IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

SHALLUM ETPISON,
Appellant,
v.
CHARLES OBICHANG and CAROLYN N. TAKADA,[1]
Appellees.

Cite as: 2020 Palau 8
Civil Appeal No. 19-014
Appeal from Civil Action No. 17-185

Argued: February 24, 2020
Decided: March 24, 2020

Counsel for Appellant .....Jeffrey L. Beattie
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BEFORE: GREGORY DOLIN, Associate Justice
DANIEL R. FOLEY, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

FOLEY, Associate Justice:

[¶ 1] This case concerns the validity of a deed which purports to convey land owned in fee simple by Ngerteluang Clan[2] to Shallum Etpison. In 2014, Etpison entered

[1] We have altered the caption in this case. Because who belongs to and holds the titles of Ngerteluang Clan—and is therefore authorized to bring suit on behalf of the Clan—is at the center of the dispute in this case, we have removed Ngerteluang Clan from the list of Defendants. We further note that Defendant Takada was substituted for her mother, Elong Nakamura, who passed away during the pendency of this case.

into an agreement with Simeon Eberdong, whom he asserts is the chief of Ngerteluang Clan, to claim certain property for the Clan in Land Court. If the Clan prevailed in that litigation, Etpison was to receive title to part of the Clan's land holdings. In satisfaction of the agreement, on May 24, 2016, Eptison received a warranty deed to Cadastral Lot No. 098 N 02. Appellees did not consent to the agreement with Eptison and also pursued a claim to the property in Land Court, on behalf of their lineage in Ngerteluang Clan.

[¶ 2] Appellees filed this action seeking to invalidate the conveyance to Eptison; they contend that they are senior strong members of Ngerteluang Clan. Etpison filed a counterclaim requesting a declaratory judgment that the deed is valid. Resolving the dispute between the parties requires a determination of whether the deed was signed by all of the senior strong members of the Clan. If not, it is undisputed that the deed is invalid. *Terekieu Clan v. Ngirmeriil*, 2019 Palau 37 ¶ 1 (2019).

[¶ 3] The Trial Division concluded that Appellees are senior strong members of the Clan, based in part on collateral estoppel, and set aside the deed. Because we hold that the Trial Division erred in its application of the collateral estoppel doctrine, we **REVERSE** and **REMAND** for further proceedings.

BACKGROUND

[¶ 4] What seems to be a straightforward dispute is, in reality, a complex intra-clan battle that has already spanned over 50 years and generated at least four other court cases. A brief review of the voluminous record in this case will provide the necessary background for our decision.

A.

[¶ 5] The highest-ranking female title in Ngerteluang Clan is Ebiledil. The earliest Ebiledil referenced in the record before us had three children, a daughter Elochedengel, who it appears did not have descendants, and two sons, Kulas and Badingerang. Thus, after Elochedengel died there were no true ochell members of

[2] This is also spelled Ngertelwang Clan. For names and titles used in this opinion, we have simply chosen one spelling for consistency and do not list all of the alternatives found in the record.

the Clan. However, there are several other clans that may be *kaukebliil* or *talchad*[3] with Ngerteluang Clan.

[¶ 6] Badingerang's daughter Elong had a daughter Olotech who had a daughter Meyong. In addition to her membership in the Ngerteluang Clan Elong, and therefore her descendants, were also members of Tmeleu Clan. Meyong (Elong's granddaughter) adopted a child named Ibul.[4] Ibul's biological mother was Ongeklungel, who it appears from the record may also have been a member of Tmeleu. When Ibul was adopted, the story indicates that Meyong stated they were of the same house, which is logical if Ibul was biologically a member of Tmeleu Clan and adopted by a descendant of Elong,[5] although Meyong may have meant that Ibul was related to her husband. Meyong also adopted Ibul's son Ngiramesubed. In turn, Ibul adopted both Charles Obichang ("Charles"), her biological great-grandson (and Ngiramesubed's son), and Elong Nakamura, her biological granddaughter. Presently, Charles and Nakamura claim to hold the highest male title in the Clan, Iyechaderteluang, and the Ebiledil title, respectively.

[¶ 7] The individuals in Appellant's faction trace their status in Ngerteluang Clan to Kulas' daughter, Ongelutel.[6] Ongelutel had a daughter Kenrad who in turn had Mekesong and Adelbai. Mekesong then adopted Katsue and Simeon Eberdong, her biological grandchildren. Katsue and Simeon claim that they are the rightful holders

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[3] The former term has no fixed definition but "means there is some relationship between members of the two clans. Under Palauan custom, when two clans are *kaukebliil*, their members "assist each other in funerals, contributions of money, eldecheduchs and ocheraols." *See Ngiramechelbang v. Katosang*, 8 ROP Intrm. 333, 336 (Tr. Div. 1999). "[T]alchad means that there is a blood relation between clans," though experts "disagree as to the degree of specificity to which one needs to identify his or her blood relation to the other clan." *Isechal v. Umerang Clan*, 18 ROP 136, 143 (2011).

[4] Appellees occasionally refer to themselves as the "Ibul lineage," although they also acknowledge that this is not a formal lineage and they are actually from Esebar lineage. In this opinion we shall simply refer to them as the "Ibul faction." One of the difficulties in the instant case is that the Ibul faction traces their ancestry back only to her and, even when this dispute started in the 1970s, this faction never presented a coherent family tree explaining their relationships.

[5] Appellants in this case introduced a recording, allegedly of their ancestor Mekesong, in which she stated that Ibul was not related to the Ngerteluang Clan at all, but only to Baules Schelong (he is discussed *infra*) and Tmewang Clan, but the Trial Division did not find that recording particularly credible, and we accept the trial court's credibility determinations absent exceptional circumstances. *E.g.*, *Kotaro v. Ngotel*, 16 ROP 120, 123 (2009).

[6] This faction is variously referred to as the Esebong lineage in this case and the "Chespong or Merchii Lineage" in a 1979 case. We will refer to it in this opinion as the "Ongelutel faction," as that is the first female ancestor to whom they trace their status.

of the Iyechaderteluang and Ebiledil titles, respectively. They are also signatories to the deed to Etpison. along with other relatives from the Ongelutel faction.

B.

[¶ 8] It appears that when Iyechaderteluang Ngiramesubed died there was a difference of opinion between various relatives over the disposition of his property, which became a dispute over who should hold the Iyechaderteluang title next. *See generally Ngertelwang Clan v. Sechelong*, 6 TTR 323 (1973) (hereinafter "1973 Case"). These disputes are what gave rise to the division between the factions which continues to this day. *See id.* Adelbai (of the Ongelutel faction) alleged that he was appointed titleholder at Ngiramesubed's *chomeluosw*.[7] Later, Ibul (the progenitor of the competing Ibul faction) purportedly appointed Baules Sechelong to hold the title. Where Baules fits into the Ngerteluang Clan family tree is unclear, although there is evidence his uncle was a titleholder in the Clan. The District Court of the Trust Territory concluded that neither Adelbai nor Baules were properly appointed and directed the Ngerteluang Clan together with the royal Tmeleu Clan of Airai to meet and select the Iyechaderteluang. While the case was on appeal to the High Court, members of Tmeleu and Ngerteluang Clan met and signed an "affidavit . . . wherein the clan members stated they met and appointed Baules in conformity with the judgment order of the trial court." *Id.* at 325.

[¶ 9] In another dispute between the factions, in 1979 the Ongelutel faction sued Baules alleging that his attempt to dispose of Ngerteluang Clan property without their consent was illegal. *See Chespong Lineage v. Sechelong*, Action No. 124-77, H.C.T.T. Tr. Div. (1979). The parties settled that case by entering into a stipulation wherein Baules agreed that the lease or use of the land in question required the consent of all parties and that multiple members of the Ongelutel faction, including Etpison's father and Mekesong, "are also strong members of Ngertelu[a]ng Clan through Chespong or Merchii Lineage." Stipulation, Civil Action No. 124-77, H.C.T.T. Tr. Div. (July 23, 1979).

[¶ 10] More recently, both sides asked the Land Court to consider their evidence in support of Ngerteluang Clan's claim to other parcels of land, acknowledging that the issue before the court was the ownership of the property, not the factions'

[7] As explained in the District Court opinion, this is "the time in which the relatives of the deceased person take the last glance of the deceased before going to the graveyard."

membership or rank in the Clan. *See* Summary of Proceedings, Findings of Fact, Conclusions of Law, and Determination, *In re: LC/N 14-00081* (Jan. 14, 2016). In 2016, the Land Court awarded eight lots to the Clan in that case.

PROCEDURAL HISTORY

[¶ 11] Claims to the property at issue in the instant case were previously litigated in Land Court. *See* Summary of the Proceedings; Findings of Fact; Determination, *In re: Ngerchemel*, *LC/N 09-0191* (Mar 25, 2015) (hereinafter "2015 Land Case").[8] The Land Court found that, because initially "Telungalk ra Ibul" (the Ibul faction in this case) had not claimed on behalf of their "sub-group" of the Clan, but on behalf of the Clan itself, they could not later restrict their claim to their own faction. The Land Court also found that Esbong Lineage (the Ongelutel faction in this case) had not shown that the Clan's lands had been transferred to their lineage. Thus, the Land Court awarded the property to the Clan as a whole and not to either faction.

[¶ 12] About a year later, in May and June of 2016, members of the Ongelutel faction—without the consent of the Ibul faction—purported to deed the very property at issue in the 2015 Land Case to Appellant Shallum Etpison by warranty deed.[9] Based on that deed, Etpison brought an action in Land Court requesting a Certificate of Title. *See In re: Cadastral Lot No. 098 N 02, Ngerchemel/Mizuho/Siokumins*, LC/TR 16-12. The Land Court, noting that Charles had objected and it would not determine who the strong senior members of a clan were, closed the case on August 26, 2016, and directed the parties to resolve their dispute in the Trial Division.

[¶ 13] On May 4, 2017, Charles and Nakamura, allegedly on behalf of Ngerteluang Clan, filed a complaint against Shallum Etpison for declaratory relief, ejectment from the property, and damages for trespass. *See* Complaint, Civil Action No. 17-185. On June 2, Etpison filed a Counterclaim for declaratory judgment and to quiet title to the property. After trial, the Trial Division issued a written opinion and a separate judgment declaring the deed invalid, denying Appellant's counterclaim, and

[8] One party, Singeru Singeo, filed an appeal, but voluntarily dismissed it. *See* Order of Dismissal, *Singeo v. Ngerteluang Clan*, Civil App. No. 15-007 (Sept. 29, 2015).

[9] The deed refers to Cadastral Lot No. 098 N 02, but notes that the property was formerly known as Worksheet Lot Nos. 09N002-076, 078, 080A, 081A, 081B, and 081D, which were properties awarded to the Clan in the 2015 Land Case.

finding that neither party met their burden to prove who the titleholders were. Etpison timely appealed.

STANDARD OF REVIEW

[¶ 14] This Court has previously and succinctly explained the appellate review standards as follows:

> A trial judge decides issues that come in three forms, and a decision on each type of issue requires a separate standard of review on appeal: there are conclusions of law, findings of fact, and matters of discretion. Matters of law we decide *de novo*. We review findings of fact for clear error. Exercises of discretion are reviewed for abuse of that discretion.

Kiuluul v. Elilai Clan, 2017 Palau 14 ¶ 4 (citations omitted).

ANALYSIS

A.

[¶ 15] The Trial Division's judgment largely rests on the application of "Issue Preclusion/Res Judicata/Collateral Estoppel"[10] Doctrine. Whether collateral estoppel applies is a legal issue which this Court reviews *de novo*. *Salii v. Terekiu Clan*, 19 ROP 166, 170 (2012).

[¶ 16] The Trial Division held that the High Court's finding in 1973 Case that "Ibul, who appointed [Baules to be Iyechaderteluang], was a strong maternal line-member

[10] *Res judicata*, also called claim preclusion, is a distinct doctrine, which "prevents the subsequent litigation by either party of any ground of recovery that was available in the prior action, whether or not it was actually litigated or determined." *Ngerketiit Lineage v. Ngirarsaol*, 9 ROP 27, 29 (2001). The parties' clan status is not a *claim* that could have been previously litigated, but an *issue* that may have already been decided by the prior court. While the Courts obviously can make determinations regarding the strength and membership in a clan, we have never held that such a claim was required to be brought in a case between clan factions, and to do so would violate a core principal that such disputes are better resolved by the clan itself. *See, e.g.*, *Imeong v. Yobech*, 17 ROP 210, 220 (2010) ("Although the courts have constitutional authority over matters presenting issues of customary law, it remains true that disputes over customary matters are best resolved by the parties involved rather than the courts." (ellipses omitted)); *Aitaro v. Koror State Gov't*, 15 ROP 175 (Tr. Div. 2008) ("When title or customary disputes are resolved through traditional means, such resolutions can only strengthen traditions and customs.").

whereas Mekesong, sister of Adelbai, was not a strong member of the clan because she was of the paternal line," precluded Appellant from relitigating the relative status of the two factions or from arguing that Ibul was not biologically related to the Clan. The Trial Division further opined that "[w]hile Defendant and the Eberdongs may feel the basis for the *Sechelong* court's statement regarding Ibul's maternal line was unclear, the fact is it was an issue that was raised; . . . [c]hallenges to membership in a clan must end somewhere." Though we commend the Trial Division for its efforts to avoid relitigating an issue that was already decided, particularly in a long-running dispute such as this, we cannot agree that issue preclusion applies here.

[¶ 17] The application of issue preclusion requires that four elements be present: 1) "an issue of fact or law is actually litigated"; 2) it is "determined by a valid and final judgment"; 3) "the determination is essential to the judgment"; and 4) at least the party against whom preclusion is being used[11] was a party to, or in privity with a party to, the prior case.[12] *Odilang Clan v. Ngiramechelbang*, 9 ROP 267, 270 (Tr. Div. 2001) (quoting Restatement (Second) of Judgments § 27). We focus on the third element, and conclude that determining Ibul's biological relationship to the Clan and her status relative to Mekesong's was not necessary to the High Court's judgment. In order to explain this conclusion, we must look closely at the procedural history and findings in the 1973 Case. Doubts regarding the applicability of issue preclusion should be resolved in favor of Appellant. *See Salii v. Terekiu Clan*, 19 ROP 166, 171 (2012).

B.

1.

[¶ 18] When Palau was a Trust Territory, parties could have a trial before the District Court, presided over by a "Micronesian trial judge." If they were dissatisfied with the result, a party could then appeal to the High Court, which could rely solely on the

[11] Traditionally, the law required that both sides be the same parties or their privies, but "this mutuality requirement has largely been abandoned." *See Ngersikesol Lineage v. Ngiwal State Legislature*, 5 ROP Intrm. 284, 287 (Tr. Div. 1994).

[12] There is an exception to the privity requirement. "A judgment in an action whose purpose is to determine or change a person's status is conclusive with respect to that status upon *all* other persons . . . ." *Id.* (*quoting* Restatement (Second) of Judgments § 31(2)). This exception is inapplicable here because the purpose of the litigation was to determine the status of Adelbai and Sechelong, not Ibul and Mekesong, and because this exception to the fourth requirement does not obviate the need to meet the third requirement, which we hold was not present.

record below, take new testimony, as here, or conduct a trial *de novo*. It is the High Court's opinion that the Trial Division and Appellees cite as preclusive,[13] but while one witness testified in the High Court to fill a perceived gap in the record regarding Baules' ancestry, the High Court relied heavily on the transcripts from the District Court trial. Unfortunately, the District Court file, including the transcript, is unavailable as it is missing from the Palau National Archives. Another concern is that the Palauan to English translations done at that time were imprecise at best, making the District Court's opinion difficult to parse. These factors make it more challenging for this Court to determine which factual findings were essential to the District Court's or the High Court's judgments.

[¶ 19] In the 1973 Case, the District Court was asked to determine who bore the chief title Iyechaderteluang of Ngerteluang Clan. Adelbai argued that he was permanently appointed at Ngiramesubed's *chomeluosw*. Ibul's faction argued that this was a temporary appointment, if it occurred at all, and that later Ibul, acting alone, appointed Baules as Iyechaderteluang. The District Court, disagreeing with both parties' claims held that "neither plaintiff nor defendant bore the title because the proceedings under which each of them claimed the title were insufficient under custom." *Sechelong*, 6 TTR at 324. Mekesong's status, or lack thereof, was not the reason that the District Court found Adelbai's appointment to be invalid. Rather, the District Court concluded that under Palauan custom the *chomeluosw* appointment was a temporary one. At the same time, although the District Court apparently agreed that Ibul was a female titleholder and a strong member of Ngerteluang Clan,[14] it held that under Palauan custom she could not appoint the male titleholder by acting alone. Logically then Mekesong, acting alone, could not appoint the male titleholder either. The point is that a determination of the relative status of Ibul and Mekesong was not necessary to the District Court's holding, and therefore the application of issue preclusion is not proper.

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[13] The Trial Division's assertion the that the High Court opinion was affirmed on appeal is incorrect. While the Ongelutel faction did appeal, while it was pending the appellate court decided, in another case, that appeals would no longer be available from High Court decisions that had already been appealed from the District Court. *See Elias v. T.T.P.I.*, Cr. App. No. 48 (May 13, 1975). Thus, the appeal was dismissed and the High Court judgment stands.

[14] It is not clear which title she held, however, or whether it was in Ngerteluang or Tmeleu Clan, and at least the Ongelutel faction contended that Mekesong was Ebiledil at that time.

2.

[¶ 20] Having concluded that neither party was the proper holder of the Iyechaderteluang title, the District Court ordered the senior members of both Ngerteluang and Tmeleu Clan to meet and appoint a titleholder within three months. The record is not clear on precisely how the two clans are related or if members of Tmeleu who were not also senior strong members of Ngerteluang were permitted to participate and, if so, why.

[¶ 21] Both parties appealed to the High Court, alleging that the District Court had "fail[ed] to understand or follow the custom" of Palau.[15] In the meantime, the meeting ordered by the District Court was held, and according to an affidavit submitted to the High Court, Baules was appointed titleholder. The affidavit itself states that: "[w]e, the strong male members of Tmeleu with strong female members unite together" to appoint Baules. It is not clear from the record why men were involved, rather than the ourrot of the Clan appointing the male titleholder as is usually the custom. *See Ngirmang v. Orrukem*, 3 ROP Intrm. 91, 95 (1992). No mention was made in the affidavit[16] of Ngerteluang Clan or anyone in the Ongelutel faction. While the High Court questioned this fact, it accepted Baules' counsel's representation that the individuals from the Tmeleu Clan who signed the affidavit were also members of Ngerteluang Clan. In any event, Adelbai's arguments were not based on the omission of any particular individuals from the affidavit, but rather on the impropriety of Tmeleu Clan being involved at all. *Sechelong*, 6 TTR at 324.

[¶ 22] Regardless of the validity of the first two attempted appointments, the High Court determined that Baules had been validly appointed "in conformity with the trial court order in November, 1972," and that he was "a member of Tmeleu Clan in the maternal line and a member of Ngertel[u]ang Clan in both maternal and paternal lines," and therefore "[h]is qualification to bear the title is not subject to challenge

[15] The High Court, which was staffed by American judges, noted how unusual this case was, as ordinarily it was the High Court judges whom parties complained did not understand local customs. *Sechelong* 6 TTR at 324.

[16] It should be noted that the characterization of the affidavit as a "stipulation" by the parties to the instant case is incorrect. Instead, the affidavit memorialized what happened at the meeting held in accordance with the District Court's Order. Adelbai never stipulated to the validity of the affidavit or conceded that the individuals who signed it were the proper people to appoint Baules. *Cf. Camacho v. Osarch*, 19 ROP 94 (2012) (explaining that "a stipulation is in the nature of a contract," which requires mutual assent).

irrespective of the means by which he was appointed to that position." *Id.* (emphasis added). While the High Court stated its belief that the evidence was "compelling that Baules was appointed [by Ibul] in 1969, contrary to the trial court finding," it did not actually overturn that finding. In other words, the holding of the High Court was that it did not matter whether Ibul had the authority to appoint Baules, because he was thereafter appointed by affidavit. Therefore, Ibul's status as a senior strong member was not essential to the holding.

[¶ 23] The High Court also rejected Adelbai's argument that he was permanently appointed to be titleholder at the funeral, and that this could not be overturned by Ibul's subsequent attempt to appoint someone else. The High Court held in the alternative that either Adelbai's appointment was temporary in accordance with Palauan custom, as the District Court had held, or that Adelbai had not fulfilled his customary obligations and therefore could be removed by a subsequent appointment.[17] *See* 6 TTR at 325-26.

[¶ 24] "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." *Saka v. Rubasch*, 11 ROP 137, 140 (2004) (*quoting* Restatement (Second) of Judgments § 27 cmt. h (1982)). This is because, where a court makes findings that are dicta or constitute alternative grounds for a decision, such determinations "may not have been as carefully or rigorously considered as it would have been if it had been necessary to the result."[18] Restatement § 27 cmt. i.

[¶ 25] As for the relative status of Ibul and Mekesong, the High Court said—in dicta—that Ibul "was a strong maternal line-member whereas Mekesong, sister of Adelbai, was not a strong member of the clan because she was of the paternal line." But given the High Court's holding that the appointment by affidavit was proper, it was unnecessary for the Court to determine the relative strengths of the two women. In light of that fact, the High Court's comments regarding the relative status of Ibul and Mekesong in the Clan is insufficient for the application of issue preclusion.

[17] While the High Court opinion is hardly a model of clarity, it is clear that the Court believed there were multiple grounds for its decision.

[18] That appears to be the case here, where the unusual deviation from custom in having men involved in appointing a titleholder was not even remarked upon by the High Court, and where the relationship between Tmeleu and Ngerteluang Clan was never explained in the High Court opinion.

C.

[¶ 26] None of this is to say that the 1973 decision is not relevant to the resolution of the present dispute. Indeed, it has bearing on the instant case in several ways. First, the High Court addressed "whether or not it was proper for members of Tmeleu Clan to participate" in the selection of the male titleholder for Ngerteluang Clan. Adelbai argued that such participation was improper because the "two clans were separate entities." *Sechelong* 6 TTR at 326. The High Court squarely rejected this contention, finding that it "was contradicted by [Adelbai's] own witnesses" in the District Court, specifically Mekesong herself. *Id.* Whether this holding is based on the application of estoppel, a factual finding by the High Court, or a finding that the District Court's conclusion was not clearly erroneous is unclear. Because the District Court transcript is missing, it is impossible for this Court to determine what, exactly, the testimony about the relationship between the two clans was. In any event, the High Court found that Baules was the titleholder, and that it was "unnecessary to affirm or modify the judgement appealed from," instead filing its opinion as a "supplement" to the trial decision. *Id.* at 327. What we are left with is the High Court's conclusion that "members of Tmeleu Clan are also members of Ngertel[u]ang Clan."

[¶ 27] Second, nowhere in the record of the 1973 Case does it appear that *anyone* contested Ibul's strength and status in the clan. In fact, in the Pretrial Memorandum from the District Court—which Appellant in the instant case attempted to use to bind Appellees on another issue—states that the Ongelutel faction "claims as follows: . . . Ibul Dirreblekuu was one of the strongest members of the clan but she had no authority to act alone in this regard with titlebearing." Appellant argues that the Pretrial Memorandum is of little consequence because at most it suggests that Ibul's status was stipulated to, rather than actually litigated as required for the application of collateral estoppel. We need not address this contention because we have already held that collateral estoppel is inapplicable. We do note that the Trial Division found that "the doctrine of judicial estoppel . . . suggests that an issue that was accepted as fact in an earlier case and relied upon cannot be changed in a later case." The Trial Division's analysis suggests that it is irrelevant whether Ibul's status was actually litigated, as long as it was stipulated to, which did occur in the Pretrial Memorandum. The flaw in that analysis is that the parties only stipulated that Ibul was a strong member of the Clan, not that she was ochell, as the Trial Division found, or even *ideul el ngalk*.

[¶ 28] Appellant argues that Ibul was not blood related to the Clan and may have achieved her status through services to the Clan.[19] Because the Trial Division's mention of judicial estoppel is tied in with its incorrect collateral estoppel analysis, we are unable to determine if the Trial Division intended it to be a separate, stand-alone basis for the decision. While Justice Dolin points out that it is unlikely a non-blood related person, even one adopted by an ochell clan member, could become one of the strongest members of a clan through services, we believe that it is preferable to permit the Trial Division to address this issue in the first instance.

[¶ 29] Finally, the same Pretrial Memorandum in the 1973 Case clearly establishes that all parties to that case agreed Meyong was not Ibul's biological, but rather her adoptive, mother.[20] Appellees' witnesses' testimony to the contrary was equivocal at best, as the witnesses acknowledged that their elders in the 1973 Case would know more about the issue than they did. Charles Obichang himself admitted that he was not certain whether Meyong "was adopted or birth mother." Transcript Vol. II p.7. In addition, Elong Nakamura admitted it was possible that she was simply not told that Ibul was adopted, because "[i]n the old days, things of this matter are not discussed by mothers because it is forbidden," and that she was "very little and probably was not aware of many things" at the time of the 1973 Case. Deposition Transcript, Ex. 24C p. 31-32. This testimony stands in contrast to the unequivocal statements made by individuals in the 1973 Case who actually knew Ibul. Finding that this uncertain testimony from Ibul's descendants is sufficient to support a factual finding that Meyong was Ibul's biological mother was clearly erroneous and we reverse it.

D.

[¶ 30] On remand, the Trial Division must reconsider whether Appellees have "met their burden of proof that they are senior strong members of Ngerteluang Clan" without the use of collateral estoppel. We further hold that Appellees must meet that burden without claiming that Meyong was Ibul's biological mother. Given that Ibul was adopted, the question on remand is what exactly her status was in the Clan and

[19] The Trial Division also made findings about the parties' services to the Clan. This Court expresses no opinion on these findings.

[20] The Pretrial Memorandum states that "[b]oth parties agree as follows: . . . 5. Ibul Dirreblekuu's mother was . . . Ongeklungel." The Memo also states that Baules "claims as follows: . . . 9. . . . Me[y]ong . . . ran away to Ngersuul. Then she adopted Ibul . . . [and] [s]he and Ibul came to Tmeleu Clan."

the extent to which, as a matter of customary law, she could pass that status on to her descendants, whom she also adopted. These are issues upon which we express no opinion.

[¶ 31] Palauan customary law requires the consent of all senior strong members of a clan in order to alienate clan land. *E.g.*, *Terekieu Clan v. Ngirmeriil*, 2019 Palau 37 ¶ 1 (2019). This requirement does not "turn[] on fine distinctions of rank and authority," but includes all senior strong members, even if some are weaker than others. *Estate of Rdiall*, 16 ROP at 139. Thus, all the Trial Division must determine on remand is whether there are any senior strong members who did not consent the deed to Etpison.

CONCLUSION

[¶ 32] For the foregoing reasons, we **REVERSE IN PART**, **VACATE** the judgment of the Trial Division, and **REMAND** for further proceedings consistent with this opinion.

DOLIN, Associate Justice, concurring:

[¶ 33] I join the opinion of the Court in full. I, however, write separately to set forth my views as to why I believe that the application of judicial estoppel is appropriate to the present case[1], as well as to highlight the grounds in the record which would preclude Etpison from challenging Ibul's status as a senior strong member of Ngerteluang Clan. That said, I agree that the resolution of the doctrine's applicability to the facts of this case would be best done by the Trial Division in the first instance. *See DeMarco v. United States*, 415 U.S. 449, 450, 94 S. Ct. 1185, 1185 (1974) ("This factual issue was dispositive of the case, and it would have been better practice not to resolve it in the Court of Appeals based only on the materials then before the court."). *Accord Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016) (Roberts, C.J., concurring) (agreeing with the majority that the case should be remanded but writing separately to express concern that the lower court could fashion an appropriate remedy).

DISCUSSION

A.

[¶ 34] The doctrine of judicial estoppels exists to "to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S.Ct. 1808, 1814 (2001) (internal citations and quotations omitted). Under this doctrine, when "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.*, 532 U.S. at 749, 121 S.Ct. at 1814 (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

[¶ 35] Unlike collateral estoppel, its judicial cousin dispenses with the "but for" causation requirement; it demands only that "the party's former position has been adopted *in some way* by the court in the earlier proceeding.'" *In re Adelphia Recovery Trust*, 634 F.3d 678, 695–96 (2d Cir. 2011) (emphasis added)). The doctrine is "more flexible than the claim and issue preclusion doctrines . . . [and] concerned more generally with protecting the integrity of the courts from the appearance and reality of manipulative litigation conduct." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*,

[1] The Trial Division mentions judicial estoppel in its opinion, although this seems to be in reference to Etpison's faulty claim that the judgment in the 1973 Case was based on a stipulation.

719 F.3d 785, 795 (7th Cir. 2013) (citing *New Hampshire v. Maine*, 532 U.S. at 750, 121 S.Ct. at 1815 (holding that judicial estoppel is intended to address the "improper use of judicial machinery.") (additional citations omitted)). In other words, it is not necessary that the issue to which estoppel is to be applied to have been necessary to the *judgment*. Rather, the doctrine ensures that "absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981). The doctrine "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. at 749, 121 S.Ct. at 1814 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, 120 S.Ct. 2143, 2153, n.8 (2000)).

[¶ 36] In this case, Etpison argued that Ibul was not Meyong's biological child—an argument that we found persuasive and an issue on which we reversed the Trial Division's conclusion to the contrary. *See ante*. However, in order to make this argument, Etpison relied on the Pretrial Memorandum[2] from the 1973 Case, which unequivocally stated that parties agreed that "Ibul Dirreblekuu's mother was . . . Ongeklungel." But Etpison cannot be permitted to pluck out a single sentence from a document that favors his current litigation stance and ignore statements in that same document that may undermine his position. And that same document also states that "Ibul Dirreblekuu was one of the strongest members of the clan . . . ."[3] Acknowledging Ibul's status only hurt Adelbai's case, because he was challenging her decision to appoint a titleholder. This makes the Ongelutel faction's admission even more reliable. *Cf.* ROP R. Evidence 804(b)(3) (admissions against interest fall within a hearsay exception, because they are deemed to have an indicia of reliability); *Williamson v. United States*, 512 U.S. 594, 600, 114 S.Ct. 2431 (1994) (noting the reliability of statements against interest). Given the admissions of the parties, the

[2] The Pretrial Memorandum was in essence a statement separating the undisputed facts in that case from the disputed ones.

[3] The Memorandum doesn't suffer from the same flaw (if a flaw it is) that Etpison argues is present in the High Court's opinion. With respect to the latter document Etpison (unconvincingly) argues that it's unclear which clan (Tmeleu or Ngerteluang) was being referred to when the Court was discussing Ibul's strength in the clan. (Of course, that may be irrelevant as the High Court concluded that "members of Tmeleu Clan are also members of Ngertel[u]ang Clan," *Sechelong*, 6 TTR at 326, thus mooting Etpison's argument). Whatever doubts one may entertain about the meaning of the High Court judgment (and in my view those doubts are likely unreasonable), there are no such doubts regarding the meaning of the Pretrial Memorandum. In that document, the Ongelutel faction admitted that Ibul "was one of the strongest members of the clan." As that admission was made *prior to* any involvement or even mention of the Tmeleu Clan, it follows that the *only* clan that could have been referred to was the Ngerteluang Clan.

District Court opinion stated: "tracing the relationship of these people to Ngertel[u]ang Clan, there is *no doubt* that Dirreblekuu Ibul is a strong member of this Clan." (Emphasis added). In short, and as this Court points out, nowhere in the record does it appear that *anyone* contested Ibul's strength and status in the clan, and both the District and the High Court accepted the admissions in the Pretrial Memorandum as part of their analysis. Etpison cannot have it both ways—if he wishes to bind Appellees to their predecessors' statements in earlier cases on the issue of Ibul's parentage, he should be bound by his predecessors' statements, made in the *same document*, on the issue of Ibul's standing in the Clan.

[¶ 37] The use of judicial estoppel is particularly prudent here, where the individuals involved in the 1973 Case would have had a much better understanding of the familial relationships at issue than their descendants, multiple generations and close to half a century later. *Cf. ROP v. Decherong*, 2 ROP Intrm. 152 (1990) (noting that memories fade as time passes); *Techemding Clan v. Mariur*, 3 ROP Intrm. 116, 119 (1992) (noting that statutes of limitation are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."). Allowing Etpison to argue that Ibul was not a senior strong member of the Clan, when his ancestors clearly acknowledged her strength, appears to be "manipulative litigation conduct" in an effort to secure title to disputed lands.[4]

[¶ 38] Much militates in favor of applying judicial estoppel against the Ongelutel faction in this case. Yet, like the Court, for reasons that follow, I favor remand to the Trial Division for determination, in the first instance, of whether the Ongelutel faction should be estopped from contesting Ibul's and her descendants' strength in the Ngerteluang Clan.

[¶ 39] "Judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *New Hampshire v. Maine*, 532 U.S. at 750, 121 S.Ct. at 1815 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). Because "no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas . . . [the] decision will necessarily rest on the *trial courts*' sense of justice and equity." *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 333–34, 91 S. Ct. 1434, 1445 (1971) (emphasis added). *See also Kakalik v. Bernardo*, 439 A.2d 1016, 1020 (Conn. 1981) ("The determination of what

[4] I do not suggest that any particular witness in this case is being untruthful (that determination is best left to the trial court in any event); rather I seek to underscore that permitting the Ongelutel faction as a whole to dramatically change its position, many years later when the witnesses who knew the individuals at issue have died, gives at least the appearance of manipulative litigation conduct.

equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court.").

[¶ 40] The trial court's discretion on remand, however, is not unbridled.

> The term 'discretion' denotes the absence of a hard and fast rule. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Langnes v. Green, 282 U.S. 531, 541, 51 S. Ct. 243, 247 (1931).

[¶ 41] Although the application of judicial estoppels is "not reducible to any general formulation of principle," *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982), three key factors usually inform the application of the doctrine:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. at 750–51, 121 S.Ct. 1815 (internal citations and quotations omitted).

[¶ 42] As the discussion above indicates, it appears plain that the first and second prong of the test are met (after all, Appellant, in large part on the basis of the Pretrial Memorandum in the 1973 Case, successfully convinced this Court to adopt his position regarding Ibul's parentage). The third prong, on the other hand, is a much closer call. I am of opinion that determination on this last issue, as well as the balancing of equities, is best resolved by the Trial Division in the first instance. For this reason, I join in the Court's judgment remanding the matter back to the Trial Division.

B.

[¶ 43] Assuming that the Trial Division does apply judicial estoppel on remand, or otherwise finds that Ibul was a senior strong member of Ngerteluang Clan, the

question becomes whether or not Ibul's high status in the Clan can be passed on to her descendants—Appellees herein. The answer to that question turns on *how* Ibul acquired her status in the Clan.

[¶ 44] Etpison argues that Ibul was not blood-related to the Clan and therefore not a member despite her adoption. If true, that would mean that, despite her own status in the Clan which she could have acquired by services to it, she could not pass her strength on to her descendants, who necessarily would not be members of the Clan themselves. These, of course, are questions of fact that should be resolved by the Trial Division. Nevertheless, it is worth highlighting an air of implausibility to Appellant's claims.

[¶ 45] At oral argument, Etpison contended that Ibul's high status could have come about through services, rather than a blood relationship. This assertion, however, is hard to square with Etpison's own brief. In his written submission Etpison argues that "Appellee's own expert witness on Palauan custom, Noah Secharraimul, testified that . . . an adopted child who is not related by blood to a member of the clan has *no strength* in the clan." Appellant Op. Br. at 23 (emphasis added). Etpison goes on to argue that because of this, "even if Meyong were *ochell*, Ibul would have '*no strength*.'" *Id.* (emphasis added). But the Onglutel faction (Etpison's ancestors) conceded that Ibul "was one of the strongest members of the clan." *See ante*. It cannot be the case that Ibul was one of the strongest members of Ngerteluang Clan and simultaneously had "no strength" in the Clan. Therefore, Appellant's assertion that Ibul had no blood relationship to the Clan is highly unlikely to be correct.

[¶ 46] It is also highly unlikely that Meyong would have adopted a child that was unrelated to her. There was expert testimony in the Trial Division that adoptions in Palau are almost always of individuals who are blood relatives. This is consistent with our caselaw as well. *See, e.g.*, *Oseked v. Ngiraked*, 20 ROP 181, 184 (2013) (noting that "adoptions usually occur between lineages within the same clan" and almost always between blood relatives.). In addition, as the Court noted, *see ante*, Meyong was supposed to have said at the time that she and Ibul were related. Further still, the 1973 District Court opinion indicated that Ibul had "relatives of Tmeleu Clan." Assuming the District Court was referring to Ibul's biological relatives, this would necessarily mean that Ibul was Meyong's blood relative because Elong—Meyong's grandmother—was herself a Tmeleu. *See* High Court Transcript at 11. Indeed, Etpison appears to concede that Ibul was Tmeleu. *See* Appellant Op. Br. at 13. But if so, then Ibul had to be related to Meyong.

[¶ 47] More importantly, it would have been very difficult, if not impossible, for Ibul to become as strong as she was through services alone. While it is true that services

can increase an individual's strength in a clan, *see Ngeribongel v. Gulibert*, 8 ROP Intrm. 68 (1999), it seems highly unlikely that a person can go from *terruoal*, the lowest possible status in a clan, to one of its highest-ranking members. *Cf. Dokdok v. Rechelluul*, 14 ROP 116, 119 (2007) (holding that *ulechell* members could become stronger than *ochell* members of a clan if they performed the services and held the titles for the clan).

C.

[¶ 48] In summary, I am of opinion that, absent a compelling reason to the contrary, this case calls for the application of judicial estoppel against Appellant. I join in the Court's remand order so as to afford Appellant an opportunity to proffer reasons (should there be any) why the doctrine should not apply. The Trial Division may then, consistent with the principles of equity outlined *ante*, exercise its discretion and determine whether judicial estoppel ought to bar Etpison from contesting Ibul's status within Ngerteluang Clan.

[¶ 49] With these observations, I join the Court's opinion.