IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

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| JURELANG ZEDKAIA & TOLBWIJ TORING,<br><br>Plaintiffs/Appellants,<br><br>vs.<br><br>MARSHALLS ENERGY COMPANY, INC., et al.,<br><br>Defendants/Appellees. | S. Ct. Civil No. 2012-001<br>(High Court Civil No. 2006-157)<br><br>OPINION |

Before: CADRA[1], Chief Justice; SEABRIGHT[2] and KURREN[3], Acting Associate Justices.

KURREN, Acting Associate Justice:

## 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

[1] The Honorable Daniel N. Cadra, Supreme Court Chief Justice.

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

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

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.

## 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,[4] entitled "Quitclaim New Port Development, Majuro, Marshall Islands." In the quitclaim, Plaintiffs' predecessors granted to the Government "[a]ll land within the New Port Subdivision

[4] 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 and the Republic of the Marshall Islands are referred to as "the Government."

except Lot 'B' and Lot 'D' as depicted on Survey Map Number 8010/74, 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 Lobotin 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 predecessors entered the area in dispute, plaintiffs' claims are barred by the applicable statute of limitations."

Plaintiffs now appeal the High Court's ruling.

## ANALYSIS

### I. 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.

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").

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."

Section 105 may not be applied retroactively absent a clear indication from the Nitijela that it intended such a result. See Immigration & Naturalization

Serv. 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.

II. 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.

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.

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.

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.

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.

## CONCLUSION

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

Dated: 11/13, 2015

Daniel N. Cadra
Chief Justice

Dated: 11/13, 2015

J. Michael Seabright
Associate Justice

Dated: 11/12, 2015

Barry M. Kurren
Associate Justice