*PPLA v. Tmiu Clan*, 8 ROP Intrm. 326 (2001)
**PALAU PUBLIC LANDS AUTHORITY,**
**Appellant,**

**v.**

**TMIU CLAN,**
**Appellee.**

CIVIL APPEAL NO. 00-25
D.O. No. 14-24

Supreme Court, Appellate Division
Republic of Palau

Argued: March 26, 2001
Decided: July 13, 2001

Counsel for Appellant: Dale Trigg (argued); Douglas Juergens (on the brief)

Counsel for Appellee: Carlos Salii

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

MICHELSEN, Justice:

The Palau Public Land Authority [PPLA] appeals from a Land Court determination awarding Tmiu Clan title to property in Angaur pursuant to 35 PNC § 1304(b), the implementation statute for the Return of Public Lands Clause of the Palau Constitution. [1] The land at issue is a parcel numbered "Lot 120387 part," as shown on a Bureau of Land and Surveys Cadastral ⊥327 worksheet [hereinafter "the Lot"]. The Land Court held that Tmiu Clan was entitled to a return of the Lot. On appeal, PPLA's substantive argument is that the Clan is bound by a negotiated settlement in 1962 with PPLA's predecessor in interest, the Trust Territory Government.

## Background

The government's claim of title can be stated concisely. The Lot is a portion of the southern third of the Angaur airfield, which was originally built by the U.S. military in October 1944 at the time the island was wrested from Japanese land forces. The area continued to be occupied and claimed as government land in the post-war period. Government ownership claims

[1] "The national government shall . . . provide for the return to the original owners or their heirs of any land which became part of the public lands as a result of the acquisition by previous occupying powers or their nationals through force, coercion, fraud, or without just compensation or adequate consideration." ROP Const. art. XIII, § 10.

can be traced back to assertions that the entire island of Angaur was purchased in 1909 by Germany, and hence was public land. The leaders of Angaur challenged government ownership claims from the earliest days of the Trusteeship period. [2] In 1962, as part of the government's efforts to resolve land disputes in Palau, various agreements were executed with land claimants. With respect to Tmiu Clan, the government released some land claimed by the Clan, and the Clan released its ownership claims to the airport strip area.

Although the Trust Territory Government claimed ownership of Angaur as successor in interest to the German claims, the German acquisition of Angaur cannot be defended as fair or free of duress. [3] In the 1970's, copies of the original German contract for sale surfaced, and the specifics of the document were discussed in *Thomas v. Trust Territory*, 8 TTR 40 (App. 1979):

> There appears little doubt that the persons who signed the deed did not have authority to transfer the entire island. The Trial Court found that at all times pertinent there were 18 separate and distinct clans on Angaur, each of which owns land in its own right. Only three heads of the 18 clans signed the deed.

*Id.* at 44. The court held that only the clans whose chiefs had signed the deed were bound thereby. As PPLA concedes, Tmiu Clan was not one of them.

**Issues on Appeal**

PPLA raises two issues on appeal: (1) whether the Land Court erred by not upholding the 1962 settlement between the Clan and the Trust Territory as a good-faith settlement of a claim, and (2) whether the Land Court erred in permitting Carlos Salii to ⊥328 testify as a witness for the Clan when he also was the Clan's attorney in the case.

A. *The 1962 Settlement Agreement: Just Compensation/Adequate Consideration*

PPLA understandably does not attempt to defend the merits of the 1909 "sale." Thus, as an initial matter, there is no dispute that Tmiu Clan was deprived of its land in circumstances

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[2] 3 Dorothy E. Richard, *United States Naval Administration of the Trust Territory of the Pacific Islands* 818-20 (1957).

[3] "A consortium of German banks and other firms organized the German South Seas Phosphate Joint Stock Company, which was granted exclusive mining rights in Angaur. The German government, acting on the company's behalf, purchased the entire island from nine chiefs for twelve hundred marks, or about three hundred dollars. An Englishman named James Sims, who had lived on Angaur for over twenty years, tried to rally the people against the sale, but the Germans promptly deported him for his efforts. As the German Phosphate Company made preparations to begin mining operations, the island population of 150, having surrendered all claims to their ancestral home, were moved to a small reservation in the southeast corner of the island." Francis X. Hezel, *Strangers In Their Own Land* 121 (1995); *see also* 1 Shingeru Kanshiro, *Land Tenure Patterns* 309 (1958) ("The discovery of phosphate ore on Angaur in 1903 was followed by the forcible purchase of mining rights by the German officials from the Angaurese.").

covered by the Return of Public Lands Clause. However, PPLA argues that the relevant transaction was not in 1909, but 1962, when the Clan quit-claimed this Lot in exchange for the government's release of other Clan land.

The Land Court held that the property was originally taken by the German colonial government, and that in 1962 there was no "just compensation" given by the Trust Territory to the Clan, because all it received was some of its own land back in exchange for releasing its ownership rights to this Lot. On appeal, PPLA argues that the term "just compensation" is an expression applicable to eminent domain proceedings, [4] and since there was no "taking of property" by the government in 1962, the Land Court should not have applied a "just compensation" analysis. PPLA suggests the 1962 transaction is more properly viewed as a matter of contract law. Appellant directs our attention to section 74 of the *Restatement (Second) of Contracts,* which states that

> [t]he execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

PPLA argues that the 1962 Agreement was a good-faith attempt by both sides to reach a full resolution of the parties' conflicting claims, and is supported by consideration. As we understand PPLA's argument, notwithstanding the deficiencies of the 1909 sale, Tmiu Clan received consideration for the Lot in 1962. However, even if this alternative approach is adopted, we reach the same result as did the Land Court.

"As a basic principle, 'the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange, and a consideration.'" *Kamiishi v. Han Pa Const. Co.*, 4 ROP Intrm. 37, 40 (1993) (quoting the *Restatement (Second) of Contracts* § 17 (1981)). When determining whether an agreement is an enforceable contract, normally "courts do not inquire into the adequacy of consideration. This is particularly so when one or both of the values exchanged are uncertain or difficult to measure." *Restatement (Second) of Contracts* § 79, cmt. c (1981).[5] However, in cases involving the Return of Public Lands Clause, a different rule applies. Pursuant to that section, the original landowner is to have title returned if there is a showing that there was no "adequate consideration" supporting the transfer of title to the government. "Adequate ⊥329 consideration," is defined as "[c]onsideration that is fair and reasonable under the circumstances."[6]

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[4] *See, e.g.*, ROP Const. art. XIII, § 7 ("The national government shall have the power to take property for public use upon payment of just compensation."); *see also Black's Law Dictionary* 277 (7th ed. 1999) (stating that government taking of private property requires "just compensation," which means "a fair payment by the Government for property it has taken under eminent domain - usu. the property's fair market value, so that the owner is no worse off after the taking.").

[5] Where there is glaring inadequacy of consideration, it may be a relevant factor in cases alleging fraud, mistake, duress, undue influence, and the like. *Id.* cmt. e.

[6] *Black's Law Dictionary* 301 (7th ed. 1999). Compare with "sufficient consideration:

In the circumstances presented, we do not believe Tmiu Clan received "adequate consideration" for the Lot. Although the Trust Territory Government had legal title to the lands it quitclaimed to Tmiu Clan, these lands, too, had been taken from the Clan via the same German deed. Thus, these lands cannot be considered a "fair and reasonable" replacement for the Lot. Rather, in order to get back lands (the quitclaimed lands) that had been taken away in 1909, the Clan was required to forego the return of other land (the Lot) that it had also previously owned. We therefore reach the same conclusion as the Land Court. Given the unhappy history of expropriation and exploitation of Angaur's resources during the German and Japanese eras, the Land Court reached the only reasonable conclusion: that the Trust Territory's willingness in 1962 to give back some former Clan land in exchange for keeping other former Clan property cannot be considered just, and we agree, because the agreement was not supported by adequate consideration.

*B. Carlos Salii as Counsel and Witness*

PPLA contends that the Land Court erred in allowing Carlos Salii to testify for the Clan without withdrawing as counsel. PPLA argues that the decision to allow Mr. Salii to testify prejudiced PPLA because he did not announce his intention to testify until near the close of the Clan's case, and PPLA was therefore prevented from discovering Salii's testimony in advance of the hearing. PPLA also argues that finding other counsel before the hearing would not have caused hardship to the Clan.

It is not disputed that

> [t]he roles of attorney and witness usually are incompatible. A witness is supposed to present the facts without a slant, while an attorney's job is to advocate a partisan view of the significance of the facts. One person trying to both is apt to be a poor witness, a poor advocate, or both.

*Gusman v. Unisys Corp.,* 986 F.2d 1146, 1148 (7th Cir. 1993). However, an exception is made when the attorney's disqualification would cause substantial hardship to the client. *See ABA Model Rule* 3.7 (1998); *Cottonwood Estates v. Paradise Builders,* 624 P.2d 296, 299-301 (Ariz. 1981) (en banc). In evaluating such claims on appeal, we hereby adopt the usual rule that a decision to allow an attorney to serve as counsel in a case and also testify is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *See, e.g., Purgess v. Sharrock,* 33 F.3d 134, 144 (2d Cir. 1994); *Cottonwood Estates,* 624 P.2d at 302.

The Land Court's decision to allow Mr. Salii to testify was within its discretion. First, in the Land Court (as well as its predecessor courts), rulings concerning the admissibility of evidence and the taking of testimony have always favored admission over exclusion, consistent with the legislative preference that "procedural and evidentiary rules [should be] designed to allow claimants to represent themselves" in the Land Court. 34 PNC § 1309(a). In keeping with

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One deemed by the law of sufficient value to support an ordinary contract between the parties, or one sufficient to support the particular transaction." *Black's Law Dictionary* 307 (6th ed. 1990).

this ⊥330 preference, persons representing clans and lineages have been allowed to act as advocates of such claims, and also testify, and in this case that is what Mr. Salii did. Mr. Salii is a title holder in the Clan and was the person most knowledgeable concerning this ownership issue. He testified that he began to serve as counsel for Tmiu Clan in land matters in the 1970s and that he acquired extensive knowledge about the Clan's affairs by talking with older clan members in addition to his own research. The Land Court was within its discretion to conclude that Mr. "Salii has a distinctive value to Tmiu Clan as counsel in this particular case."

The objections of PPLA that this late development hampered discovery is less of a factor in Land Court, where discovery is informal at best, and often not conducted at all.

**Conclusion**

For the foregoing reasons, we affirm the determination of the Land Court.

NGIRAKLSONG, Chief Justice, dissenting:

I agree with the majority that the land conveyed to Tmiu Clan under the 1962 agreement probably did not constitute "adequate consideration" or "just compensation" under 35 PNC § 1304(b). However, I dissent because Tmiu Clan's case did not establish this fact. Tmiu Clan's first two witnesses were Ruchetkiud Noria Henry and Ulengchong Gregorio Henry, who were 103 and 71 years old, respectively. Noria and Gregorio did not claim to have any knowledge of the 1962 transaction. Carlos Salii claimed to have acquired knowledge of the transaction from other clan members, but Mr. Salii should not have been permitted to testify. Mr. Salii had already guided the testimony of the two previous witnesses with extremely leading questions and at one point had even taken over the job of translating Noria's answers. After taking the stand as witness, Mr. Salii's "testimony" consisted largely of legal argument that the Trust Territory executed the 1962 deed solely to legitimize its control of the airfield and that the land returned to the clan was not consideration for the taking of the airfield property. Thus, although it was not unreasonable for the Land Court to find that Mr. Salii "has a distinctive value to Tmiu Clan as counsel," Mr. Salii's presentation of the case so blurred the lines between evidence and advocacy as to make it an abuse of discretion to allow Mr. Salii to serve as counsel and testify for the clan. Tmiu Clan could have hired another attorney and there were surely other clan members besides Mr. Salii who knew something about the 1962 transaction. For these reasons I would reverse the judgment for Tmiu Clan and remand for a new hearing rather than affirm.