ETPISON v. PERMAN
Cite as 1 FSM Intrm. 405 (Pon. 1984)

THE SUPREME COURT OF THE

FEDERATED STATES OF MICRONESIA

TRIAL DIVISION-STATE OF PONAPE

BISMARK ETPISON Plaintiff, v. FELICIANO PERMAN and PETRUS PERMAN Defendants, v. PERLY PHILLIP, Intervenor.	)	CIVIL ACTION NO. 1982-010

O P I N I O N

Before Edward C. King
Chief Justice
Ponape, Federated States of Micronesia
February 22, 1983.

APPEARANCES:

For Bismark Etpison:	Johnson Toribiong Toribiong & Coughlin P.O. Box 378 Koror, Republic of Palau 96940
For Feliciano Perman and Petrus Perman	Martin F. Mix Trial Counselor P.O. Box 100 Kolonia, Ponape, FSM 96941
For Perly Phillip	Patricia E. Billington P.O. Box 129 MLSC, Ponape Office Kolonia, Ponape, FSM 96941

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This lawsuit was instituted by Bismark Etpison, a resident of Palau, against Peter (also known as Petrus) M. Perman and Feliciano M. Perman, both of Ponape. Etpison's complaint asserted that the defendants were jointly and severally liable under a March 23, 1976 promissory note, payable to Etpison in the amount of $9,000, executed by the Permans in exchange for Etpison's quitclaim deed to them of Tract No. 016-A-07 in Kolonia, Ponape. The defendants in their answer deny they are indebted to plaintiff for the reason that the "$9,000 allegedly promised by the defendants would have been without consideration."

Subsequently, Mr. Perly Phillip sought, and was granted, permission to intervene in the lawsuit, asserting that he has an interest in Tract No. 016-A-07.

Mr. Etpison and his counsel failed to appear for the trial and adduced no evidence as to the Permans' alleged obligation to pay. Consequently, Etpison's claim against the Permans is dismissed.

The trial and this opinion focus on the dispute between the Permans and Mr. Phillip. Both claim interests in the land. At issue also is the action of the Ponape Public Lands Authority's renewal of Mr. Phillip's 20-year lease without notice to Feliciano Perman and without giving him an opportunity to be heard after he had advised of his opposition to renewal of Mr. Phillip's lease. I find that Mr. Perman has no present interest in the land but he should have been given

an opportunity to be heard on that question and on proposed renewal of the lease. The case is remanded to the Authority for a Board decision on the lease renewal question in accordance with due process.

Findings of Fact

Following are my findings of fact based upon the testimony and documentary evidence presented, and inspection of the land and building. The inspection was at the request of the parties and in their presence.

Mr. Phillip received a one-year lease from the Trust Territory Government of lot Nos. 8 and 9 in Kolonia on June 17, 1960. On June 25, 1962, a new 20-year business and residential site lease covering the same lots was executed by Maynard Neas, Ponape District Administrator on behalf of the Trust Territory Government, as lessor, and Perly Phillip (also identified as Perly Pelep) as lessee.[1] The lease, effective October 30, 1961, contained a 20-year renewal option: "This lease may be

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[1]The lots referred to as Nos. 8 and 9 in the lease are now identified by all concerned as lot 016-A-07 and lot 016-A-13. Lot 016-A-13 is a residential area adjacent to 016-A-07 and occupied by Mr. Phillip's family. Although the lease specifies that the land covered is to be used for "Retail store and Furniture shop and for no other purposes whatsoever", the State of Ponape as the Trust Territory Government's successor-in-interest under the lease agrees that the current intent is that one lot, 016-A-13, may be residential and the other, 016-A-07, is to be used for business purposes. See Intervenor's Exhibit No. 6, a May 16, 1983 letter from Ponape State Public Lands Authority Assistant Commissioner Ioanes Kanichy to Mr. Phillip.

renewed one time only and for the term agreed upon in paragraph 4 [i.e., 20 years] at the option of the lessee."

Although the residential lot has been used continuously by Mr. Phillip or his family, he conducted little if any commercial activity on lot 016-A-07 throughout the 20-year period.[2] Instead, beginning in 1965, he allowed other persons to occupy that lot. Specifically, Mr. Phillip permitted Bismark Etpison to operate a bar on the lot beginning approximately in 1965. Mr. Phillip received no rental payments from Etpison, but understood that Etpison would eventually move the bar to another location. In the meantime, he considered Etpison's operation of the bar to be fulfilling Mr. Phillip's obligation to use the lot for a business purpose.

However, in succeeding years, the balance of power shifted as Etpison's control of the premises increased and Phillip's diminished. In about 1968, Mr. Phillip went to Hawaii and Ngatik. He then accepted a teaching position at the Micronesian Occupational Center in Palau. Sometime while he was in Palau, during the period from 1969 through 1971, he learned from his daughter, Philomena, that Etpison had torn down the building previously constructed on lot 016-A-07 and was building a new one there.

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[2]Mr. Phillip constructed on the premises a building, 28 foot square, made principally of wood and tin, with some concrete. The building was later destroyed by Mr. Etpison.

Bismark Etpison's actions in tearing down and constructing buildings on the lot were carried out without the prior knowledge, approval or consent of Perly Phillip, and without any promise, action or inaction by Perly Phillip which could have led Bismark Etpison reasonably to believe that he had the right to erect the new building or that he would receive any interest in the land or other compensation by virtue of the construction.

When Perly Phillip returned to Ponape in 1972 he found the new building on lot 016-A-07 nearly completed. Etpison requested permission to use the building while he remained on Ponape, with the understanding that the building would be Mr. Phillip's upon Etpison's departure.

For the next several years, until early 1976, Etpison exercised control over lot 016-A-07. Etpison operated a bar on the lot for awhile, then rented the building to Lee Mendiola. The lease between Etpison and Mendiola was for five years, beginning January 1973, and called for rental payments of $500 a month. Mr. Mendiola retained possession of the building for several years, operating various businesses there, including a small hotel. He also constructed a rather substantial addition to the front of the building.

In 1975, Mr. Etpison also signed a document purporting to lease the lot to one Kabrina Taima for five years. That lease was terminated by a separate document dated March 23, 1976.

These activities from 1972 through 1976 took place while

Mr. Phillip was living on the adjacent residential lot, 016-A-13. At no time did he either expressly approve of or object to any of the construction or business activities, aside from his agreement with Etpison in 1972.

Early in 1976, word circulated that Bismark Etpison wished to sell the building. Defendant Peter Perman, then married to Perly Phillip's daughter, Philomena, and Feliciano Perman contacted Mr. Etpison to discuss a possible transaction. Aware of Perly Phillip's government lease, Feliciano Perman inquired of Mr. Etpison as to ownership and was assured that Mr. Etpison owned the land and building. However, the defendants did not seek confirmation of this information from Perly Phillip, nor did they check the Ponape land records or demand proof of title. They received only unsubstantiated oral assurance from Bismark Etpison and his legal counsel.

Etpison and the Permans then entered into a transaction whereby Etpison executed a quitclaim deed, dated March 23, 1976, of Tract No. 016-A-07 in exchange for a cash payment[3] and the Permans' $9,000 promissory note payable either on October 31, 1981[4] or "at or soon after" the right of the Permans to

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[3]The deed says $5,000 but the promissory note recites $4,800 as the amount of payment. Feliciano Perman testified that $5,000 was paid.

[4]October 31, 1981 was the expiration date of Mr. Phillip's first 20-year lease term.

occupy and use Tract No. 016-A-07 is "officially or legally recognized", "whichever occurs earlier."

Armed with this March 1976 documentation, the Permans then occupied lot No. 016-A-07 and operated various businesses there. During their five-year occupancy of the premises the Permans made some repairs and improvements, including extension of the porch and construction of some shelves.

Perly Phillip admits that he did not interfere or challenge the Permans' use of the premises. However, he insists, and I find, that this was because Peter M. Perman was then married to Mr. Phillip's daughter, Philomena. Indeed, after Peter Perman and Philomena separated and divorced in 1981 Perly Phillip reasserted his right to use the property.

In December 1981, Phillip, through his counsel, wrote to Feliciano Perman requesting him to vacate the lot. His counsel also wrote to Ponape Public Lands Authority requesting extension of the lease for another 20 years.

The Ponape Public Lands Authority was created pursuant to the terms of the Ponape Public Lands Act of 1976, Ponape District Law 4L-69-76, as the "legal entity to receive, hold and dispose of public lands in Ponape..." Id., § 2. The Authority is a public body governed by a board of trustees consisting of nine members, three appointed by the Speaker of the Ponape Legislature, three by the Ponape Governor, and three by the traditional leaders, all subject to advice and consent of the Ponape Legislature. Id., § 5.

The Authority is vested with various powers including power to sell public lands, Id., § 10(5), but is bound to "comply with all provisions of existing leases and land use and occupancy agreements previously entered into" by the Trust Territory Government. Id., § 13. The Authority has adopted regulations pertaining to its lease of public lands. The regulations also contain provisions relating to cancellation and forfeiture, assignment and subleasing of existing leases.

Feliciano Perman notified the Public Lands Authority by letter dated September 1, 1982 to Commissioner Joseph Phillip that he objected to renewal of Perly Phillip's lease of lot 016-A-07.

The Authority's Board convened a hearing to consider renewal of Mr. Phillip's lease on January 6, 1983. Despite Mr. Perman's previous letter notifying the Authority of his objections to the renewal, no notice of the scheduled hearing was given to Feliciano Perman. The only notice was by general radio announcement.[5] That message did not reach Perman and he

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[5]Section 8 of the Ponape Public Lands Act of 1976, as amended, requires "public notice of the date, time and place" of a forthcoming Board meeting "to be broadcast on the broadcast station projected to reach the greatest number of people in Ponape District." The Act does not expressly require the notice to specify the purpose of the meeting. No evidence has been presented in this case as to the contents of the general radio notice which the Board provided. Since the method of notice to Feliciano Perman is found to be constitutionally inadequate, I need not consider whether the contents of the notice would have been sufficient to alert him to the fact that the Board would consider renewal of Mr. Phillip's lease at the meeting.

received no prior notice of the meeting or its purpose. He therefore did not have an opportunity to attend the Board hearing or to assert his objections to renewal of the lease. The Authority's failure to provide notice was upon advice of the Authority's legal counsel based upon counsel's opinion that the earlier lease's provisions bound the Authority to grant the 20-year renewal.

At the January 6, 1983 hearing, the Authority's Board authorized renewal. Perly Phillip was notified by Commissioner Joseph Phillip's letter of January 10, 1983 that the Authority had "approved ... your right to continue the lease of lot 016-A-07 in Kolonia for another 20 years" (translation from Ponapean).

When Feliciano Perman vacated the building at Perly Phillip's insistence, he padlocked the doors and retained the keys. The building and lot have therefore been essentially unoccupied and unused for more than one year.

Legal Analysis

The Court has jurisdiction over this case because of the diversity of citizenship of the parties. FSM Const. art. XI, § 6(b). Plaintiff Bismark Etpison is a citizen of the Republic of Palau. The other parties are residents of Ponape and citizens of the Federated States of Micronesia. Mr. Etpison's claim is adverse to all others. The Permans resist Etpison's claim that they owe him some $9,000 and Perly Phillip contests the assumption implicit in the Etpison-Perman transaction, that

Etpison had the legal capacity to convey an interest in Tract No. 016-A-07 to the Permans.

The Court's jurisdiction is not diminished by the fact that Mr. Etpison, whose Palauan citizenship furnishes the diversity upon which our jurisdiction is based, did not participate in the trial itself. Diversity is determined as of the commencement of the action. C. Wright, Law of Federal Courts § 28 (4th ed. 1983). 1 J. Moore, Moore's Federal Practice ¶ 0.74[1] (2d ed. 1972). If diversity existed between the parties at the date and time the suit commenced, it is not defeated by later developments. 1 C. Scott & D. Rutherford, Cyclopedia of Federal Procedures § 2.319 (3rd ed. 1982). The authorities cited here are texts discussing interpretations under the United States Constitution. However the jurisdictional language of the Federated States of Micronesia Constitution is similar to that of the United States Constitution and this Court has frequently looked to decisions under the United States Constitution for guidance in determining the scope of our jurisdiction. In re Estate of Nahnsen, 1 FSM Intrm. 97 (Pon. 1982); Ponape Chamber of Commerce v. Nett Municipality, 1 FSM Intrm. 389 (Pon. 1984), Lonno v. Trust Territory (I), 1 FSM Intrm. 53 (Kos. 1982).

A. Etpison v. The Permans

On May 19, 1983, the office of the Clerk of Court forwarded to the plaintiff notice that the trial of this matter was to be held on July 6. The plaintiff failed to appear.

From that time until now, no explanation has been offered by the plaintiff or his counsel. Plaintiff's failure to appear at the trial and his subsequent inaction amount to abandonment of his claim. Plaintiff's claim is dismissed for failure to adduce evidence and also for failure to prosecute the claim. FSM Civ. R. 41(b).

I also find, for the reasons stated in the succeeding section of this opinion, that Mr. Etpison had no interest in Tract No. 016-A-07 which he could convey to the Permans. Therefore, he furnished nothing in exchange for the promise to pay which he now seeks to enforce.

B. Permans v. Phillip

The Permans' primary theory apparently is that Mr. Phillip effectively abandoned his interest in Tract No. 016-A-07 which somehow then shifted to Mr. Etpison and subsequently was conveyed by Etpison to Feliciano Perman.

There are circumstances under common law where one may lose his interest in land by failing to take action that would normally be expected of one who holds that particular type of interest in land. For example, if a landowner acquiesces in continuous control of his land by another who asserts the right to control the land and to exclude the original landowner, the inactive landowner eventually may lose his title to that other by virtue of the doctrine of adverse possession. See 5 G. Thompson, Thompson on Real Property § 2543 (1957).

However the requirements for application of the doctrine of adverse possession are not met here. Under Ponape law, the adverse possession must continue unabated for 20 years. 6 TTC 302(1)(b).[6] There is no claim in this case that any adverse possession could have begun before Mr. Etpison occupied the lot in 1965. Viewing the evidence in the most favorable light possible for the Permans the adverse possession could not be seen as extending for more than some 17 years, from 1965 until January 14, 1983, when Mr. Phillip filed his petition to intervene. There is also substantial doubt that any of the 1965 to 1982 occupation of the premises was "hostile" as required by the doctrine of adverse possession since each occupancy may arguably have been with the permission of Mr. Phillip.

Similarly, the common law doctrine of prescriptive right is inapplicable since, among other reasons, the 20-year statutory period was not completed. 2 G. Thompson, Thompson on Real Property § 335 (1961).

I have also considered whether, by virtue of his actions

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[6]This statute, formerly a Trust Territory statute, continues in effect by virtue of the Constitution's transition provisions. FSM Const. art. XV, § 1. Now, however, because land matters fall within state rather than national powers, this former Trust Territory law is a law of each of the states, until amended for any state by its legislature. The same is true of all other provisions in the Trust Territory Code relating to matters which do not fall within powers of the national government under the Constitution and are not inconsistent with the Constitution.

and inactions, Perly Phillip may now be equitably estopped from objecting to the Permans' claims arising from their dealings with Mr. Etpison.[7] Under the doctrine of equitable estoppel, or estoppel in pais, a person may sometimes be precluded by his act or conduct, or silence when he has a duty to speak, from asserting a right which he otherwise would have had. However, this equitable doctrine applies only when justice demands intervention on behalf of a person misled by the conduct of the party estopped.

No intervention is appropriate where the party claiming to have been misled was aware of the facts which he now insists the other party should have told him, or could reasonably have been expected to learn the facts. California Cigarette Concessions, Inc. v. City of Los Angeles, 350 P.2d 715 (Cal. 1960). Here, Feliciano Perman acknowledges that he was aware of Mr. Phillip's leasehold interest. Indeed, the transaction plainly reflects keen awareness by Etpison and Permans of Mr. Phillip's interest. The promissory note calls for payment whenever the Permans' right to use the lot is "officially or legally recognized." This extraordinary provision confirms that Etpison and Permans entered into the transaction aware that Etpison's power to convey a right to use the land was

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[7]No promise of any kind was made by Mr. Phillip to the Permans, and he also said nothing to Etpison which could have led Etpison to believe that Etpison had title to the property. Thus, the doctrine of promissory estoppel does not apply.

subject to question. The alternative payment provision, setting October 31, 1981 as the latest payment date, bespeaks knowledge at the time of the transaction of the identity of the person claiming the opposing interest and of the source of that claim.

It surely is no mere coincidence that the payment date selected on March 23, 1976 coincides precisely with expiration of Mr. Phillip's 20-year leasehold. The Permans, fully aware of Phillip's claims when they entered into the Etpison deal, cannot now insist that his rights are barred simply because he did not reiterate to them information they already knew.

Finally, there is no suggestion, and no evidence, that Mr. Phillip's inaction or silence constituted waiver of his claims to the land. It is admitted by the Permans that they did not discuss the Etpison documents with Phillip either before or after the transaction. The evidence does not establish that Perly Phillip had prior knowledge of the impending transaction. His failure to forewarn the Permans therefore cannot be interpreted as a knowing waiver of his rights. Upon this record, then, there is no basis for finding either an equitable estoppel against Phillip or a waiver by him of his rights.

It bears mention too that the Permans have demonstrated no financial loss as a result of their transaction with Etpison. Evidence presented by the Permans reveals that during the period from 1971 to 1976 Etpison executed two other leases of

the lot. Each provided for rental payments by the tenants at the rate of $500 per month.

This Court has denied Etpison's claim against the Permans for the $9,000 payment called for by the promissory note. Thus, the total payments by Permans to Etpison were $5,000. Prorated over the five-year period during which the Etpisons used the property, this is less than $90 per month, far below the rental payments under earlier leases.

Finally, I find that no sufficiently substantial improvements of the property were made by the Permans to require special consideration or to warrant modification of any of the above conclusions.

C. Feliciano Perman v. Ponape Public Lands Authority

As an alternative to his claim that he is now vested with Phillip's leasehold rights, Feliciano Perman says that the Ponape Public Lands Authority's action in renewing the lease was violative of his rights of procedural due process. Specifically, he contends that he should have received prior notice and been given an opportunity to be heard at the hearing when the Board considered renewal of the lease. He urges that the Board's action was null and void as violative of due process, and that this Court should now decide whether the renewal should be in the name of Phillip or the Permans.

Mr. Phillip insists that no personal notice to Feliciano Perman was necessary. He argues that the Act requires the Authority to honor the provisions of earlier leases issued by

the Trust Territory Government, including the 20-year renewal provision in Mr. Phillip's lease. In his view the Board had no options available. Since there was no need or opportunity for an adjudication or any kind of discretionary determination by the Board, there was no need for a hearing or notice to interested persons. Mr. Phillip's contention was supported by legal counsel for the Authority who confirmed that she had advised the Authority that it was legally required to renew the lease to Mr. Phillip.

Of course, if there was no decision to be made it would have been a futile mockery to provide prior notice and encourage participation in a sham hearing. The argument that the Board was absolutely required to renew the lease in favor of Mr. Phillip, however, takes too lightly the Authority's role and disregards various provisions in the lease.

Land plays a fundamental and unique role in the lives of Micronesians. The special importance of land here is in part traceable to its scarcity. The Federated States of Micronesia consists of numerous relatively small islands scattered across a vast expanse of ocean. Land is also uniquely significant in Micronesia, however, because it is so thoroughly intertwined with social structures in Micronesia. A body such as the Public Lands Authority mandated to decide who will be permitted to use land holds an awesome power indeed.

Basic notions of fair play, as well as the Constitution, require that such significant decisions be made openly and

after giving appropriate opportunity for participation by the public and interested parties. A Public Lands Authority, of all administrative agencies in Micronesia, must be scrupulous in developing fair procedures and zealous in recognizing those decisions which require exercise of discretion and call for public participation and observation.

Examination of the circumstances relating to Phillip's lease reveals numerous opportunities for exercise of discretion by the Authority. While Section 5.K. provides for renewal "at the option of the lessee", the lease also specifies that the land is "to be used for Retail store and Furniture shop and for no other purposes whatsoever." Id., § 3. In addition, the lease prohibits assignment, Id., § 5.G., as well as construction of any building on the land without written permission of the government. Id., 5.D.

The evidence in this case strongly suggests that each of the three latter provisions may have been violated. Section 5.J. of the lease states that violations may result in cancellation. Regulations of the Board, Part 7.A.(2), are to the same effect. The Board was required to consider whether it had a right to cancel the lease and, if so, whether that right should be exercised. Moreover, at the January 6, 1983 meeting the Board had before it Feliciano Perman's September 1, 1982 letter charging that Perly Phillip had violated the lease and claiming that Mr. Perman had carried out activities on the land which qualified him for consideration as possible lessee.

There may be legitimate reasons for the Authority to forgive previous lease violations from 1965 up through 1981. For example, one could conclude that Mr. Phillip was a victim of events and should not now be made to suffer simply because he did not confront Mr. Perman and reassert his own rights until Peter Perman and Mr. Phillip's daughter were divorced. Counsel for the Authority also testified that the vast majority of the 400 to 500 lessees of public land have violated provisions of their leases, yet only three or four revocations have occurred. In light of that information, one could reasonably conclude that it would be unfair now to revoke Mr. Phillip's lease or to deny his request for renewal.

The Authority might also consider the respective claims of Messrs. Perman and Phillip and conclude that Mr. Phillip, not Mr. Perman, should be permitted to use the land for the next 20 years.

The crucial point, though, is that these are decisions to be made by the Authority after a rational decisionmaking process. The decisions call for careful review of the actions of Mr. Phillip on the land and for balancing of the respective claims of Mr. Phillip and Feliciano Perman. It is not permissible to make such decisions by indirection, through the expedient of refusing to acknowledge there are decisions to be made.

These decisions would necessarily determine the right to use the property during the forthcoming 20 years. Adjudicatory

decisions affecting property rights are subject to the procedural due process requirements of Article IV, § 3 of the Constitution. Suldan v. FSM (II), 1 FSM Intrm. 339 (Pon. 1983). These due process requirements apply to allocation of use rights in public land as well. Id., at 354 n. 17.

Specific requirements of due process may vary depending on the nature of the decisions to be made and the circumstances. Id., at 354.[8] At the core, however is the right to be heard. Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L.Ed. 1363 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-72, 71 S. Ct. 624, 647-648, 95 L.Ed. 817 (1951) ("fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights ....[And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."). This right to be heard is hollow and the convening of a hearing a futile gesture unless those whose interests are at stake are informed of the proceedings. Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed. 2d 556 (1972) ("parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.").

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[8]The analysis here is applicable to Article II, § 4 of the Ponape State Charter as well as Article IV, § 3 of the Constitution of the Federated States of Micronesia.

Mr. Perman was not notified. He contends he was thereby deprived of his right to be heard. The Board provided only general public notice by radio announcement. The question is whether that general announcement was sufficient.

This Court has not previously been asked to determine the adequacy of notice for purposes of due process under the Federated States of Micronesia Constitution or the Ponape State Charter. Earlier decisions under the United States Constitution, in effect at the time of the Micronesian Constitutional Convention, furnish assistance in determining what constitutes due process under the Federated States of Micronesia Constitution. Alaphonso v. FSM, 1 FSM Intrm. 209 (App. 1982); Suldan v. FSM (II), supra.

The landmark United States decision considering the necessary method for providing notice is Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950). There the Court held that "within the limits of practicality notice must be such as is reasonably calculated to reach interested parties." Id., 339 U.S. at 315, 70 S. Ct. at 657. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315, 70 S. Ct. at 657.

Mullane involved a petition to a court by the trustee of a common trust fund for approval of the trustee's accounting. The only notice of the petition was by publication in a local newspaper. Although that notice met the requirements of the

New York statute, a representative of the beneficiaries contended that notice by publication was inadequate to comply with due process requirements.

The Court committed itself to no precise formula, observing that the determination of notice requirements calls for balance between the state's interests in arriving at decisions efficiently and the interests of individuals protected by constitutional due process provisions.

The Court held that the constitutionality of the method of notice employed may vary depending on the circumstances, especially the nature of interests held or claimed by those to be notified and the availability of "reliable means of acquainting interested parties" that their rights are to be determined. Id., 339 U.S. at 315, 70 S. Ct. 658. The Court saw that under certain circumstances, notice by publication may be "all the situation permits," e.g. for notice to persons missing or unknown. Resort to publication was also held a reasonable substitute for actual notice where the required notice is to large numbers of persons many of whose interests are "either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee". This would be true where "impractical and extended searches" would be required and where the interests of many of the persons to be contacted are "so remote as to be ephemeral." In those circumstances, the Court felt, the expense of notice would impose a "severe

burden" and would likely "dissipate its advantages." 339 U.S. at 318, 70 S. Ct. at 659.

Under this reasoning, radio notice to the Ponape general public may have been adequate since the interests of most citizens in this particular lease renewal likely would be conjectural or remote. However, the Mullane Court saw it quite differently where the party required to provide notice knows the names and locations of specific persons entitled to notice but does not provide actual notice to them.[9] A "serious effort" must be made to inform such persons "personally", 339 U.S. at 318, 70 S. Ct. at 659, and the United States Constitution requires "at least" notice by ordinary mail to the record addresses of persons whose names and post office addresses are known. Id. For such persons, notice by publication was constitutionally inadequate, "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." 339 U.S. at 319, 70 S. Ct. at 660.

I do not here attempt to draw the precise line beyond which the effort to provide notice to Feliciano Perman could not have permissibly fallen. It is sufficient to recognize

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[9]The issue of reasonableness of method of notice arises only when the method selected by the government agency does not in fact reach the person to be notified. One who receives actual notice can not assert a constitutional claim that the method employed was not calculated to reach him.

that the Authority did not employ means of a kind that "one desirous of actually informing" Mr. Perman "might reasonably adopt to accomplish it."

Mr. Perman was living in Kolonia and a Ponape State legislator during January 1983. Since the Authority's offices are located in Kolonia, it surely would not have been a "severe burden" for the Authority to have given him personal notice or at least to have delivered written notice to the legislature or the post office.

Notice by radio is the common and generally effective method of notice to the general public on Ponape, vastly better than the notice by publication under consideration in Mullane. Yet radio notice alone was not constitutionally sufficient in this instance, where more effective alternative or supplementary means of notice could easily have been provided. Here, the person entitled to notice: (1) had a direct and serious claim based on his activities on, and actual possession of, the land during the leasehold period; (2) had given written notice to the Board of his wish to assert the claim; (3) lived in the Kolonia area, relatively near the Authority's offices; and (4) had a work location, the state legislature, where telephone or written messages to him could have been received during the day.

Under these circumstances, the Board's use of radio notice alone, without supplementary notice to Mr. Perman, was not reasonably calculated to provide notice to him. He therefore

was deprived of due process in connection with the determination of his claim concerning Tract No. 016-A-07.

D. Remedies

Having concluded that the Board's action in approving renewal of the lease in favor of Perly Phillip was violative of Feliciano Perman's rights of procedural due process, I am compelled to find that the Board's action was null and void.

Both parties have asked that the Court proceed to determine whether the lease renewal should have been granted to Perly Phillip or to Feliciano Perman, or whether the land should be made available to the general public.

I decline to make that decision now for two reasons. First, land matters are generally, and properly, within the power of the states. In re Estate of Nahnsen, supra. While the Constitution is the supreme law of the land and this Court may under no circumstances acquiesce in unconstitutional governmental action, Suldan v. FSM (II), supra at 342-43, the Court also should avoid interceding unnecessarily in the exercise of state powers. States should be given a full opportunity to exercise their legitimate powers in a manner consistent with the commands of the Constitution. This is especially true in these early days of constitutional interpretation where governmental officials adhering to previous patterns may suddenly find themselves afoul of constitutional requirements.

The second reason is somewhat related to the first. The

Ponape Public Lands Authority is a body established by the State of Ponape to develop and implement a coherent policy concerning the use of public lands. The Constitution recognizes that the special knowledge and experience relevant to land use resides within states as compared to the national government. See In re Estate of Nahnsen, supra. The Ponape Public Lands Act of 1976 is an attempt to draw on persons within Ponape with special expertise, varied perspectives, and solid judgment in order to establish a just and uniform approach to public land use in Ponape.

This Court should not lightly intercede in efforts to carry out that mandate, even where the Authority has erred procedurally in its initial attempt to act. Nothing before the Court suggests that the Authority has acted in other than good faith. No substantive violations by the Authority are apparent. It is therefore appropriate to remand this matter to the Authority for its own decision, but this time in accordance with due process requirements.

This procedure calls for no special creativity. There is under the common law a doctrine whereby courts may remit matters to administrative bodies especially familiar with the customs and practices of the activity or industry governed. This is typically done in the hope that the administrative determination either will obviate the need for further court action or will prepare the way for a more informed and precise determination by the Court. 4 K. Davis, Administrative Law

Treatise, § 22.1 (1983), citing Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S. Ct. 573, 34 L.Ed. 2d 525 (1973).

I find it proper here to invoke this common rule, known as the doctrine of primary jurisdiction. This is to permit the Board, after hearing views of all interested parties, to consider in the first instance the proper disposal of the competing claims for Tract 016-A-07. The Board should not assume that it is bound by the renewal provision to grant the 20-year extension, but instead should determine whether the lease should be renewed in light of the renewal provision, any violations of the lease which may have occurred during the preceding 20 years and any possible waiver by the Authority or its predecessors of any rights the government might otherwise have had to terminate the lease previously or to refuse to renew now. That decision, of course, should also take into consideration other actions of the Authority where similar or comparable lease violations may have occurred. This should be done in an effort to establish a fair and uniform policy so that persons in similar circumstances will be treated in the same manner and to maintain a constructive and coherent land use policy in Ponape.

The Board should also permit Feliciano Perman to be heard concerning his interests, but the Authority's decision should be consistent with the findings of fact in this opinion and the conclusion of law that Perly Phillip's interests in the land have not heretofore shifted to the Permans, or either of them,

by operation of law.

A brief written statement of reasons in support of the Board's conclusion could also prove helpful.

Conclusion

Defendants Feliciano and Peter Perman are not liable to Bismark Etpison, and Perly Phillip's interests in Tract 016-A-07 have not been acquired or obtained in any way by Feliciano or Peter Perman.

The Board's attempted renewal of Perly Phillip's lease is null and void because the Board failed to provide reasonable notice and an opportunity to be heard for Feliciano Perman, on the question of renewal, although Mr. Perman had notified the Board of his claims concerning the land.

This matter is now remanded to the Ponape Public Lands Authority for reconsideration of Mr. Phillip's request for renewal of the lease together with Feliciano Perman's objections.

The Court retains jurisdiction pending action by the Board. If no final decision is reached by the Board within 90 days of this decision, any party may move this Court for a decision as to whether Perly Phillip is entitled to renewal of the lease.

So ordered this 22nd day of February 1984.

Edward C King
Chief Justice
Supreme Court of the
Federated States of Micronesia

Entered this 22nd day of February 1984.

Evelian J. Killeng
Chief Clerk of Court