth above, the undersigned: (1) **GRANTS** Straight Establishment's motion for stay pending appeal CONDITIONED UPON the posting of a bond in the amount of $250,000,000 USD (the estimated value of the judgment plus interest.); (2) Respondent-Appellant shall have 14 days from the date of this order to post said bond; (3) Upon posting of the bond the stay shall become effective subject to those conditions set forth by the High Court in its December 8, 2020, Order, which conditions are incorporated by reference thereto.

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[34]Motion for Stay at 19.

[35]Opposition to Motion at 7.

[36]*Id*. at 7-9.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

VIRGILIO T. DIERON, JR.,
Plaintiff-Appellant,
v.
STAR TRIDENT XII, LLC,
Defendant/Appellee,

STAR BULK SHIPMANGEMENT COMPANY (CYPRUS) LIMITED,
Defendant-Intervenor

SCT CN 2018-015 (HCT CV CN 2017-003)

ON APPEAL FROM THE HIGH COURT
Argued April 12, 2021
Filed June 4, 2021

Summary

The Supreme Court affirmed the High Court's decision (i) allowing defendant-appellee Star Bulk Shipmanagement Company (Cyprus) Limited ("SBSC") to intervene as a defendant and (ii) concluding that plaintiff-appellant Virgilio T. Dieron, Jr. ("Dieron") must arbitrate his claims against defendants-appellees Star Trident XII, LLC ("Trident") and SBSC. This appeal involves a maritime personal injury action brought by a seafarer, Dieron against Trident, the owner of the MN Star Markella ("Vessel") registered in the Republic of the Marshall Islands ("RMI"). While working aboard the Vessel, Dieron suffered catastrophic physical injuries. Dieron, a citizen of the Republic of the Philippines, was employed pursuant to a standard Philippine Overseas Employment Administration ("POEA") contract with Intervening Defendant SBSC, an affiliate company of Trident and manager of the Vessel. The POEA contract contained an arbitration clause, a Philippine choice of law clause, and an elaborate no-fault compensation scheme for personal injury. Dieron executed this employment contract with SBSC only; Trident was not a signatory to the contract. Following the accident, Dieron filed suit in the High Court against only Trident, bringing claims for negligence, unseaworthiness, and failure to pay maintenance and cure. The High Court granted signatory SBSC's motion to intervene and subsequently granted both non-signatory Trident's and signatory SBSC's motions to compel arbitration under Philippine law in accordance with the terms of Dieron's employment contract with SBSC. In granting SBSC's motion to intervene under Section 24(a) of the MIRCP, the High Court, following the four-part test for intervention of right under the Section 24(a) of the FRCP, upon which Section 24(a) of the MIRCP is patterned on the United States Ninth Circuit

Court of Appeals in *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001). That is, the High Court concluded (1) that SBSC's application to intervene was timely, (2) that SBSC had a "significantly protectable" interest, (3) that SBSC was so situated that the disposition of the matter may as a practical matter impede SBSC's ability to protest its interest, and (4) that SBSC's interest, as a signatory to the POEA contract, had an interest that could not be represented by the existing parties, including its affiliate defendant Trident. In concluding that POEA contract applied to Trident as well as SBSC, the High Court followed the Supreme Court's ruling in *Mongaya v. AET MCV BETA LLC*, S. Ct. No. 2017-003 (Aug. 10, 2018), reconsideration denied (Sept. 5, 2018). In Mongaya, the Supreme Court held that under the doctrine of a POEA contract's arbitration clause even for claims brought by an injured seafarer against a non-signatory to the contract under an equitable estoppel theory.

Digest

1. APPEAL AND ERROR – *Review – Questions of Law*: Questions of law are reviewed *de novo.*

2. CIVIL PROCEDURE – *Rules – Construction*: Because MIRCP Rule 24(a) is nearly identical to the United States' Federal Rule of Civil Procedure 24(a), this Court looks to United States federal court decisions for guidance.

3. CIVIL PROCEDURE – *Intervention – Grounds for*: The High Court adopted and applied the four-part test for intervention of right as articulated by the United States Ninth Circuit Court of Appeals in *Southwest Ctr. for Biological Diversity v. Berg*.

4. CIVIL PROCEDURE – *Intervention – Grounds for – Significantly Protectable Interest*: To demonstrate a "significantly protectable" interest, "an applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue."

5. CIVIL PROCEDURE – *Intervention – Burden of Proof*: While an applicant seeking to intervene has the burden to show that the four elements are met, the requirements are broadly interpreted in favor of intervention and the review is guided primarily by practical considerations, not technical distinctions.

6. CIVIL PROCEDURE – *Intervention – Grounds for – Significantly Protectable Interest*: Whether the broad terms of the POEA contract estop injured employees from pleading around the contract and suing SBSC's corporate affiliates instead has serious business implications for SBSC as a vessel manager. SBSC therefore has a significant interest in enforcing its legal rights under its contracts and in having an opportunity to be heard in litigation interpreting them.

7. CIVIL PROCEDURE – *Intervention – Burden of Proof*: Particularly given MIRCP Rule 24(a)(2)'s broad interpretation in favor of intervention, SBSC has a right to intervene here.

8. UMLICA – *Application*: Because UMLICA tracks the Convention's limitation to "commercial" agreements, which numerous United States appellate courts have found to apply to seafarer employment contracts like Dieron's, there is no reason to adopt a different conclusion here. UMLICA governs this dispute.

9. UMLICA – *Application*: UMLICA, like the Convention, strongly favors the enforcement of arbitration agreements in international disputes.

10. UMLICA – *Application – Exception*: Section 608 does, however, contain an exception to the general rule enforcing arbitration clauses when a court finds the agreement is "null and void, inoperative or incapable of being performed." United States courts have interpreted this "null and void" exception narrowly to include only the traditional contract defenses of fraud, mistake, duress and waiver.

11. UMLICA – *Application – Non-Signatory*: Because UMLICA, like the Arbitration Act of 1980, does not address when a non-signatory may compel a signatory plaintiff to arbitrate, we look to the common law.

12. EQUITY – *Principles – Estoppel – Application*: The common law doctrine of equitable estoppel permits non-signatories to compel signatories to arbitrate in some situations, and the Court announced a three-part test, requiring: (1) a close relationship between the entities involved, (2) a relationship between the alleged wrongs and the nonsignatory's obligations and duties in the contract, and (3) the claims be intertwined with the underlying contractual obligations.

13. MARITIME LAW – *Seaworthiness*: A shipowner's liability for the seaworthiness of its vessel is neither limited by conceptions of negligence nor contractual in character; rather, it is an absolute duty.

14. MARITIME LAW – *Seaworthiness*: The obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in hazards of the work.

15. MARITIME LAW – *Seaworthiness – Arbitration*: POEA was not a impermissible derogation of a vessel owner's duty to maintain a seaworthy vessel. Similarly, numerous appellate courts in the United States have affirmed orders compelling arbitration under POEA contracts.

16. MARITIME LAW – *Seaworthiness – Arbitration*: The importance of the POEA Standard Terms to the Philippine economy weighs in favor of enforcement. As the Ninth Circuit has noted, arbitration of all claims by Filipino overseas seafarers is an integral part of the POEA's mandate to promote and monitor the overseas employment of Filipinos and safeguard their interests.

17. UMLICA – *Application – Exception*: UMLICA, like the Convention, enables the High Court to set aside an arbitral award if it finds that the award is in conflict with the public policy of the Republic. UMLICA § 634(b)(ii). This assessment, however, must be made after an award has been calculated and finalized under the contract in arbitration. To disregard the POEA contract's choice of law and compensation scheme at this stage would therefore be premature.

Counsel

Tatyana Cerullo, Melvin C. Narruh, Richard J. Dodson, and Kenneth Hooks, counsel for Plaintiff-Appellant Virgilio T. Dieron, Jr.
Dennis J. Reeder and Nenad Krek, counsel for Defendant/Appellee Star Trident XII, LLC, and Defendant Intervenor/Appellee, Star Bulk Shipmanagement Company (Cyprus) Limited

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

I. INTRODUCTION

This appeal involves a maritime personal injury action brought by a seafarer, Virgilio T. Dieron, Jr., against Defendant Star Trident XII, LLC ("Trident"), the owner of the MN Star Markella ("Vessel") registered in the Republic of the Marshall Islands ("RMI"). While working aboard the Vessel, Dieron suffered catastrophic physical injuries. Dieron, a citizen of the Republic of the Philippines, was employed pursuant to a standard Philippine Overseas Employment Administration ("POEA") contract with Intervening Defendant Star Bulk Shipmanagement Company (Cyprus) Limited ("SBSC"), an affiliate company of Trident and

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

manager of the Vessel. The POEA contract contained an arbitration clause, a Philippine choice of law clause, and an elaborate no-fault compensation scheme for personal injury. Dieron executed this employment contract with SBSC only; Trident was not a signatory to the contract. Following the accident, Dieron filed suit in the High Court against only Trident, bringing claims for negligence, unseaworthiness, and failure to pay maintenance and cure. The High Court granted SBSC's motion to intervene and subsequently granted both Trident's and SBSC's motions to compel arbitration under Philippine law in accordance with the terms of Dieron's employment contract with SBSC. On appeal, Dieron challenges the High Court's decision allowing SBSC to intervene as well as compelling him to arbitrate his claims against both Defendants. Lastly, Dieron challenges the High Court's order permitting the application of the POEA contract's choice of law and compensation scheme, arguing these clauses impermissibly derogate Trident's obligations as a vessel owner under general maritime law. Because the High Court correctly held that SBSC was entitled to intervene, and that Dieron's contract mandated arbitration against both defendants under Philippine law, the High Court's decisions are **AFFIRMED**.

II. BACKGROUND

A. The POEA Contract

The facts of this case are not disputed. On April 21, 2016, Dieron entered into a POEA contract of employment with Intervening Defendant SBSC, which contemplated he would be working on board the Vessel. Trident, the owner of the Vessel, was not a signatory to the contract.

Section 1.A.4 of the POEA contract requires the "Principal/Employer/Master/Company" to provide "a seaworthy ship for the seafarer and take all reasonable precautions to prevent accident and injury to the crew including provision of safety equipment, fire prevention, safe and proper navigation of the ship and such other precautions necessary to avoid accident, injury or sickness to the seafarer." Section 20.J of the POEA contract provides for employer liability when a seafarer suffers work-related injuries:

> The seafarer or his successor in interest acknowledges that payment for injury, illness, incapacity, disability or death and other benefits of the seafarer under this contract . . . shall cover all claims in relation with or in the course of the seafarer's employment, including but not limited to damages arising from the contract, tort, fault or negligence under the laws of the Philippines or any other country.

Section 20.A.6 further specifies that, "[i]n case of permanent total or partial disability of the seafarer caused by either injury or illness the seafarer shall be compensated in accordance with the schedule of benefits enumerated in Section 32 of his Contract." Section 32 of the POEA contract provides an elaborate scheme of compensation for various kinds of injury and illness.

Section 29 includes the following mandatory arbitration clause:

> In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of voluntary arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to the Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995, as amended, or to the original and exclusive jurisdiction of the voluntary arbitrator or pane l of arbitrators. If there is no provision as to the voluntary arbitrators to be appointed by the parties, the same shall be appointed from the accredited voluntary arbitrators of the National Conciliation and Mediation Board of the Department of Labor and Employment.

Lastly, Section 31 of the POEA contract includes the following choice of law clause:

> Any unresolved dispute, claim or grievance arising out of or in connection with this contract including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants to which the Philippines is a signatory.

B. Dieron's Injury and the High Court Proceedings

On June 19, 2016, Dieron was severely injured in the course of his employment when a mooring windlass broke from the deck of the Vessel. Dieron's injuries resulted in the amputation of his left arm and left leg, the fracture of his right wrist, disfiguring damage to his face, loss of vision in his right eye, and brain damage. He was also subsequently diagnosed with post-traumatic stress disorder.

This lawsuit followed. In October 2017, Dieron filed suit against Trident in the High Court for negligence, unseaworthiness, and failure to provide full maintenance and cure. Dieron alleges his injuries were directly and proximately caused by Trident's negligence and failure to provide a seaworthy vessel. Dieron's complaint seeks $25 million in compensatory damages and an additional $25 million in punitive damages. Dieron did not file any claims against SBSC.

Although SBSC is not named as a defendant and Dieron is not suing under the terms of his employment contract, SBSC nonetheless moved to intervene under Marshall Islands Rule of Civil Procedure ("MIRCP") Rule 24(a)(2), which Dieron opposed. With the motion to intervene pending, both Trident and proposed Intervening Defendant SBSC moved to compel arbitration pursuant to the POEA contract. In the midst of multiple rounds of briefing on both motions, this Court issued its opinion in Mongaya v. AET MCV BETA LLC, S. Ct. No. 2017-003 (Aug. 10, 2018), reconsideration denied (Sept. 5, 2018). In Mongaya, a Filipino seafarer employed under a POEA contract was seriously injured while working aboard a vessel registered in the RMI. Mongaya brought claims in the High Court for negligence, unseaworthiness, and failure to pay maintenance and cure against three defendants: (1) his employer, the vessel's managing agent, who was a signatory to the POEA contract; (2) the owner of the vessel, a non-signatory; and (3) the vessel operator, also a non-signatory. All defendants, including the non-signatories, moved to compel arbitration, which the High Court granted and this Court affirmed. Because Mongaya

similarly involved a motion to compel arbitration pursuant to a POEA contract, the parties were asked to submit additional briefing on the arbitration issue.[3]

In November 2018, the High Court granted SBSC's motion for leave to intervene and shortly thereafter granted both Defendants' requests to compel arbitration. In support of its ruling allowing SBSC to intervene, the High Court concluded that SBSC had a "significant protectable interest" in the litigation, which entitled it to intervene as of right under MIRCP Rule 24(a)(2). On the question of arbitration, the High Court reasoned that *Mongaya* controlled. In *Mongaya*, we enforced a POEA contract's arbitration clause even for claims brought by an injured seafarer against a non-signatory to the contract under an equitable estoppel theory. The High Court therefore concluded that Dieron's personal injury claims against the non-signatory Trident were subject to the arbitration provision in Dieron's employment contract with SBSC through equitable estoppel. The High Court accordingly stayed the case pending arbitration. Dieron timely appealed both the intervention and arbitration rulings to this Court.

III. STANDARD OF REVIEW

[1]Questions of law are reviewed *de novo*. *Jack v. Hisaiah*, 2 MILR 206, 209 (2002); *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991).

IV. DISCUSSION

Dieron presents four issues on appeal: (1) whether the High Court erred when it allowed SBSC to intervene under MIRCP Rule 24(a)(2); (2) whether the High Court erred by compelling Dieron to arbitrate claims against SBSC, despite the fact that Dieron's complaint asserts no claims against SBSC and does not include SBSC as a named defendant; (3) whether the High Court erred when it invoked the doctrine of equitable estoppel to allow Trident to compel Dieron to arbitrate his claims against Trident pursuant to the POEA contract which Trident never signed; and (4) whether the High Court erred by ordering the parties to arbitrate in the Republic of the Philippines under Philippine Law and in accordance with the compensation scheme contained in

[3]Certain counsel representing Dieron also represented Mongaya, another Filipino seafarer suing for serious injuries sustained while working under a POEA contract.

the POEA contract.[4] Furthermore, in connection with his arguments concerning equitable estoppel, Dieron requests that this Court reconsider its recent holding in *Mongaya*.

A. SBSC May Intervene under Rule 24(a)(2)

MIRCP 24(a) governs when a party has a right to intervene and provides as follows:

> (a) Intervention of Right. On a timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the moving party's ability to protect its interest, unless existing parties adequately represent that interest.

[2][3]Because MIRCP Rule 24(a) is nearly identical to the United States' Federal Rule of Civil Procedure ("FRCP") 24(a), this Court looks to United States federal court decisions for guidance. *See Kabua v. Kabua*, 1 MILR 96, 104 (1988). The High Court adopted and applied the four-part test for intervention of right as articulated by the United States Ninth Circuit Court of Appeals in *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001). Under *Berg*, to qualify for intervention as of right under FRCP Rule 24(a):

> (1) The application for intervention must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

Id. Finding this test captures the requirements of MIRCP Rule 24(a), and because Dieron accepts this as the governing standard, we likewise adopt the *Berg* test and apply it here.

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[4]Dieron identifies a potential fifth question: "Is the application of RMI law under the provisions of the RMI Merchant Seafarers Act to RMI flagged vessels by RMI courts proper?" Opening Br. at 7. Because this Court's treatment of the fourth question resolves the question of applicable law, we need not address this fifth question separately.

[4][5]The parties agree with the High Court's finding that SBSC's motion was timely. However, Dieron insists the High Court erred in finding SBSC had a "significantly protectable" interest. According to Dieron, "SBSC's interest in the litigation is simply to reduce Trident's financial exposure," which falls short of a significantly protectable interest for purposes of intervention under MIRCP Rule 24(a). Opening Br. at 8. To demonstrate a "significantly protectable" interest, "an applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). Moreover, "[w]hile an applicant seeking to intervene has the burden to show that the[] four elements are met, the requirements are broadly interpreted in favor of intervention" and the "review is guided primarily by practical considerations, not technical distinctions." *Id*.

[6]SBSC has a strong interest in seeing the terms of its employment contract with Dieron enforced, given the POEA contract applies to "all claims in relation with or in the course of the seafarer's employment, including but not limited to damages arising from the contract, tort, fault or negligence under the laws of the Philippines or any other country." Order Granting Mots. to Compel Arbitration at 4-5 (citing Section 20.J of POEA contract). The plain language encompasses the claims for negligence and unseaworthiness which Dieron asserts against Trident, SBSC's corporate affiliate. Indeed, this is SBSC's interpretation of the POEA contract. Furthermore, whether the broad terms of the POEA contract estop injured employees from pleading around the contract and suing SBSC's corporate affiliates instead has serious business implications for SBSC as a vessel manager. SBSC therefore has a significant interest in enforcing its legal rights under its contracts and in having an opportunity to be heard in litigation interpreting them. *See Tech. & Intellectual Prop. Strategies Grp. PC v. Insperity, Inc.*, 2012 WL 6001098, at *8 (N.D. Cal. Nov. 29, 2012) (holding that the signatory seeking intervention was not adequately represented by its non-signatory corporate parent, because the plaintiff contested the corporate parent's right to enforce the arbitration agreement as a non-signatory).

The third and fourth *Berg* factors are likewise satisfied. If SBSC were prohibited from intervening, it would be unfairly deprived of the opportunity to be heard on the consequential

issue of whether Dieron's POEA employment contract should govern this dispute. Furthermore, Trident cannot adequately represent SBSC's interest because it was not a signatory to the POEA employment contract and cannot speak authoritatively on its interpretation. Although the two companies are affiliates and wholly owned by the same parent corporation, Trident cannot adequately protect SBSC's interests here. Without SBSC in the lawsuit, Trident's argument for compelling arbitration becomes noticeably weaker. SBSC has a right to protect its own legal interests in this action.

[7]The requirements of MIRCP Rule 24(a)(2) are therefore satisfied and practical considerations require allowing SBSC to intervene. Dieron appears to have strategically omitted SBSC from its complaint to avoid the unfavorable provisions of his contract, which could reduce his expected recovery. Although Dieron's claims technically arise under general maritime law, the incident implicates the contract, which covers these types of accidents. Particularly given MIRCP Rule 24(a)(2)'s broad interpretation in favor of intervention, SBSC has a right to intervene here. *See Citizens for Balanced Use*, 647 F.3d at 897.

B. Dieron Must Arbitrate His Claims Against Trident and SBSC

Dieron also challenges the High Court's decision compelling him to arbitrate his claims against Trident and SBSC. He claims the order to arbitrate against SBSC is nonsensical because he brings no claims against his former employer. He further avers that he should not be forced to arbitrate his claims against Trident because he never signed any agreement with Trident, much less one containing an arbitration clause. The analysis must begin with the governing arbitration statute.

1. UMLICA Governs This Case

On March 15, 2018, the UNCITRAL[5] Model Law on International Commercial Arbitration Act, 2018 ("UMLICA"), 30 MIRCP Ch. 6, took effect in the RMI. UMLICA partially

[5]"UNCITRAL" refers to the United Nations Commission on International Trade Law.

enacted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). UMLICA provides, in relevant part:

> §607. Definition of arbitration agreement.
>
> "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> §608. Arbitration agreement and substantive claim before court.
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

In addition, UMLICA, like the Convention, only applies to "commercial" matters. While the parties initially disputed whether UMLICA—enacted while this case was pending before the High Court—applies here, they now agree that Dieron's contract is a "commercial" contract covered by UMLICA. United States courts that have considered the issue have similarly concluded seafarer employment contracts like Dieron's are "commercial" agreements for purposes of the Convention. *See, e.g., Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1155 (9th Cir. 2008) ("The employment contracts of seafarers 'aris[e] out of legal relationship[s] . . . which [are] considered as commercial,' and therefore those contracts 'fall[] under the [C]onvention.'") (quoting 9 U.S.C. § 202); *Bautista v. Star Cruises*, 396 F.3d 1289, 1295-96 (11th Cir. 2005) (finding plaintiffs' POEA employment contracts "are commercial legal relationships under the Convention Act"). The High Court did not expressly decide whether UMLICA or the Arbitration Act of 1980 applied, because the court concluded either statute compelled the same result.

[8]Because UMLICA tracks the Convention's limitation to "commercial" agreements, which numerous United States appellate courts have found to apply to seafarer employment

contracts like Dieron's, there is no reason to adopt a different conclusion here. UMLICA governs this dispute.

2. UMLICA Mandates Arbitration Against SBSC

[9]UMLICA, like the Convention, strongly favors the enforcement of arbitration agreements in international disputes. Indeed, section 608 states that a court "shall" refer a dispute to arbitration when the matter "is the subject of an arbitration agreement." As quoted above, Dieron's employment contract covered claims of negligence and unseaworthiness in connection with his service on board the Vessel. Therefore, despite the fact that Dieron's claims are brought only against Trident and only under general maritime law, they are nonetheless "the subject of an arbitration agreement," albeit an agreement with SBSC, not Trident.

[10]Section 608 does, however, contain an exception to the general rule enforcing arbitration clauses when a court finds the agreement is "null and void, inoperative or incapable of being performed." United States courts have interpreted this "null and void" exception narrowly to include only the traditional contract defenses of fraud, mistake, duress and waiver. *See, e.g., Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 372 (4th Cir. 2012) ("[T]he null and void defense only applies when the arbitration agreement has been obtained through those limited situations, such as fraud, mistake, duress, and waiver, constituting standard breach-of-contract defenses that can be applied neutrally on an international scale. . . . The narrow scope of the null and void clause is in complete accord with the prevailing authority in other circuits.") (internal quotations and citations omitted).

Because Dieron is not claiming the arbitration clause contained in his POEA contract was the product of fraud, mistake, or duress, nor is he claiming that SBSC somehow waived this provision, UMLICA requires this dispute be referred to arbitration in accordance with Dieron's contract. Although Dieron brought no claims against SBSC, he signed a contract that bound him to arbitrate all claims arising from injuries suffered while working about the Vessel. Given this subject matter overlap, UMLICA required the High Court to refer the dispute to arbitration.

Dieron, on appeal, makes much of the fact that Defendants could not point to a single case where a signatory to a POEA contract was allowed to intervene and interpose the contract's arbitration clause into litigation against a non-signatory affiliate. The absence of such authority, however, speaks more to the novelty of Dieron's pleading strategy than to any error on the part of the High Court. Indeed, certain of the counsel representing Dieron here also represented the plaintiff in the Mongaya action two years prior and presumably devised this plan to omit Dieron's employer altogether in hopes of avoiding application of the contract. This was the logical next step after Mongaya officially endorsed the application of equitable estoppel to compel arbitration against a non-signatory.

While creative, Dieron's gambit to omit SBSC from his pleadings should not allow him to avoid arbitration pursuant to Dieron's contract, which by its terms applies to this dispute. SBSC was properly allowed to intervene as of right under Rule 24(a)(2), and having done so, was permitted to compel arbitration under UMLICA and under the terms of its employment contract with Dieron. The High Court's order compelling Dieron to arbitrate against SBSC is **AFFIRMED.**[6]

3. Dieron is Estopped from Avoiding Arbitration with Trident

[11]Because UMLICA, like the Arbitration Act of 1980, does not address when a non-signatory may compel a signatory plaintiff to arbitrate, we look to the common law. *See Mongaya*, S. Ct. No. 2017-003 at 9-10 (finding that, because the Arbitration Act did not address non-signatories' ability to compel arbitration, the Court would turn to the common law); *see also Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) ("General contract and agency principles apply in determining the enforcement of an arbitration agreement by or against nonsignatories.").

[12]In *Mongaya*, we applied the common law doctrine of equitable estoppel and permitted a non-signatory vessel owner to compel arbitration pursuant to plaintiff's POEA employment

[6]The High Court's order compels Dieron to arbitrate his claims against SBSC, but because no claims are asserted against it, this aspect of the order was not technically correct. Rather, SBSC simply has a right to participate.

contract. Mongaya specifically held that "the common law doctrine of equitable estoppel permits non-signatories to compel signatories to arbitrate in some situations," S. Ct. No. 2017-003 at 13, and the Court announced a three-part test, requiring: "(1) a close relationship between the entities involved, (2) a relationship between the alleged wrongs and the nonsignatory's obligations and duties in the contract, and (3) the claims be intertwined with the underlying contractual obligations." *Id*. at 15 (quoting *Mundi*, 555 F.3d at 1046) (internal quotations and citations omitted).

On appeal, Dieron does not contest that the common law doctrine of equitable estoppel may, in certain circumstances, enable a non-signatory defendant to compel a signatory plaintiff to arbitrate. Rather, Dieron makes a two-part argument: first, that Mongaya adopted the wrong test for equitable estoppel and to that extent should be abrogated; and second, that under the appropriate test, equitable estoppel should not apply to Dieron's claims against Trident. Dieron asks this Court to reconsider Mongaya. He posits that though the equitable estoppel test we adopted was described in *Mundi*, it was only in the course of reviewing an approach used in an earlier case, *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 199 (3d. Cir. 2001). The *Mundi* court ultimately deemed *DuPont* inapposite and, eight years later, the Third Circuit in *White v. Sunoco, Inc*. clarified that it "did not adopt a rule regarding alternative estoppel in *DuPont*. . . . In *DuPont*, we had no occasion to adopt or reject a standard, but merely observed that other Courts of Appeals have employed an 'alternative estoppel' theory when 'a nonsignatory voluntarily pierces its own veil to arbitrate claims against a signatory that are derivative of its corporate-subsidy's claims against the same signatory.'" 870 F.3d 257, 263 (3d Cir. 2017) (quoting *DuPont*, 269 F.3d at 201). Regardless of its origin, however, the Mongaya test provides an analytically reasonable way to evaluate equitable

estoppel.[7] We take this opportunity to reaffirm the three-part Mongaya test as the law of the RMI and hold that, as applied here, it compels Dieron to arbitrate his claims against Trident.

Dieron is estopped from avoiding arbitration of his claims against Trident because all three factors are satisfied. Just as the non-signatory vessel owner and operator successfully compelled arbitration under the POEA contract in Mongaya, so too can Trident compel arbitration here. There is a "close relationship" between the entities involved—SBSC hired Dieron pursuant to SBSC's agreement with Trident to serve as vessel manager, and both affiliates are wholly owned by the same corporate parent. Second, there is a close relationship between the wrongs Dieron alleges and the scope and duties outlined in the contract. Third, Dieron's claims, though arising under general maritime law, are "intertwined" with the contractual obligations in the POEA contract. The POEA contract obligated the "Principal/Employer/Master/Company" to provide a seaworthy ship and take reasonable precautions to avoid injury. Dieron's claims of unseaworthiness and negligence track exactly these terms of the POEA contract and allege the specific types of harm it sought to regulate. The
High Court's decision compelling arbitration against Trident is thus affirmed.[8]

C. The POEA Contract's Choice of Law Clause and Compensation Scheme Applies

Dieron also challenges the High Court's ruling that the POEA contract's choice of law and compensation scheme should be honored in arbitration. The High Court treated this as a public policy argument protesting the lesser recovery available under Philippine law and the contract's

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[7]Moreover, the three-pronged test we adopt is, as discussed at length in *Mongaya*, "substantially similar" to the formulation adopted in various United States Courts of Appeal. *Mongaya*, S. Ct. 2017-003 at 13-14. Dieron claims that under his preferred test, articulated in *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999), the argument for arbitration against Trident fails because Dieron did not expressly allege any "substantially interdependent and concerted misconduct" by SBSC and Trident. In fact, Dieron construes this *MS Dealer* prong too narrowly. Multiple cases purporting to apply *MS Dealer* have found "intertwined" conduct is sufficient. Even under *MS Dealer*, therefore, Trident can compel arbitration.

[8]The holdings here and in *Mongaya* should not be read to suggest that all seafarer signatories to POEA contracts will be compelled to arbitrate their claims. For example, if a signatory were to bring claims against an independent vessel owner, arbitration would not be a foregone conclusion because the first factor of the *Mongaya* test requires a "close relationship" between the entities involved.

compensation scheme. The High Court responded that "a lesser recovery under the POEA Contract's arbitration and compensation scheme is not grounds for avoiding arbitration[,]" and that "RMI public policy does not necessarily disfavor lesser or different remedies under foreign law." *See* Order Granting Mots. to Compel Arbitration at 11-12. The court further observed: "Dieron's assertion of public policy at this stage is premature." *Id*. at 13. On appeal, Dieron claims the High Court mischaracterized his argument. Instead of protesting the lesser recovery available under the contract, Dieron argues that the choice of law and compensation scheme impermissibly "derogate a vessel owner's obligation to provide a seaworthy vessel, all in violation of U.S. Supreme Court precedent and RMI and U.S. general maritime law." Pls.' Opening Br. at 15.

[13][14]The United State Supreme Court has indeed emphasized that the doctrine of unseaworthiness is of critical importance to seafarers. A shipowner's liability for the seaworthiness of its vessel "is neither limited by conceptions of negligence nor contractual in character"; rather, it is an "absolute duty." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95 (1946). The United States Supreme Court has further cautioned that the "obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in hazards of the work." *Reed v. Steamship Yaka*, 373 U.S. 410, 414-15 (1963). Nonetheless, Dieron's argument on this point fails for three reasons.

[15]First, Dieron's argument is undercut by this Court's enforcement of an identical provision in *Mongaya*, where we did not find any impermissible derogation of a vessel owner's duty to maintain a seaworthy vessel. Similarly, numerous appellate courts in the United States have affirmed orders compelling arbitration under POEA contracts. *See, e.g., Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012). This would not be the case if the POEA contract's standard terms ran afoul of general maritime law.

[16]Second, pursuant to his authority under Maritime Regulation MI-108 § 7.45.1.b, the Maritime Administrator of the Republic approved the POEA Standard Terms for use on board

vessels flagged in the RMI. *See* Republic of the Marshall Islands Response to Comments by the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations on MLC, 2006, submitted February 5, 2016 (noting that "the [RMI Maritime] Administrator has deemed the following collective bargaining agreements for employment acceptable for use onboard RMI flag vessels: Philippine collective bargaining agreements or contracts based on the Philippine Overseas Employment Administration Contract of Standard Terms and Conditions . . ."), as cited in Appellees' Appendix at 7. This approval makes sense, given the POEA's terms are intended to safeguard Filipino sailors from lower workplace standards. *See Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1018 (5th Cir. 2015) ("The importance of the POEA Standard Terms to the Philippine economy also weighs in favor of enforcement. As the Ninth Circuit has noted, '[a]rbitration of all claims by Filipino overseas seafarers is an integral part of the POEA's mandate to promote and monitor the overseas employment of Filipinos and safeguard their interests.'" (quoting *Balen v. Holland America Line, Inc.*, 583 F.3d 647, 651 (9th Cir. 2009)). The international trend to enforce the POEA standard terms cuts strongly against a finding that they flout general maritime law.[9]

Lastly, while it is certainly possible that arbitration under the contract's compensation scheme will yield an award that is inadequate and unenforceable, that is a question reserved for the award recognition stage. In *Aggarao v. MOL Ship Mgmt. Co.*, 2014 WL 3894079 (D. Md. Aug. 7, 2014), for example, a Filipino seafarer working under a POEA contract suffered catastrophic injuries in the course of his employment. After countless surgeries, he was left wheelchair-bound and incontinent. He had to endure abdominal wall reconstruction, skin expansion, and a host of other procedures. Eventually, he filed a lawsuit in United States federal

[9]In arguing against application of the POEA compensation scheme, Dieron relies on *Brown v. State*, 816 P.2d 1368, 1375 (Alaska 1991), a case in which the Alaska Supreme Court rejected a similar workers' compensation scheme as "an impermissible limitation of the state's obligations under the doctrine of unseaworthiness." Although the reasoning of this case did rely in part on United States Supreme Court decisions addressing general maritime law, it is not in line with the majority of United States appellate decisions interpreting seafarer employment contracts. *See, e.g., Asignacion*, 783 F.3d at 1020 (reversing district court's order invalidating arbitration award under POEA contract). This Court thus declines both to contradict the Administrator and overrule Mongaya by invalidating the compensation scheme and choice of law provisions.

court, but the Fourth Circuit ultimately compelled him to arbitrate his claims pursuant to his contract. At the time of this district court decision on remand, the plaintiff was roughly $800,000 in debt from medical-related expenses, yet the arbitration award under the POEA's compensation scheme yielded an award of only "$89,100, 240 days of sick pay, and attorney's fees." *Id*. at *7. The district court set the award aside as a violation of United States public policy, as allowed under the Convention. *Id*. at *8 (citing 9 U.S.C. § 207 ("The court shall confirm [a foreign arbitration] award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . Convention.")).

[17]UMLICA, like the Convention, enables the High Court to set aside an arbitral award if it finds that "the award is in conflict with the public policy of the Republic." UMLICA § 634(b)(ii). This assessment, however, must be made after an award has been calculated and finalized under the contract in arbitration. To disregard the POEA contract's choice of law and compensation scheme at this stage would therefore be premature. *See, e.g., Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1288 (11th Cir. 2015) (rejecting plaintiff's argument that the choice of law clause in his employment contract is unenforceable for selecting a jurisdiction that does not afford the same rights and remedies as American law and noting that "[plaintiff's] public-policy defense is premature at this arbitration-enforcement stage"). The High Court's order requiring the arbitration to honor the POEA contract's choice of law clause and compensation scheme is therefore **AFFIRMED**.

V. CONCLUSION

For the foregoing reasons, the High Court's Order Granting SBSC's Motion to Intervene and the High Court's Order Granting Motions to Compel Arbitration are **AFFIRMED**.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MAUJ EDMOND, *et al.*,
Plaintiffs-Appellees,
v.

MARSHALL ISLANDS MARINE RESOURCES AUTHORITY, *et al.*,
Defendants-Appellants.

SCT CN 2021-00406 (HCT CN 2016-252)

ORDER GRANTING UNOPPOSED "SECOND MOTION TO DISMISS APPEAL" AND DISMISS APPEAL

Submitted July 28, 2021
Filed August 9, 2021

Summary

The Chief Justice of the Supreme Court, in a single-judge procedural order, granted plaintiffs-appellees' unopposed motion to dismiss the appeal for defendant-appellant MIMRA's repeated violations of the Supreme Court Rules of Procedure ("SCRP"). The violations numbered three and included MIMRA's two previous failures to serve documents and certificates of service and MIMRA's more recent filing of an 11-page reply brief, exceeding the 10-page limit impose by SCRP, Rule 28. The Supreme Court did not, however, grant the motion to dismiss merely because MIMRA failed to seek leave to exceed the 10-page limit for a reply and failed to oppose the plaintiffs-appellees' motion to dismiss, but due to MIMRA's series of failures to comply with the SCRP, despite monetary sanctions and extensions of time. As the Court noted: "[w]hile the Supreme Court will interpret its appellate rules, when possible, to further resolution of appeals on the merits, litigants should not view relaxation of rules in a particular case as endorsing noncompliance, and litigants who ignore the rules do so at the risk of forfeiting appellate review." Further, as the Supreme Court held "[s]anctions short of dismissal are likely inadequate to secure [MIMRA]'s future compliance with the Rules and are inadequate to send the message to the bar and other litigants that the Rules of Procedure are, indeed, mandatory, not 'voluntary' and that there are consequences for repeated violations of those Rules."

MARSHALL ISLANDS, SUPREME COURT

Digest

1. APPEAL and ERROR – *Disposition on the Merits Preferred*: Appeals should be decided upon their merits and, therefore, dismissals of appeals based on procedural technicalities are disfavored.

2. APPEAL and ERROR – *Dismissal, Grounds for – Noncompliance with the Rules*: While the Supreme Court will interpret its appellate rules, when possible, to further resolution of appeals on the merits, litigants should not view relaxation of rules in a particular case as endorsing noncompliance, and litigants who ignore the rules do so at the risk of forfeiting appellate review.

3. APPEAL and ERROR – *Disposition on the Merits Preferred*: Historically, this Court has favored resolution of appeals on their merits and has refused to dismiss appeals based on technical, non-jurisdictional grounds. This policy has extended to civil matters and has been especially true in cases involving *pro se* Litigants and in criminal cases where liberty interests have been at stake.

4. APPEAL and ERROR – *Dismissal, Grounds for – Noncompliance with the Rules*: In the larger context, however, there is prejudice to the system when rules are ignored without consequence.

5. APPEAL and ERROR – *Appellate Rules of Procedure – Motions – Failure to Oppose*: Because no opposition has been filed, it can reasonably be inferred that Appellant does not oppose dismissal.

Counsel

David M. Strauss, counsel for Plaintiffs-Appellees Edmond, *et al.*
Laurence Edwards, counsel for Marshall Islands Marine Resources Authority, *et al.*

Before CADRA, Chief Justice, acting as a single judge addressing procedural issue pursuant to Rule 27(c):

I. INTRODUCTION

On July 28, 2021, Appellee Mauj Edmond, et al., filed a "Second Motion to Dismiss Appeal for Repeated Violations of the Rules" pursuant to Supreme Court Rules of Procedure (SCRP) 42(b)(2), (3).

Appellant Marshall Islands Marine Resources Authority ("MIMRA") has not filed an Opposition to Appellee's Motion to Dismiss and has not requested an extension of time in which to file an Opposition or otherwise respond.

Because Appellant has not opposed dismissal and because the record demonstrates a pattern of disregard or noncompliance with the Supreme Court Rules of Procedure ("SCRP") throughout this litigation, Appellee's motion is **GRANTED** and this appeal is **ORDERED DISMISSED**.

II. PROCEDURAL HISTORY OF INSTANT APPEAL

This case presents with an atypical procedural background demonstrating repeated violations of the Rules by Appellant, most of which violations are unexplained. The record establishes:

1. Appellant MIMRA filed its Notice of Appeal on February 19, 2021.
2. Appellant did not serve its Notice of Appeal on Appellee's counsel of record as required by SCRP 3(d), 25(b).
3. On May 7, 2021, Appellant filed a "Motion for Extension of Time" in which to file its Opening Brief.
4. Appellant did not serve its "Motion for Extension of Time" on Appellee' s counsel of record as required by SCRP 25(d).
5. On May10, 2021, Appellee filed a "Motion to Dismiss Appeal for Repeated Rule Violations of the Rules."
6. On May 17, 2021, the undersigned issued a single-judge procedural order denying Appellee' s Motion to Dismiss Appeal but imposed a monetary sanction on Appellant's counsel for the above referenced Rules violations.
7. On May 24, 2021, Appellant filed another (second) "Motion for Extension of Time" in which to file its Opening Brief. Appellee opposed the requested extension. That motion was granted despite Appellee's opposition.
8. Appellant's Opening Brief was filed on May 31, 2021.

9. Appellee filed its Answering Brief on July 12, 2021. Appellee' s Answering Brief asserts another procedural violation by Appellant regarding the questions presented for review pursuant to SCRP 28(b)(6). Appellee requests dismissal of the appeal in its entirety based on this Rule's violation.

10. On July 21, 2021, Appellant filed a "Motion for Enlargement of Time" of 3 days in which to file its Reply Memorandum due to sickness of unidentified off-island counsel. The requested extension of time was opposed by Appellee but the motion was granted by the undersigned's single-judge procedural order dated July 22, 2021.

11. Appellant filed its Reply Brief on July 26, 2021.

12. On July 28, 2021, Appellee filed its instant "Second motion to Dismiss Appeal for Repeated Violations of the Rules." A Certificate of Service indicates service on Appellant's counsel on that date.

13. Appellant has not filed an Opposition to dismissal of its appeal within the time allowed by SCRP, Rule 27(a) and has not requested an extension of time to object to dismissal.

III. THE INSTANT "SECOND MOTION TO DISMISS APPEAL"

A. Appellee's Arguments for Dismissal

Appellee moves for dismissal of this appeal pursuant to SCRP 28(a), 30 and 42 "for MIMRA's repeated and continuing violations of the rules."

The specific violation triggering Appellee' s most recent (second) motion to dismiss is Appellant's filing of an eleven (11) page Reply Brief which exceeds the ten (10) page limit imposed by SCRP, Rule 28.

Appellee, however, does not contend that Appellant's brief exceeding the limit by one page justifies the harsh sanction of dismissal. Rather, Appellee points to a pattern of repeated violations of the Rules despite previous imposition of sanctions: "[I]t is not the 11th page of the Reply Brief that is problematic in this instance, but MIMRA' s repeated and continuing violations of the rules. MIMRA has already been admonished several times by this Court and has even been sanctioned. However, these admonishments and penalties have had no effect on MIMRA' s

continued behavior. It is clear that MIMRA believes that either (i) the Supreme Court Rules of Procedure do not or should not apply to it; or (ii) the Rules should be renamed the Supreme Court Voluntary Rules of Procedure." (Appellee's Memorandum in Support of Motion to Dismiss at 2).

It must be noted that Appellee does not claim that it has been prejudiced in this appeal by Appellant's most recent violation of the Rules or that the procedural missteps by Appellant amount to some sort of cumulative prejudice. Rather, the undersigned construes Appellee's motion to dismiss as a policy argument calling upon the Court to enforce its Rules of Procedure which have been seemingly ignored by Appellant.

B. Appellant Has NOT OPPOSED DISMISSAL

SCRP, Rule 27(a) provides:

> . . . . Any party may file a written response in opposition to a motion within 5 days after service of the motion, but the Supreme Court may shorten or extend the time for responding to any motion pursuant to Rule 26(d) or (b).

The instant motion to dismiss was filed and served on July 28, 2021. Thus, excluding the intervening weekend, Appellant had until close of business on August 4, 2021, in which to file an Opposition pursuant to SCRP Rule 26(a).

Appellant MIMRA has not opposed dismissal of its appeal. Appellant has not requested an extension of time in which to file an Opposition or otherwise respond to the requested dismissal.

Due to the lack of an Opposition, it is unclear whether MIMRA (as the client) opposes, dismissal, intends on pursuing its appeal, has chosen to abandon its appeal or whether counsel has ignored or neglected a deadline for advising the Court of MIMRA's position on dismissal.

IV. DISCUSSION

A. SCRP, Rule 42, Authorizes Dismissal of an Appeal for Failure to Comply with the Rules of Procedure.

SCRP, Rule 42 authorizes the Court to dismiss an appeal for noncompliance or lack of timely compliance with the Rules.

Rule 42(b), in relevant part, states:

> (2) Upon motion and notice, the Supreme Court may dismiss an appeal upon terms fixed by the Supreme Court.
>
> (3) The Supreme Court may also dismiss an appeal, on its own initiative, for failure of appellant to abide by these rules or for lack of timely compliance with these rules.

That Rule, on its face, does not mention or require a showing of prejudice to an opposing party or a pattern of Rules violations prior to ordering dismissal.

B. Dismissals of Appeals based on Technicalities or Procedural Errors are Disfavored; Nevertheless, Appellate Rules Cannot be Ignored

[1]Notwithstanding Rule 42's grant of authority to dismiss an appeal for violation of the Rules, it is well settled that appeals should be decided upon their merits and, therefore, dismissals of appeals based on procedural technicalities are disfavored.

> A motion to dismiss an appeal is, in effect, a request that the appellate court refuse to examine the merits of the cause, that is, dismiss it on some technical ground. However, appellate courts prefer to decide cases oh the merits, and appellate courts should avoid dismissing appeals. As appeals are favored in the law, unless the ground urged for dismissal of the appeal is free from doubt the appeal should be maintained. Thus, pursuant to policy embodied in the appellate rules, disposing appeals based on harmless procedural defects is disfavored. Since cases on appeal should be heard on the merits if possible, the statutes and rules governing the orderly administration of justice should be construed liberally in favor of allowing appeals to proceed.

See, generally, 5 C.J. S. Appeal and Error, Sec. 747 (citations omitted).

[2]While the Supreme Court will interpret its appellate rules, when possible, to further resolution of appeals on the merits, litigants should not view relaxation of rules in a particular case as endorsing noncompliance, and litigants who ignore the rules do so at the risk of forfeiting appellate review. *See, e.g., Bennett v. Cochran*, 96 S.W.3d 227 (Tex. 2002).

[3]Historically, this Court has favored resolution of appeals on their merits and has refused to dismiss appeals based on technical, non-jurisdictional grounds. This policy has extended to civil matters and has been especially true in cases involving *pro se* Litigants and in criminal cases where liberty interests have been at stake.

C. The Record Reflects Repeated, Unexplained Failures of Appellant to Comply with the SCRP

The record in this case (as above referenced) demonstrates a pattern of Appellant's noncompliance with the Rules. Monetary sanctions were previously imposed against Appellant's counsel for his unexplained failure to make service of its Notice of Appeal and motion for enlargement of time. The purpose of the sanction was "(a) to send a message to the legal community that the Supreme Court Rules must be complied with; (b) that there are consequences for violations of the Rules; (c) to discourage sharp practice, harassment or tactical game playing whereby opposing parties are subjected to unnecessary expenditure of time and effort attributable to failure to serve documents; and (d) in this case, to (partially) compensate Appellees for the time expended in filing its motion to dismiss and efforts undertaken to secure satisfaction of the judgment prior to being advised that a Notice of Appeal had been filed." ("Order Denying Motion to Dismiss Appeal" dated May 16, 2021 (AST)).

Appellant's most recent Rule violation consists of exceeding the briefing limit on a Reply Brief by 1 page. Rule 28(a) states:

> All briefs must conform with this rule and must be accompanied by proof of service of a copy on each party to the appeal. Except after leave is granted, the clerk of the Supreme Court will not accept an opening or answering brief of more than 35 typewritten pages or printed pages, or a reply brief of more than 10 typewritten of printed pages, exclusive of indices, appendices and statements of related cases, or any brief that does not conform with Rule 31. (Emphasis added.)

Rule 28(a) required Appellant to seek leave of Court to file a request in order to file a brief exceeding the 10-page limit. Appellant failed to follow the Rule. It is a Rule violation regardless of whether the Reply brief exceeded the limit by 1 page or 100 pages. The prejudice to

Appellee by Appellant's violation of Rule 28(a) in the context of this particular case may be nonexistent or minimal.

[4]In the larger context, however, there is prejudice to the system when rules are ignored without consequence. Routinely excusing seemingly minor rule violations (such as exceeding a briefing limit by 1 page and/or by not requesting the required leave of Court) is likely to undermine the purpose of having clear standards set forth by the rules of procedure. With no clear standards (or standards which are not enforced) procedural litigation would likely increase accompanied by increased delay and expense to litigants and the court. Quite simply, if the rules are not enforced then why have the rules(?). ln the instant case, the Court does find prejudice to the administration of justice by Appellant's repeated and unexplained violation of the SCRP. There has been prejudice, albeit minimal, to Appellee because Appellee has been subjected to the time and expense of having to repeatedly bring motions before this Court to secure Appellant's compliance with the Rules. More importantly, as discussed below, Appellant has offered no explanation for its failure to comply with the Rules and has not even bothered to make a plea for not dismissing this appeal by responding to the instant motion to dismiss.

D. Because Appellant Has Not Opposed Dismissal, The Court Is Unaware Of Any Reason This Case Should Not Be Dismissed

Appellant MIMRA has not opposed dismissal and has not requested an extension of time in which to file an opposition. Because there has been no opposition filed, the Court is unaware of whether Appellant (MIMRA) objects to dismissal, intends of abandoning its appeal, or whether Appellant's counsel has intentionally failed to object to dismissal or has missed a deadline through inadvertence or neglect. Appellant's lack of opposition or response to Appellee's motion to dismiss is troubling. It is not a particularly difficult task to respond to a 2-page dismissal motion within the time limits provided by the Rules. The Rules even allow an extension of time in which to respond upon timely application. It would seem to the undersigned that when confronted with a motion to dismiss that some sort of response would be filed if this appeal was intended to be pursued.

[5]Because no opposition has been filed, it can reasonably be inferred that Appellant does not oppose dismissal. In the trial court context, the failure to oppose a motion to dismiss constitutes an abandonment of the claims for which dismissal is being sought. *See, e.g., King v. Contra Costa County*, 2020 WL 978632 (US. Dist. Ct., N.D. Ca.2/28/20). There is no reason why a similar rule should not apply on the appellate level when a dispositive motion is unopposed.

Even if this Court were to adopt a policy that dispositive motions on appeal are not to be granted merely because they are unopposed, there are ample grounds for dismissing this appeal due to Appellant's (1) lack of opposition to dismissal and (2) the pattern of repeated rules violations despite the prior imposition of sanctions aimed at securing compliance with the rules. Alternative sanctions, such as striking the Reply Brief or imposing additional monetary sanctions, appear inadequate in securing future compliance with the Rules.

V. CONCLUSION & ORDER

Appellee has requested dismissal of this appeal. Appellant does NOT OPPOSE DISMISSAL Grounds for dismissal exist under Rule 42(b)(2)(3) due to Appellant's repeated . failure to abide by the Rules.

Sanctions short of dismissal are likely inadequate to secure Appellant's future compliance with the Rules and are inadequate to send the message to the bar and other litigants that the Rules of Procedure are, indeed, mandatory, not "voluntary" and that there are consequences for repeated violations of those Rules.

IT IS THEREFORE ORDERED that Appellee's motion to dismiss is **GRANTED** and this appeal is **DISMISSED**.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MAUJ EDMOND, et al.,
Plaintiffs-Appellees,
v.

MARSHALL ISLANDS MARINE RESOURCES AUTHORITY, et al.,
Defendants-Appellants.

SCT CN 2021-00406 (HCT CN 2016-252)

ORDER REINSTATING APPEAL AND IMPOSING SANCTIONS

Submitted August 19, 2021
Filed August 27, 2021

Summary

Upon full panel consideration of Appellant's August 18, 2021 "Motion to Vacate Order Dismissing Appeal," the Supreme Court vacated the August 9, 2021 single-Justice Order dismissing this appeal and reinstated the appeal conditioned upon Appellant's payment of a sanction of $1,000 to Appellee's counsel. While the Court found a troubling pattern of repeated rule violations, the justices concluded that dismissal of the appeal was not warranted. Appellee had not been prejudiced by Appellant's disregard of the rules, and the Court's institutional interest in ensuring compliance with Supreme Court Rules of Procedure could be accomplished by imposition of a monetary sanction.

Digest

1. APPEAL and ERROR – *Dismissal, Grounds for – Noncompliance with the Rules*: Failure to comply with the rules in pursuing an appeal is grounds for dismissal. And because flaunting of the rules undermines the guarantee of equal treatment to ail parties, there is no requirement that the Court balance the merits of an appeal against the prejudice to an opposing party before issuing a sanction, including dismissal.

2. APPEAL and ERROR – *Dismissal, Grounds for – Noncompliance with the Rules*: A monetary sanction in the amount of $1,000 is imposed against Appellant, payable to Appellee within ten (10) days. The sanction is imposed (I) to send the message to Appellant's counsel and to the bar that compliance with the SCRP is mandatory, not voluntary, and that there are

consequences (which might include dismissal) for repeated failures to comply with the rules; and (2) to compensate Appellee for the time and expense of filing the instant motion to dismiss.

Counsel

David M. Strauss, counsel for Plaintiffs-Appellees Edmond, et al.
Laurence Edwards II, counsel for Marshall Islands Marine Resources Authority, et al.

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices
[Full Panel Review of Single-Justice Procedure Order — Supreme Court Rule of Procedure 27(c)]

ORDER

CADRA, C.J., SEABRIGHT, A.J., and SEABORG, A.J.

I. INTRODUCTION

Upon full panel consideration of Appellant's August 18, 2021 "Motion to Vacate Order Dismissing Appeal," we vacate the August 9, 2021 single-Justice Order dismissing this appeal and reinstate the appeal conditioned upon Appellant's payment of a sanction of $1,000 to Appellee's counsel.

While we find a troubling pattern of repeated rule violations, we conclude that dismissal of this appeal is not warranted. Appellee has not been prejudiced by Appellant's disregard of the rules, and the Court's institutional interest in ensuring compliance with Supreme Court Rules of Procedure ("SCRP") can be accomplished by imposition of a monetary sanction.

II. DISCUSSION

Appellee filed a "Motion to Dismiss Appeal for Repeated Rule Violations" on May I0, 2021. That motion was denied, but sanctions in the amount of $250 were imposed against Appellant. On July 28, 2021, Appellee then filed a "Second Motion to Dismiss Appeal for Repeated Violations of the Rules," which was unopposed by Appellant. The Second Motion to

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

Dismiss was granted by a single-Justice Order on August 9, 2021. Appellant now seeks an order vacating the dismissal of its appeal.

[1]SCRP 42(b)(2) and (3) authorize dismissal of an appeal upon motion by a party or upon the Court's own initiative "for failure of appellant to abide by these rules or for lack of timely compliance with these rules." Failure to comply with the rules in pursuing an appeal is grounds for dismissal. And because flaunting of the rules undermines the guarantee of equal treatment to ail parties, there is no requirement that the Court balance the merits of an appeal against the prejudice to an opposing party before issuing a sanction, including dismissal.

> The parties to an appeal must recognize that rules are not mere annoyances, to be swatted aside like so many flies, but, rather, that rules lie near the epicenter of the judicial process . . . . Of course, there must be some play in the joints. No one is perfect, and occasional oversights — fribbling infringements of the rules that neither create unfairness to one's adversary nor impair the court's ability to comprehend and scrutinize a party's submissions ordinarily will not warrant Draconian consequences. But major infractions or patterns of, repeated inattention warrant severe decrees. In the long run, . . . strict adherence to . . . procedural requirements . . . is the best guarantee of evenhanded administration of the law. . . . We hold that a party's persistent noncompliance with appellate rules, in and of itself, constitutes sufficient cause to dismiss its appeal.

Reyes-Garcia v. Rodriguez & Del Valle, Inc., 82 F.3d 11, 15 (1st Cir. 1996) (internal citations omitted).

Here, there have been numerous and continuing rule violations — the Notice of Appeal was not served, a motion for enlargement of time was not served, an over-length reply brief was filed, and certificates of service were not filed.

[2]As noted in prior Orders issued in this case, there is a strong policy in favor of deciding appeals on their merits. While the Court fully expects counsel to know and comply with the rules, we decline to dismiss this appeal given the lack of prejudice to Appellee. Instead, the Court's interest in securing counsel's compliance with the SCRP can be secured by imposition of an

escalating sanction pursuant to SCRP 51. A monetary sanction in the amount of $1,000 is imposed against Appellant, payable to Appellee within ten (10) days. The sanction is imposed (I) to send the message to Appellant's counsel and to the bar that compliance with the SCRP is mandatory, not voluntary, and that there are consequences (which might include dismissal) for repeated failures to comply with the rules; and (2) to compensate Appellee for the time and expense of filing the instant motion to dismiss.

III. CONCLUSION

It is therefore **ORDERED**:

1. Within 10 days of the date of this Order, Appellant shall pay a sanction of $1,000 to Appellee and provide proof of payment to the Court;
2. Once the Court receives proof of payment, this appeal shall be automatically reinstated;
3. Appellant shall file a new Reply Brief that complies with all rules within seven (7) days of reinstatement of this appeal; and
4. Failure to pay the $1,000 sanction in a timely manner, or failure to file a new Reply Brief in a timely manner, will result in the automatic dismissal of this appeal.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,
Plaintiff-Appellee,
v.
BARMOJ NAISHER,
Defendant-Appellant.

SCT CN 2020-01608 (HCT CR CN 2019-014)

ON APPEAL FROM THE HIGH COURT
Argued November 8, 2021
Filed November 30, 2021

Summary

The Supreme Court upheld the High Court's conviction of defendant-appellant Naisher for first-degree sexual assault and second-degree kidnapping. In its ruling, the Supreme Court held that there was sufficient evidence indicating Naisher's use of physical force "to overcome" the victim, including chasing her down, pulling her into the cook's restroom, and removing her clothing, to substantiate his conviction for first-degree sexual assault by strong compulsion. Further, there was sufficient evidence of Naisher's use of a separate act of physical force to move the victim a "substantial distance," that is pulling the victim from the kitchen into the storage room, to substantiate his conviction of kidnapping the victim.

Digest

1. CRIMINAL LAW AND PROCEDURE – *Convictions – Bench Trial – Findings of Fact Required*: When the High Court conducts a criminal bench trial and finds a defendant guilty, the High Court must state the specific findings of fact supporting the finding of guilt. *See* Marsh. Is. R. Crim. P. 23(c).

2. APPEAL AND ERROR – *Convictions – Bench Trial – Standard of Review*: On appeal of criminal case tried to High Court, the Supreme Court reviews the findings of fact for clear error, and the ultimate conviction for sufficiency of the evidence.

3. APPEAL AND ERROR – *Question Reviewable – Findings of Fact – Clearly Erroneous*: A finding is clearly erroneous when, although there is evidence to support it, the reviewing court

on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

4. APPEAL AND ERROR – *Question Reviewable – Findings of Fact – Clearly Erroneous*: Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

5. APPEAL AND ERROR – *Convictions – Bench Trial – Findings of Fact Required – Burden of Proof*: A conviction is supported by the sufficiency of the evidence when after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

6. APPEAL AND ERROR – *Convictions – Bench Trial – Findings of Fact Required – Burden of Proof*: In viewing the evidence in the light most favorable to the prosecution, the reviewing court may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal. Instead, the reviewing court should defer to all reasonable inferences drawn by the trial court by viewing the evidence in the light most favorable to the prosecution regardless of whether that evidence is direct or circumstantial.

7. APPEAL AND ERROR – *Convictions – Bench Trial – Findings of Fact Required – Burden of Proof*: Only after the reviewing court has construed all the evidence at trial in favor of the prosecution does the reviewing court take the second step, and determine whether the evidence at trial, including any evidence of innocence, could allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

8. APPEAL AND ERROR – *Convictions – Bench Trial – Findings of Fact Required – Burden of Proof*: Once a defendant has been found guilty of the crime charged, the fact-finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. That preservation mechanism permits a reviewing court to affirm a conviction even when the reviewing court considers a subset of evidence considered by the trial court, so long as there is "still sufficient evidence" to support the conviction.

9. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping*: Courts with similar criminal laws have largely rejected kidnapping charges when the forcible asportation of the victim is merely incidental to another offense.

10. CRIMINAL LAW AND PROCEDURE – *Crimes – Sexual Assault in the First Degree – Elements*: First-degree sexual assault occurs when a "person knowingly subjects another person to an act of sexual penetration by strong compulsion." 31 MIRC § 213.1(1)(a). In turn, "strong compulsion" means, *inter alia*, "the use of or attempt to use" "physical force" "to overcome a person." 31 MIRC § 213.0(11)(c). This statutory language requires that a defendant apply

physical force to the victim in two ways: through the act of sexual penetration, and by overcoming the victim in order to accomplish the penetration.

11. CRIMINAL LAW AND PROCEDURE – *Crimes – Sexual Assault in the First Degree – Elements*: The elements of first-degree sexual assault by physical force are thus (1) the defendant penetrated the victim's genital or anal opening, however slightly, with any object, including with any part of any person's body; (2) the defendant accomplished the penetration using force sufficient to overcome the reasonable resistance of the victim, regardless of whether the victim physically resisted; and (3) the defendant did so knowingly. 31 MIRC §§ 213.0(11)(c), 213.1(1)(a)

12. CRIMINAL LAW AND PROCEDURE – *Crimes – Sexual Assault in the First Degree – Elements*: When viewing the evidence in the light most favorable to the Republic, we are satisfied that a rational trier of fact could have found that Naisher used physical force sufficient to overcome the reasonable resistance of the victim. Naisher's chasing down and pulling the victim into the cook's restroom after she attempted to escape the storage room.

13. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping – Elements*: Kidnapping occurs when a "person unlawfully removes another . . . a substantial distance from the vicinity where he or she is found" for the "purpose[]" of "subject[ing] that person to a sexual offense." 31 MIRC § 212.1(1)(c). A removal is "unlawful" if, *inter alia*, "it is accomplished by force, threat or deception." *Id*. § 212.1(2).

14. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping – Elements – Deception*: The MIRC does not define "deception," but that term traditionally involves an "act of deliberately causing someone to believe that something is true when the actor knows it to be false."

15. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping – Elements – Substantial Distance*: The MIRC also does not define "substantial distance." But the comments to the Model Penal Code's kidnapping provision—after which the MIRC's kidnapping provision is modeled—specify that the rationale behind the substantial-distance requirement was to punish "isolation of the victim from the protection of the law" and to punish removal conduct that was "especially terrifying and dangerous."

16. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping – Elements – Substantial Distance*: Decisions from other jurisdictions confirm that the substantial-distance requirement focuses on whether the removal increased the difficulty of escape, decreased the risk of detection, or otherwise increased the risk of harm by giving the defendant more control over the victim.

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17. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping – Elements – Substantial Distance*: For a removal to have occurred over a "substantial distance," the removal must have increased the risk of harm to the victim under the totality of the circumstances. Factors relevant to that inquiry include whether—relative to the victim remaining in the place where the victim was found—the removal increased the difficulty of escape, decreased the risk of detection, or otherwise increased the risk of harm to the victim by giving the defendant more control over the victim.

18. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping – Elements*: Naisher's luring the victim into the kitchen by telling her to "go eat" was not threatening or forceful. Nor was it deceptive, because Naisher did not trick the victim into believing a circumstance was true when he knew it to be false—indeed, the girls did eat food in the kitchen.

19. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping – Elements – Substantial Distance*: A rational trier of fact could have found that Naisher removed the victim a substantial distance because pulling the victim from the kitchen into the storage room increased the risk of harm to the victim, regardless of whether the displacement was merely a few yards or a few feet.

20. CRIMINAL LAW AND PROCEDURE – *Crimes – Kidnapping – Elements – Substantial Distance*: Naisher's pulling the victim into the storage room thus markedly increased the risk of harm to the victim, thus satisfying the substantial-distance requirement.

Counsel

Richard Hickson, Attorney-General, counsel for Plaintiff-Appellee Republic of the Marshall Islands
David M. Strauss, counsel for Defendant/Appellant Naisher

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

I. INTRODUCTION

Defendant-Appellant Barmoj Naisher was convicted by the High Court of first-degree sexual assault under Title 31, Section 213.l(l)(a) of the Marshall Islands Revised Code ("MIRC"), and of second-degree kidnapping under Section 212.1(1)(c) of the same Title. Naisher makes two principal arguments on appeal: First, the sexual-assault conviction cannot stand because there is insufficient evidence that his use of force satisfies the "physical force" requirement of 31 MIRC §§ 213.0(ll)(c) and 213.l(l)(a). And second, the kidnapping conviction cannot stand because there is insufficient evidence that he "remove[d]" the victim a "substantial distance" from where she was found, as required by 31 MIRC § 212.1(1).[3] For the reasons stated below, we disagree with Naisher's arguments and hold there is sufficient evidence supporting both the sexual-assault and kidnapping convictions. Accordingly, we **AFFIRM** both convictions.

II. BACKGROUND

A. Evidence Adduced at Trial

The incident giving rise to this prosecution occurred on Sunday, March 31, 2019, at Jaluit High School on Jaluit Atoll. At that time, Naisher was 51 years old and was a cook at the school's cafeteria; the victim was a 20-year-old female student at the school. The victim testified that she was socializing with other students outside of the cafeteria under the lukowj trees, when Naisher summoned a group of female students, including herself, into the cafeteria. Once they arrived, Naisher told the girls to "go eat," and the girls proceeded to eat inside the cafeteria's kitchen. Naisher then told the girls, with the exception of the victim, to go buy ice lukwor (i.e.,

[3]Naisher also argues that the High Court erred by "convicting" him of lesser included offenses of first-degree sexual assault. But, as the Republic acknowledged during oral argument, there are only two convictions in this case: first-degree sexual assault and second-degree kidnapping. This is confirmed by the High Court's statement that the charges of the lesser included sexual-assault offenses "merge[d]" with the first-degree sexual assault, *see RMI v. Naisher*, No. 2019-014, slip op. at 6 (Marsh. Is. Nov. 5, 2020), and by the fact that the High Court sentenced Naisher for only first-degree sexual assault and second-degree kidnapping, *see RMI v. Naisher*, No. 2019-014, slip op. at 7–8 (Marsh. Is. Dec. 1, 2020). Thus, the High Court's statement that there was "sufficient evidence to support verdicts of guilt and convictions" on the lesser included offenses was harmless surplusage and did not result in a conviction for those lesser offenses. *See* Marsh. Is. R. Crim. P. 52(a); *see also RMI v. Menke*, 1 MILR 36, 37 (1986) (per curiam).

coconut smoothies). The girls complied, leaving the victim alone with Naisher for a brief period, but nothing happened during that period, as the girls returned to find Naisher and the victim still in the kitchen.

The girls left shortly thereafter to use the restroom, once again leaving the victim alone with Naisher. The victim testified that Naisher then "pulled" her by the hand into a storage room, a room that is separate from but adjacent to the kitchen. Once in the storage room, Naisher lifted her onto a table and kissed her. The victim further testified that Naisher was "going to do what he wanted" to her, and that she pushed him away and ran outside of the storage room.

According to the victim, Naisher then chased her down and "pulled" her into the neighboring room, the cook's restroom. The cook's restroom, like the storage room, is separate from but adjacent to the kitchen; the doorway to the cook's restroom is only a few feet to the right of the doorway to the storage room (when facing both doorways from the kitchen). While in the cook's restroom, Naisher removed the victim's undergarments and sexually penetrated her.[4] The victim testified that Naisher did not ask for consent, that she did not consent, and that she did not want the sexual act to occur. When questioned whether she did anything during the sexual act, the victim responded "no," but that she was "really afraid or frightened," and "wanted to scream but . . . just couldn't." The victim reported the incident immediately after it occurred.[5]

B. The High Court's Verdict and Findings of Fact

On August 23, 2019, the Republic filed an Information charging Naisher with first-degree sexual assault and second-degree kidnapping, along with lesser included offenses of second-- third-, and fourth-degree sexual assault. *RMI v. Naisher*, No. 2019-014, slip op. at 1–2 (Marsh. Is. Nov. 5, 2020) ("Conviction Order"). A bench trial was held in the High Court on October 20, 2020, resulting in convictions of first-degree sexual assault and second-degree kidnapping. *Id*. at 1, 6.

[4]The victim's testimony as to the sexual penetration was corroborated by another female student who testified that she saw Naisher and the victim having sex in the cafeteria building.

[5]Naisher testified to a different version of events. He admitted that he was working at the cafeteria on March 31, 2019, but he denied having seen or talked to the victim that day.

In support of the convictions, the High Court made the following findings of fact: On March 31, 2019, Naisher "unlawfully lured [the victim] from the lukwej trees, through the cafeteria, [and] to the kitchen," where he "forcefully pulled [the victim] by her hand to a storage room off the kitchen." *Id*. at 3. "[The victim] pushed Naisher off and ran out, but Naisher pulled her to the other room, overcoming [her] by physical force." *Id*. "Naisher pulled off [her] undergarments" and sexually penetrated her. *Id*. at 4. Naisher did not ask if the victim "wanted to go to the room," nor did he ask whether "he could penetrate her." *Id*. "[The victim] did not consent to sexual penetration," "she was really afraid," and "[s]he wanted to scream, but could not." *Id.*

The High Court determined that Naisher "is guilty beyond a reasonable doubt on two counts: Count 1, Sexual Assault in the First Degree, having subjected [the victim] to sexual penetration by strong compulsion, in violation of [31 MIRC § 213.1(1)(a)]; and Count 2, Kidnapping, having unlawfully remov[ed] [the victim] a substantial distance from the vicinity where she was found . . . to subject her to a sexual offense [in violation of 31 MIRC § 212.1(1)(c)]." Conviction Order at 2. Regarding the sexual-assault conviction, the High Court explained that "Naisher subjected [the victim] to non-consensual sexual penetration . . . , overcoming her by physical force . . . . Naisher pulled [the victim] by her arm, lifted her up, and prevented her from fleeing, to subject her to non-consent sexual penetration." *Id*. at 5 (citations omitted). Regarding the kidnapping conviction, the High Court explained that Naisher "unlawfully remov[ed] [the victim] a substantial distance from the vicinity where she was found . . . to subject her to a sexual offense . . . . Naisher lured [the victim] and other young women from lukwej trees 40 feet from the cafeteria, through the cafeteria, and to the kitchen, and when [the victim] was left isolated from others, Naisher, a man almost twice her weight, pulled [her] into rooms off the kitchen area to subject her to non-consensual sexual penetration." *Id*. (citations omitted).

The High Court sentenced Naisher to ten years imprisonment for the first-degree sexual assault, with five years served and five years suspended pursuant to certain conditions, and ten

years imprisonment for the second-degree kidnapping, also with five years served and five years suspended pursuant to certain conditions. *See RMI v. Naisher*, No. 2019-014, slip op. at 7–8 (Marsh. Is. Dec. 1, 2020). The sentences are to be served concurrently. *Id*. at 8.

III. STANDARD OF REVIEW

[1][2]When the High Court conducts a criminal bench trial and finds a defendant guilty, the High Court must state the specific findings of fact supporting the finding of guilt. *See* Marsh. Is. R. Crim. P. 23(c). On appeal, we review the findings of fact for clear error, and the ultimate conviction for sufficiency of the evidence. *See United States v. Vance*, 956 F.3d 846, 853 (6th Cir. 2020) ("In our review of evidentiary sufficiency, we assess a district court's specific factual findings following a bench trial for clear error. . . . Similarly, in reviewing the district court's ultimate finding of a defendant's guilt, we assess [the sufficiency of the evidence]." (citations omitted)); *United States v. Temkin*, 797 F.3d 682, 688 (9th Cir. 2015); *see also RMI v. Menke*, 1 6 MILR 36, 37 (1986) (per curiam) (stating, when reviewing a jury verdict, that "[f]indings of fact of the High Court cannot be set aside unless clearly erroneous").

[3][4]"[A] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009) (internal quotation marks omitted). "Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

[4][5]"A conviction is supported by the sufficiency of the evidence when 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *RMI v. Kijiner*, 3 MILR 122, 124 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In viewing the evidence in the light most favorable to the prosecution, the [reviewing] court 'may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal.'" *Id*. (quoting *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010)). Instead, the reviewing court should "defer to all reasonable inferences drawn by the trial court" by viewing the evidence

in the light most favorable to the prosecution regardless of whether that evidence is direct or circumstantial. *United States v. Ybarra*, 70 F.3d 362, 364 (5th Cir. 1995).

[6][7][8]"Only after [the reviewing court] [has] construed all the evidence at trial in favor of the prosecution [does] [the reviewing court] take the second step, and determine whether the evidence at trial, including any evidence of innocence, could allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Kijiner*, 3 MILR at 124 (quoting *Nevils*, 598 F.3d at 1164–65). "Once a defendant has been found guilty of the crime charged, the fact-finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. That preservation mechanism permits a reviewing court to affirm a conviction even when the reviewing court considers a subset of evidence considered by the trial court, so long as there is "still sufficient evidence" to support the conviction. *See United States v. Driggers*, 913 F.3d 655, 659–60 (7th Cir. 2019) (citing Jackson, 443 U.S. 307).

IV. DISCUSSION

[9]As charged in this case, both first-degree sexual assault and second-degree kidnapping require the defendant to have applied physical force onto the victim. The High Court, in fact, identified Naisher's pulling the victim into the storage room and the cook's restroom as supporting both convictions. Because the High Court relied on those forcible actions in support of both convictions—and because courts with similar criminal laws have largely rejected kidnapping charges when the forcible asportation of the victim is merely incidental to another offense[6]—we take care to separate the forcible actions supporting the sexual-assault conviction from the forcible actions supporting the kidnapping conviction. Although it may be possible under certain circumstances for the same forcible action to provide support for both a sexual

[6]*See* 3 Wayne R. LaFave, Subst. Crim. L. § 18.1(b) (3d ed. 2017, Oct. 2020 update); *see also Gov't of Virgin Islands v. Ventura*, 775 F.2d 92, 97–98 (3d Cir. 1985) ("[W]e cannot assume that any asportation incident to rape, however slight, constitutes kidnapping with intent to commit rape."); *People v. Dominguez*, 39 Cal. 4th 1141, 1150 (2006), as modified (Nov. 1, 2006).

assault and a kidnapping conviction, we need not consider that possibility in this case, because there is sufficient evidence supporting both the sexual-assault conviction and the kidnapping conviction even when the forcible actions are divided across those convictions. Principally, we divide the two "pulling" actions across the convictions: Naisher's pulling the victim into the storage room supports the kidnapping conviction, while Naisher's pulling the victim into the cook's restroom supports the sexual-assault conviction.

A. The Sexual Assault Conviction

1. First-Degree Sexual Assault Under the MIRC

[10]First-degree sexual assault occurs when a "person knowingly subjects another person to an act of sexual penetration by strong compulsion." 31 MIRC § 213.1(1)(a). In turn, "strong compulsion" means, *inter alia*, "the use of or attempt to use" "physical force" "to overcome a person." 31 MIRC § 213.0(11)(c). This statutory language requires that a defendant apply physical force to the victim in two ways: through the act of sexual penetration, and by overcoming the victim in order to accomplish the penetration. *See id*.; *see also State v. Jones*, 154 Idaho 412, 418, 422 (2013) (holding that Idaho's sexual-assault statute requires "more force than is inherent in the sexual act," *i.e.*, it requires "extrinsic force," because the contrary interpretation would render meaningless the statutory requirement that the victim be "overcome by force").

[11]The elements of first-degree sexual assault by physical force are thus (1) the defendant penetrated the victim's genital or anal opening, however slightly, with any object, including with any part of any person's body; (2) the defendant accomplished the penetration using force sufficient to overcome the reasonable resistance of the victim, regardless of whether the victim physically resisted;[7] and (3) the defendant did so knowingly. 31 MIRC §§ 213.0(11)(c), 213.1(1)(a); *see also State v. Cardus*, 86 Haw. 426, 435–36 (Ct. App. 1997) (defining similar elements for a similar sexual-assault statute).

[7]The phrase "regardless of whether the victim physically resisted" clarifies that when the victim does not physically resist in a particular case, the question becomes whether the force applied was sufficient to overcome a reasonable victim's will to resist. *See* 2 Wayne R. LaFave, Subst. Crim. L. § 17.3(a) (3d ed. 2017, Oct. 2020 update); *see also State v. Cardus*, 86 Haw. 426, 436 (Ct. App. 1997) ("'[S]trong compulsion' denote[s] . . . acts intended to overcome resistance to prohibited sexual conduct." (footnote omitted)). Force that is inherent in the act of sexual penetration is categorically insufficient.

2. There Is Sufficient Evidence Supporting the Sexual Assault Conviction.

Naisher challenges the second element. He argues there is insufficient evidence that he accomplished the sexual penetration using physical force sufficient to overcome the victim's resistance. Specifically, he argues that the forcible actions evidenced in the record—his "pull[ing] [the victim] by her arm, lift[ing] her up, and prevent[ing] her from fleeing"—do not amount to the kind of physical force sufficient to overcome a victim's reasonable resistance. In support of his argument, Naisher cites decisions from other jurisdictions in which appellate courts have upheld findings of "strong compulsion" by physical force, and he contrasts the facts of those cases with the facts of this case.

Although accurate, Naisher's case summaries are not helpful in delineating the minimum amount of force required for strong compulsion, as the forcible actions in those cases were quite extreme and clearly warranted findings of strong compulsion. *See, e.g., State v. Smith*, 106 Haw. 365 (Ct. App. 2004). Here, we consider only the following two forcible actions in our review of the sexual-assault conviction: Naisher's preventing the victim from fleeing by chasing her down and pulling her into the cook's restroom, and Naisher's removing the victim's clothing. The High Court made findings of fact on those two forcible actions, *see* Conviction Order at 3–4, and relied on those forcible actions, among others, when determining that Naisher was guilty of first-degree sexual assault, *see id*. at 5. The totality of the evidence in the record does not suggest that these factual findings are clearly erroneous.[8]

[12]Ultimately, when viewing the evidence in the light most favorable to the Republic, we are satisfied that a rational trier of fact could have found that Naisher used physical force sufficient to overcome the reasonable resistance of the victim. Naisher's chasing down and

[8]Naisher challenges the High Court's factual finding that the victim was "105 pounds." That challenge is beside the point because Naisher admitted at trial that he was capable of lifting the victim. Once it is assumed that Naisher was capable of lifting and thus pulling the victim, all of the forcible actions supporting the sexual-assault and kidnapping convictions become physically plausible.

pulling the victim into the cook's restroom after she attempted to escape the storage room is similar to the forcible action in *Jones*, 154 Idaho at 422, wherein the defendant "leaned forward to where his body was pushing on [the victim], pinning her hands underneath her so she could not turn around." The Supreme Court of Idaho affirmed the conviction of forcible rape in Jones because those actions "seem[ed] in particular less 'incidental' to sex and far more like force employed to overcome [the victim's] resistance." *Id*. Naisher's forcible actions are also similar to those in *State v. Mohammed*, 2020 ND 52, 939 N.W.2d 498 (2020), a case in which the Supreme Court of North Dakota affirmed a conviction of forcible sexual assault. Like Naisher, the *Mohammed* defendant grabbed his victim, pulled her in a different direction, and removed her clothing in order to accomplish the sexual penetration. *See id.*, 939 N.W.2d at 502 (rejecting defendant's argument "that there was no evidence that [the victim] physically resisted any action that would need to be overcome in the bedroom," because "[a] victim is not required to resist," and because there was "sufficient evidence that [defendant] used force to compel [the victim] to engage in sexual acts").

In sum, there is still sufficient evidence supporting the sexual-assault conviction even setting aside Naisher's actions in the storage room. We thus affirm that conviction.

B. The Kidnapping Conviction

1. Second-Degree Kidnapping Under the MIRC

[13][14]Kidnapping occurs when a "person unlawfully removes another . . . a substantial distance from the vicinity where he or she is found" for the "purpose[]" of "subject[ing] that person to a sexual offense." 31 MIRC § 212.1(1)(c).[9] A removal is "unlawful" if, *inter alia*, "it is accomplished by force, threat or deception." *Id*. § 212.1(2). The MIRC does not define "deception," but that term traditionally involves an "act of deliberately causing someone to believe that something is true when the actor knows it to be false." Deception, Black's Law

[9]As demonstrated by the element test set forth below, the MIRC defines other forms of kidnapping, including kidnapping for the purposes of collecting a ransom, terrorizing the victim, or interfering with the performance of any governmental or political function, *see* 31 MIRC § 212.1(1)(a)–(e). Kidnapping is a felony of the second degree when the defendant "voluntarily releases the victim, alive and not suffering from serious or substantial injury, in a safe place prior to trial." *Id*. § 212.1(2).

Dictionary (11th ed. 2019) (also defining "deception" as a "trick intended to make a person believe something untrue.").

[15]The MIRC also does not define "substantial distance." But the comments to the Model Penal Code's kidnapping provision—after which the MIRC's kidnapping provision is modeled[10]—specify that the rationale behind the substantial-distance requirement was to punish "isolation of the victim from the protection of the law" and to punish removal conduct that was "especially terrifying and dangerous." Model Penal Code and Commentaries § 212.1, cmt. 3, at 222–23 (Am. Law. Inst., Official Draft 1980). In short, the substantial-distance requirement "precludes kidnapping convictions based on trivial changes of location having no bearing on the evil at hand." *Id*. at 223.

[16]Decisions from other jurisdictions confirm that the substantial-distance requirement focuses on whether the removal increased the difficulty of escape, decreased the risk of detection, or otherwise increased the risk of harm by giving the defendant more control over the victim. *See, e.g., State v. Jackson*, 211 N.J. 394, 418–19 (2012)("[D]efendant isolated [the victim], who was threatened with a gun and in a moving vehicle, thus impeding [the victim]'s ability to obtain assistance. . . . [Defendant] expos[ed] [the victim] to the risk of a serious accident, injury or death by virtue of a desperate attempt to escape . . . ."); *State v. Fasthorse*, 2009 S.D. 106, ¶ 8 (2009) ("[T]aking [the victim] to a remote location increased the risk of harm to her. . . . Most movement of rape victims by their attackers is designed to seclude the victim from possible assistance and to prevent escape—which inevitably increases the risk of harm to the victim." (internal quotation marks omitted)); *State v. Masino*, 94 N.J. 436, 445 (1983) ("[N]either the Model Penal Code nor [the New Jersey kidnapping statute] contemplated 'substantial distance' as

[10]See Model Penal Code § 212.1 (2001) (containing nearly identical language as 31 MIRC § 212.1); *see also* Comm. on the Elimination of Discrimination against Women, Information received from the Marshall Islands on follow-up to the concluding observations on its combined initial to third reports of the Marshall Islands, U.N. Doc. MHL/FCO/1-3, at 3 (2021) ("In 2011, the [RMI] Criminal Code underwent a major transformation based upon the Model Penal Code . . . ."), available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MHL/CEDAW_C_MHL_FCO_1-3_44587_E.pdf.

a linear measurement." "[A]n actor who takes the trouble to set the scene so that he will have a relatively free hand to deal with his isolated victim is obviously more likely to lead to more dangerous consequences" and should be "adequately punished" by a kidnapping conviction. (quoting Model Penal Code and Commentaries § 212.1, comments at p. 15 (Am. Law. Inst., Tent. Draft No. 11, 1960))); *State v. Bunker*, 436 A.2d 413, 417 (Me. 1981) ("While the asportation may have been preparatory . . . , we think that the risks of harm and fright to this child, beyond that which she actually suffered, were significantly enhanced by her asportation and isolation.").

[17]Accordingly, the elements of kidnapping in this case are (1) the defendant knowingly removed the victim from the vicinity where the victim was found, using force, threat, or deception; (2) the removal was a substantial distance from the vicinity where the victim was found; and (3) the defendant removed the victim with the intent to subject the victim to a sexual offense. For a removal to have occurred over a "substantial distance," the removal must have increased the risk of harm to the victim under the totality of the circumstances. Factors relevant to that inquiry include whether—relative to the victim remaining in the place where the victim was found—the removal increased the difficulty of escape, decreased the risk of detection, or otherwise increased the risk of harm to the victim by giving the defendant more control over the victim.

2. There Is Sufficient Evidence Supporting the Kidnapping Conviction

Naisher essentially challenges the High Court's findings on the second element, arguing there is insufficient evidence that he removed the victim a substantial distance from where she was found. He principally contends that his pulling the victim into the rooms off the kitchen area was not a removal of a substantial distance because the victim was moved only a "few yards." As for the High Court's finding that Naisher "lured [the victim] . . . from lukwej trees 40 feet from the cafeteria, through the cafeteria, and to the kitchen," Naisher contends that finding is erroneous because there is no evidence in the record that he "lured" the victim anywhere. The victim's movement from the lukwej trees to the kitchen should not, therefore, be considered in support of the substantial-distance requirement, according to Naisher.

[18]We agree with the latter contention—that the victim's movement from the lukwej trees to the kitchen is not relevant to the substantial-distance requirement—but not because we view the High Court's finding that Naisher "lured" the victim to be erroneous. Rather, even if true, that factual finding is legally irrelevant because it does not demonstrate a removal that was done by force, threat, or deception. Naisher's luring the victim into the kitchen by telling her to "go eat" was not threatening or forceful. Nor was it deceptive, because Naisher did not trick the victim into believing a circumstance was true when he knew it to be false—indeed, the girls did eat food in the kitchen. *See* Deception, Black's Law Dictionary (11th ed. 2019); *see also State v. Holt*, 223 Kan. 34, 42 (1977) ("There is no evidence that [the victim] was taken either by force or deception against his will to any place other than where he always intended to go. . . . [T]o prove deception the state had to introduce evidence to show that the defendant . . . made a false statement pertaining to a present or past existing fact. There was no such evidence."). To the contrary, "luring" involves transparency as to an allurement, not deception as to an allurement. *Cf*. Merriam-Webster's Collegiate Dictionary 741 (Merriam–Webster, Inc., 11th ed. 2014) (defining "lure, v." as "to draw with a hint of pleasure or gain" or to "attract actively and strongly").

[19]Nevertheless, although we agree with Naisher that the victim's movement from the lukwej trees to the kitchen is irrelevant, we disagree with Naisher's principal contention that there is insufficient evidence supporting the High Court's finding on the substantial-distance requirement. Even setting aside the victim's movement from the lukwej trees to the kitchen, and setting aside Naisher's pulling the victim into the cook's restroom, a rational trier of fact could have found that Naisher removed the victim a substantial distance because pulling the victim from the kitchen into the storage room increased the risk of harm to the victim, regardless of whether the displacement was merely a few yards or a few feet.[11] *See State v. Matarama*, 306 N.J. Super.

[11]The High Court did not clearly err in finding that Naisher pulled the victim into the storage room. There was testimony from the victim directly supporting that finding. And another student testified that he saw Naisher pull the victim into the cook's restroom after Naisher had "lifted her" up, the implication being that the victim was

6, 21–22 (App. Div. 1997) (affirming denial of motion for acquittal of a kidnapping charge, where there was sufficient evidence supporting a substantial-distance removal because "the victim was dragged twenty-three feet [(roughly eight yards)]" "to a more secluded place where the assailants could more easily attack her without being seen"); *People v. Shadden*, 93 Cal. App. 4th 164, 169–70 (2001) (affirming kidnapping, where there was sufficient evidence supporting a substantial-distance removal because the defendant "dragged [the victim] nine feet from an open area to a closed room"; "the distance was short, but . . . the risk of harm substantial").

[20]Relative to completing the sexual assault in the kitchen, Naisher's pulling the victim into the storage room increased her difficulty of escape, as borne out by the fact that the victim attempted to escape the storage room but was caught by Naisher before she could successfully do so. That asportation also decreased the likelihood of detection, as the trial testimony and exhibits demonstrate that the storage room and the kitchen are separate rooms, and that the storage room is more secluded than the kitchen. Further, that asportation created a more isolated environment in which Naisher was able to better control the victim and thus more effectively carry out the assault, as borne out by the victim's testimony that she thought Naisher was "going to do what he wanted" with her, and that she was "really afraid" and "wanted to scream but . . . just couldn't." Naisher's pulling the victim into the storage room thus markedly increased the risk of harm to the victim, thus satisfying the substantial-distance requirement.[12]

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transferred from the storage room to the cook's restroom, because the victim testified that she was "lifted" up in the storage room. The High Court credited the victim's testimony and drew reasonable inferences from the other student's testimony. We defer to both determinations. *See Ybarra*, 70 F.3d at 364.

[12]Naisher relies on four decisions from appellate courts in other jurisdictions. Three of those decisions stand for the distinguishable proposition that moving a victim between rooms of a house during the commission of an assault or burglary is incidental to those crimes and is thus not grounds for a kidnapping conviction—put differently, the movements did not increase the risk of harm to the victims under the totality of the circumstances. *See, e.g.*, *State v. Wolleat,* 338 Or. 469 (2005) ("[The defendant] went into the bedroom where the victim was sleeping, grabbed her by her hair, and pulled her out of bed. Still holding the victim by her hair, defendant dragged her approximately 15 to 20 feet from the bedroom into the living room, where he repeatedly struck her."). The fourth decision is also distinguishable because the central issue in that case was whether the defendant had "confined" the victim for a "substantial period," not whether there was a removal over a substantial distance. *See State v. Cruz-Pena*, 243 N.J. 342 (2020).

We have considered a subset of evidence considered by the High Court with respect to its finding that the victim was moved a substantial distance, we conclude there is still sufficient evidence supporting that finding and the kidnapping conviction, on the whole.

V. CONCLUSION

For the foregoing reasons, we **AFFIRM** Naisher's convictions for first-degree sexual assault and second-degree kidnapping.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

CECILIE E. KABUA,
Plaintiff-Appellant,
v.
MWEJEN MALOLO,
Defendant-Appellee.

SCT CN 2018-008 (HCT CN 2012-190)

ON APPEAL FROM THE HIGH COURT
Argued November 8, 2021
Filed December 10, 2021

Summary

The Supreme Court affirmed the decision of the High Court adopting the Traditional Rights Court ("TRC") opinion. The TRC found the applicable custom is that, in the absence of an agreement otherwise, the *alab* title to *morjinkot* lands descends through the male bloodline (*bototok*) until the birth of a female which then establishes a *bwij*. Upon establishment of a *bwij*, *marjinkot* lands become *bwij* lands. As *bwij* lands, the succession of the alab title changes from that of through the *botoktok* (paternal bloodline) to that of through the *bwij* (matrilineally). Applying the custom to the facts of this case, the Traditional Rights Court found two *bwijs* were established by the births of two females in the same generation who descended from Lokomoram, the parties' common ancestor and original recipient of the wetos awarded as *marjinkot*. The older *bwij* being that of Libonlok and her children and the younger *bwij* being that of Litawe and her children. "Custom changes custom" and as *bwij* land "the children of the females will become *alabs* and the children of the males will become *dri jerbals*." Because Appellee Mwejen Malolo is a "child of the female" and is in the same generation as the last recognized *alab*, Laji Taft, the Traditional Rights Court concluded that Mwejen Malolo is the proper person to presently hold the alab title to the wetos at issue. The Traditional Rights Court opined that Cecilie Kabua is entitled to inherit the *dri jerbal* title as she is a child of the male.

Digest

1. APPEAL AND ERROR – *Review – Questions of Law*: Matters of law are reviewed *de novo.*

2. APPEAL AND ERROR – *Review – Findings of Fact*: Findings of fact are reviewed under the "clearly erroneous" standard.

3. APPEAL AND ERROR – *Review – Findings of Fact – 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.

4. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: The clearly erroneous standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues *de novo*.

5. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: We will not interfere with a finding of fact if it is supported by credible evidence, must refrain from re-weighing the evidence and must make every reasonable assumption in favor of the trial court's decision.

6. APPEAL AND ERROR – *Review – Traditional Rights Court*: In cases involving customary issues decided by the Traditional Rights Court, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution art. VI, sec. 4(5).

7. APPEAL AND ERROR – *Review – Traditional Rights Court*: The High Court's duty is to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law.

8. CUSTOM – *Burden of Proof*: Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense.

9. JUDICIAL ESTOPPEL – *In General*: Judicial estoppel can be applied when a party asserts a position in a legal proceeding and prevails, only to later assert a contrary position because of changed interests. Its purpose is to protect the judicial process by preventing parties from "deliberately changing positions according to the exigencies of the moment.

Counsel

John E. Masek, counsel for Plaintiff-Appellant Kabua
Roy T. Chikamoto, counsel for Defendant-Appellee Malolo

KABUA v. MALOLO (2)

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Acting Associate Justices

OPINION

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

I. INTRODUCTION

Plaintiff-Appellant Cecilie E. Kabua appeals a judgment of the High Court determining that, as between herself and Defendant-Appellee Mwejen Maiolo, Mwejen Maiolo is the proper person to hold the *alab* title/rights on Kuror, Enejore, Jakroot, Boken, Bokram, and Wonwot wetos on Kwajalein Atoll.

In reaching its judgment, the High Court accepted and gave substantial weight to the opinion of the Traditional Rights Court. The Traditional Rights Court found the applicable custom is that, in the absence of an agreement otherwise, the *alab* title to *morjinkot*[3] lands descends through the male bloodline (*botoktok*) until the birth of a female which then establishes a bwij. Upon establishment of a *bwij*, *marjinkot* lands become *bwij* lands. As *bwij* lands, the succession of the *alab* title changes from that of through the *botoktok* (paternal bloodline) to that of through the *bwij* (matrilineally). Applying the custom to the facts of this case, the Traditional Rights Court found two *bwijs* were established by the births of two females in the same generation who descended from Lokomoram,[4] the parties' common ancestor and original recipient of the wetos awarded as *marjinkot*. The older bwij being that of Libonlok and her children and the younger bwij being that of Litawe and her children. "Custom changes custom" and as *bwij* land "the children of the females will become *alabs* and the children of the males

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

[3]*Morjinkot* – "land taken at the point of the spear." Tobin, Land Tenure in the Marshall Islands, p. 34. Also spelled *Morijinkwot* – "The highest land award in recognition of valor, and a male only award." Amata Kabua, CUSTOMARY TITLES AND INHERENT RIGHTS, A General Guideline in Brief (1993).

[4]Also spelled "LoKamran," "Lokomoran," or "Lokmoram."

will become *dri jerbals*." Because Appellee Mwejen Malolo is a "child of the female" and is in the same generation as the last recognized *alab*, Laji Taft, the Traditional Rights Court concluded that Mwejen Malolo is the proper person to presently hold the *alab* title to the wetos at issue. The Traditional Rights Court opined that Cecilie Kabua is entitled to inherit the *dri jerbal* title as she is a child of the male.

Cecilie Kabua timely appealed. She contends the Traditional Rights Court's findings are contrary to custom. She also contends these courts erred in failing to consider certain evidence and explain adequately its findings regarding custom including the impact of Lelet, a male born in the same generation as Libonlok and Litawe, being *alab*.

As discussed below, we conclude the findings of the Traditional Rights Court are not "clearly erroneous" and, therefore, we affirm the High Court's judgment.

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. The Proceedings Below

On October 19, 2012, Cecilie Kabua filed a "Complaint for Declaratory and Injunctive Relief," High Court Civil Action No. 2012-190, against Mwejen Malolo, seeking a determination that she is the rightful *alab* on the above referenced wetos. Mwejen Malolo answered on March 6, 2013. The case was eventually referred to the Traditional Rights Court.

A hearing before the Traditional Rights Court was conducted on November 9, 10, and 11, 2016. The question presented to the Traditional Rights Court was:

> As between Cecilie Kabua and Mwejen Malolo, and all persons claiming herewith, who is the proper person, according to Marshallese custom, to inherit from Laji Taft the Alab right on the wetos on Kwajalein Atoll, Marshall Islands? The wetos are Kuror, Enejore, Jakroot, Boken, Bokram, and Wonwot.

After hearing testimony from Cecilie Kabua, Michael Jenkins, Helkena Anni and Mwejen Malolo, and having considered the exhibits offered by the parties, the Traditional Rights Court issued its "Opinion and Answer" on February 15, 2017. In its "Opinion and Answer" the

Traditional Rights Court concluded that, as between Cecilie Kabua and Mwejen Malolo, Mwejen Malolo is the proper person to hold the alab title on the wetos at issue.

The Traditional Rights Court reasoned that, in the absence of an agreement otherwise, the *alab* title of Lokomoram (the original recipient of the lands award as *marjinkwot* and the parties' common ancestor) descended through the male bloodline (*botoktok*) until such time that the females, Libonlok and Litawe, were born.[5] Upon the birth of these females, a "*jidrak in bwij*" occurred establishing two *bwijs*: an older *bwij* of Libonlok and a younger *bwij* of Litawe.[6] Because "custom changes custom," the wetos at issue became *bwij* land.[7] As *bwij* land "[t]he children of the females will become *Alabs* and the children of the males will become ."[8] The *alab* title to the subject wetos would then descend through the *bwij* (matrilineally) rather than through the *botoktok* (patrilineal blood line.) The Traditional Rights Court explained "[u]nder Marshallese custom the inheritance of the *Alab* title is through the children of the female, beginning from the eldest."[9] Laji Taft was the last *alab* having been declared such in the previous High Court case of *Laji Taft v. Mwejen Malolo*, High Court Civil Action No. 1993-040. Based on the *memenbwij* submitted by the parties, the Traditional Rights Court agreed "[i]t was proper for Laji Taft to hold the right of *Alab* before Mwejen Malolo because he (Laji Taft) is listed under the

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[5]"According to Marshallese custom, the descending line from Lanjok to Lokabale and Lainammo is bloodline or children of a male, and since there was no agreement as to inheritance of land that Lokomoram made, it is proper under Marshallese custom for the children of Lokabale and the children of Lainammo to inherit the *Alab* title when their time comes. However, this is with respect to bloodline or children of males . . . Lokobale and Litawe are "*jidrak in bwij*," to this family, that began and continued down over generations under bloodline or children of males. Since custom changes custom, meaning if a daughter is born, the land will become bwij land . . . the panel sees that there are two *bwij* that emerged. The older *bwij* is that of Libonlok and her children and the younger *bwij* is of Litawe and her children." Opinion & Answer of TRC, p. 2.

[6]*Id.*

[7]*Id.*

[8]"Under Marshallese custom the inheritance of the *Alab* title is through the children of the female beginning with the eldest. The children of a male shall inherit the *Dri Jerbal* title or *Senior Dri Jerbal* (the head of all *Dri Jerbal* on the land.)" Opinion & Answer of TRC, p. 3.

[9]*Id.*

eldest *bwij* of his grandmother, Libonlok, and his mother, Bojaar."[10] Mwejen Malolo is of the same generation as Laji Taft, although from the younger bwij.[11] Therefore, the Traditional Rights Court reasoned "[s]ince Laji Taft was the last living descendant of Bojaar and his grandmother, Libonlok, the *Alab* right shall go back to the younger *bwij*, the descendants of Litawe who are the children of Litabu."[12] The Traditional Rights Court concluded that because "Laji Taft was the last Alab and since he does not have any surviving siblings left, it is only proper that Mwejen Malolo, who is of the same generation as Laji, but from a younger bwij, be the rightful *Alab* title holder."[13]

On May 20, 2018, the High Court conducted a Rule 9 hearing. Cecilie Kabua, relying on the Traditional Rights Court's decision in the case of *Thomas v. Samson*, CA 2000-184 (2006), argued that two *bwijs* can never hold title to the same land at the same time. Kabua thus claimed the Traditional Rights Court's decision was "clearly erroneous" because it found that an elder and younger *bwij* with rights to the same wetos at the same time had been established with the births of Libonlok and Litawe. The High Court rejected that argument distinguishing the *Thomas v. Samson, supra*, case on its facts and characterizing its holding as *dicta*. The High Court reviewed the Traditional Rights Court's "Opinion and Answer" in light of the evidence concluding there was a sufficient factual basis for its determination and that determination was not "clearly erroneous." The High Court therefore adopted the Traditional Rights Court's decision and declared that, as between Cecilie Kabua and Mwejen Malolo, Mwejen Malolo is the proper person to hold the alab title on the subject wetos in its "Final Judgment" dated June 1, 2018.

Cecilie Kabua timely appealed on July 2, 2018.

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[10]"It was proper for Laji Taft to hold the right of an Alab before Mwejen Malolo because he is listed under the eldest bwij of his grandmother Libonlok, and his mother Bojaar. This panel agrees with the judgment of the High Court in Civil Action 1993-040, as shown in Plaintiff Exhibit D." Opinion & Answer of TRC, p. 3.

[11]Opinion & Answer, p. 3.

[12]*Id.*

[13]*Id.*

B. The Uncontested Facts

The facts of this case are largely undisputed.

It is undisputed that the *alab* title to the wetos at issue originated with Lokomoram who was awarded these lands as *marjinkot* by his Iroij for bravery in battle.

It is also undisputed that the parties' common ancestor is Lokomoram (a male). The *memenbwij* submitted by the parties establishes the following uncontested genealogy. Lokomoram had a son named Lanjok. Lanjok had two sons, Lokobale[14] (the elder) and Lainammo (the younger). Lokobale (the older son of Lanjok) had a daughter named Libonlok and a son named Lelet. Lelet (the son of Lokobale) had a daughter named Rose (Rose Lelet Jenkins) and sons (Melu and August). Appellant Cecilie Kabua is a daughter of Rose (and thus a granddaughter of Lelet). Libonlok (the daughter of Lokobale) had a daughter named Bojar. Bojar had a son named Laji (Laji Taft) and a daughter named Betty (as well as other sons and daughters). Lainammo (the younger son of Lanjok) had sons (Malolo, Temoj, and Laitto) as well as a daughter named Litawe. Litawe (the daughter of Lainammo) had a daughter named Litabu (and sons, Raimon, Livai and Attari). Appellee Mwejen Malolo is a son of Litabu (and thus a grandson of Litawe).[15]

It is undisputed that Laji Taft was the last *alab* on the wetos at issue. The High Court previously entered an "Order Granting Summary Judgment" in the case of *Laji Taft v. Mwejen Malolo*, CA No. 1993-040 (3/22/94), declaring Laji Taft to be the *alab* on the wetos at issue. That judgment was not appealed and the parties concede that Laji Taft was the last recognized *alab*.

It is further undisputed that Appellant Cecilie Kabua and Appellee Mwejen Malolo are of the same generation descending from their common male ancestor, Lokomoram, as Laji Taft.

What is disputed is who between Appellant Cecilie Kabua and Appellee Mwejen Malolo succeeds Laji Taft as alab. This dispute is one of custom.

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[14]Sometimes spelled "Lokabale."

[15]See Plaintiff's Exhibit A; Defendant's Exhibit 2.

III. APPELLANT'S CONTENTIONS ON APPEAL

A. Appellant Contends the Traditional Rights Court Erred in Declaring the Applicable Custom

Cecilie Kabua argues that the Traditional Rights Court made a mistake in declaring the applicable custom. Her theory of the case can be briefly summarized.

Cecilie Kabua contends there are two bloodlines (bototok) descending from Lokomaram: the senior bloodline of Lokobale (the elder son of Lokomoram) and the junior bloodline of Lainammo (the younger son of Lokomoram). The common ancestors of the parties (Lokobale, of the senior bloodline and Lainammo, of the junior or younger bloodline) were all males and therefore the parties are related through their bloodlines (*tor bototok*), not *bwijs* (there being no common female ancestor). Cecilie Kabua, is descended from the senior bloodline (that of Lokobale) whereas Appellee Mwejen Malolo is descended from the junior bloodline (that of Lainammo). As long as members of the senior bloodline of the same generation are living, members of the senior bloodline take precedence over members of the younger bloodline in the inheritance of the alab title. In the case of *Laji Taft v. Mwejen Malolo*, the High Court held that Laji Taft was of "the senior *bwij* within the senior bloodline" and was therefore the proper person to hold the *alab* title on these lands.[16] The "authority within the family" (or *alab* rights) had been held by Lokobale and Lelet until a female was born in their line; that female being Rose Jenkins which established "the *bwij* of the descendants of Lelet in the senior bloodline." The *bwijs* within the senior bloodline are those of LeBojar (Bojaar) from whom Laji Taft was descended and a younger *bwij* within the senior bloodline which was established with the birth of Rose Lelet Jenkins. Upon the death of Lelet, the *alab* title should have gone to the children of his sister Libonlok (within the same generation) and his own children, Melu, August, and Rose (which would be the next generation). Pursuant to custom, title passes horizontally from senior members

[16]It is unclear where the alleged finding that "Laji Taft was of the senior *bwij* within the senior bloodline" is derived. Plaintiff/Appellant's Exhibit E is an Order Granting Summary Judgment which declared that Laji Taft was *alab* but that Order does not explain how it reached that declaration/conclusion.

of a generation to junior members of the same generation. As the oldest daughter of Rose, Cecilie Kabua is the oldest member of the younger *bwij* within the senior bloodline and, as such, is the next in line after Laji Taft (her cousin) to take the *alab* title. In other words, because Appellant Kabua is of the senior bloodline she is entitled to take the *alab* title over Appellee Malolo, who is of the younger bloodline.[17]

B. Other Issues Raised on Appeal

Appellant specifies as error that:

(1) the Traditional Rights Court "failed to address questions regarding the origin of the land being from the bloodline and that Plaintiff/Appellant is of the older bloodline, (and) that therefore (Plaintiff/Appellant) has a superior claim as opposed to Defendant/Appellee";

(2) the Traditional Rights Court "failed to take into account the fact that Plaintiff/Appellant and Defendant/Appellee come from two entirely separate *bwijs*, and that both these *bwijs* cannot hold title to the same property at the same time"; and

(3) the Traditional Rights Court "failed to address the impact of Lelet being the *alab* and defendant/appellee's inconsistent statements in regard to the status of Lelet."[18]

IV. STANDARD OF REVIEW

[1][2][3][4][5]Matters of law are reviewed *de novo. Lobo v. Jejo*, 1 MILR (Rev.) 224, at 225. Findings of fact are reviewed under the "clearly erroneous" standard. *Dribo v. Bondrik*, et al, 3 MILR 127, 131 (2010); *Abner v. Jibke, et al.*, 1 MILR 3, 5 (1984). A finding of fact is

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[17]Appellant's theory does find arguable support in J.A. Tobin's "LAND TENURE IN THE MARSHALL ISLANDS," p. 35, which states "[t]he recipient (of *Marjinkot* land) could give the land to his children or lineage . . . . If the original recipient gave the land to the lineage, it must continue that way. It is up to the first recipient to decide. If it should start through the paternal side, it must continue that way and may not be changed." Amata Kabua's "CUSTOMARY TITLES AND INHERENT RIGHTS, A General Guideline in Brief" (1993) similarly states "[p]resuming a *Morijinkwot* is awarded, it is then imperative that the awardee choose his successor, or successors, and so inform the *iroilablab* of his choice for formal confirmation. There are only two choices of successor open to him, *e.g.*, the *bwij* which includes his brother, sister, etc., or his children who are of a different *bwij* than his own. In the event there is no close matrilineal and patrilineal relatives to succeed him, upon his death, the land rights revert back to the *iroilablab* for reassignment." In the instant case, it is unclear whether the original recipient Lokomoram made the requisite choice as to his successors.

[18]*See* Notice of Appeal, Appellant's Opening Brief, pp. 4-6 and the arguments set forth in that brief at pp. 8-15.

"clearly erroneous" when review of the entire record produces a definite and firm conviction that the court below made a mistake. *Lobo v. Jejo, supra*, at 225-6 (1991). The clearly erroneous standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues *de novo*. *Bulele v. Morelik*, 3 MILR 96, 100 (2009). We will not interfere with a finding of fact if it is supported by credible evidence, must refrain from re-weighing the evidence and must make every reasonable assumption in favor of the trial court's decision. *Kramer & PII v. Are & Are*, 3 MILR 56, 61 (2008). We must defer to the factual findings of the court(s) below even if we would have decided the case differently and even if the evidence would make another conclusion more plausible.

[6][7]In cases involving customary issues decided by the Traditional Rights Court, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution art. VI, sec. 4(5). "The High Court's duty is to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law." *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

[8]Determinations of custom by the Traditional Rights Court are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final court decision. "Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense." *Lebo v. Jejo*, 1 MILR (Rev.) 224, 226 (1991); *Zaion v. Peter*, 1 MILR (Rev.) 228, 231 (1991).

Because the custom applicable to the facts of this case has not been incorporated into a statute or formed the basis of a Supreme court decision, we must review this case under the "clearly erroneous" standard.

V. DISCUSSION

A. The Traditional Rights Court's Findings Regarding the Applicable Custom Are Not "Clearly Erroneous"

Determination of the applicable custom by the Traditional Rights Court is a factual issue to which we must give deference and substantial weight as required by the Constitution and our prior decisions.

Having considered all the evidence, the Traditional Rights Court found that two *bwijs* came into existence with the births of females. A senior *bwij* through Libonbok and a junior *bwij* through Litawe. The *alab* title was then to pass through the *bwij* with the title going first to members of the elder *bwij* and then to members of the younger *bwij* (in the same generation). We note this finding regarding custom is consistent with the generally recognized rule that the alab title to *morijinkwot* lands will pass through the male bloodline (*tor botoktok*) of the original recipient until a female is born at which time a *bwij* is established. The *alab* title then passes through the *bwij*, which is the usual pattern of succession.

> The general rule of patrilineal inheritance applies on all the land entitlement and rewards, if, among the matrilineal successors as described above, there is no female to pass on to her children the authority on these land rights. However, in the absence of a female heir, the authority over the land rights is determined on a seniority basis of the *botoktok bwij* of a particular *jowi* and the highest ranking patrilineal heir takes the reigns of authority. *Such authority by the patrilineal heirs will continue until, in later generations, a female heir is born to bear children to whom the authority will automatically pass.*

CUSTOMARY TITLES AND INHERENT RIGHTS, A General Guideline in Brief, Amata Kabua (1993) (emphasis added).

The evidence before the Traditional Rights Court supports its findings regarding the applicable custom. Plaintiff's Exhibit "C," Certification of Traditional Title Holder, indicates that Cecilie Kabua was recognized as *senior dri jerbal* by *Iroijlaplap* and the Chairman of the

Koba Maran, Anjua Loeak.[19] This recognition is consistent with the Traditional Rights Court's finding that the children of the males as in Lelet (through whom Appellant claims title as a child of Rose) become *dri jerbal*. Defendant's Exhibit "3," Certification of Traditional Successor, indicates Mwejen Malolo was recognized as *alab* by Iroijlaplap Anjua Loeak. This evidence is likewise consistent with the Traditional Rights Court's finding of the applicable custom that the alab title descends through the female or bwij. The Traditional Rights Court also relied on Defendant's Exhibit "4," Certification of Traditional Successor and Iroijlaplap Approval and Reaffirmation of Traditional Title Holder, Iroij Mike Kabua, affirming that Mwejen Malolo is the proper person to be *alab*.

Cecilie Kabua offered evidence regarding her view of the custom through the testimony of Michael Jenkins, her exhibits, and commentary on land tenure in the Marshall Islands. The Traditional Rights Court, as fact finder, was entitled to accept or reject competing evidence regarding the applicable custom. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Bulele v. Morelik*, 3 MILR 96, 100 (2009).

We have previously recognized that the Traditional Rights Court is uniquely qualified to make determinations regarding custom. *Zion v. Peter*, 1 MILR (Rev.) 228 (1991). The Traditional Rights Court's findings regarding the custom and its application to the facts of this case are supported by the evidence in the record and the Traditional Rights Court's own expertise in custom. We therefore find the Traditional Rights Court's findings regarding the applicable custom are supported by the evidence and are not "clearly erroneous." As such, we will not interfere with those findings.

[19]This document does not reference the wetos at issue in this case. The significance is that Appellant is inheriting the *dri jerbal* rights through Rose (Rose Lelet Jenkins).

B. The Traditional Rights Court Adequately Addressed Questions Regarding the Origin of the Lands Being From the Bloodline

Review of the record in its entirety reveals the Traditional Rights Court heard and gave due consideration to Appellant's arguments and evidence regarding the origin of the subject lands (*marjinkot* to Lokomoram) as being from the bloodline. The Traditional Rights Court found that the parties had a common ancestor in Lokomoram (a male). The Traditional Rights Court recognized that the title passed through the male bloodline (*botoktok*) to Lokobale and Lainammo until the birth of females, at which time a *jidrak in bwij* occurred establishing two *bwijs*. The *alab* title was then to pass through these *bwijs*. The Traditional Rights Court rejected the theory that Appellant, as a member of the older bloodline, is entitled to take the *alab* title before Appellee, who is a member of the younger bloodline. Appellant's specification of error is merely a disagreement with the Traditional Rights Court's findings of fact regarding the custom and application of that custom to the facts of this case. Again, we defer the Traditional Rights Court's factual findings regarding the applicable custom and find no error.

C. The Traditional Rights Court Adequately Addressed Appellant's Theory That the Parties Come From Two Entirely Separate Bwijs and That Two Bwijs Cannot Simultaneously Hold Title to the Same Land

Cecilie Kabua argues that the parties have no common female ancestor and are therefore not part of the same *bwij*, but, rather, they are from separate and distinct *bwijs*. Because the bwijs are unrelated, they cannot inherit from each other or hold title to the same land through their bwijs. Branches of the same *bwij* must have a common female ancestor. There being no common female ancestor to Laji Taft, Cecilie Kabua or Mwejen Malolo, inheritance must be through the bloodline, not the *bwij*.

In support of her argument that the Traditional Rights Court erred, Cecilie Kabua relied on the Traditional Rights Court's decision in *Thomas v. Samson*, High Court Civil Action No. 2000-184 (2006), for the proposition that two bwijs cannot hold title to the same lands simultaneously. Appellant's apparent theory is that the Traditional Rights Court erred in finding that the two distinct *bwijs* of Libonlok and Litawe can hold title to the same wetos. The High Court distinguished that case from the facts presented by the instant case. The High Court explained:

> As to the TRC's *dicta* in *Thomas*, to the effect that two *bwijs* can never hold title on the same land, the Court concludes that this finding applies to two unrelated *bwijs* claiming rights over the same land given a customary award to two unrelated people. The TRC in *Thomas* tells us that customary awards of land are never given to two people, only to one person. The facts in the present case are different. The two *bwijs* claim their rights through common ancestors. The older *bwij*, Libonlok and her descendants, and the younger *bwij*, Litawe and her descendants, are both descendants of earlier *alabs* Lokomoram and Lanjok. This was not the case in *Thomas* with two unrelated *bwijs* claiming through unrelated ancestors.[20]

We agree with the High Court's analysis. Further, even accepting Appellant's reading of *Thomas, supra*, as standing for the proposition that two *bwijs* cannot hold title to the same land at the same time, it is clear that the Traditional Rights Court did not hold that the *bwijs* of Libonlok and Litawe hold title to the same land at the same time. As declared by the Traditional Rights Court, the custom is that title passes from the older *bwij* of Libonlok to the younger *bwij* of Litawe only after extinction of the member of the older *bwij* in that generation. Thus, these two *bwijs* do not hold title to the same land at the same time as claimed by Appellant.[21]

D. The Traditional Rights Court Adequately Addressed the Issue of Lelet Being Alab and Appellee's Inconsistent Statements in That Regard

Cecilie Kabua claims the Traditional Rights Court erred in failing to address the impact of Lelet being *alab*. As we understand Kabua's argument, the Traditional Rights Court's recognition of Lelet as *alab* is inconsistent with its finding that, under custom, the *alab* title was to descend through the *bwijs* established by the births of Libonlok and Litawe. The apparent inconsistency is that if the *alab* title was to pass through Libonlok, Litawe, and their respective *bwijs*, as found by

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[20]Final Judgment, pp. 5-6

[21]In her appellate briefing, Cecilie Kabua cites the case of *Peter v. Napking*, CA 2006-163 (2008) for the proposition that "pursuant to Marshallese custom two *bwijs* can never hold the same title to the same land at the same time." We have reviewed that case and find it inapposite, the reference to that case likely being a mis-cite.

the Traditional Rights Court, then Lelet would not have been entitled to be *alab* because he was not a member of either *bwij*.[22] It is undisputed, however, that Lelet was *alab*, notwithstanding that the Traditional Rights Court did not explain why or how Lelet became *alab* on these wetos. Because Lelet was undisputedly *alab*, that title should have descended to Rose Lelet Jenkins which established "the *bwij* of the descendants of Lelet in the senior bloodline." As the oldest daughter of Rose, Cecilie is the eldest member of the younger *bwij* within the senior bloodline and, as such, is the next in line to after Laji Taft, who was the son of Bojar, the senior *bwij* within the senior bloodline, to inherit the *alab* title before Mwejen Malolo.[23]

As pointed out by Appellee, the fact that Lelet may have been *alab* does not mean Cecilie Kabua as a grandchild of Lelet must be *alab* under custom. While Lelet's position as *alab* may be unexplained, we find the Traditional Rights Court's declaration of the custom applicable to the facts of this case is not clearly erroneous, and we therefore decline a remand on this issue. In further support of her theory that the alab title descends through the bloodline descending from Lelet to Rose and then herself, Cecilie Kabua points to the case of *Laji Taft v. Mwejen Malolo*, High Court Civil Action No. 1993-040. She asserts the High Court found that Laji Taft was the rightful *alab* "as a descendant of the senior *bwij* within the senior bloodline."[24] Her apparent theory is that as between the parties and privies to that prior case, the parties to this instant case are bound by that finding. We have reviewed the record of this appeal and note the assertion that the High Court found that "Laji Taft was the rightful *alab* as a descendant of the senior *bwij* within the senior bloodline" is unsupported by the record. The record on appeal in that case indicates that *Laji Taft v. Mwejen Malolo*, *supra*, was disposed of by a two-page order granting summary judgment.[25] That order declared that Laji Taft was the holder of the *alab* rights to the

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[22]According to the memenbwij submitted by the parties (Plaintiff's Exhibit A and Defendant's Exhibit 2) Lelet is a son of Lokobale (male) and is the brother of Libonlok (not a child of Libonlok or member of her bwij).

[23]Appellant's Opening Brief, p. 10.

[24]Appellant's Opening Brief, p. 10.

[25]Plaintiff's Exhibit E.

subject wetos. There were no findings regarding the source of Laji Taft's *alab* title as being "a descendant of the senior *bwij* within the senior bloodline." Therefore, to the extent that order granting summary judgment may have issue preclusion effect on the parties and their privies, it is only that Laji Taft was *alab* on these wetos—a fact not at issue, as both parties agree Laji Taft was the last *alab* on the subject wetos.

The Traditional Rights Court considered and agreed with the High Court's finding in *Laji Taft v. Mwejen Malolo, supra*, that Laji Taft was the proper *alab* but not because he was "a descendant of the senior *bwij* within the senior bloodline." Rather, consistent with its finding of the custom applicable to the facts of this case, the Traditional Rights Court explained that Laji Taft was from the older *bwij* established by Libonlok, his grandmother, and his mother Bojaar. he Traditional Rights Court agreed with Defendant's Exhibits 5 and 6 in making this finding.[26] There is ample evidence in the record supporting the Traditional Rights Court's finding the source of Laji Taft's title as descending from the older *bwij* of Libonlok, not that he was from the senior *bwij* within the senior bloodline.

[9]Appellant also points to allegedly inconsistent statements and positions taken by Appellee in the prior litigation, *Laji Taft v. Mwejen Malolo, supra*, and contends it was error for the courts below not to address that issue. Appellant does not disclose the theory on which she believes Appellee Malolo should be bound by such allegedly prior inconsistent statements made in the prior litigation. Judicial estoppel can be applied when a party asserts a position in a legal proceeding and prevails, only to later assert a contrary position because of changed interests. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). Its purpose is to protect the judicial process by preventing parties from "deliberately changing positions according to the exigencies of the moment." *Id*. at 750 (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993). In deciding whether to apply judicial estoppel, a court considers various factors, including whether the party's position is clearly inconsistent with its earlier position and whether the party

[26]Opinion & Answer of TRC, p. 3.

changing position would gain an unfair advantage over the opposing party. Id. at 750-51.

In reviewing the record in its entirety, we cannot find error in the rejection (or non-consideration) of Appellant's evidence or arguments as to Appellee's alleged contradictory or inconsistent statements regarding Lelet holding the alab title. Cecilie Kabua's Exhibit D is an unverified Answer and Counterclaim of Mwejen Malolo in the prior case of *Laji Taft v. Mwejen Malolo*. In that Answer, Mwejen Malolo raised as an affirmative defense that "[a]ll claims of plaintiff are barred by the customary defense of BWILOK or TIM." In his counterclaim, Malolo alleged "[c]ounterclaim-defendant Laji cannot become *alap* due to the *Bwilok* or *Tim* committed by his former male persons under the *bwij* or family of Lokabale;" "[a]ll the male persons before counterclaim-defendant Laji from the *bwij* or family of Lokabale never acted as *alap* or *senior dri jerbal* on these lands involved due to the *Bwilok* or *Tim* above stated;" and "[c]ounterclaimant Mwejen and Junios Malaolo (both from the *bwij* or family of Lainammo) hold the same *Kajur* rights, interests and titles held by their former male predecessors-*alaps* (like Lainammo) to the land involved." Appellee Malolo's position in the prior litigation involving Laji Taft is not "clearly inconsistent" with his position taken in the present case. The assertion in the prior case that a *Bwilok* took place, thereby preventing Laji Taft from taking the *alab* title, is not inconsistent with an alternative theory that Malolo is now the proper *alab* under the customary pattern of inheritance (as found by the Traditional Rights Court in the present case).
Malolo's theory in the prior litigation was that his alab rights descended from Lainammo, which is consistent with his theory in the instant case. Further, even if Malolo has taken an inconsistent position in the present litigation from that which he took in the prior litigation, he did not prevail in the prior litigation. Thus, there is no estoppel arising and no error by the High Court or Traditional Rights Court in failing to address those alleged inconsistent statements or positions.

Testimony was elicited that the Loeak domains have recognized Appellant as the *alab* under a similar factual pattern. Thus, Appellant argues this recognition should henceforth be applicable to the lands at issue in the Kabua domains, as there is only one *manit* (or custom).[27]

[27]Appellant's Opening Brief, p. 10.

The Traditional Rights Court, however, is not bound by how a similar situation may have been handled within the Loeak domain (or the Kabua domains). The Traditional Rights Court heard that testimony and was free to accept or reject it.

We have also considered the evidence and arguments regarding alleged wrongful acts of Mwejen Malolo, the Kwajalein Land Commission, and others to usurp the alab title from Appellant's predecessors. These acts occurred prior to the recognition of Laji Taft as alab by the High Court's decision in *Laji Taft v. Mwejen Malolo, supra*. The parties concede Laji Taft was properly recognized as *alab*. The title being properly returned to Laji Taft, we find evidence of these allegedly wrongful prior acts irrelevant to the instant dispute.

VI. CONCLUSION

There is sufficient evidence in the record to support the Traditional Rights Court's determination of the applicable custom and ultimate conclusion that Mwejen Malolo is the proper person to hold the alab title to the wetos at issue.

The High Court's Final Judgment is therefore **AFFIRMED**.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

BATLE LATDRIK,
Plaintiff-Appellee,
v.
LINA LAIK (on behalf of the children of Laik Kejon),
Defendant-Appellant.

SCT CN 2018-013 (HCT CN 2006-101)

ON APPEAL FROM THE HIGH COURT

Argued May 9, 2022
Filed June 6, 2022June 21, 2024

Summary

The Supreme Court affirmed the High Court's and the Traditional Rights' decisions finding that Batle Latrik is the *alap* over Mwejelok Weto, Delap Island, Majuro Atoll, Marshall Islands and that there is no *iroijedrik* for Mwejelok. In concluding that Batle Latdrik is *alap* on Mwejelok, the Traditional Rights Court found that Mwejelok was *ninnin* land from the parties' common ancestor Lekejon to his descendants, Anjo (male), Libollan (female), and Laninbit (male). Lekejon died without a will, agreement in writing, or oral directive regarding disposition of Mwejelok. The Traditional Rights Court found the custom in such situation is that the *alap* title to *ninnin* lands descends through the male bloodline (bototok) until the birth of a female. The birth of a female establishes a *bwij*. Upon establishment of a *bwij*, "custom changes custom" and *ninnin* lands become *bwij* lands. As *bwij* lands, the succession of the *alap* title changes from that of through the paternal bloodline (*botoktok*) to that of through the *bwij* (matrilineally). The custom as applied to the facts of this case is that the children of Libollan (female) established a new *bwij*. Therefore, Mwejelok, formerly a *ninnin* land, became *bwij* land. As *bwij* land, the descendants of Libollan become *alaps* (the *alap* title descending matrilineally through the bwij). The parties' *memenbwij* indicate Libollan had a child named Toeme (female). Toeme had sons, Raymond (the eider, who is now deceased) and Batle (the younger). The Traditional Rights Court concluded that Batle Latdrik, a descendant of Libollan (through Toeme), is the current *alap* under the custom. The Traditional Rights Court further opined that the children of males are considered *dri jerbal*, concluding that the children of Anjo will exercise the rights of *senior dri jerbal* and the children of Laninbit are *dri jerbal* with the right to remain and live on Mwejelok. The Traditional Rights Court determined there is no *iroijedrik* on Mwejelok.

MARSHALL ISLANDS, SUPREME COURT

Digest

1. CONSTITUTIONAL LAW – *Construction – Article VI*: In cases involving customary issues decided by the Traditional Rights Court, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution, Art. VI, Sec. 4(5). The High Court's duty is to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law.

2. CUSTOM – *Question of Law*: Determinations of custom by the Traditional Rights Court are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final court decision.

3. CUSTOM – *Question of Law*: "[F]inal court decision" means a final Supreme Court decision.

4. APPEAL AND ERROR – *Review – Questions of Law*: Matters of law are reviewed *de novo*.

5. STARE DECISIS: The application of *stare decisis* and *res judicata* are questions of law that we review *de novo*.

Counsel

Tiantaake Beero-Sexton, counsel for Plaintiff-Appellee Latdrik
Karotu Tiba, Assistant Public Defender, counsel for Defendant-Appellant Laik

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Associate Justices

OPINION

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

[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

LATDRIK v. LAIK

I. INTRODUCTION

Defendant-Appellant Lina Laik (on behalf of the children of Laik Kejon) ("Lina Laik" or "Appellant") appeals an October 15, 2018 decision and an October 25, 2018 final judgment of the High Court determining that Plaintiff-Appellee Batle Latdrik ("Batle Latdrik" or "Appellee") is *alap* for Mwejelok Weto, Majuro Atoll.

In reaching its October 15, 2018 decision and its October 25, 2018 final judgment, the High Court adopted the "Opinion and Answer" of the Traditional Rights Court. In concluding that Batle Latdrik is *alap* on Mwejelok, the Traditional Rights Court found that Mwejelok was *ninnin* land from the parties' common ancestor Lekejon (also spelled Kejon and LeKejon) to his descendants, Anjo (male), Libollan (female), and Laninbit (male). Lekejon died without a will, agreement in writing, or oral directive regarding disposition of Mwejelok. The Traditional Rights Court found the custom in such situation is that the *alap* title to *ninnin* lands descends through the male bloodline (*bototok*) until the birth of a female. The birth of a female establishes a *bwij*. Upon establishment of a *bwij*, "custom interchanges (sic) custom" and *ninnin* lands become *bwij* lands. As *bwij* lands, the succession of the *alap* title changes from that of through the paternal bloodline (*botoktok*) to that of through the *bwij* (matrilineally). The custom as applied to the facts of this case is that the children of Libollan (female) established a new *bwij*. Therefore, Mwejelok, formerly a *ninnin* land, became *bwij* land. As *bwij* land, the descendants of Libollan become *alaps* (the *alap* title descending matrilineally through the *bwij*). The parties' *memenbwij* indicate Libollan had a child named Toeme (female). Toeme had sons, Raymond (the eider, who is now deceased) and Batle (the younger). The Traditional Rights Court concluded that Batle Latdrik, a descendant of Libollan (through Toeme), is the current *alap* under the custom. The Traditional Rights Court further opined that the children of males are considered *dri jerbal*, concluding that the children of Anjo will exercise the rights of *senior dri* jerbal and the children of Laninbit are *dri jerbal* with the right to remain and live on Mwejelok. The Traditional Rights Court determined there is no *iroijedrik* on Mwejelok.

In its October 15, 2018 decision and October 25, 2018 final judgment, the High Court adopted the Traditional Rights Court's decision that Batle Latdrik is *alap* and that there is no *iroijedrik* for *Mwejelok*. The High Court rejected the opinion regarding the *dri jerbal* and *senior dri jerbal* titles because that issue had not been certified to the Traditional Rights Court.

Lina Laik (for the children of Laik Kejon) timely appealed the High Court's October 15, 2018 decision and October 25, 2018 final judgment that Batle Latdrik is *alap* on Mwejelok. She contends that the Traditional Rights Court and High Court erred as a matter of law in failing to apply the custom as allegedly set forth by the Trust Territory Court in the case of *Janre v. Labuno*, 6 TTR 133 (Trial Division March 8, 1973). Appellant Laik contends that *Janre* is binding precedent which must be followed under the principle of *stare decisis*. As discussed below, applying the *de novo* standard of review urged by both parties, we conclude *Janre v. Labuno, supra*, is not binding precedent in the courts of the Republic. We therefore find no error in the High Court's and Traditional Rights Court's alleged failure to follow that case as binding precedent under the doctrine of *stare decisis*. We also conclude that the Traditional Rights Court's findings regarding the custom and its application to the facts of this case are supported by the evidence and are not clearly erroneous. We therefore **AFFIRM** the High Court's October 15, 2018 decision and October 25, 2018 final judgment.

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

This longstanding and procedurally convoluted case had its origins in two civil actions filed in 2006 by Raymond Latdrik. The first case, *Raymond Latdrik v. Luni Gong*, High Court Civil Action No. 2006-008, challenged defendant Luni Gong's building on Mwejelok without Raymond's consent as *alap*. The second case, *Raymond Latdrik v. Jane's Corporation*, High Court Civil Action No. 2006-101, sought to enjoin Jane's Corporation from construction activities on Mwejelok. Raymond alleged he was both *iroijedrik* and *alap* on Mwejelok and he had not approved the lease to Jane's. That lease had been signed by Jurelang Zedkaia as *iroijedrik* (apparently, on behalf of Leroij Atama Zedkaia) and Laik Kejon as *alap* and *senior dri jerbal*. The High Court found that Mwejelok had previously been leased to the government. Declaring

void the subsequent lease to Jane's Corporation, the High Court enjoined Jane's from further construction. The High Court ordered that an amended complaint be filed naming Jurelang Zedekaia for his mother Atama Zedekaia and Lina Laik for the children of Laik Kejon. *Latdrik v. Gong* (Civil Action No. 2006-008) and *Latdrik v. Jane's Corporation* (Civil Action No. 2006-101) were consolidated for hearing before the Traditional Rights Court. The Traditional Rights Court issued a decision in *Latdrik v. Jane's Corporation* (Civil Action No. 2006-101) in favor of Lina Laik for the children of Laik Kejon. The High Court did not adopt the Traditional Rights Court's decision due to procedural irregularities. Consequently, the case was remanded to the Traditional Rights Court for a second hearing so as to allow all counsel to participate. This second hearing, which forms the basis of the instant appeal, was ultimately held before a new panel of Traditional Rights Court judges.[3]

Two questions were certified to the Traditional Rights Court: Who, if there is, the *Iroijedrik* for Mwejelok Weto, Majuro Atoll? And who is *Alap* for Mwejelok Weto, Majuro Atoll?

The hearing was held before the Traditional Rights Court on March 28, 2017, March 28, 2018, and April 3, 2018. Batle Latdrik's theory of the case was that Mwejelok Weto was originally *bwij* land from Jeri (LeJeri). Jeri was the mother of Lekejon (male). Lekejon had a sister named Liolet who died without children. Consequently, the rights Jeri had on Mwejelok descended to Lekejon and then to his children, Anjo (male) and Libollan (female). Anjo had two children; Laik, who was the father of Lina (*i.e.*, Defendant-Appellant Lina Laik), and Lajbo (male). Libollan had a daughter named Toeme, the mother of both Raymond Latdrik and Plaintiff-Appellee Batle Latdrik (Raymond Latdrik died during the pendency of this litigation). According to Batle, the *bwij* of Jeri became extinct with the death of Liolet. A new *bwij* was then established with Libollan. Because Raymond and Batle are descendants of Libollan, they should be the proper persons to hold the *alap* title on Mwejelok.[4]

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[3]This procedural background is derived from the parties' briefing.

[4]Transcript of March 28, 2017, hearing before TRC, pp. 5-6.

Lina Laik's theory of the case was that Mwejelok Weto was given to Lekejon by Iroij Lainlen as *botoktok* land after Lekejon had cleaned and cleared the land. Lekejon had three children: Anjo (male), Libollan (female), and Laninbit (male). Anjo had children Laik (male) and Lajbo (male). The *alap* title went from Lekejon to Anjo. Because the *botoktok* line was not extinct, the *alap* title would go to Laik when Anjo died. The title would then go to "the children of Laik," which would include Lina Laik. According to Lina, Libollan cannot hold the *alap* title while the *botoktok* line still survives.[5]

The Traditional Rights Court issued its "Opinion and Answer" on May 10, 2018. The Traditional Rights Court concluded (1) there is no *iroijedrik* for Mwejelok Weto; (2) Batle Latdrik is *alap* for Mwejelok; and (3) the children of Laik hold the *Senior Dri Jerbal* title and have the right as *Dri Jerbal* on Mwejelok. In reaching its conclusions, the Traditional Rights Court found that, as descendants of Lekejon (or Kejon), both parties were from the same lineage. Lekejon had three children: Anjo (male), Libollan (female) and Laninbit (male). Mwejelok Weto was *ninnin* land from Lekejon to his descendants (Anjo, Libollan, and Laninbit). Lekejon did not "make a will or agreement in writing or by word of mouth to any of his children" regarding disposition of Mwejelok Weto. The custom, as found by the Traditional Rights Court under this fact pattern, is that "the descendants of females inherit the *Alap* rights and the descendants of males inherit the *Dri Jerbal* rights over land. Custom interchanges (sic) custom. The children of Libollan establish a new *bwij* and the children of Anjo are considered *Dri Jerbal* and will exercise the rights of *Senior Dri Jerbal*, and the children of Laninbit are *Dri Jerbal* and have the right to remain and live on Mwejelok Weto."[6] Because Toeme, Raymond Latdrik, and Batle Latdrik are descendants of the female Libollan, they are the proper persons to hold the *alap* title.

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[5]Transcript of March 28, 2017 hearing before TRC, pp. 7-9.

[6]Traditional Rights Court "Opinion & Answer," May 10, 2018, p. 3.

The Traditional Rights Court concluded there is no *iroijedrik* on Mwejelok because there was insufficient evidence indicating royal blood in the parties' lineage.[7]

A Rule 9 hearing was held before the High Court on August 7, 2018, which issued its decision on October 15, 2018. The High Court, giving substantial weight to the Traditional Rights Court decision as required by the Constitution and case law, adopted the findings of the Traditional Rights Court regarding the *alap* rights to Mwejelok. The High Court held "as a matter of custom, that *ninnin* land reverts to *bwij* land upon the establishment of a new *bwij* from among the *ninnin* donor's descendants. The TRC's opinion as to the *alap* title is correct; it is not contrary to law; it is not clearly erroneous; and it is therefore adopted."[8]

In adopting the Traditional Rights Court's findings, the High Court discussed the available commentaries regarding custom:

> It is custom that "authority by the patrilineal heirs will continue until in later generations, a female heir is born to bear children to whom the authority will automatically be passed on." Customary Titles and Inherent Rights by Amata Kabua (1993), page 13. "[T]he chief or *alab* gives *ninnin* to one generation only, his son or daughter." Land Tenure in the Marshall Islands by J.A. Tobin 1956), page 29. "The recipient generation of *ninnin* and their female children and the children of its female members, have full rights in the land. he male descendants of this generation have *ajri* rights only." Land Tenure in the Marshall Islands by J.A. Tobin (1956), page 31. "Past studies ... show ... that a strong preference existed for *ninnin* land to revert from *botoktok* patrilineal inheritance back to a *bwij* matrilineal succession after one generation." Land and Women: The Matrilineal Factor by K. Stege, R. Maetala, A. Nupa, J. Simo and E. E. Huffer (2008), page 14.

The High Court also discussed the Trust Territory case of *Janre v. Labuno*, *supra*. Lina Laik contended that Janre was binding precedent and relied on language from that decision which stated:

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[7] *Id.*

[8] "Rule 9 Decision," filed October 18, 2018, p. 6.

> *Ninnin* land, unlike *bwij* or *kabijukinen* land, is inherited vertically by the descending issue of the donor, whereas lineage land is inherited horizontally from the oldest to the youngest persons in the oldest to youngest *bwij*.

The High Court commented:

> The statement is absolutely true for the first generation donees, i.e., the *alap's* children. But the statement does not address the inheritance scheme once a new *bwij* is established from among the *alap's* descendants. The children of Laik Kejon rely on the statement for the proposition that *ninnin* land continues to be passed vertically, generation after generation, to the descendants of the original *alab's* male children. Their reliance is misplaced.

Noting the available commentaries on custom support the Traditional Rights Court's decision, the High Court adopted the conclusion that Batle Latdrik is the proper person to be *alap* on Mwejelok. The High Court gave Batle Latdrik an opportunity to challenge the Traditional Rights Court decision that there is no *iroijedrik* on Mwejelok. That finding was not challenged and the High Court issued its final appealable judgment on October 25, 2018.

III. APPELLANT'S CONTENTIONS ON APPEAL

Lina Laik, for the children of Laik Kejon, filed a timely Notice of Appeal on November 23, 2018, identifying the issue as:

> [W]hether the High Court's 15 October, 2018 decision and 25 October, 2018 judgment in this matter adopting the Traditional Rights Court's 8 August, 2018 opinion, in holding that the plaintiff was *alap* on Mwejelok weto, based on the application of the custom for inheritance and transmission of *alap* rights as *ninnin*, was erred in law and in custom.

In her briefing, Appellant Lina Laik argues the High Court and Traditional Rights Court erred as a matter of law because the custom identified in the Trust Territory Trial Division case of *Janre v. Labuno*, *supra*, was not afforded *stare decisis* effect as binding precedent. The parties agree the standard of review of this issue is *de novo*.

IV. STANDARD OF REVIEW

[1]In cases involving customary issues decided by the Traditional Rights Court, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution, Art. VI, Sec. 4(5). The High Court's duty is to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law. *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

[2][3]Determinations of custom by the Traditional Rights Court are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final court decision. *Lobo v. Jejo*, I MILR (Rev.) 224, 226 (1 991); *Zaion v. Peter*, 1 MILR (Rev.) 228,231 (1991). Recently, in *Kabua v. Maiolo*, Supreme Court Case No. 2018-008 (December 10, 2021), we clarified that "final court decision" means a final Supreme Court decision.

[5][6]Matters of law are reviewed *de novo*. *Lobo v. Jejo*, I MILR (Rev.) at 225. Because Appellant contends that the courts below erred in failing to follow custom which has attained the status of law by final court decision in the Trust Territory case of *Janre v. Labuno*, *supra*, the appropriate standard of review is *de novo*. *See*, *e.g.*, *In Re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1252 (9th Cir. 2020) ("The application of *stare decisis* and *res judicata* are questions of law that we review *de novo*." (emphasis added)).

V. DISCUSSION

A. The High Court Did Not Err "As A Matter of Law" in Adopting the Traditional Rights Court Decision

I. Trust Territory Decisions Such as *Janre v. Labuno*, 6 TTR 133, Are Not Binding Precedent Under the Doctrine of *Stare Decisis*

Appellant Lina Laik contends that the High Court and Traditional Rights Court erred in failing to apply the inheritance pattern for *ninnin* lands adopted by the "Trust Territory of the Pacific Islands, Trial Division of the High Court" decision in the case of *Janre v. Labuno*, 6 TTR 133 (Trial Division March 8, 1973).

Janre v. Labuno, supra, was a trial level decision. The general rule, and the rule which we adopt, is that trial court decisions are not precedents binding on other courts under the principle of *stare decisis*. *See, e.g., Harrott v. Cnty. of Kings*, 25 P.3d 649, 655 (Cal. 2001); *In re Est. of Jones*, 287 P.3d 610, 615 (Wash. Ct. App. 2012) ("*Stare decisis* is not applicable to a trial court decision because the findings of fact and conclusions of Jaw of a superior court are not legal authority and have no precedential value."); *In re Emma F.*, 107 A.3d 947, 958 (Conn. 2015) ("In contrast to an Appellate Court decision, a trial court decision does not establish binding precedent."); *Wilson v. Parker*, 227 A.3d 343, 356 (Pa. Super. Ct. 2020) (stating that trial court decisions "are not binding precedent" but "may be considered for their persuasive authority."). United States federal courts, likewise, do not generally afford binding precedential value to district court (*i.e.*, trial court) decisions under the doctrine of *stare decisis*. *See, e.g., United States v. Cerceda*, 172 F.3d 806, 812 n.6 (11th Cir. 1999) ("The opinion of a district court carries no precedential weight, even within the same district."); *United States v. Article of Drug* Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987) ("A single district court decision . . . is not binding on the circuit, or even on other district judges in the same district."). We therefore hold that the trial court decision in *Janre v. Labuno, supra*, does not bind either the Traditional Rights Court or the High Court under the principle of *stare decisis*, although those courts might consider that decision for its persuasive value.

Moreover, and perhaps more importantly, the case of *Janre v. Labuno, supra*, was decided by the Trust Territory High Court, Trial Division prior to independence of the Republic. The Republic is a separate sovereign independent from that of the former Trust Territory of the Pacific Islands. Trust Territory decisions were not adopted under the RMI Constitution or by any Act of the Nitijela. The doctrine of *stare decisis* does not require the courts of one sovereign state or nation (such as the Republic of the Marshall Islands) to follow decisions of other sovereigns as binding precedent although such decisions may be considered persuasive. *See generally*, 20 Am. Jur. 2d Courts § 13 7 ("The decisions of the courts of foreign nations do not bind state courts in the interpretation of state law.").

In *Langijota v. Alex*, 1 MILR (Rev.) 216,218 (1990), we recognized the courts of this Republic, an independent nation, are not bound by decisions of the former Trust Territory, a separate sovereign:

> Further, for the guidance of counsel we are obliged to announce that decisions of the Trust Territory courts do not have *stare decisis*, as distinguished from *res judicata*, effect in the courts of the Republic. The Republic is a jurisdiction separate and distinct from the former Marshall Islands District of the Trust Territory. We do not deny, however, that in some circumstances the value of Trust Territory court decisions as precedent will exceed the precedential value of cases from non-Pacific Islands jurisdictions.

While Trust Territory decisions may be persuasive authority or instructive on issues of custom, we reiterate *Langijota's* holding that the courts of this Republic are not bound to follow those decisions as precedent under the principle of *stare decisis*.

Because *Janre*, *supra*, is not binding precedent on either the Traditional Rights Court or the High Court, we find no error in the alleged failure of the High Court to follow that decision under the doctrine of *stare decisis*.

2. *Janre v. Labuno* ls Not the Basis of a "Final Court Decision" and Has Not Become "Law"

Citing *Lobo v. Jejo*, I MILR (Rev.) 224, 226 (1991) and *Zaion v. Peter*, 1 MILR (Rev.) 228, 231 (1991), Appellant argues that the custom annunciated in *Janre*, *supra*, has become "law" because it has "formed the basis of a final court decision." While we have concluded that the courts of the Republic are not bound by Trust Territory decisions under the doctrine of *stare decisis*, we address Appellant's argument to clarify and give guidance as to when a "final court decision'' becomes "law.''

In *Lobo*, *supra*, and *Zaion*, *supra*, we observed that"[o]nly when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense." Lobo, 1 MILR (Rev.) at 226; Zaion, 1 MILR (Rev.) at 231. In the recent case of *Kabua v. Malolo*, Supreme Court Case No. 2018-008 (Dec. 10, 2021), we clarified that the phrase "final court decision" means final "Supreme Court decision." We stated:

> Only when the assertion is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense. Citations omitted. Because the custom applicable to the facts of this case has not been incorporated into a statute or formed the basis of a Supreme Court decision, we must review this case under the "clearly erroneous standard." *Kabua v. Malolo*, Slip Op., p. 10.

Our statement in *Kabua v. Malolo*, *supra*, that a "final court decision" means a "Supreme Court" decision is not a new pronouncement of the law but merely a clarification of the previously stated rule in *Lobo v. Jejo*, *supra*, and *Zaion v. Peter*, *supra*. As discussed above, a trial court decision does not create precedent which would be "law" binding on this court or other trial courts on the same level or of "equal dignity." It is generally accepted that trial judges need not accept the prior decisions of the judges of the same court although they are free in their discretion to do so. *See generally*, 20 Am. Jur. 2d Courts § 137. ,Thus, for a custom to become, "law" to be given stare decisis effect, a "final court decision" setting forth that custom must necessarily mean a final decision of the Supreme Court. Because *Janre v. Labuno*, *supra*, is not a final decision of the Supreme Court, the custom expressed in that case has not become "law" required to be followed by the High Court or Traditional Rights Court.

B. The Findings of the Traditional Rights Court and High Court Regarding the Applicable Custom Are "Not Clearly Erroneous"

Having concluded that the High Court and Traditional Rights Court did not err as a "matter of law" in not giving *stare decisis* effect to *Janre v. Labuno*, *supra*, we review the High Court's decision under the "clearly erroneous" standard giving "substantial weight" to the factual findings of the Traditional Rights Court as required by the Constitution and our case law.

The Traditional Rights Court's findings regarding the applicable custom are not clearly erroneous. We have previously recognized that the Traditional Rights Court is uniquely qualified to make determinations regarding custom. *Zaion v. Peter*, I MILR (Rev.) 228, 232 (1991). Having heard the evidence, the Traditional Rights Court determined that the custom applicable to

the facts of this case was that the *alap* title to Mwejelok, a *ninnin* land, descended from Lekejon to his descendants Anjo (male), Libollan (female), and Laninbit (male). The children of Libollan established a *bwij*. The establishment of a *bwij* changes the custom ("custom interchanges (sic) custom") so that "the descendants of females inherit the *alap* rights and the descendants of males inherit the *dri jerbal* rights over land." Thus, the descendants of Libollan (which include Batle Latdrik) are *alaps* and the descendants of Anjo and Laninbit are considered *dri jerbal*, the eldest descendant of Anjo being *senior dri jerbal*.[9] These factual findings regarding the custom and its application to the facts of this case are not clearly erroneous.

In adopting the Traditional Rights Court's findings regarding the applicable custom, the High Court noted and quoted the treatises on custom by Amata Kabua, J.A. Tobin, and K. Stege, et al. Those treatises support the Traditional Rights Court's findings regarding the applicable custom. The High Court recognized the statement in *Janre v. Labuno*, *supra*, that "*ninnin* land, unlike *bwij* or *kabijukinen* land, is inherited vertically by the descending issue of the donor, whereas lineage land is inherited horizontally from the oldest to the youngest in the oldest to youngest *bwij* is "absolutely true for the first generation donees, *i.e.*, the *alap's* children. But the statement does not address the inheritance scheme once a new *bwij* is established . . . ." The High Court's observation is supported by the treatises on custom. To the extent that the view of custom in *Janre*, *supra*, conflicts with that expressed by Amata Kabua, J.A. Tobin and K. Stege, et al., in their respective treatises, the High Court and/or Traditional Rights Court were free to disagree with and reject *Janre's* expression of the custom.[10] While the parties disagree as to what that case actually stands for,[11] it is not necessary to delve into an analysis of that case, because

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[9]"The genealogy shows Lekejon had a daughter. The descendants of Libollan establish a new *bwij* and are listed as *alaps*. The descendants of Anjo are *dri jerbals*, and one of the descendants or the eldest will be the *senior dri jerbal*. The descendants of Laninbit are considered *dri jerbal*." TRC "Opinion & Answer," p. 5.

[10]A fair reading of *Janre* fails to reveal or fully explain the custom relied upon that would explain how the *alap* right descended to plaintiff from the donor's children.

[11]The factual findings and applicable custom are ambiguous or unclear in the *Janre* decision. The trial court held that "plaintiff, acting for his older sister Neimej, is entitled to the *alab* interests" and orders that "plaintiff and his sister Neimej are entitled to hold the alab interests . . . ." Appellee thus disputes that *Janre* clearly recognized that the plaintiff, Clement Janre, and not his sister Neimej, was entitled to the *alap* rights because he was a male.

neither the Traditional Rights Court nor the High Court was bound to follow that decision.

The Traditional Rights Court explained how it reached its conclusions based on the evidence. We conclude that the Traditional Rights Court's findings regarding the custom and its application are supported by the evidence and are not "clearly erroneous." As such, we will not interfere with those findings.

VI. CONCLUSION

Under the *de novo* standard of review we find that the Traditional Rights Court and the High Court were not bound under the doctrine of *stare decisis* to follow the Trust Territory decision in *Janre v. Labuno*, *supra*. We also find that the custom as found by the Trust Territory trial court has not attained the status of "law" as a "final court decision" within the meaning of our prior decisions in Lobo, *supra*, and *Zaion*, *supra*.

Finally, there is sufficient evidence in the record to support the Traditional Rights Court's determination of the applicable custom and conclusion that Batle Latdrik is the proper person to hold the *alap* title to Mwejelok Weto. That determination is not clearly erroneous, and we must give deference to that determination.

The High Court's Final Judgment is therefore **AFFIRMED**.

(Answering Brief, p. 7). Further, the Trust Territory court did not identify or clearly set forth the custom in explaining how the *alap* rights descended to Neimej and/or Clement other than to make passing reference to Tobin's treatise (the same treatise referenced by the High Court in this case) and two prior Trust Territory cases. Because of the lack of clarity in the *Janre* decision, it is doubtful that case was intended to serve as precedent governing future cases:

> Precedential opinions are meant to govern not merely the case for which they are written, but future cases as well. . . . That a case is decided without a precedential opinion does not mean it is not fully considered or that the disposition does not reflect a reasoned analysis of the issues presented. What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases.

Hart v. Massanari, 266 F.3d 1155, 1176-78 (9th Cir. 2001).

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

NIDEL LORAK (on behalf of Gertrude Navarro), BOJEANG LORAK and AlN KABUA,
Plaintiffs-Appellees,
v.
SIMPTON (JIMMY) PHILIPPO, HAEM MEA and TIMMY MARCH,
Defendants-Appellants.

SCT CN 2019-004 (HCT CN 2014-232)

ON APPEAL FROM THE HIGH COURT
Argued May 9, 2022
Filed July 7, 2022

Summary

The Supreme Court affirmed the High Court's and the Traditional Rights Court's decisions holding that the Ain Kabua is the *alap* and Bojeang Lorak is the *senior dri jerbal* over To Weto, Ajeltake Island, Majuro Atoll, Marshall Islands. In reaching its decision, the Court determined that the questions of custom before the Traditional Rights Court ("TRC") had not previously been resolved by statue or Supreme Court decision. Therefore, the questions were classified as "questions of fact" and not "questions of law." As questions of fact, the High Court's and the Supreme Court's review of the TRC's decisions were governed by the "clearly erroneous" standard and not the "*de novo*" standard. A finding of fact is considered "clearly erroneous" when review of the entire record produces a definite and firm conviction that the court below made a mistake. In the present case, the Supreme Court did not find that the TRC or the High Court had made a mistake regarding their findings of facts. Additionally, regarding the admission of evidence, the Supreme Court determined that the lower courts had not abused their discretion regarding the admission of relevant evidence. Furthermore, they had not violated the "plain error rule," by failing to exclude evidence that would have impaired a substantial right — in this case, the due process right to notice.

Digest

1. APPEAL AND ERROR – *Abandonment*: Issues which are not specifically and distinctly argued and raised in a party's opening brief are waived.

2. APPEAL AND ERROR – *Review – Questions of Law*: Matters of law are reviewed *de novo.*

3. APPEAL AND ERROR – *Review – Findings of Fact*: Findings of fact are reviewed under the "clearly erroneous" standard.

4. APPEAL AND ERROR – *Review – Findings of Fact – 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.

5. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: The "clearly erroneous" standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues *de novo*.

6. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: The Supreme Court will not interfere with a finding of fact if it is supported by credible evidence, must refrain from reweighing the evidence and must make every reasonable assumption in favor of the trial court's decision.

7. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: The Supreme Court is required to defer to the factual findings of the court(s) below even if we would have decided the case differently and even if the evidence would make another conclusion more plausible.

8. APPEAL AND ERROR – *Review – Traditional Rights Court*: In cases involving customary issues decided by the TRC, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the TRC's decision. Constitution, art. VI, sec. 4(5).

9. APPEAL AND ERROR – *Review – Traditional Rights Court*: The High Court's duty is to review the decision of the TRC and to adopt that decision unless it is clearly erroneous or contrary to law.

10. CUSTOM – *Question of Law*: Determinations of custom by the TRC are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final Supreme Court decision.

11. CUSTOM – *Factual Inquiry*: Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If

so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modem sense.

12. CUSTOM – *Factual Inquiry*: Under *de novo* review, the Supreme Court concludes that Appellants' asserted custom (*i.e.,* that the *alab* and *senior dri jerbal* titles must come from the same lineage) has not attained the status of law through enactment of a statute or formed the basis of a final Supreme Court decision. Because that asserted custom has not attained the status of law, the existence of such a custom is a factual issue and the burden was on Appellants to prove its existence and application to the facts presented by this case.

13. CUSTOM – *Factual Inquiry*: The Supreme Court finds the custom alleged by Appellants (that the *alab* and *senior dri jerbal* titles/interests must come from the same lineage) is a factual issue and, therefore, the appropriate standard of review is the highly deferential "clearly erroneous" standard, not *de novo* review. Appellants failed to prove the existence of that custom and its application to the facts of this case so the court concludes the TRC did not err in failing to address and apply that custom under either the *de novo* or "clearly erroneous" standards of review.

14. APPEAL AND ERROR – *Questions Reviewable – Asserted Below*: An argument regarding the custom was not raised before the TRC and should therefore not be brought up for the first time in the Supreme Court.

15. APPEAL AND ERROR – *Review – Discretionary Matters – Evidenctiary Matters*: Generally, the Supreme Court reviews evidentiary rulings by the trial courts under the "abuse of discretion" standard. The "abuse of discretion" standard applicable to evidentiary rulings is highly deferential.

16. EVIDENCE – *Hearsay*: The Ninth Circuit has reviewed hearsay rulings using a two-part test: (1) whether a district court correctly construed the hearsay rule as a question of law which is reviewed *de novo*, and (2) a district court's decision to admit evidence as non-hearsay for an "abuse of discretion."

17. APPEAL AND ERROR – *Questions Reviewable – Asserted Below*: In considering whether the trial court abused its discretion in admitting and considering evidence it is necessary for the appellate court to consider any objections to such evidence which were timely and specifically raised below. It is well settled that objections to the admission of evidence are waived if not timely raised before the trial court.

18. APPEAL AND ERROR – *Questions Reviewable – Question of Law*; Even in the absence of an objection to evidence at trial, we have discretion to review evidentiary rulings and admission of evidence for "plain error." Marshall Islands Rules of Evidence, Rule 103(d) provides "Nothing in this Rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

19. CONSTITUTIONAL LAW – *Due Process – In General*: Procedural due process generally requires "notice" and "an opportunity" to be heard before any property interest is affected by government action, such as the former Trust Territory's land ownership determinations. Because substantial due process and property rights are implicated by the alleged lack of notice of proceedings before the Trust Territory Land Title Officer and the TRC's admission and consideration of Plaintiffs' Exhibit F, the Supreme Court exercises its discretion and review for "plain error."

20. EVIDENCE – *Relevant*: Whether the TRC erred in admitting and giving weight to Exhibit F depends on whether that Exhibit was "relevant." TRC Rules of Procedure, Rule 15.

21. EVIDENCE – *Relevant*: "Relevant evidence" is defined by Marshall Islands Evidence Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The test for relevancy is very liberal, the test being whether the evidence has any tendency "however slight" to prove a fact at issue.

22. EVIDENCE – *Relevant – Discretion of Court*: The determination of whether evidence is relevant is reviewed for "abuse of discretion" and appellate courts are highly deferential to findings of relevancy by the trial courts.

23. CIVIL PROCEDURE – *Parties – Substitution*: Requests for dismiss due to the death of a party should be made to the Supreme Court by motion instead of in a brief.

24. APPEAL AND ERROR – *Mootness*: In exercising discretion as to how to proceed upon the death of a party to an appeal, an appropriate consideration is whether the appeal has become moot because of the death of that party.

25. APPEAL AND ERROR – *Mootness*: A moot case or question is one on which there is no real controversy. The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties.

Counsel

Tiantaake Beero-Sexton, counsel for Plaintiff-Appellee Latdrik
Karotu Tiba, Assistant Public Defender, counsel for Defendant-Appellant Laik

LATDRIK v. LAIK

Before CADRA, Chief Justice, and SEABRIGHT[1] and SEABORG,[2] Associate Justices

OPINION

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

I. INTRODUCTION

Defendants-Appellants, Simpton (Jimmy) Philippo, Haem Mea, and Timmy March appeal a September 29, 2019, judgment of the High Court determining, among other issues, that Plaintiff-Appellee Ain Kabua holds the *alab* title, rights and interests and that Plaintiff-Appellee Bojeang Lorak holds the *senior dri jerbal title*, rights and interests on To weto, (also spelled "Too weto" and "To weto") located in Ajeltake, Majuro Atoll.

In reaching its judgment the High Court reviewed the findings of the Traditional Rights Court (TRC) in view of the evidence and concluded those findings were permissible and therefore not "clearly erroneous." As required by the Constitution and our case law, the High Court therefore gave deference to and adopted the opinion of the TRC.

Appellants timely appealed. In their briefing, Appellants contend (1) that both the High Court and TRC erred in concluding that Bojeang Lorak is *senior dri jerbal* on To weto; (2) that both courts erred in considering and giving weight to Plaintiffs' Exhibit F, an "unofficial" 1958 land determination by the former Trust Territory, in finding that Plaintiffs' predecessors in interest Akki was *dri jerbal* and Jam was *alab* on To weto; and (3) that the "claims" of Bojeang and Nidel Lorak should be dismissed because they died during the pendency of this appeal.

As discussed below, we conclude the findings of the TRC are neither "contrary to law" nor "clearly erroneous" and therefore affirm the High Court's judgment. Further, we refrain from dismissing decedents Bojeang and Nidel Lorak as parties to this appeal because the issues raised in this appeal are not mooted by their death.

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

This customary title dispute arises out of Gertrude Navarro's construction of two residences on To weto in or around 1987. These residences were constructed with the permission of *iroij* Amata Kabua, Atlon Caleb acting as *alap* and Lito Mea acting as *senior dri jerbal*. After construction was completed, Simpton (Jimmy) Philippo, acting as *man-maronron*[3] for Neimon Philippo, took possession of these two residences from Navarro. In response, Navarro commenced the instant civil action (High Court Case No. 2014-232) seeking ejectment of Philippo from To weto and for a permanent injunction.

The High Court ordered joinder of the individuals recognized by the opposing parties as *alap* and *senior dri jerbal* for To weto as well as for a weto known as Enejibaru, located on Rongrong, Majuro Atoll. Plaintiff Nidel Lorak represented the interests of his sister Gertrude Navarro. Gertrude Navarro claimed she is the rightful owner of the two residences constructed on To weto. Plaintiff Ain Kabua claimed the *alap* title and interest. Plaintiff Bojeang Lorak (the older sister of Nidel Lorak) claimed the title and interest of *senior dri jerbal.* Defendant Haem Mea claimed the *alap* title and interest Defendant Timmy March claimed the title and interest of *senior dri jerbal*.

On June 30, 2017, the High Court referred nine questions reflecting the parties' theories of their respective cases to the TRC for resolution. Those questions were as follows:

> (1) Was Lito Mea the adopted child of Ladrille under the custom of *kanne lujen* or *kanin lojeo*?
> (2) Did Ladrille give the *alap* and *senior dri jerbal* rights on Enejibaru Island and To weto to Lito Mea as *imon ninnen*?
>
> (3) If the answer to question # 2 is 'yes,' was the *ninnen* transfer in accordance with custom?

[3] *Man-maronron* refers to "a Marshallese custom which applies only within a *bwij* if there are male siblings who are younger than the female siblings. With the approval and appointment by the older female, the male will do all the work for her. However, when it comes to making the final decisions, it is solely the responsibility of the elder sister." *See*, *e.g.*, TRC Opinion/Summary of Case in *Kalip Mack v. Tony Robert, et al.*, Civil Action Nos. 2005-127 & 2007-217 Consolidated, 8/4/2011.

(4) In 1987, as between Alton Caleb and Lito Mea, who was the proper person to hold and exercise the *alab* right and title on To weto?
(5) In 1987, as between Akki Laruon and Lito Mea, who was the proper person to hold and exercise the *senior dri jerbal* title on To weto?
(6) When Alton Caleb and Akki Laruon gave their consent to Gertrude Navarro to build a house on To weto in 1987, were they acting respectively as *alab* and *senior dri jerbal*, or were they acting as *man-maronron* for Lito Mea?
(7) Was it just and proper under custom for Jimpton 'Jimmy' Philippo, acting as *man-maronron* for Neimon Philippo, to take possession of the two houses built by Gertrude Navarro on To weto?
(8) Today, as between Ain Kabua and Haem Mea, who is the proper person to hold and exercise the *alap* right and title on To weto?
(9) Today, as between Bojeang Lorak and Timmy March, who is the proper person to hold and exercise the *senior dri jerbal* right and title on To weto?

A trial spanning six days was held before the TRC in April, 2018. In brief, Plaintiff Ain Kabua claimed To weto was originally *bwij* land. The *bwij* became extinct and the land consequently became *botoktok* land. According to Ain Kabua, she is the member of the *botokto*k currently entitled to exercise the *alab* title.[4] Ain Kabua's *memenbwij* traces her claim to the *alab* title back to Linwad (also spelled Lenwood, Ain Kabua's great-grandmother). Linwad was the sister of Jam (male), and Ladrille (male).[5] Jam, the younger brother of Linwad, exercised the *alab* rights on To weto. After Jam's death the *alab* title went to Atlon Caleb, the last member of the *bwij*. Atlon was then succeeded by Amlok Sawej, then in descending order by Toke Sawej and then Billy Sawej (who are *botoktok* inheriting the *alab* title because the *bwij* had become extinct). Ain Kabua contends she is the eldest member of the *botoktok* currently entitled to exercise the alab title on To weto.

[4]Plaintiffs' Opening Statement, TRC transcript, Vol. 1, April 10-12, 2018, pp. 4-5.

[5]5 Plaintiffs' Exhibit A.

Plaintiff Nidel Lorak's (and Boejeang Lorak's) theory of the case was that they are the proper persons to exercise the *senior dri jerbal* title under custom. Plaintiffs' *memenbwij* traces Nidel Lorak' s genealogy back to Neiwan. Neiwan (female) had children including Luamouj (female) who was married to Larijon (male). Larijon and Luamouj had children including Kitmeto (female), Akki (male) and Lito (female). Kitmeto had children including Bojeang (female) and Nidel (male). Bojeang Lorak claims to be *senior dri jerbal* based on the descending lineage of Laruon, Kitmeto, and Akki. Bojeang is older than Nidel and, as such, is entitled to exercise the *senior dri jerbal* title before Nidel. Plaintiffs' *memenbwij* indicates Akki also had children as did Lito. Lito's children include Haem (male) and Timi (male).[6]

Defendants Simpton "Jimmy" Philippo, Haem Mea and Timmy March's theory of the case, as reflected by the questions certified to the TRC, was that Ladrille held the *alab* and *senior dri jerbal* titles to To weto and Enejibaru Ladrille adopted Lito as *kanin lujen* and To weto (as well as Enejibaru) were given as *immon ninnin* from Ladrille to Lita. Because the land had been given by Ladrille to Lito as *immon ninnen*, the *alab* and *senior dri jerbal* titles and interest would descend through Lito' s bloodline (lineage). According to Defendants, it is proper for Haem Mea and Timmy March to currently hold the *alap* and *dri jerbal interests*, respectively, to the subject wetos based on the descending lineage of Lito. Defendants' *memenbwij* traces their lineage back to Ladrille (male). Ladrille adopted Lito (female). Lito had children including Neimon (female), Aem (variant spelling of Haem, male) and Timi (Timmy, male).[7]

The parties introduced testimony and documentary evidence in support of their respective claims, which evidence is discussed below as is relevant to this appeal. f particular relevance to this appeal is Plaintiffs' Exhibit F which is a 1958 land title determination by the former Trust Territory which designated Jam as *alab* and Akki as *senior dri jerbal* for To weto.

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[6]Plaintiffs' Exhibit H.

[7]Defendants' Exhibit No. 4.

The TRC issued its "Opinion & Answer" on August 8, 2018. In response to the questions certified to it, the TRC found:

> (I) La drill e adopted Li to Mea;
> (2) there was insufficient evidence to show that Ladrille gave To weto and Enejibaru to Lito Mea as *immon ninnin*;
> (3) the purported transfer was not an *immon ninnin* because "according to the evidence, the *bwij* have no knowledge of an *immon ninnin*;"
> (4) in 1987, as between Atlon Caleb and Lito Mea, Alton Caleb was the proper person to hold and exercise the *alap* right and title to To weto;
> (5) in 1987, as between Akki Laruon and Lito Mea, Akki Laruon was the proper person to hold and exercise the *senior dri jerbal* title on To weto;
> (6) when Alton Caleb and Akki Laruon gave their consent to Gertrude Navarro to build a house on To weto in 1987, they were acting as *alap* and *senior dri jerbal* (not as *man-maronron* for Lito Mea);
> (7) it was not proper under custom for Simpton (Jimmy) Philippo, acting as *man-maronron*
> for Neimon Philippo to take possession of the two houses built by Gertrude Navarro on To weto;
> (8) today, as between Ain Kabua and Haem Mea, Ain Kabua is the proper person to hold and exercise the *alap* right and title on To weto; and
> (9) as between Bojeang Lorak and Timmy March, Bojeang Lorak is the proper person to hold and exercise the *senior dri jerbal* title on To weto.[8]

The TRC explained each of its findings referencing the evidence which had been admitted before it. The TRC explained that although Ladrille adopted Lito under custom and considered the adoption *kane lujen*, the descendants of the *bwij* or the *botoktok* should have agreed to Ladrille's giving of To weto and Enejibaru to Lito as *immon ninnin*. Referencing Plaintiffs Exhibit A (*memenbwij*), the TRC noted that Ladrille had elder siblings, Jam and Lenwod. Jam had no children but Lenwod did. The TRC stated "clearly, if her (*i.e.* Lenwod's) descendants are

[8]TRC "Opinion & Answer," pp. 2-3.

not aware and do not agree with the *immon ninnin* for Lito, having been given to an adopted child, then the giving of To weto and Enejibaru as *immon ninnin* is not proper."[9] Because "according to the evidence, the *bwij* had no knowledge of such an *immon ninnin*" the purported transfer of the *alab* and *dri jerbal rights* to the subject wetos from Ladrille to Lito was not proper under custom.[10]

The TRC found that in 1987 (the year Gertrude Navarro constructed the two houses) "it was proper and right for Atlon to be *alab* on To weto." In support of that finding, the TRC relied on Plaintiffs Exhibit B which "shows that the Commission of Land had asserted that Atlon held the *alab* right to Enejibaru and To weto."[11] The TRC further made reference to Plaintiffs Exhibit F (a 1958 Majuro Land Determination of Ownership by the former Trust Territory) which indicated Akki Lauran was *senior dri jerbal* on To weto.[12] The TRC explained that Defendant's Exhibit 5 shows that *iroij* Amata Kabua, Alton as *alap* and Akki as *senior dri jerbal* consented to (Navarro's) construction of the two houses on To weto.[13] The TRC found that while it was proper under custom for Simpton Jimmy Philippo to act as *man-maronron* for Neimon Philippo, that did not allow him to take Gertrude Navarro's houses "because the *iroijlaplap*, the *alap*, and the *senior dri jerbal* of To weto had authorized the construction of the two dwellings. "[14]

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[9]TRC "Opinion & Answer," p. 3.

[10]*Id.*

[11]Id; Exhibit B is signed by iroijlaplap Amata Kabua and is dated November 11. 1996.

[12]TRC "Opinion & Answer," p. 4.

[13]*Id.*

[14]TRC "Opinion & Answer," pp. 3-4.

The High Court held a Rule 9 hearing on August 22, 2019, and issued its "Decision & Judgment" on October 1, 2019.[15] The High Court found the TRC' s answers to the nine questions which had been referred to it were not "clearly erroneous or contrary to law," accepted those findings and entered judgment declaring that Ain Kabua is the holder of the *alap* title, rights and interests on To weto and that Bojeang Lorak is the holder of the *senior dri jerbal title*, rights and interests on To weto. The High Court also declared that Gertrude Navarro is the owner of the two residential structures on To weto which are in dispute.[16] The High Court ordered that defendants may be ejected from the two residential structures owned by Navarro but denied an injunction excluding Defendants from entering To weto because Defendants also have the right under custom to build their residences and live on To weto.[17]

In discussing the TRC' s finding that Bojeang Lorak is *senior dri jerbal* and addressing Defendants' contention that the TRC had improperly relied on Plaintiffs Exhibit F (the 1958 Majuro land determination), the High Court observed:

> The TRC determined that Bojeang Lorak was the appropriate person, between her and Timmy March, to hold the *senior dri jerbal* title in their answer to Question 9. It reasoned, based on the *memenbwij* of Neimon (Plaintiffs Exhibit H), that Bojeang was the daughter of Kitmeto. Kitrneto was the older sister of Akki and Lito. Akki had been recognized as *senior dri jerbal* in the 59 Trust Territory land ownership listing for To weto (Plaintiffs Exhibit F). As noted by defendants, this document was not an "official" determination, and as such, would not provide the basis for conclusive determination of rights for *res judicata* purposes. However, that does not mean the unofficial land ownership determination has no evidentiary value. It is up to the trier of fact (in this case, the TRC) to determine how much or little weight to give to that evidence. It is not for the High Court to reweigh that determination. Similarly, Akki Lauron was the senior dri jerbal and was so found by the TRC' s answer to Question 5. To the extent

[15]The High Court's Decision & Judgment is dated 9/29/19 but was filed 10/1/19.

[16]*Id.*

[17]*Id.*, pp. 10-12.

> that defendants may argue for purposes of Question 7 that Jimmy Philippo was acting as *man-maronron* for Lito in her capacity as *senior dri jerbal*, this would not have been proper as the TRC had found Akki, not Lito, to be *senior dri jerbal*.

[1]Defendants-Appellants timely filed a Notice of Appeal on October 15, 2019, identifying six questions on appeal. That Notice of Appeal was amended by a Notice of Appeal filed on October 25, 2019, identifying nine questions presented on appeal. As discussed below, Appellants' briefing presents three issues on appeal. We limit our review to the issues briefed. *See, e.g., Arpin v. Santa Clara Valley Trans. Agency*, 261 F.3d 912, 919 (9th Cir. 200l)("[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived.").

Ill. APPELLANTS' CONTENTIONS ON APPEAL

Appellants' briefing raises three questions on appeal:

1. "Whether the High Court including the TRC erred in finding that Bojeang Lorak was the *senior dri jerbal* on To weto;
2. Whether the High Court and TRC erred in finding that the plaintiffs-appellants' Exhibit No. F, (the 1958 unofficial determination of land ownership by the Trust Territory), which is an unofficial document naming Akki as the *dri jerbal* on To weto when said document was not official and the defendants' family was never informed or participated in the land determination process regarding To weto.
3. Whether the High Court and TRC erred in finding that the plaintiffs-appellees' Exhibit No. F, (the 1958 unofficial determination of land ownership by the Trust Territory), which is an unofficial document naming Jam as the *alab* on To weto, when said document was not official and the defendants' family was never informed or participated in the land determination process regarding To weto."[18]

[18]Opening Brief, pp. 10-11, "Questions Presented."

Appellants urge the proper standard of review on these issues is "*de novo* with regard to the High Court's failure to apply the law and customary law."[19] Appellees agree that the appropriate standard of review of whether the courts below erred in giving substantial weight to Appellees' Exhibit F is *de novo*.[20]

Finally, Appellants contend the claims by Nidel Lorak and Bojeang Lorak, both of whom died during the pendency of this appeal, are "no longer valid and should be dismissed." According to Appellants, the *senior dri jerbal rights* and title now pass to the younger *bwij* in the same generation which Bojeang and Nidel Lorak were in and that Appellant Haem Mea is now the proper person to hold the *senior dri jerbal* title on To weto.[21]

IV. STANDARD OF REVIEW

[2][3][4][5][6][7]Matters of law are reviewed *de novo. Lobo v. Jejo*, l MILR(Rev.) 224, 225 (1991). Findings of fact are reviewed under the "clearly erroneous" standard. *Dribo v. Bondrik, et al.*, 3 MILR 127, 131 (2010); *Abner v. Jibke, et al.*, 1 MILR 3, 5 (1984). 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. *Lobo v. Jejo, supra*, at 225-6 (1991). The "clearly erroneous" standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues *de novo*. *Bulele v. Morelik*, 3 MILR 96,100 (2009). We will not interfere with a finding of fact if it is supported by credible evidence, must refrain from reweighing the evidence and must make every reasonable assumption in favor of the trial court's decision. *Kramer & PII v. Are & Are*, 3 MILR 56, 61 (2008). We are required to defer to the factual findings of the court(s) below even if we would have decided the case differently and even if the evidence would make another conclusion more plausible. *Kabua v.*

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[19]Opening Brief, p. 10.

[20]Answering Brief, "Standard of Review," p. 5.

[21]Opening Brief, pp. 20-21.

Maiolo, Supreme Court Case No. 2018-008, Slip. Op. 12/10/21; *see also Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

[8][9]In cases involving customary issues decided by the TRC, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the TRC's decision. Constitution, art. VI, sec. 4(5). "The High Court's duty is to review the decision of the TRC and to adopt that decision unless it is clearly erroneous or contrary to law." *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

[10][11]Determinations of custom by the TRC are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final Supreme Court decision. "Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modem sense." *Lobo v. Jajo*, l MILR (Rev.) 224, 226 (1991); *Zaion v. Peter*, 1 MILR (Rev.) 228,231 (1991); *Kabua v. Maiolo*, Supreme Court Case No. 2018-008, Slip Op. 12/10/21.

V. DISCUSSION

A. Appellants' Argument That the TRC Erred In Applying The Custom Fails On *De Novo* Review.

Appellants contend the High Court and TRC erred in finding that Bojeang Lorak was *senior dri jerbal* on To weto because that finding violates custom. Appellants argue this finding is contrary to custom because (1) the *alab* and *senior dri jerbal* titles/interests to the subject lands must come from the same lineage (*bwij* or *botoktok*); (2) it is uncontested that Bojeang Lorak and Ain Kabua come from different lineages (or families); therefore, (3) Ain Kabua cannot be *alab*

and Bojeang Lorak cannot be *senior dri jerbal* on these wetos because they are from different lineages (or families).[22] In support of the asserted custom (that the *alab* and *senior dri jerbal* interests must come from the same lineage, *bwij* or *botoktok*) Appellants rely on Amata Kabua's treatise, CUSTOMARY TITLE & INHERENT RIGHTS, A General Guideline In Brief, (1993), p. 4.[23] Appellants urge a *de novo* standard of review because custom is a matter of law.[24]

We note first that Amata Kabua's treatise cited by Appellants does not clearly set forth an invariable custom that the titles of *alab* and *senior dri jerbal* must come from the same lineage. That treatise, page 4, simply defines "*alab*" as "the elder and senior head of the *kajur bwij*" and "*dri jerbal*" as the "worker and senior patrilineal offspring, lower ranking members of the *bwij*." Both titles are from the *bwij* but there is no statement that both titles must necessarily originate from the same *bwij* in all circumstances.

Second, Amata Kabua' s treatise although an excellent reference which is commonly cited and relied upon is appropriately styled a "general guideline in brief." As such, it is not intended as a definitive statement of the custom and all the many variations of custom which might apply to different fact patterns. We cannot conclude that treatise is meant to cover and define the custom applicable in all situations which might come before the courts.

[12]Finally, and more importantly under *de novo* review, we conclude that Appellants' asserted custom (*i.e.,* that the *alab* and *senior dri jerbal* titles must come from the same lineage) has not attained the status of law through enactment of a statute or formed the basis of a final Supreme Court decision. *See Lobo v. Jajo, supra*, and *Zaion v. Peter, supra*. Because that asserted custom has not attained the status of law, the existence of such a custom is a factual issue and the burden was on Appellants to prove its existence and application to the facts presented by this case. *Id.* Appellants failed in proving the existence of that custom as it applies to the facts of this particular case.

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[22]Opening Brief, pp. 8-9; pp. 12-13.

[23]Opening Brief, pp. 8-9; Appendix 5.

[24]Opening Brief, IV. STANDARD Of REVIEW, p. 10.

[13]We find the custom alleged by Appellants (that the *alab* and *senior dri jerbal* titles/interests must come from the same lineage) is a factual issue and, therefore, the appropriate standard of review is the highly deferential "clearly erroneous" standard, not *de novo* review. Appellants failed to prove the existence of that custom and its application to the facts of this case so we conclude the TRC did not err in failing to address and apply that custom under either the *de novo* or "clearly erroneous" standards of review.

The judges of the TRC are uniquely qualified as experts in the custom and, in the absence of some statute, court decision or some obvious error, we defer to its findings regarding the custom applicable to the facts of this case. The TRC found the custom is that the alleged transfer of land rights from Ladille to Lita required *bwij* (or *botoktok*) knowledge and consent which was not obtained. The fact that Ain Kabua and Bojeang Lorak are from different lineages is obvious from the *memenbwij* submitted and that fact was likely not lost on the TRC. If the custom is that the *alab* and *senior dri jerbal* titles must come from the same lineage the TRC could have been reasonably expected to have identified that custom and applied it to the facts presented. In any event the burden was on Appellants to present proof of such a custom at trial but they failed to do so. In the absence of proof of such a custom, a statute or final Supreme Court decision setting forth such a custom as alleged by Appellants, we cannot find that the TRC erred "as a matter of law" in determining the custom applicable to the facts of this case and in its ultimate conclusion that under custom Ain Kabua is *alab* and Bojeang Lorak is *senior dri jerbal* on To weto although they are from separate lineages.

Appellants argue, alternatively, that:

> "if plaintiff Ain Kabua were to become *alab* on To weto then the proper person to hold the *senior dri jerbal* title would be Lito according to the *memenbwij* and Traditional Marshallese custom. The reason is simply because the TRC had found Ladille adopted Lito (p. 3, TRC decision), Jam did not have any children and Ladille had adopted Lito, if not as a *kannin lu1en*, but under customary adoption as decided by the TRC. In other words, following the TRC' s decision in finding that Ladille adopted Lito, then Lito was

> the only child in the male line of succession therefore she is the proper person to hold the *senior dri jerbal* title on To weto, Ajeltake, and Enajbaro, Majuro Atoll, Republic of the Marshall Islands."[25]

[14]Appellees respond that this argument regarding the custom was not raised before the TRC and should therefore not be brought up for the first time in the Supreme Court citing *Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 86 (2008).[26]

We have reviewed the transcript of proceedings below and find that Appellants' alternative theory was not raised in the proceedings below and is therefore waived on appeal. *Nashion, supra*.

B. The Lower Courts' Finding that Bojeang Lorak is Senior Dri jerbal on To Weto Is Not "Clearly Erroneous."

We have independently reviewed the TRC's findings under the "clearly erroneous" standard and conclude its findings and ultimate conclusions are supported by credible evidence.[27] The TRC' s explained its findings by referring to the evidence. We find that the TRC' s account of the evidence is plausible in light of the entire record and its findings cannot therefore be "clearly erroneous." Therefore, we may not reverse even if we would have weighed the evidence differently and arrived at a different conclusion. We, like the high Court, find no clear error in the TRC's findings and therefore defer to those findings as required by the Constitution and our case law.

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[25]Opening Brief, p. 13.

[26]Answering Brief, p. 12.

[27]*See* "Factual Background and Proceedings Below," *infra*, summarizing TRC's findings in reference to the evidence submitted by the parties.

C. The Lower Courts Did Not Err In Admitting, Considering And Giving Substantial Weight To Plaintiff's "Exhibit F."

Plaintiffs' Exhibit F is a" 1958 land title determination" by the former Trust Territory listing Jam as *alap* and Akki as *senior dri jerbal* on To weto. That Exhibit indicates there was "no claim," "no hearing" and that "ownership (is) unofficial from 1958."

Appellants claim the TRC and High Court erred in relying on Plaintiffs' Exhibit F in finding that Jam was *alap* and Akki was *senior dri jerbal* on To weto. Appellants frame the issue as whether the court(s) below "misused its discretionary power in taking into consideration the unofficial land determination document as a valid evidence (sic) with probative value to support the findings of the TRC."[28] Appellants further argue this unofficial land determination was improperly given "conclusive and binding" effect in violation of the Court's holding in *Ebot v. Jablotok*, 1 MILR 13 (1984).[29]

Thus, Appellants raise two issues:

(1) whether the TRC erred in admitting and considering Exhibit F as "valid evidence" with "probative value;" and

(2) whether the TRC abused its discretion in the amount of weight it afforded Exhibit F.

[15][16][17]The first issue raised by Appellants is whether Exhibit F was properly admitted into evidence for consideration by the TRC. Generally, we review evidentiary rulings by the trial courts under the "abuse of discretion" standard. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 174 n. 1 (1997). The "abuse of discretion" standard applicable to evidentiary rulings is highly deferential. *See, e.g., Sprint/United Mgmt. Co v. Mendelson*, 552 U.S. 379, 384 (2008)("In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeal afford broad discretion to a district court's evidentiary rulings."). However, the Ninth Circuit has reviewed hearsay rulings using a two-part test: (1)

[28]Opening Brief, p. 15.

[29]*Id.*

whether a district court correctly construed the hearsay rule as a question of law which is reviewed *de novo*, and (2) a district court's decision to admit evidence as non-hearsay for an "abuse of discretion." *See, e.g., United States v. Alvarez*, 358 F.3d 1194, 1214 (9th Cir. 2004). In considering whether the trial court abused its discretion in admitting and considering evidence it is necessary for the appellate court to consider any objections to such evidence which were timely and specifically raised below. *See* Marshall Islands Evidence Rules, [28 MIRC, Chpt. 1, Evidence Act,] Rule 103(a). It is well settled that objections to the admission of evidence are waived if not timely raised before the trial court. *See, e.g., Kramer & PII v. Are & Are*, 3 MILR 556, 569 (2008)(Failure to object to admission of evidence on a specific ground constitutes a waiver to assert the alleged error on appeal); *see also, Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996)("By failing to object to evidence at trial and request a ruling on such an objection, a party waives the right to raise any issue [on appeal] . . . concerning admissibility").

Review of the record indicates that Appellants initially objected to the admission of Plaintiffs' Exhibit F on grounds of "authentication." That objection, however, was withdrawn upon the parties' stipulation that Exhibit F is "not a land determination."[30] There were no other objections, such as on grounds of relevance or hearsay, which were raised by Defendants-Appellants to the admission of Exhibit F into evidence. Due to the lack of objection, we find that any objection to its admission has been waived. Having been admitted into evidence without objection, the TRC was free to consider that Exhibit. We find no error in the admission and consideration of Exhibit F by either court.

[18]Even in the absence of an objection to evidence at trial, we have discretion to review evidentiary rulings and admission of evidence for "plain error." Marshall Islands Rules of Evidence, Rule 103(d) provides "Nothing in this Rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

> Plain error requires an error that is plain or obvious and that it is so prejudicial that it affects the parties' substantial rights such that review is necessary to prevent a miscarriage of justice. . . . An error

[30]TRC Transcript, Vol. 3, pp. 9-10.

> creates a miscarriage of justice if it 'seriously impaired the fairness, integrity, or public reputation of judicial proceedings.' . . . Plain error is not only a highly deferential standard to meet in non-evidentiary challenges, but poses an even higher burden in evidentiary appeals. As a result, "[a]ppellate decisions reversing a judgment in a civil case for plain error in applying rules of evidence are very rare." 1 C. Mueller & L. Kirkpatrick, Federal Evidence, Sec. 1:22 (4th ed. 2013).

Tan Lam v. City of Los Banos, 976 F .3d 986, 1006 (9th Cir. 2020).

[19]Appellants argue the true owners of the wetos at issue did not have "notice" of the meetings concerning the land determination by the Land Title Officer. Not having "notice," Appellants or their predecessors did not have an "opportunity to be heard" on their claims to the subject wetos. Procedural due process generally requires "notice" and "an opportunity" to be heard before any property interest is affected by government action, such as the former Trust Territory's land ownership determinations. Because substantial due process and property rights are implicated by the alleged lack of notice of proceedings before the Trust Territory Land Title Officer and the TRC's admission and consideration of Plaintiffs' Exhibit F, we exercise our discretion and review for "plain error."

[20]Review for "plain error" does not require that we engage in an academic exercise positing all arguments for the admission or exclusion of evidence which were not raised below. Ultimately, whether the TRC erred in admitting and giving weight to Exhibit F depends on whether that Exhibit was "relevant." TRC Rules of Procedure, Rule 15, states:

> The Marshall Islands Rules of Evidence shall govern proceedings of the TRC, except that the TRC may admit any evidence that is reasonably relevant to the question under its consideration. . . .

[21][22]"Relevant evidence" is defined by Marshall Islands Evidence Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The test for relevancy is very liberal, the test being whether the evidence has any

tendency "however slight" to prove a fact at issue. The determination of whether evidence is relevant is reviewed for "abuse of discretion" and appellate courts are highly deferential to findings of relevancy by the trial courts. *See, e.g., Transgu, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1020 (9th Cir. 1985).

The parties conceded Exhibit F is an "unofficial" document and stipulated it is "not a land determination." Although not determinative of ownership, that document is relevant to show that Jam and Akki were asserting title interests in To weto in 1958 which is consistent with iroijlaplap Amata Kabua' s implicit recognition of Allon and Akki as being title holders when he consented to Navarro's construction of the two residences as evidenced by Exhibit 5. Appellants had the opportunity to put on evidence that they were not able to attend the meeting and/or had no notice of that meeting. There was no abuse of discretion in admitting Exhibit F as relevant evidence.

Regarding Appellants' claim that the TRC gave "conclusive weight" or "bound itself by such unofficial document" in violation of the holding of *Ebot v. Jablotok*, I MILR 13(1984), it is clear that conclusive weight or *res judicata* effect was not given to Exhibit F by the TRC. Again, the TRC considered Exhibit F along with other testimony and documents, such as Exhibit 5, in concluding Akki held the *dri jerbal* interest on To weto. Further, the TRC did not rely on Exhibit F at all in finding Jam was *alab*. The TRC, rather, found Jam was *alab* after Lenwod explaining that "previous *iroijlaplaps* as well as the current *iroijlaplap* recognize these people to hold the right of *alap* on the wetos, namely To weto, Enejibaru island and other wetos on Rongrong island as shown on Plaintiff Exhibit B (*iroijlaplap* Amata Kabua), Plaintiff Exhibit D (*leroij* Atama Zedkaia), and Plaintiff Exhibit E (*iroijlaplap* Lein P. Zedkaia)."[31]

We find that the TRC did not err in the weight it afforded Exhibit F. The weight a trial court gives to evidence properly admitted before it is within its discretion and we will not reverse a finding based on such evidence absent an abuse of discretion. There being no objection to the admission of Exhibit F, the TRC was free to ascribe whatever weight it believed appropriate to

[31]TRC "Opinion & Answer," p. 4.

that Exhibit in light of the other evidence. We will not reweigh that evidence substituting our judgment for that of the TRC.

D. The Deaths of Bojeang and Nidel Lorak Do Not Justify a Dismissal of Their "Claims" or Their Status as Parties to this Appeal.

Appellants argue that the claim(s) of Bojeang and Nidel Lorak to the *senior dri jerbal* title should be dismissed because both of these claimants died during the pendency of this appeal. Appellants further assert that because Bojeang and Nidel were the last persons in the generation of Kitmeto' s *bwij*, that the *senior dri jerbal rights* and title now pass to the next younger *bwij*, which is Lito' s *bwij*. Thus, Haem Mea being a member of this younger bwij is now the proper person to hold the *senior dri jerbal rights*.[32]

Appellees do not address Appellants' argument that the claims of Bojeang and Nidel Lorak should be dismissed but submit the issue of whether Haem Mea is now the rightful person to hold the *senior dri jerbal rights* is a matter for the TRC to determine and not this Court.[33]

[23]The deaths of Bojeang and Nidel Lorak were placed on record albeit not before this Court.[34] There has been no motion to substitute a personal representative for either Nidel or Bojeang Lorak. Appellants have not filed a motion to dismiss for failure of Appellees to effectuate a substitution of a representative for these deceased parties. As a procedural matter, we find Appellants' requested dismissal of these deceased parties inappropriate because the request should have been made by motion, not by inclusion as an issue in its brief on appeal. Nevertheless, we find that dismissal of Bojeang and Nidel Lorak as parties to this appeal would be inappropriate even if a motion to dismiss had been filed.

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[32]Opening Brief, pp. 20-21.

[33]Answering Brief, p. 15.

[34]Appellees filed a "Notice of Death"of Bojeang Lorak on 1/21/20 in the High Court. Appellants filed a Certificate of Death of Nidel Lorak dated 12/14/19 with their brief. No motions or other filings have been made with this Court.

Appellants seek dismissal of the "claim" of Nidel and Bojeang Lorak as "no longer valid" because they died during the pendency of this appeal. As a preliminary matter, it should be clarified the "claim" of deceased Appellees Nidel and Bojeang Lorak to the *senior dri jerbal* title on To weto has already been decided by the trial courts and is now a "judgment." The rules governing dismissal of "claims" in the trial courts upon death of a party differ from the rules governing the death of a party to an appeal from a "judgment."

> Generally, an appeal cannot be taken, in the name of a person who has died after judgment; nor can an appeal be taken, against such a person; but the death of a party to a judgment does not necessarily prevent an appellate review of the judgment. An appellate court's authority to substitute a party following the death of a party is controlled by the applicable rule of civil appellate procedure; not the rule of civil procedure governing substitution of parties upon death. Accordingly, the appropriate rule on the death of a party may empower a court of appeals to direct that an appeal may continue and be decided as if the deceased party were not deceased.

See, generally, 4 C.J.S., Appeal and Error, Sec. 347.

Unlike the High Court's counterpart rule, High Court Rules of Civil Procedure, Rule 2[5], the Supreme Court Rules of Procedure do not mandate dismissal of an appeal for failure to timely file a substitution motion upon the death of a party. Supreme Court Rules of Procedure, Rule 43(a) provides in relevant part:

> If a party dies after notice of appeal is filed or while the proceeding is otherwise pending in the Supreme Court, the Court may substitute the party's successor or representative or by any party. . . . If the party on motion filed by the representative
> deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as that Court shall direct.

[24]In exercising discretion as to how to proceed upon the death of a party to an appeal, an appropriate consideration is whether the appeal has become moot because of the death of that party.

> Generally, a proceeding for appellate review which is pending does not abate because of the death of a party; but a pending appeal will abate if by reason of the death of a party the issue becomes moot. As a general rule, if a proceeding for appellate review has been

> instituted and is pending, it does not abate because of the death of a party, particularly if property rights are involved. . . . An appeal will abate . . . where, by reason of the death of a party, the record presents a mere abstract or moot question, the determination of which will be of no practical benefit.

4 C.J.S., Appeal and Error, Sec. 348.

[25]A moot case or question is one on which there is no real controversy. The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties. *See, e.g., Crawford v. State*, 153 S.W.3d 497, 501 (Tex.App. 2004).

The issues presented by this appeal are not mooted by the deaths of Bojeang and Nidel Lorak because property rights of other parties to this litigation are involved and are dependent on how the appeal is ultimately decided. The High Court's judgment that Gertrude Navarro is the owner of the two residential structures on To weto is dependent on the findings that Bojeang and Nidel Lorak' s predecessors were the rightful holders of the *senior dri jerbal* interests with the authority to consent to the construction of the residential structures on To weto. Further, customary title disputes have the potential for spanning generations. The courts' conclusion that Bojeang and Nidel Lorak are the holders of the s*enior dri jerbal* interests has been the subject of litigation resulting in a judgment which should be entitled to *res judicata* effect in future disputes involving these parties or their privies. Finally, as a practical matter, it is difficult to understand how Appellants' case is furthered by the requested order dismissing the claim of Bojeang and Nidel Lorak as "no longer valid" or abating Appellants' appeal as moot. Such a dismissal order would not amount to a reversal of the trial court's judgment and would not serve a basis for a declaration that Appellants are now *senior dri jerbal* on To weto. To the extent that Appellants argue that Haem Mea is now the proper person to exercise the *senior dri jerbal* rights to To weto under custom, we agree with Appellees that this issue is not for the Supreme Court to decide in this appeal.

Accordingly, we deny Appellants' request to dismiss the "claim(s)" of decedents Bojeang and Nidel Lorak and refrain from addressing the factual issue of who now is *senior dri jerbal* on To weto.

VI. CONCLUSION

For the above stated reasons, we **AFFIRM** the judgment of the High Court.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

EMILA ZEDHKEIA, on behalf of Emile Aini,
Plaintiff-Appellant,
v.
LISEN LEIT and KENNETH KEDI,
Defendants-Appellees.

SCT CN 2019-001 (HCT CN 2014-229)

ON APPEAL FROM THE HIGH COURT
Argued May 9, 2022
Filed September 16, 2022

Summary

The Supreme Court affirmed the High Court's and the Traditional Rights "finding that Leit is the proper *alap* and *senior dri jerbal* of Monloklap Weto, Ajeltake Island, Majuro Atoll], and because there is no challenge to the authority of the *iroij* who signed the ground lease of a portion of Monloklap weto with Kedi, we also AFFIRM the High Court's conclusion that the lease with Kedi is signed by the appropriate parties as required by the Constitution and is therefore valid." The Supreme Court also affirmed the High Court denial of attorney's fee for delay by the opposing party.

Digest

1. APPEAL AND ERROR – *Review – Questions of Law*: Matters of law are reviewed *de novo*.

2. APPEAL AND ERROR – *Review – Findings of Fact*: Findings of fact are reviewed under the "clearly erroneous" standard.

3. APPEAL AND ERROR – *Review – Mixed Questions*: Mixed questions of law and fact are reviewed under the *de novo* standard.

4. APPEAL AND ERROR – *Review – Findings of Fact – 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.

5. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: The "clearly erroneous" standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues de novo.

6. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: The Supreme Court will not interfere with a finding of fact if it is supported by credible evidence, must refrain from reweighing the evidence and must make every reasonable assumption in favor of the trial court's decision.

7. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: The Supreme Court is are required to defer to the factual findings of the court(s) below even if we would have decided the case differently and even if the evidence would make another conclusion more plausible.

8. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: In cases involving customary issues decided by the Traditional Rights Court, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution, art. VI, sec. 4(5).

9. CUSTOM – *Question of Law*: Determinations of custom by the Traditional Rights Court are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final Supreme Court decision.

10. TRUST TERRITORY COURTS DECISIONS – *Precedential Value*: Expressions of custom by the courts of the prior Trust Territory Administration, while instructive, are not binding.

11. LAND RIGHTS – *Succession to Rights*: As a general rule of customary law and traditional practice it is not disputed that the title of *alap* goes from the eldest to the youngest *bwij* member.

12. APPEAL AND ERROR – *Review – Traditional Rights Court*: Findings regarding the custom, credibility of witnesses or the weight to be afforded documentary evidence are factual findings to which the Supreme Court will defer if those findings are supported by evidence in the record. The Court will not reverse simply because it would have found the facts and decided the case differently.

13. APPEAL AND ERROR – *Review – Traditional Rights Court*: The TRC is tasked with determining questions relating to titles or land rights depending wholly or partly on customary law and traditional practice. Constitution, Art. VI, Sec. 4(3).

14. COURTS – High Court – *Droulul*: Because the issue of *droulul* or 20/20 consent does not arise under custom, it is an issue properly to be addressed by the High Court. It is the exclusive function of the trial judge to find and interpret the applicable law.

15. LAND RIGHTS – *Droulul*: The legislative intent of the "Customary Law (Restoration) Act 1986," was to abolish the *droulul* or 20/20 as of the effective date of that statute which was March 6, 1986.

16. STATUTE – *Construction and Operation – Rules of Interpretation*: If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, citation omitted, we are obligated to construe the statute to avoid such problems, citation omitted.

17. CONSTITUTIONAL LAW – *Equal Protection*: The Equal Protection clause directs that "all persons similarly situated should be treated alike.

18. CONSTITUTIONAL LAW – *Equal Protection*: Generally, "special legislation" conferring a benefit, liability or right upon an individual or class to the exclusion of others similarly situated is a violation of the equal protection clause. "Legislation which confers benefits on one class and denies same to another may be attacked both as special legislation and as a denial of equal protection, but under either ground for challenge it is the duty of courts to decide whether classifications are unreasonable.

19. CONSTITUTIONAL LAW – *Equal Protection*: Unless legislation operates to the disadvantage of a suspect classification or infringes upon a fundamental right, the legislation, to be upheld as constitutional, must bear a rational relationship to a legitimate governmental interest.

20. LAND RIGHTS – *Droulul*: The Supreme Court concluded that the "Act" eliminates the issue of *droulul* or 20/20 approval for transfers of land on Jebdrik's side from consideration in determining the validity of the wills or *kalimurs* in this case.

21. JUDGMENTS – *findings of fact*: Where the trial court does not make detailed written findings of fact, the appellate court will assume that the trial court made those findings of fact necessary to support its judgment, unless such findings would be clearly erroneous.

22. JUDGMENTS – *findings of fact*: A remand is not necessary if the appellate court can reasonably infer from the trial court's findings other facts that would suffice to support the court's decision.

23. LAND RIGHTS – *Kalimur*: It can be reasonably inferred that the TRC found *bwij* consent to the 1975 will or *kalimur* because Litiria was the *bwij* being the last surviving member. Therefore, the will did not require the consent of anyone else from the junior *bwij* (*i.e.*, Litiria's children) for it to be valid.

24. JUDGMENTS – *findings of fact*: In deciding whether there is substantial evidence, the appellate court resolves all evidentiary conflicts and draw all reasonable inferences in favor of the trial court's decision and will not reverse that decision merely because a different decision could also reasonably have been reached.

25. LAND RIGHTS – *Kalimur*: Because any custom requiring *bwij* approval of an *alap's* will has not been codified or declared by a final Supreme Court decision, we cannot find the TRC's reliance on the validity of the 1975 will or *kalimur* was "clearly erroneous" or contrary to law even if there were other members of the *bwij* who did not consent to alap Litiria's will or *kalimur*.

26. APPEAL AND ERROR – *Review – Findings of Fact*: Because forgery of a will presents an issue of fact, the resolution of the issue necessarily turns on the court's assessment of the witnesses' credibility.

27. JUDICIAL ESTOPPEL – *In General*: Judicial estoppel is intended to prevent parties from playing fast and loose with the courts by asserting inconsistent positions.

28. CUSTOM – *Leases, approval of*: There is no requirement under custom which has been codified or declared by a final Supreme Court decision that there be a family meeting and/or that all family members must consent to a lease which complies with the requirements of the Constitution.

29. APPEAL AND ERROR – *Review – Discretionary Matters – Attorney's Fees or Sanctions*: The Supreme Court reviews a grant or denial of attorney fees and/or sanctions for abusive litigation practices under the "abuse of discretion" standard. Under the "abuse of discretion" standard of review applicable to attorney fees, the appellate court will make every reasonable presumption in favor of upholding the trial court's decision.

30. ATTORNEYS – *Fees*: There is no specific Rule of Civil Procedure authorizing an award of costs or attorney fees for abusive litigation practices. Such an award, however, is within the inherent powers of the court.

31. ATTORNEYS – *Fees*: A finding that counsel's conduct constituted or was tantamount to bad faith is a necessary precedent to any sanction of attorney's fees under the court's inherent powers.

Counsel

MARSHALL ISLANDS, SUPREME COURT

Roy T. Chikamoto, counsel for Plaintiff-Appellant Emila Zedhkeia
Russell Kun, Chief Public Defender, counsel for Defendant-Appellee Lisen Leit
Kenneth Kedi, Defendant-Appellee, *pro se*

Before CADRA, Chief Justice, and SEABRIGHT[35] and SEABORG,[36] Associate Justices

OPINION

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

I. INTRODUCTION

Plaintiff-Appellant Emila Zedhkeia, on behalf of Emile Aini (the real party in interest), appeals a final judgment of the High Court declaring (1) that as between Emile Aini and Defendant-Appellee Lisen Leit, Lisen Leit holds the title of *alap* and *senior dri jerbal* on Monloklap weto, Ajeltake, Majuro Atoll; (2) that a lease with Defendant-Appellee Kenneth Kedi for a portion of Monloklap weto is signed by the appropriate parties and is therefore valid; and also appeals; (3) an order by the High Court denying a motion for imposition of costs or sanctions upon the High Court's granting of a continuance of the hearing date to Defendants-Appellants.

In reaching its judgment the High Court adopted the opinion of the Traditional Rights Court (TRC). The TRC found that Emile Aini should be *alap* and *senior dri jerbal* on Monloklap weto under custom but that the previous *alap* and *senior dri jerbal*, Litiria, made a will or *kalimur* transferring Monloklap weto to Lisen Leit (Leit). The TRC concluded that Leit is the proper person to hold those rights and titles to Monloklap pursuant to the "applicable customary law and traditional practice" of "*Imon Aje* and will by an *alap*, from *alap* Litiria to Lisen Leit."

Having found Leit is the proper person to hold the title of *alap* and *senior dri jerbal* on Monloklap pursuant to custom and because the only issue regarding the validity of a ground lease of a portion of Monloklap weto with Kenneth Kedi (Kedi) was the identity of the proper *alap* and

[35]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[36]Richard Seeborg, District Judge, District of Northern California, sitting by appointment of Cabinet.

senior dri jerbal, the High Court declared that the ground lease between Leit and Kedi was signed by the appropriate parties and was therefore valid.

Emile Zedhkeia (Zedhkeia) timely appealed. On appeal, Zedhkeia broadly contends the High Court erred "when it confirmed a decision of the TRC that was obviously contrary to the facts and established law on custom which require consent by the *iroij* and the *bwij* members before any transfer of land rights is deemed valid."

Specifically, Zedhkeia contends the TRC and High Court erred in relying on a March 2000 division of wetos purportedly signed by Emile Aini and her sisters transferring Monloklap weto to Leit. Zedhkeia argues that division of wetos is invalid because it did not have the consent of the *iroij* and all *bwij* members as required by custom. She (correctly) points out that the High Court erred in its finding that the parties' common ancestor and former *alap* on Monloklap, Litiria, had authored that document because it is undisputed that Litiria had died prior to the time that document was created. Further, Emile Aini testified she did not sign that document and that the document is a forgery.

Zedhkeia also claims the TRC erred in relying on wills or *kalimurs* purportedly made by Litiria in 1975 and 1980 because those documents, like the 2000 division of wetos, lacked the consent of the *iroij* and/or all *bwij* members as required under custom. She further contends that the 1975 and 1980 wills or *kalimurs* are invalid as a "matter of law" because they did not have *droulul* or 20/20 approval as required by the former Japanese and Trust Territory Administration's law which existed at the time those wills or *kalimurs* were made or executed. The High Court found this issue was waived because it was an issue of custom not raised before the TRC. Zedhkeia challenges that finding. We agree with Zedhkeia that the High Court erred in finding the issue was waived but, as discussed below, do not believe a remand is warranted because the issue is one of law which we review *de novo*.

Additionally, Zedhkeia claims the High Court and TRC's decision is "clearly erroneous" because it is unsupportable or contrary to the evidence introduced at trial. A plethora of factual issues are raised in that regard. Significantly, in addition to claims of forgery, Zedhkeia points out that the 1975 will or kalimur is not signed by Litiria, and claims that the proper iroij did not sign

that document introducing yet another title issue into this contentious dispute. Zedhkeia also introduced and relies on a 2008 affidavit by Leit wherein Leit claimed that Emile Aini is the *alap* on Monloklap weto. No explanation has been offered for the inconsistency in Leit's prior sworn statement and her testimony in this case. These factual issues, among others, were not specifically addressed by either the TRC or High Court.

Although we may have decided this case differently, we find the TRC's and High Court's factual findings regarding the custom and ultimate judgment that Leit holds the title of *alap* and *senior dri jerbal* to Monloklap weto are supported by credible evidence and are, therefore, not "clearly erroneous." Because those findings are not "clearly erroneous" we are required by the Constitution and our case law to defer to those findings even though we may (and perhaps probably would) have reached a different conclusion on the evidence presented. We therefore **AFFIRM** the TRC's finding and High Court's judgment that Leit is *alap* and *senior dri jerbal* on Monloklap weto.

Because we affirm the High Court's and TRC's finding that Leit is the proper *alap* and *senior dri jerbal*, and because there is no challenge to the authority of the *iroij* who signed the ground lease of a portion of Monloklap weto with Kedi, we also **AFFIRM** the High Court's conclusion that the lease with Kedi is signed by the appropriate parties as required by the Constitution and is therefore valid.

Finally, while we recognize the potential for abusive litigation practices by last minute requests for continuances of scheduled trial dates or hearings, we do not find that the High Court's order denying sanctions or costs to Zedhkeia was "clearly erroneous." We therefore also **AFFIRM** that order.

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

This case is a customary title dispute between two sisters, Emile Aini and Lisen Leit. The dispute arises out of an April 4, 2013, ground lease between lessors, *iroijlaplap* and *iroijedrik* Alden Nemna, and Lisen Leit acting as *alap* and *senior dri jerbal*, with lessee Kenneth Kedi for a

portion of Monloklap weto, Ajeltake Island, Majuro Atoll.[37] Having obtained the ground lease Kedi proceeded with construction of a house on Monloklap weto.

On April 20, 2013, Emila Zedhkeia (Zedhkeia) sent a letter to Kedi stating that she (Zedhkeia) was the eldest daughter of *alap* Emile Aini and was responsible for managing her lands including Monloklap weto. Zedhkeia asserted that Kedi did not have a valid lease or the alap's permission to build on Monloklap. Zedhkeia stated her intent to have Kedi ejected if he did not sign a lease with the proper *alap* (Emile Aini) within 14 days.[38] Kedi did not enter into a ground lease with either Zedhkeia or Emile Aini. Zedhkeia then commenced the instant civil action.

The High Court referred two broad questions to the TRC: (1) Who as between Emile Aini and Lisen Leit is the proper person to hold and exercise the *alap* right? and (2) Who, as between Emile Aini and Lisen Leit is the proper person to hold and exercise the *senior dri jerbal right* (on Monloklap weto)?[39]

A trial spanning 12 days was held before the TRC over June 5, 2018, through July 20, 2018. Simply stated, Zedhkeia's theory of the case was that her mother Emile Aini is the eldest surviving member of the *bwij*. As the eldest member of the bwij Emile Aini is the proper person to presently hold the *alap* and *senior dri jerbal* rights to Monloklap weto pursuant to Marshallese custom.[40] Because the ground lease with Kedi did not have the approval of Emile Aini (or Zedhkeia acting as Aini's agent under a power of attorney) as required by the Constitution the ground lease is invalid.[41]

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[37]Defendants' Exhibit 2H.

[38]Plaintiff's Exhibit "I."

[39]*See* TRC "Opinion & Answer," p. 1, "The Question(s) Referred to the TRC Panel for Answers."

[40]*Id*. at 1, "The Parties' Contentions."

[41]This issue regarding validity of the ground lease was not addressed as a matter of customary law by the TRC but was addressed by the High Court in its Rule 9 Decision & Judgment.

Leit's theory of the case was that *alap* Litiria had set apart and bequeathed to her, and her children, the *alap* and *senior dri jerbal* rights on Monloklap weto.[42] Leit relied on a series of wills or *kalimurs* purportedly from Litiria devising the rights to Monloklap weto to Leit. Leit also relied on a document dividing Litiria's wetos amongst the then surviving members of the *bwij*.

The validity of the wills or *kalimurs* relied upon by Leit were contested by Zedhkeia as being contrary to custom, not having approval of the *bwij* and/or proper *iroij*, not complying with the law which existed when those wills or *kalimurs* were made, and/or being outright forgeries. Zedhkeia also introduced an affidavit of Leit wherein Leit acknowledged Emile Aini as the *alap* on Monloklap weto.

The TRC issued its "Opinion & Answer" on August 29, 2018. The TRC found that Emile Aini should have held and exercised the *alap* and *senior dri jerbal* rights on Monloklap weto pursuant to Marshallese custom but that *alap* Litiria had willed Monloklap weto to Lisen Leit and her children. Because Monloklap weto had been willed to Leit, the TRC concluded that Lisen Leit is the proper person to hold both the *alap* and *senior dri jerbal* rights on Monloklap weto. The TRC explained its factual findings and conclusions referencing the testimony and exhibits as follows:

> Testimonial evidence by the defendants made it clear to the TRC panel that Lisen Leit is the proper person to hold the *alap* and *senior dri jerbal rights* on Monloklap weto, Ajeltake, . . . As stated by *Leroij* Arleen Jacob in her testimony, she recognized that Emile Aini should have held and exercised the *alap* and *senior dri jerbal* rights on Monloklap weto. She also stated that if there were any prior agreements or wills made by the previous *alaps* to Lisen Leit, she will also recognize her as it is the custom. (Defendant Exhibit P).
>
> *Iroij* Kelai Namna in his testimony also recognized Emile as the *alap* in accordance with custom because she is older and still living today. However, after understanding that Monloklap weto in

[42]TRC "Opinion & Answer," p. 1.

> Ajeltake was bequeathed in a will by *alap* Litiria to Lisen and her children, and the previous *iroijs* agreed to it, he, in truth, said he does not have the power or authority today to revoke or change this pursuant to custom. *Iroij* Telnan Lanki and *Iroij* Alden Nemna did not oppose any of the arrangements made by *Alap* Litiria with respect to the transfer (of) Monloklap to her daughter, Lisen Leit, and her children. Based on these facts, he stated that he will therefore recognize Lisen Leit as the *Alap* and *Senior Dri jerbal* on Monloklap weto in Ajeltake. (Defendant Exhibit 2BS, (Defendant Exhibit 2P), (Defendant Exhibit 2J), (Defendant Exhibit 2Q), (Defendant Exhibit 2B).
>
> According to Lutrik Smart's testimony, she stated that all the wills concerning Monloklap weto has her younger sister, Lisen, as beneficiary, and that she was fully aware and understood this to be the case.
>
> Frank Beinkotkot testified that he lived on the neighboring weto adjacent to the weto Lisen resides on (Monloklap weto),and saw Lisen living on the weto from 1945 to date (2018). This confirms that Monloklap weto in Ajeltake belongs to or is owned by Lisen.[43]

The TRC found, without discussion or explanation, that the custom applicable to the facts of this case was "*imon aje* and will by an *alap*, from *alap* Litiria to Lisen Leit."[44] Regarding the custom, however, there was testimony from Alfred Capelle regarding the concept of "*ajej*" or separation/division of land. Capelle testified that if the *iroij* and members of the *bwij* agree to a division of land, such as Monloklap weto, then that is permissible under custom.[45]

The TRC found there was both *bwij* and *iroij* consent to the transfer of Monloklap from Litiria to Lisen Leit. The TRC found that, based on the evidence, "it was clear that *alap* Litiria

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[43]TRC "Opinion &Answer," p. 2.

[44]*Id.* at 2 "Applicable Customary Law and Traditional Practice."

[45]Transcript of proceedings before the TRC, pp. 395-6.
Kedi: Meaning if Monloklap was separated for Lisen and her descendant, the rights are with Lisen. Is that right?
Capelle: As I have said, if that was the agreement in the division of land and the members of the *bwij* had agreed to it and the *iroij* had agreed to it then.
Kedi: Meaning if they agreed to it. So, it's proper?
Capelle: If the *iroij* during that time, and the members of the *bwij* had agreed to the agreement, that's how it will be.

held and exercised the *alap* right title on many lands. However, with respect to Monloklap weto, Ajeltake, Majuro, it was set aside from the rest and transferred to Lisen Leit and her children. This is a clear indication that Lisen Leit is the *alap* and *senior dri-jerbal* for Monloklap weto pursuant to the agreement by the *bwij* and the *iroijs* of Monloklap weto."[46]

Although not necessary to its decision, the TRC believed it should be mentioned that "according to expert witness Alfred Capelle, . . . a power of attorney is a western concept and that it cannot be used to give away or change the order or line of succession on land, but can be used for other matters and personal property."[47] Capelle further testified that under custom when an *alap* is absent from the land then the next in line takes the position of *alap*.[48] This testimony is potentially significant because there was evidence that Emile Aini had left Monloklap weto, was living off-island in the State of Washington for years,[49] and had delegated her *alap* and *senior dri*

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[46]*Id.* at 3 "Analysis."

[47]TRC "Opinion & Answer," p. 5, "Other Matters The Panel Believes Should Be Mentioned."

[48]Transcript of proceedings before TRC, pp. 397-8.
Capelle: If it is a *bwij* land, nobody can use power of attorney for it. Everybody lives on the land. Not just one person.
Kedi: If the *alap* was to depart from the island, the current *alap*, if she should depart from the island for any medical reason for over years, who would be the most proper person to exercise her rights in her absence?
Capelle: I would say one more time that if it was bwij land, it would go from the eldest to those that are younger.
Kedi: Meaning that it should have gone to her younger sister and not her descendant. The power of attorney?
Capelle: If it is bwij land, then yes.

[49]Deposition of Emile Aini, 11/12/15?), p. 3.
Q: (Chickmota): Were you ever living in the United States?
A: (Aini): Yes, in 2008.
Q: Was it just for the year 2008 or was it from the year 2008 til today?
A: From 2008 till now.
Q: So from 2008 you moved from Majuro is that correct you left Majuro?
A: Yes.
Q: And where did you move to?
A: Spokane.
Q: Spokane, Washington?
A: Yes.

jerbal rights to Emila Zedhkeia by a power of attorney,[50] which would be arguably contrary to custom. The concern being that the traditional order of title passing from the eldest to the youngest member of the *bwij* could be bypassed and given to the younger generation or *bwij* by use of a power of attorney. There were, however, no findings by the TRC or the High Court regarding this power of attorney issue or whether the *alap* or *senior dri jerbal* rights should have gone to the next eldest member of the *bwij* when Emile Aini left island for an extended period of time. Because neither lower court made findings on this issue and because that issue played no role in the TRC's ultimate conclusion that Leit is *alap* and *senior dri jerbal* on Monloklap, we do not address this significant and potentially dispositive issue.

The TRC also mentioned that Lutrik had adopted Kenneth Kedi but there were no findings as to how that adoption might affect Kedi's rights to be on Monloklap. Because neither court made findings on these issues and because we do not make factual findings on appeal, we express no opinion as to resolution of that issue. We do believe, as did the TRC, that these unresolved issues are worthy of mention.

On September 26, 2018, a Rule 9 Hearing was held before the High Court (Judge Winchester). In her "Rule 9 Statement," Zedhkeia argued that the wills or *kalimurs* from Litiria to Leit were invalid as a matter of law because they did not have *droulul* or 20/20 approval as required by the law as it then existed during the Trust Territory Administration. Zedhkeia's argument is concisely set forth in her Rule 9 Statement:

> The point is that the alleged *kalimurs* or wills supposedly executed by Litiria, mother of Plaintiff Emile Aini and Defendant Lisen Leit, that the TRC Panel relied upon in basing their decision, were executed during the time that the *droulul* and the 20/20 were collectively functioning as the equivalent of an *Iroijlaplap* on lands formerly controlled by *Iroijlaplap* Lukotwerak on Majuro Atoll. As such, in order for the *kalimurs* or wills that were submitted by Defendant supporting her claims, to be considered valid, they had to be approved by all the *Iroij edriks* on Jebdrik's side (collectively), the *droulul* and 20/20, in accordance Marshallese custom

[50]16 *See, e.g.,* Plaintiff's Exhibit G "General Power of Attorney" dated 2/18/14; Exhibit F "General Power of Attorney" dated 12/9/2008.

> acknowledged under case law from the early days of the Trust Territory. Those approvals were lacking as their signatures were absent on the *kalimurs* in question, and no proof of approvals was put on by Defendants explaining that absence. Since all the *kalimurs* relied upon by the TRC justifying their decision in favor of Defendant Lisen Leit, pre-date the Customary Law (Restoration) Act 1986, and therefore required the necessary approval of the *droulul* and 20/20 in order to be valid transfers of land rights and titles, the essence upon which the opinion of the TRC panel was based, was patently defective, and were in violation of established law and custom that has been recognized by the Courts since the Trust Territory time. These *kalimurs* were invalid under custom and should have been recognized as such by the TRC Panel. Therefore, the TRC's reliance upon the alleged wills of Litiria was gross legal error and an abuse of discretion by the TRC in finding that those wills were valid transfers of the titles originally held by Litiria – their validity simply violated Marshallese custom and tradition as a matter of law. The TRC Panel never addressed this critical customary and legal fact in arriving at their decision.[51]

Zedhkeia devoted a substantial portion of her oral argument to the issue of *droulul* and 20/20 consent at the Rule 9 Hearing, again summarizing her argument and casting it as an "issue of law":

> Chickmota: But what is critical to understand what I've been trying to develop in my submissions to the court is during this critical period of time between 1975 and 1980 what this . . . all of these documents had to be signed by the *Iroijlaplap* who was not in existence and therefore had to be signed by the representative of the *droulul* and 20/20 which don't exist and that is why we question how could the court of custom who is supposed to understand land laws throughout the Marshall Islands can miss such a critical point under Marshallese custom and did not apply that in rejecting the very wills that depended upon in arriving at their decision.
> Court: Mr. Chickmota, did you raise that to them at the time?
> Chickmota: No, the reason why your honor is that if you go through the cases, you'll understand that the reason why that this came up

[51]Plaintiff's Rule 9 Statement, p. 8.

> was first of all when Jebdrik died in 1919 and there was no one to succeed him. The successor of administration at that time, the Japanese, under the trusteeship that was given them by the League of Nation came up with this solution with that problem, understanding that an *Iroijlaplap* has to sign. So really as a matter of law, that's what they came up with and it has been followed by the Trustee . . . the Trust Territory court decisions and should have been applied all the way up through 1986 but that customary law was passed by the Nitijela abolishing this droulul as well as the 20/20 as having to sign documents on behalf of the *Iroijlaplap*. So, as a matter of law, which is what we are talking about now, they deal with matters of custom but they should have understood that the *Iroijlaplap* had to sign these wills in order to have it validated.[52]

The High Court issued its "Rule 9 Decision and Judgment" on November 2, 2018. The High Court noted "[t]he most significant argument made by Emile during the Rule 9 hearing was that the March 2000 transfer is invalid because it was not approved by the *droulul* and all members of the *bwij*. Emile admittedly did not raise those issues during the TRC proceedings. When I asked why, Mr. Chickmota responded that those are matters of law for the High Court, and not matters of custom for the TRC."[53] The High Court stated "those issues are, first and foremost, issues of custom to be considered by the TRC, followed by High Court review."[54] The High Court consequently found the issue of *droulul* or 20/20 approval was waived because the issue had not been raised before the TRC.[55] The High Court adopted the opinion of the TRC finding that decision was not clearly erroneous or contrary to law.[56]

The High Court in its "Rule 9 Decision and Judgment" also denied Zedhkeia's motion for sanctions and costs incurred by a last minute motion for continuance of the hearing date for two reasons: "First, there have been numerous delays in this matter, some even occasioned by Mr.

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[52]Transcript, pp. 6-7.

[53]"Rule 9 Decision & Judgment," p. 2.

[54]*Id.*

[55]*Id.* at 3-4.

[56]*Id.*

Chickmota. When it comes to delay, there is blame sufficient for all to share. Second, although "these particular delays were occasioned by Mr. Kun and/or Keti, I do not find evidence to support the intentional misrepresentations or improper purposes alleged by Mr. Chickmota."[57]

Zedhkeia filed a motion for reconsideration which could not be addressed because the High Court trial judge, Judge Winchester, had left the Republic and the remaining High Court judges were disqualified due to conflicts of interest.

Zedhkeia timely filed her Notice of Appeal on January 7, 2019.

III. APPELLANTS' CONTENTIONS ON APPEAL

Appellants' briefing raises two very broad questions on appeal:

1. Did the High Court commit error when it confirmed a decision of the TRC that was contrary to the facts and established law on custom which require consent by the *Iroij* and the *bwij* members before any transfer of land rights is deemed valid? And
2. Did the High Court commit error in failing to award attorney's fees and costs to a delay which (when viewed by a disinterested party) could only be interpreted as an intentional delay on the part of Appellees?[58]

IV. STANDARD OF REVIEW

[1][2][3]Matters of law are reviewed *de novo*. *Lobo v. Jejo*, 1 MILR (Rev.) 224, at 225. Findings of fact are reviewed under the "clearly erroneous" standard. *Dribo v. Bondrik, et al,*, 3 MILR 127, 131 (2010); *Abner v. Jibke, et al*, 1 MILR 3, 5 (1984). Mixed questions of law and fact are reviewed under the *de novo* standard. *Samson, et al, v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 284 (1992).

[4][5][6][7]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. *Lobo v. Jejo*, *supra*, at 225-6 (1991). The "clearly erroneous" standard does not entitle a reviewing court to reverse the

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[57]*Id.* at 5.

[58]Opening Brief, p. 4.

findings of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues de novo. *Bulele v. Morelik*, 3 MILR 96,100 (2009). We will not interfere with a finding of fact if it is supported by credible evidence, must refrain from reweighing the evidence and must make every reasonable assumption in favor of the trial court's decision. *Kramer & PII v. Are & Are*, 3 MILR 56, 61 (2008). We are required to defer to the factual findings of the court(s) below even if we would have decided the case differently and even if the evidence would make another conclusion more plausible. *Kabua v. Malolo*, Supreme Court Case No. 2018-008, Slip. Op. 12/10/21; *see also, Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

[8]In cases involving customary issues decided by the Traditional Rights Court, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution, art. VI, sec. 4(5). "The High Court's duty is to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law." *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

[9]Determinations of custom by the Traditional Rights Court are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final Supreme Court decision. "Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense." *Lebo v. Jajo*, 1 MILR (Rev.) 224, 226 (1991); *Zaion v. Peter*, 1 MILR (Rev.) 228, 231 (1991); *Kabua v. Malolo*, Supreme Court Case No. 2018-008, Slip Op. 12/10/21.

[10]Expressions of custom by the courts of the prior Trust Territory Administration, while instructive, are not binding. *See, e.g., Langijota v. Alex*, 1 MILR (Rev.) 216, 218. Similarly, treatises on Marshallese custom, while instructive, are not binding because those treatises have not been adopted as authoritative by statute or Supreme Court decision. *Kabua v. Malolo*, *supra*.

V. THE ANALYTICAL FRAMEWORK

[11]It is uncontested that Litiria was the former *alap* for Monloklap weto and that her children, from eldest to youngest, are Berta (deceased), Jumos (deceased), Emile, Lutrik, Lisen, and Romme (also spelled Ronny, deceased). It is undisputed that the surviving children of Litiria, namely Emile, Lutrik and Lisen, constitute the current *bwij*. As a general rule of customary law and traditional practice it is not disputed that the title of *alap* goes from the eldest to the youngest bwij member. Therefore, Emile Aini should be *alap* and *senior dri jerbal* on Monloklap as she is the eldest surviving member of the *bwij* absent some exception under custom.

The exception to the custom or dispute in this case centers around the wills or *kalimurs* allegedly transferring the *alap* and *senior dri jerbal* rights to Monloklap from Litiria to Leit. It is uncontested that Monloklap weto is on "Jebdrik's side." It is also uncontested that the Trust Territory Administration law in effect when the wills or *kalimurs* made prior to 1986 required droulul or 20/20 consent for lands on Jebdrik's side. It is uncontested that the 1975 and 1980 wills or kalimurs relied upon by Leit lack *droulul* or 20/20 approval. Zedhkeia argues those wills or *kalimurs* are therefore invalid because they did not comply with the then existing Trust Territory law. Because the wills or *kalimurs* relied upon by Leit are invalid, it follows that Emile Aini is the proper person to hold the titles of *alap* and *senior dri jerbal* under custom according to Zedhkeia.

The logical starting point in deciding this case is whether the wills or *kalimurs* at issue are invalid "as a matter of law." If those wills or *kalimurs* are invalid as a matter of law the inquiry ceases and Emile Aini must be declared the proper *alap* and *senior dri jerbal* under custom. The hurdle to reaching this logical starting point is whether Zedhkeia waived her argument that the wills or *kalimurs* are invalid for lack of *droulul* or 20/20 consent because she did not raise the argument before the TRC as held by the High Court.

[12]If the will(s) or *kalimur(s)* are not invalid as a matter of law the next logical step in the analysis is whether they are valid (or invalid) under custom. Under this step, we are required to accept the factual findings of the TRC and High Court unless those findings are "clearly

erroneous." Findings regarding the custom, credibility of witnesses or the weight to be afforded documentary evidence are factual findings to which we defer if those findings are supported by evidence in the record. We will not reverse simply because we would have found the facts and decided the case differently (which we may have).

Finally, the validity of Kedi's lease is determined by whether the TRC's and High Court's conclusion that Lisen Leit is the proper *alap* and *senior dri jerbal* for Monloklap weto is affirmed. The parties do not challenge the authority of Alden Nemna to have signed the ground lease as *iroij* and *iroij edrik*.

VI. DISCUSSION

A. Zedhkeia Did Not Waive The Issue Of Droulul Approval By Failing To Raise It Before The TRC.

The High Court avoided addressing the issue of *droulul* or 20/20 approval finding it was one of "custom" which was never raised before the TRC and was, therefore, waived.[59] Appellees also claim the issue was never raised before the TRC and should not be considered by this Court on appeal.[60] Consequently, Appellees did not brief or otherwise address this issue.

We have reviewed the record and find the issue was repeatedly raised by Zedhkeia before the TRC.

Zedhkeia raised the issue in her written Closing Statement to the TRC:

> And any transfer of an *Alap's* title must be consented to by the *Iroijlaplap* and in the case of land on Jebdrik's side of Majuro, the *droulul* comprised of the *Iroij erik*, and in the instant case, the *senior Dri Jerbal* (*see Nashion v. Litiria*, 8 TTR 357 (A.D. 1983).[61]

Zedhkeia also raised the issue in her oral argument to the TRC:

[59]Rule 9 Decision and Judgment, pp. 2-3.

[60]Appellees' Joint Answering Brief, p. 10.

[61]Plaintiff's Closing Statement, pp. 2-3.

> Chickamoto: "And the only documents that really go to the heart of the case were documents that were incomplete and not signed by all the proper parties that should have approved whatever document that was submitted. In particular, whenever there's a termination of the *alap* rights it's just a drastic action that there [h]as to be approval by the *iroij edrik* in this case because its Jebdrik's land. . . ." Transcript of Proceedings before the TRC, 7/20/18, p. 2. (Emphasis by underlining added).

> Chickamoto: "Under Marshallese custom nothing short of a very serious infraction under custom will result in the termination of the title of *alap*. And I refer the court to the TT case of *Linedrik v. Maine*, 5 TTR 561. Any transfer of an *alap's* title must be consented to by the *iroijlaplap* and in this case *because its Jebdrik's lands it must be consented to by the droulul*." Transcript of Proceedings before the TRC, p. 4. (Emphasis by underlining added).

The record further reveals Appellees referenced the issue in their argument to the TRC:

> Kun: "Lisen argues that the *alap* does not have the authority to cut off interest in land by himself or herself as shown in *Jabwe v. Enos*, 5 TTR 458. Because for the *alap* to do that, cut off the interest in a land, he or she must have the approval of the *droulul* or the group that is exercising the *iroij* rights and this is shown in *Makroro v. Benjamin*, 5 TTR 519. (Emphasis by underlining added).

The High Court's and Appellees' assertion that the issue of *droulul* or 20/20 approval was not raised before the TRC is contradicted by the record. The High Court therefore erred in finding the issue had been waived.

Further, even if the issue had not been raised before the TRC the High Court should have addressed it at the Rule 9 hearing. The issue of *droulul* or 20/20 consent is not one of "custom" but, rather, is one of "law."

It is clear that the *droulul* or 20/20 and the requirement of its consent to transfer of land on Jebdrik's side was a creation of the Japanese Administration which was carried over to the Trust Territory Administration and presents an issue of law not arising under custom.

> The appellant claims that this special arrangement was contrary to Marshallese custom. We agree that it was a departure from Marshallese custom, but hold that that is not a valid objection to it. This arrangement, clearly determined upon the authority then administering the Marshall Islands, changed the law and created a new way of exercising the *iroij lablab* powers in that part or 'side' of Majuro Atoll, by giving them to the government, the iroij erik on that 'side', and the group ('*droulul*' in Marshallese) consisting of those holding property rights there." (Emphasis by underlining added).

Jatios v. Levi, 1 TTR 578, 584 (Appellate Division 1954).

> Droulul approval is the pivotal legal requirement under Marshallese custom for the creation or transfer of rights in a weto on Jebdrik's side.

Nashion v. Litiria, 5 TTR 357, 363 (App. Div. 1983).

[13][14]The TRC is tasked with determining questions relating to titles or land rights depending wholly or partly on customary law and traditional practice. Constitution, Art. VI, Sec. 4(3). Because the issue of *droulul* or 20/20 consent does not arise under custom, it is an issue properly to be addressed by the High Court. It is the exclusive function of the trial judge to find and interpret the applicable law. *See, e.g., Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 78 (Mich. 1994).

As an issue of law, not custom, we find the High Court erred in not addressing this issue which was clearly and repeatedly raised in both the briefing and oral argument before the TRC and the High Court. This error, however, does not require a remand because the applicable standard of review is *de novo*. The next step in the analysis thus becomes whether the 1975 and 1980 wills or *kalimurs* are invalid as a matter of law because they did not have *droulul* or 20/20 approval.

B. The 1975 and 1980 Wills or Kalimurs Are Not Invalid Because They Lacked *Droulul* Approval.

While the law in effect at the time the 1975 and 1980 wills or *kalimurs* relied upon by Liet were made required droulul or 20/20 approval, the "Customary Law (Restoration) Act 1986" eliminated that requirement.

The "Customary Law (Restoration) Act 1986," 39 MIRC, Chpt. 2, Sec. 202 provides:

> (1) The decision of the High Court of the Trust Territory of the Pacific Islands in the case of L. *Levi, et al. v. Kumtak, et al.*, specified as Combined Civil Action No. 1, is hereby declared null and void, and any rights, titles or interest deriving therefrom are of no force or avail in law unless the same be in conformity with the rules of customary law applicable thereto, any changes made by the Japanese Administration to the contrary notwithstanding.
> (2) No person or body of persons recognized in pursuance of the said decision shall after the date of commencement of this Chapter assert or exercise any title, right or power of *Iroijlaplap* with respect to the subject matter thereof which may be asserted or exercised by only such person as shall be entitled thereto according to the rules of customary law.

[15]The legislative intent of the "Customary Law (Restoration) Act 1986," (the "Act") as the title implies, was to restore the customary law as the rule of decision in cases involving "rights, titles or interest" by abolishing the Japanese Administration's changes to the customary law. One of the changes to the customary law by the Japanese Administration was the requirement of *droulul* or 20/20 approval of transfers of land rights or titles on Jebdrik's side. The "person or body of persons recognized in pursuance of the said decision (in *Levi v. Kumtak*)" referenced in subsection 2 of the "Act" is a reference to the droulul or 20/20 which was set up by the Japanese Administration to exercise the powers of the iroijlaplap on Jebdrik's side. The clear legislative intent of subsection 2 was to abolish the *droulul* or 20/20 as of the effective date of that statute which was March 6, 1986.

Subsection 1 of the "Act" voided the High Court of the Trust Territory's decision in the case of *Levi, et al v. Kumtak, et al.*, Combined Civil Action No. 1, declaring that any rights, titles or interests derived under that case were invalid unless in conformity with the rules of customary law. The question arises whether the Nitijela intended the "Act" to only apply to the litigants in *Levi v. Kumtak* or to apply more broadly to all similarly situated persons. If applicable to all similarly situated persons, the inquiry in the instant case ultimately becomes whether the 1975 and

1980 wills or *kalimurs* comply with custom, not whether they comply with the former Administration's requirement of *droulul* or 20/20 approval.

[16]Whether the Nitijela intended the "Act" to apply only to the litigants in the *Levi v. Kumtak* case or whether it intended the "Act" to apply more broadly is not ascertainable from the language of that statute. If the plain language does not conclusively determine a statute's meaning, it is presumed that the legislature both intended to and did act constitutionally in enacting the statute and the court should indulge in any reasonable construction that can save the statute from invalidity. *See, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004). "If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, citation omitted, we are obligated to construe the statute to avoid such problems, citation omitted." *I.N.S. v. St. Cyr.*, 533 U.S. 289, 300 (2001).

[17][18][19]The Republic of the Marshall Islands (RMI) Constitution, Art. II, Sec. 12 (1) provides "[a]ll persons are equal under the law and are entitled to the equal protection of the laws." The Equal Protection clause directs that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Generally, "special legislation" conferring a benefit, liability or right upon an individual or class to the exclusion of others similarly situated is a violation of the equal protection clause. "Legislation which confers benefits on one class and denies same to another may be attacked both as special legislation and as a denial of equal protection, but under either ground for challenge it is the duty of courts to decide whether classifications are unreasonable." *Chicago Nat. League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245, 1250 (Ill. 1985). "Unless legislation operates to the disadvantage of a suspect classification or infringes upon a fundamental right, the legislation, to be upheld as constitutional, must bear a rational relationship to a legitimate governmental interest." *Id.*, citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970).

If the "Customary Law (Restoration) Act 1986" is construed as applying only to those litigants involved in *Levi v. Kumtak*, to the exclusion of others similarly situated then the Act would be violative of the Constitutional guarantee of equal protection under the law.[62] We can posit no reasonable or rational relationship to a legitimate government interest by applying the Act only to those litigants involved in *Levi v. Kumtak* to the exclusion of everyone else in the Republic whose rights, titles or interests might have been affected by the changes to custom made by the Japanese Administration.

A reasonable construction of the Act which comports with the Constitutional guarantee of equal protection is that the Nitijela intended to restore the custom as determinative of every person's rights, titles or interests on Jebdrik's side notwithstanding the changes made to the custom by the Japanese Administration.

[20]We conclude that the "Act" eliminates the issue of *droulul* or 20/20 approval for transfers of land on Jebdrik's side from consideration in determining the validity of the wills or *kalimurs* in this case. Accordingly, the inquiry becomes whether those wills or *kalimurs* comply with custom. That inquiry is a factual one to which we are required to defer to the TRC's findings unless those findings are "clearly erroneous."

C. The TRC's Conclusion That Lisen Leit Is The Proper Alap and Senior Dri Jerbal On Monloklap Is Not "Clearly Erroneous."

[21][22]One of the difficulties in applying the "clearly erroneous" standard of review to the TRC's and High Court's findings in this particular case is that the findings are largely conclusory and are not sufficiently detailed as to reveal the precise reasoning and evidence relied upon in reaching those findings. Nevertheless, where the trial court does not make detailed written

[62]There is no specific constitutional prohibition against special legislation in the RMI. However, the rationale behind the prohibition against special legislation would apply equally to an equal protection analysis. "The purpose behind the prohibition on special legislation rests on the notion that 'over the course of time, . . . the propensities of legislatures to indulge in favoritism through special legislation developed into a major abuse of governmental power . . . [C]onstitutional prohibitions were enacted to limit the practice of enacting special legislation and to achieve greater universality and uniformity in the operation of statute law in respect to all persons." *Vreeland v. Byrne*, 72 N.J. 292, 298, 370 A.2d 825 quoting 2 Sutherland Statutory Construction, 4th Ed., Sec. 40.01.

findings of fact, we will assume that the trial court made those findings [of fact] necessary to support its judgment, unless such findings would be clearly erroneous. *See, e.g., Ex Parte Blackstock*, 47 So.3d 801, 806 (Ala. 2009). A remand is not necessary if we can reasonably infer from the court's findings other facts that would suffice to support the court's decision. *See, e.g., Brock v. Big Bear Market No. 3*, 825 F.2d 1381, 1384 (9th Cir. 1987)("[W]henever from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn. The findings of fact by a trial court must receive such a construction as will uphold, rather than defeat, its judgment. *Wells Benz, Inc. v. United States*, 333 F.2d 89, 92 (9th Cir. 1964).)

1. **The TRC's finding regarding the applicable custom is not clearly erroneous.**

The TRC identified the "applicable customary law and traditional practice" to the facts of this case was "*imon aje* and will by an *alap*, from *alap* Litiria to Lisen Leit." The TRC did not define *imon aje* or explain how that custom applies to the facts of this case. In the absence of a definition or explanation offered by the TRC and in the absence of legislation or a final Supreme Court decision defining that custom and its application we look to the commentaries.

Tobin, Land Tenure in the Marshall Islands, p. 26, defines *Burij in aje* (*imon aje*) as "the descriptive term for land that was given by the *iroij* for outstanding services in war and peace time. Many types of land are included in this general category, each with its descriptive name."

Tobin, supra, at p. 30, further defines *imon aje* or *burij in aje* as "land given to a person who performs personal services for the chief, such as nursing, bringing food, running other errands, making medicine and the like."

Significantly, Tobin's treatise makes no reference to the necessity of *bwij* consent to such transfers of land as *imon aje*. Also significant is that Tobin states it is the *iroij* who makes such transfers of land, not *alaps* and/or *senior dri jerbal*. Tobin, *supra*, at p. 30, states "the chief may give land to a commoner, either *alap* or worker; no one else may do so."

The 1975 will or *kalimur* explained that Monloklap was being devised to Lisen because of personal services Lisen performed for Litiria, much like land given as *imon aje* by an *iroij* as described by Tobin. The 1975 will states:

> The reason for the Will is because she (Lisen) was with me during the days I was struggling and in need of food. She was the one that bring my *iu* and she was suffering because of me. She helped clean the land and the land is my gift to her and her children, especially Mackson Jinna.

It is unclear whether the TRC reasoned that the signature of *iroij* Jeltan Lanki was sufficient to render the will a transfer of land by the custom of *imon aje* or whether that custom extends to an *alap* making a transfer of land for personal services rendered by the recipient. There was, however, testimony in the record regarding the concept of *ajej* or division of land. Alfred Capelle testified that if the *iroij* and *bwij* consent to such a division then it is permissible under custom. The TRC found that there was agreement of both the *bwij* and the *iroijs* of Monloklap weto to the transfer of the *alap* and *senior dri jerbal* rights to Lisen Leit from Litiria.

[23]As discussed above, we are to infer factual findings in support of the judgment unless such inferred findings would be clearly erroneous or unsupported by the record. It can be reasonably inferred that the TRC found *bwij* consent to the 1975 will or *kalimur* because Litiria was the *bwij* being the last surviving member. Therefore, the will did not require the consent of anyone else from the junior *bwij* (*i.e.*, Litiria's children) for it to be valid. This interpretation of the evidence is consistent with Leit's theory of the case. We cannot say such a finding is "clearly erroneous."

Regarding the issue of *iroij* consent to the 1975 will or *kalimur*, that document is signed by *iroij* Jeltan Lanki and Telnan Lanki. It can reasonably be inferred that *iroij* consent to the will was obtained as evidenced by those signatures. The required consents under custom having been obtained, we cannot say that the TRC's conclusion that "Lisen Leit is the *alap* and *senior dri jerbal* for Monloklap weto pursuant to the agreement by the *bwij* and the *iroijs* of Monloklap weto"

pursuant to the custom of "*imon aje* or will of an *alap*, from alap Litiria to Lisen Leit" is clearly erroneous.

2. Zedhkeia's objections to the 1975 (and 1980) will or kalimur present factual issues on which we defer to the TRC's express or inferential findings.

Zedhkeia argues the 1975 *Kalimur* is defective or invalid because (1) it lacked *droulul* consent as required by the law in effect at the time that will was made; (2) it lacked the signatures of the entire *bwij* of Litiria, including Ronny whose signature was missing; (3) it was not executed or signed by Litiria herself; (4) according to witness Zed Zedhkeia the signatures of *iroijs* Telnan and Jeltan Lanki were invalid because the signature of the then current *leroij* Reab Amon was the required critical signature; and, finally, (5) the will is a forgery because the evidence indicated that Litiria could not write and the printing of the will is similar to a will or *kalimur* which had been found to be a forgery in a previous case.[63]

[24]We address each of these contentions *seriatim* construing the evidence in the light most favorable to upholding the TRC's and High Court's decision and drawing every reasonable inference in favor of upholding its findings. *See, e.g., Lake v. Reed*,16 Cal.4th 448, 457 (Ca. 1997)("In deciding whether there is substantial evidence, we resolve all evidentiary conflicts and draw all reasonable inferences in favor of the trial court's decision and we will not reverse that decision merely because a different decision could also reasonably have been reached.").

a. The issue of *droulul* consent.

As discussed above, the "Customary Law (Restoration) Act 1986" abolished the *droulul* and therefore also abolished any requirement that *droulul* approval be obtained for a will or *kalimur* transferring land rights or titles. We do not find the lack of *droulul* approval invalidates the wills or *kalimurs*.

b. The issue of *bwij* consent.

[63]Reply Brief, pp. 6-7.

Zedhkeia argues that as a matter of custom any transfer of land rights or land division is required to be approved by the *iroij*, as well as the senior members of the *bwij*.[64] According to Zedhkeia, the *bwij* of Litiria consisted of Berta (deceased), Jumos (deceased), Emile, Lutdrik, Lisen and Ronnie. The *bwij* of Litiria, as defined by Zedhkeia, did not approve or consent to the 1975 will or *kalimur* transferring the *alap* and *senior dri jerbal* rights to Leit. Therefore, according to Zedhkeia, the will or *kalimur* is invalid under custom.

In response, Appellees/Defendants contend that *alap* Litiria had no siblings, that she was therefore the *bwij*, and as the sole member of the *bwij* she was free to make whatever disposition of her lands that she felt appropriate.

In countering Appellees' theory that Litiria was the sole member of the *bwij* Zedhkeia points out that Appellees'/Defendants' own Exhibit A (*memenbwij*) shows that Litiria had a brother named Jorlikiep. Zedhkeia put on testimony that Jorlikiep was alive during the period between 1975 and 1980. Zedhkeia thus contends that Jorlikiep as a member of Litiria's *bwij* should have signed the 1975 *kalimur*. It is undisputed that the signature of Jorlikiep is absent on both the 1975 and 1980 *kalimurs*.

Because it is undeniable that the wills or *kalimurs* are not signed by any *bwij* members other than Litiria and because there is no testimony in the record that Litiria consulted with any members of the *bwij* in making those wills or *kalimurs*, we can only conclude that the TRC accepted Defendant's theory that Litiria was the *bwij* and that as the sole member of the *bwij* she could make whatever disposition of the *alap* and *senior dri jerbal* rights she felt appropriate. We defer to this inferential finding by the TRC.

It can also be inferred that the TRC did not find credible or otherwise rejected the testimony that Jorlikiep was alive when these wills or *kalimurs* were made. Again, credibility determinations are factual issues to which we are required to defer even if we would have decided the issue differently.

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[64]Opening Brief, p. 7.

[25]Finally, we recognize that as a general rule *bwij* consent to an alap's will is required. However, it has been recognized that "[u]nder Marshallese custom, approval of an *alap's* will by the *iroij* makes it valid, with or without approval of the *bwij*, although the better practice is to consult with and obtain the approval of the *bwij*." *Linidrik v. Main*, 5 TTR 561, 56 (H.C.T.T. Tr. Div. 1971) citing *Limine v. Lainej*, 1 TTR 231; *Lazarus v. Likjer*, 1 TTR 129. Because any custom requiring *bwij* approval of an *alap's* will has not been codified or declared by a final Supreme Court decision, we cannot find the TRC's reliance on the validity of the 1975 will or *kalimur* was "clearly erroneous" or contrary to law even if there were other members of the *bwij* who did not consent to alap Litiria's will or *kalimur*.[65]

c. The issue regarding the lack of Litiria's signature on her will or kalimur.

Examination of the 1975 will or *kalimur* reveals it is in block print and is not signed by Litiria. Whether the lack of Litiria's signature renders that will or *kalimur* invalid under custom is a factual issue. To the extent the lack of Litiria's signature was brought up to the TRC it can be inferred that the TRC found her signature was not necessary under custom and that the will, while not signed in script, accurately expressed her intent that Monloklap weto go to Leit. We defer to

[65]Regarding the issue of whether the 1975 will or *kalimur* is valid because it was signed by the iroij, *bwij* consent not being necessary, Appellees argue "*Iroij* Kelai Nemna made it clear in his testimony at trial as the Appellant's rebuttal witness that the parties must follow their *memenbwij*, but if there is a *kalimur* that declared a transfer of land by the *alap* and approved by the *iroij* of that land, then the *kalimur* must be followed by the members of the *bwij*. This is the true *manit* or *jebelbel in ke iju kan*." Joint Answering Brief, pp. 9-10. Appellees do not cite the record in support of that statement. If that was indeed the testimony then the TRC's implicit finding that the 1975 will or *kalimur* was valid under custom might be supported by that testimony and Exhibit S. However, our review of the transcript is that *Kelai Nemna* was equivocal in his testimony. He repeatedly stated it was up to the court to decide the effect of the *kalimur*. "Yes I recognize her from the beginning because she's the eldest according to custom. But I still recognize this lady's *kalimur*. Whichever the court goes with.' Tr. p. 530, lines 19-21. "Yes, but as I have said earlier yes because Emile is the eldest according to the *bwij* and under the Marshallese custom it's proper but as I have mentioned there was *kalimur* and it's up to the court to determine the weight of the *kalimur*." TR. p. 532, lines 18-21. "Yes, I said according to custom she's the second born . . . so she's the one exercising the rights, but as I mentioned before the *kalimur* if the *kalimur* deems her then it's up to the court to determine." Tr. p. 535, lines 11- 14. "My understanding is, regardless of the documents I would have followed the custom and the custom says it's the eldest, the eldest of the *bwij* and because she's the eldest of the *bwij*, I would have gone with that, but because there is a *kalimur* made to this lady. . . ." Tr. 542, lines 8-12. The point is that Nemna's testimony regarding the custom that a *kalimur* by an *alap* signed by an *iroij* must be followed by the *bwij* is not as clear as Appellees represent.

the TRC's implicit finding that the 1975 will was valid under custom despite not being signed in script or cursive by Litiria.

Further, we cannot say as a matter of law or custom, that a will or *kalimur* needs to be signed in script or cursive to be valid. That issue was not briefed and the parties do not reference any custom or applicable law regarding execution of *kalimurs*. It has been held that hand printing on a holographic will satisfies the requirement that the will "be in the handwriting of the testator." *See, e.g., In the Matter of the Est. of Jeffrey A. Hand*, 684 A.2d 521 (N.J. 1996). We make no findings and express no opinion on this issue.

d. The issue of *iroij* consent.

Zedhkeia claims the 1975 will or *kalimur* is not valid under custom because it did not have the signature of *leroij* Reab Amon. Zedhkeia relies on the testimony of Zed Zedhkeia that Reab was the proper *leroij* at that time, not *Iroijs* Jeltan or Telnan Lanki.

The identity of the proper person to sign the 1975 will or *kalimur* as *iroij* or *leroij* is a factual issue. The TRC was free to reject Zed Zedhkeia's testimony as not credible. Because the TRC found *iroij* consent it can be inferred that it rejected testimony that Reab was the proper person to consent to the will. We cannot say that implicit finding was clearly erroneous and we therefore are required to defer to that factual finding.

e. The issue of forgery.

[26]Whether a document is forged is a factual issue. "Because forgery of a will presents an issue of fact, the resolution of the issue necessarily turns on the court's assessment of the witnesses' credibility." *In Re Est. of Presutti*, 783 A.2d 803, 806 (Pa. 2001). To the extent the issue was raised and testimony adduced regarding forgery the TRC did not find the 1975 will or kalimur was forged. We defer to the TRC's implicit factual finding that the will was not forged.

3. The March 24, 2000, Division of Wetos.

The High Court found that "[i]n March 2000, Litiria purportedly set aside and transferred her *alap* and *senior dri jerbal* titles on four of the wetos, one weto each to each of her daughters."[66]

We agree with Zedhkeia that the High Court's above finding regarding the March 24, 2000, division of wetos is unsupported by the record and is therefore clearly erroneous. The uncontroverted evidence is that Litiria was deceased at the time of this March 2000 division of wetos, having died in 1982.[67] The document itself does not bear the signature of Litiria. Rather it is purportedly signed by sisters, Berta Anari, Emile Aini, Lutdrik Clement and Lijen Leit.[68] That document is not signed by the *iroij* and, aside from the four signatures appearing on that document, is not signed by Ronny, a surviving male *bwij* member.[69] The issues presented by the March 24, 2000, will or *kalimur* (Exhibit 2J) are (1) whether *bwij* consent, including the consent of Ronny, was required for the division of wetos referenced in that document, and (2) whether Emile Aini signed that document.[70]

Emile testified she did not sign that document and contends her signature is a forgery.[71] Again, the authenticity of signatures or allegations of forgery present issues of fact. Because the TRC relied on the March 24, 2000, division of wetos in concluding that Leit is the proper *alap* and *senior dri jerbal* on Monloklap it can be inferred that the TRC did not find Emile Aini's signature was forged and, conversely, found that she signed it. We defer to the TRC's implicit factual finding that Emile Aini signed and consented to the division of Litiria's lands as stated in that document.

Regarding the necessity for the signature of Ronny as the surviving male member of the *bwij*, the TRC implicitly found his signature was not necessary. We cannot say the custom

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[66]Rule 9 Decision & Judgment, *Facts*, p. 1.

[67]Opening Brief, p. 7.

[68]See Defendant's Exhibit 2J.

[69]*Id.*

[70]Reply Brief, pp. 2-3

[71]*Id.* referencing Trial Transcript 207:15-23.

required Ronny's consent to this division of wetos between sisters. Ronny had already been transferred Ojaninnin by the February 10, 1980 *kalimur* by Litiria.[72] The custom governing this agreement between *bwij* members has not been codified or declared by a final Supreme Court decision. We, therefore, cannot say the TRC's reliance on this document in reaching its ultimate finding that Leit is *alap* and *senior dri jerbal* on Monloklap was clearly erroneous. Further, whether that 2000 division of wetos was valid under custom or not, the signature of Emile Aini on that document is probative evidence that she recognized Leit is *alap* and *dri jerbal* on Monloklap weto.

In our view, the validity of the March 24, 2000, division of wetos is irrelevant in light of the 1975 will or *kalimur* transferring Monloklap weto to Leit which the TRC found valid. Any error in the High Court's or TRC's findings regarding this 2000 division of wetos does not justify a reversal or remand.

4. Other Factual Findings To Which We Defer.

[27]The other issues raised by Zedhkeia on appeal involve factual issues on which we defer to the lower courts' findings. Some evidence submitted to the TRC does, however, bear discussion.

Zedhkeia's Exhibit P is an "Affidavit of Lisen Leit" in the case of Emilia Zedkeia on behalf of her mother *Emila Aini v. Tenson Benjamin, et al.*, High Court Civil Action Number 2009-078. In that April 17, 2009, affidavit Leit stated under oath that Emile Aini was *alap* on Monloklap weto. Leit's statement in her affidavit directly conflicts with her testimony and position in the instant case wherein she claims she is *alap* on Monloklap, not Emile Aini. No explanation is offered for the conflict in Leit's statements.

The conflicting and apparently irreconcilable or mutually exclusive statements and positions taken by Leit in these two cases raises a concern of playing "fast and loose" with the judicial system. Parties have been judicially estopped from "speaking out of both sides of [their]

[72] *See* Defendant's Exhibit Q (although that kalimur is also challenged as invalid under custom.)

mouth with equal vigor and credibility before [the] court." *Mc Nemar v. Disney Store, Inc.*, 91 F.3d 610, 618 (3rd Cir. 1996). *See also, e.g.*, *Ryan Operations G.P. v. Santiam Midwest Lumber Co.*, 81 F.3d 355, 361 (3rd Cir. 1996)("[j]udicial estoppel is intended to prevent parties from playing fast and loose with the courts by asserting inconsistent positions."). Nevertheless, Leit's prior statement that Emile Aini is *alap* on Monloklap weto whether characterized as an admission of a party opponent under Evidence Rule 801(d)(2) or prior inconsistent statement under Evidence Rule 801(d)(1) entails a credibility finding. Inferentially, the TRC found Leit's testimony in this case that she is *alap* credible despite the conflicting affidavit wherein she averred Emile Aini is alap on Monloklap. We defer to that credibility finding.

The bottom line is that the TRC's findings regarding the custom and its ultimate conclusion that Leit holds the titles of *alap* and *senior dri jerbal* on Monloklap are factual findings. We defer to those findings if there is support in the record even if we would have decided the case differently. While the TRC's findings are less than crystalline we find they are supported by the record. We therefore AFFIRM the TRC's and High Court's finding that Lisen Leit is *alap* and *senior dri jerbal* on Monloklap weto.

D. The High Court Did Not Err In Its Finding That The Ground Lease With Kedi Is Valid.

Zedhkeia contends the ground lease to Kedi is "defective for three reasons: it was not signed by the constitutionally required parties; it lacked the customary consent of all family members who need to agree to any valid land transfer; and there was no customary family meeting to discuss any transfer of the subject land to Defendant Kenneth Kedi."[73]

The Constitution, Article X, Section 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

[73]Opening Brief, pp. 1-2.

> by way of 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.

[28]The Constitution only requires the approval of the *iroijlaplap*, *iroijedrik* where necessary, [*alap*] and the *senior dri jerbal*, who are deemed to represent all persons having an interest in the land leased or transferred. The parties did not contest the authority of Alden Nemna to approve the ground lease as [*iroijedrik*]. Lisen Leit approved the lease as *alap* and *dri jerbal*. The TRC found that Lisen Leit is the proper *alap* and *dri jerbal* on Monloklap weto. Leit signed the lease. The ground lease to Kedi thus complies with the Constitutional requirements regarding its approval. Nothing more is required. There is no requirement under custom which has been codified or declared by a final Supreme Court decision that there be a family meeting and/or that all family members must consent to a lease which complies with the requirements of the Constitution.

E. The High Court Did Not Err In Failing To Award Attorney Fees, Costs or Sanctions to Zedhkeia.

[29][30][31]The Supreme Court reviews a grant or denial of attorney fees and/or sanctions for abusive litigation practices under the "abuse of discretion" standard. *See, e.g., Lester v. Rapp*, 942 P.2d 502, 505 (Ha. 1997). Under the "abuse of discretion" standard of review applicable to attorney fees, the appellate court will make every reasonable presumption in favor of upholding the trial court's decision. There is no specific Rule of Civil Procedure authorizing an award of costs or attorney fees for abusive litigation practices. Such an award, however, is within the inherent powers of the court. *Lester*, *supra*, at 505. A finding that counsel's conduct constituted or was tantamount to bad faith is a necessary precedent to any sanction of attorney's fees under the court's inherent powers. *Lester*, *supra*, at 505-06.

The High Court explained its decision not to award costs or sanctions for two reasons: all parties were equally responsible for delays in the case and the court could not conclude there was any intentional misrepresentations or improper motives as alleged by Mr. Chickamoto.

VII. CONCLUSION

It should be emphasized that resolution of this appeal is dependent on the applicable standard of review which is "clearly erroneous." Under the Constitution and our case law we are required to defer to the factual findings of the TRC if supported by credible evidence. Credibility, in itself, involves a factual finding to which we defer unless we are convinced a mistake has been made. We cannot reverse simply because we believe the lower court's decision was probably wrong and we would have decided the case differently. "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish" "To be clearly erroneous, then, the [decision being appealed] must be dead wrong. . . ." *Booton v. Brown*, 8 Vet.App. 368, 372 (1995). While close, neither the TRC's nor the High Court's decisions have reached the five-week mark.

We therefore **AFFIRM** the High Court's judgment that Lisen Leit holds the *alap* and *senior dri jerbal* titles on Monloklap weto, Ajeltake, Majuro Atoll. Having affirmed the High Court's judgment that Lisen Leit is the appropriate person to hold the *alap* and *senior dri jerbal* titles on Monloklap weto, and because the authority of the *iroij* to sign the ground lease with Kedi is not challenged, we **AFFIRM** the High Court's judgment that the lease with Kedi is signed by the appropriate parties and is valid. Finally, we **AFFIRM** the denial of attorney's fees, expenses and sanctions requested by Zedhkeia.