YCHITARO SIMIRON, Plaintiff-Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, STATE OF TRUK, Defendants-Appellees

Civil Appeal No. 429

Appellate Division of the High Court

Truk District

January 27, 1988

Appeal by plaintiffs from dismissal of three consolidated cases alleging that government dredging activities in marine areas below the high watermark resulted in the destruction of traditional fishing and shellfood gathering grounds, and seeking compensation for the destruction of these grounds and for the value of all dredge materials taken. The Appellate Division of the High Court, per curiam, affirmed the dismissal of the actions, holding that the government, as owner of all marine areas below the high watermark, had the absolute right to conduct such dredging operations.

1. **Appeal and Error—De Novo Review—Dismissal**

   Dismissal for failure to state a claim upon which relief can be granted is a ruling on a question of law and is subject to *de novo* review.

2. **Appeal and Error—De Novo Review—Foreign Law**

   Questions of foreign law, like questions of domestic law, are matters that appellate courts may determine *de novo.*

3. **Waters—High Watermark—Government Ownership**

   Decision in *Nipwech Ungeni v. Trust Territory of the Pacific Islands,* 8 T.T.R. 366 (1983), placing the burden on the government to prove whether the Japanese took ownership of marine areas below the high watermark is overruled; Appellate Division reached conclusion, as a matter of law, that the Japanese owned all marine areas below the high watermark during their administration of the islands.

4. **Waters—High Watermark—Government Ownership**

   Any traditional fishing rights are subject to the inherent rights of the government as owner of all marine areas below the high watermark. 67 TTC § 2.

5. **Waters—High Watermark—Government Ownership**

   Traditional owners of marine areas below the high watermark were not entitled to compensation for alleged damage to their fishing rights caused by government dredging operations, since the government, as owner of all marine areas below the high watermark, had the absolute right to conduct such dredging operations.

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Counsel for Appellees: TRAYLOR MERCER, ESQ., for *Attorney General*, Trust Territory of the Pacific Islands, Saipan, CM 96950

Before HEFNER and NAKAMURA, *Associate Justices**

PER CURIAM

Appellants' consolidated complaints were dismissed by the Trial Court for failure to state a claim upon which relief can be granted. For the reasons set forth below, we affirm.

I.

THE FACTS

This appeal was brought on behalf of the plaintiffs in three consolidated cases seeking compensation for damage to and materials removed from marine areas below the high watermark in Truk, Federated States of Micronesia. The plaintiffs and appellants in this case are Ychitaro Simiron, individually and on behalf of the Achaw Clan of Tol Island, the People of Mechitiw Village and the People of Tunnuk Village of Moen Island. Each of the appellants filed a complaint alleging that government dredging activities in marine areas below the high watermark resulted in the destruction of their traditional fishing and shellfood gathering grounds. The complaints seek compensation for the destruction of these grounds and for the value of all dredge materials taken.

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* Judges Hefner and Nakamura are designated as Temporary Associate Justices of the High Court by the Secretary of Interior pursuant to Executive Order 11021. The original appellate panel for this matter also included Judge Anthony Kennedy of the Ninth Circuit Court of Appeals. Judge Kennedy has withdrawn from further participation in this matter and the decision is by the two-judge panel. 5 TTC § 52.

Defendants and appellees filed a Motion to Dismiss claiming, *inter alia,* that the plaintiffs do not own the marine areas in question by virtue of 67 TTC § 2. The Trial Court subsequently ruled in favor of defendants and dismissed the actions on the ground that all areas below the high watermark belong to the government.

Plaintiffs have appealed the granting of defendants' motion to dismiss by the Trial Court. Plaintiffs maintain that the Trial Court erred and, among other things, failed to follow the ruling in *Nipwech v. TTPI,* Civil Action No. 84-74, Civil Appeal No. 284, requiring the government to prove the existence of Japanese law.

II.

SCOPE OF REVIEW

[1] Dismissal for failure to state a claim upon which relief can be granted is a ruling on a question of law and is subject to *de novo* review. *Kelson v. Springfield* (1985, CA9 Or.), 767 F.2d 651, 653.

III.

DISCUSSION

The starting point for our analysis is 67 TTC § 2 (formerly TTC § 32). That section provides:

> 2. Rights in areas below high watermark.
>
> (1) That portion of the law established during the Japanese administration of the area which is now the Trust Territory, that all marine areas below the ordinary high watermark belong to the government, is hereby confirmed as part of the law of the Trust Territory, with the following exceptions:
>
> (a) Such rights in fish weirs or traps (including both types erected in shallow water and those sunk in deep water) and such rights to erect, maintain and control the use of these weirs or traps as were recognized by local customary law at the time the Japanese

administration abolished them, are hereby reestablished; provided, that no weirs or traps or other obstruction shall be erected in such locations as to interfere with established routes of water travel or those routes which may hereafter be established.

(b) The right of the owner of abutting land to claim ownership of all materials, coconuts, or other small objects deposited on the shore or beach by action of the water or falling from trees located on the abutting land, and such fishing rights on, and in waters over reefs where the general depth of water does not exceed four feet at mean low water as were recognized by local customary law at the time the Japanese administration abolished them, are hereby reestablished where such rights are not in conflict with the inherent rights of the government as the owner of all marine areas below the ordinary high watermark; provided however, that this section shall not be construed to apply to any vessel wrecked or stranded on any part of the reefs or shores of the Trust Territory.

(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 district administrator before beginning such construction.

(d) Each of the rights described in paragraphs (a), (b) and (c) of this subsection are hereby granted to the person or group of persons who held the right at the time it was abolished by the Japanese administration, or to his or their successor or successors in interest. The extent of each right shall be governed by the local customary law in effect at the time it was abolished.

(e) Nothing in the foregoing subsections of this section shall withdraw or disturb the traditional and customary right of the individual land owner, clan, family or municipality to control the use of, or material in, subject only to, and limited by, the inherent rights of the government as the owner of such marine areas. The foregoing subsections of this section shall create no right in the general public to misuse, abuse, destroy or carry away mangrove trees or the land abutting the ocean or lagoon, or to commit any act causing damage to such mangrove trees or abutting land.

(f) Any legal interest or title in marine areas below the ordinary high watermark specifically granted to an individual or group of individuals by the Trust Territory or any previous administering

authority, or recognized as a legal right or rights, shall not be affected by this section.

(2) Written notice of any legal interest or title must be filed with the district land office of the district in which it is claimed within two years from January 8, 1958. The validity of the claimed legal interest or title shall be determined by the district land officer after notice to the person making the claim or any other known parties in interest, and an opportunity for hearing, in the same manner and with the same rights of appeal as in the case of claims to land which the government had possession of under claim of ownership.

The question presented requires an analysis of what rights the Government of the Trust Territory acceded to from previous rulers of the islands. This, in turn, requires us to determine whether the Japanese took ownership of the areas below the high watermark. The recent decision of this court in *Nipwech Ungeni v. TTPI*, 8 T.T.R. 366, Civ. App. No. 284 (1983), places the burden on the government to prove that the Japanese took tidelands ownership. Appellants claim that because the government failed to produce any evidence of the Japanese rule of law, i.e., a Japanese proclamation to that effect, it failed to carry its burden, the appellants argue from this that any attempt by the government to proceed under Section 2 is confiscatory and must be accompanied by compensation to the traditional owners of these areas. The government responds that an unbroken line of pre-*Nipwech* authority held or assumed that the Japanese did, in fact, own the areas below the high watermark, and it notes that Trust Territory Rule of Civil Procedure 36 expressly declares that issues of foreign law are questions of law, not fact. Thus, *Nipwech's* treatment of the issue as one of fact on which the government bears the burden is argued to be incorrect and should be overruled, thereby allowing application of Section 2 and affirmance of the trial court.

We address first the question whether the *Nipwech* case is correct in its holding that under Japanese law the tidelands in question were not controlled by the sovereign and that Section 2 is therefore a confiscatory statute. After due consideration, we have concluded that *Nipwech* is incorrect and should not be followed.

[2] At the outset, the proposition that questions of foreign law are questions of fact is no longer the general or accepted rule. Trust Territory Rule of Civil Procedure 36 expressly declares that issues of foreign law are questions of law, not fact. Questions of foreign law, like questions of domestic law, are matters that appellate courts may determine *de novo*. *Tchacosh Co., Ltd. v. Rockwell International Corp.*, 766 F.2d 1333, 1335 (9th Cir. 1985). This is not to say that whether or not a certain proclamation was made, as a matter of historical fact, might not bear on the analysis, but we think the existence or not of a specific proclamation by the Japanese is irrelevant to the issues at hand. To begin with, Japanese law generally was controlling during the mandate period, and nothing has been adduced to show us that the Japanese rule giving the sovereign control over the tidelands was not in force along with other principles of Japanese laws generally. A specific proclamation was not needed for the assertion by Japan of its law and intentions regarding this discrete subject area. Second, a substantial body of pre-*Nipwech* case law in this court recited the proposition that under Japanese rule the sovereign owned the tidelands.[1] That conclusion, of course, is consist-

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[1] *See, e.g., Tulenkun v. Government of Utwe*, 5 T.T.R. 628, 629 (1972) (section 2 "is controlling as to ownership of land below the high water mark"); *Teresia v. Neikina*, 5 T.T.R. 228, 230–31 (1970); *Peretiw v. Merium*, 3 T.T.R. 495, 499 (1968); *Protestant Mission of Ponape v. TTPI*, 3 T.T.R. 26, 32 (1965) ("'It is very clear' that the Japanese claimed below the high water mark."); *Yangruw v. Manggur*, 2 T.T.R. 205, 206 (1961); *Ngirabiochel v. TTPI*, 1 T.T.R. 485, 488 (1958) ("It appears also that by a proclamation on a date not shown in the record, the Japanese Administration had declared all land below the high water mark to be Government land.").

ent with both German and American principles of tidelands ownership and, as such, is hardly novel or surprising. *Shively v. Bowlby*, 152 U.S. 1 (1894) (tracing the common law evolution of tidelands ownership rights in the sovereign to its acceptance in the United States). Third, and of great importance, the legislative enactment by the Congress of Micronesia specifically recited that Japanese law deemed those lands to be sovereign. *See* Section 2(1). While that recitation is not conclusive upon us, it is of great weight. It amounts to a legislative declaration and a finding that the law was as the legislature said it to be, and we do not lightly disregard that conclusion.

[3] We have had the helpful aid of scholars in the field. Although their affidavits were somewhat in conflict, we think the weight of the historical data indicates that the Japanese owned below the high watermark. We conclude, as a matter of law, that the Japanese owned all marine areas below the high watermark during their administration of the islands. On this point, *Nipwech* must be, and is, overruled.

Appellants contend that even if they do not own the marine areas below the high watermark, they are entitled to damages resulting from the destruction of their fishing rights in the areas dredged by the government.

67 TTC § 2, while declaring the government's actual ownership of marine areas below the high watermark, recognizes that the Micronesians have the right to use such areas. 67 TTC § 2(a) and (b).

[4, 5] According to 67 TTC § 2 any traditional fishing rights are subject to the inherent rights of the government as owner of all marine areas below the high watermark. The government, as owner of these marine areas, holds all property rights in them. As appellants' right to fish in these marine areas is subject to the inherent rights of the govern-

ment as owner, appellants have no separate property interest in these fishing rights. Appellants then are not entitled to damages to their fishing rights since the government, as owner of these marine areas, has the absolute right to conduct dredging operations in marine areas below the ordinary high watermark.

AFFIRMED.

TOSHIWO SHIMA, et al., Plaintiffs-Appellees
v.
NAMO HERMIOS, et al., Defendants-Appellants

Civil Appeal No. 424

Appellate Division of the High Court

Marshall Islands District

July 8, 1988

Dispute over *alab* and *dri jerbal* rights to Jikibdru lar *weto* on Wotje Island in the Republic of the Marshall Islands. The Appellate Division of the High Court, Munson, Chief Justice, held that trial division erroneously awarded *alab* rights to appellee since a previous court order had declared appellant the *alab*, and the trial division was therefore without authority under the doctrine of *res judicata* to redetermine *alab* rights, and held that trial division properly awarded *dri jerbal* rights to appellee, based on finding that 1952 *kallimur* superceded a 1929 *kallimur*.

1. **Appeal and Error—Notice and Filing of Appeal—Late Filing**

   Failure to timely file an appeal will bar a litigant from contesting the determination.

2. **Judgments—"Res Judicata"**

   Trial division was without authority under the doctrine of *res judicata* to redetermine *alab* rights to a *weto* that had been the subject of a final judgment.

3. **Marshalls Land Law—"Leroij"—Powers**

   As a general matter, a *leroij* (or the male counterpart, *iroij*) does have the power to determine the rights of subordinate landowners.

4. **Marshalls Land Law—"Leroij"—Weight of Decisions**

   A decision of a *leroij* to change the rights of subordinate landowners is entitled to great weight and will be upheld unless unreasonable and arbitrary.