

Gibbons v. ROP, 1 ROP Intrm. 634 (1989)
**FLORENCIO GIBBONS and
NEMECIO ANDREW,
Appellees,**

v.

**GOVERNMENT OF THE REPUBLIC OF PALAU, PALAU NATIONAL
COMMUNICATIONS CORPORATION, ORION TELECOMMUNICATIONS, LTD.,
LAZARUS SALII, PRESIDENT OF THE REPUBLIC OF PALAU, and GORONES
INTERNATIONAL CONSTRUCTION CORPORATION,
Appellants.**

CIVIL APPEAL NO. 66-87
Civil Action No. 28-87

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: June 16, 1989

BEFORE: MAMORU NAKAMURA, Chief Justice; ROBERT A. HEFNER, Associate Justice;
EDWARD KING, Associate Justice.

HEFNER, Associate Justice:

BACKGROUND

On September 4, 1986, a management and operation contract (the “contract”) was entered into between the Government of the Republic of Palau (ROP) and Gorones International Construction Company (Gorones) to manage the Aimeliik Power Plant. This contract was not subject to bidding.

On November 12, 1986, Palau National Communications Corporation (PNCC) and Orion Telecommunications (Orion) entered **L635** into a joint venture (the “agreement”) to construct and manage a national communications system. This contract was not let out for public bidding and is in excess of \$5,000. Orion, a Delaware Corporation, does not have a foreign investors business permit as required by 28 PNC §§ 141 *et seq.*

Plaintiffs filed their complaint April 6, 1987, styling it as a taxpayer action. Although the complaint makes various allegations as to being a class action, plaintiffs apparently never sought to have themselves certified as a class pursuant to ROP R. Civ. Pro. 23(c).

In September, 1987, Orion and PNCC filed motions for judgment on the pleadings. Argument was scheduled for October 30, 1987, and the court instructed counsel to submit any

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opposition papers well in advance of the hearing. On October 29, 1987, plaintiffs moved for leave to amend their complaint. The court denied plaintiff's motion as untimely. The court then ruled that, since PNCC was not a government entity, it did not have to abide by the statutes regarding competitive bidding. The court found plaintiffs had shown no actual or threatened injury since the government is precluded by law from responsibility for the debts of PNCC. The court also found no private right of action by virtue of Orion's failure to obtain a foreign investor's permit. The court then granted the motion of PNCC and Orion for judgment on the pleadings.

¶636 Subsequently, ROP and defendant Lazarus Salii (Salii) moved to dismiss plaintiffs' claims against them. The court found that ROP's contract with Gorones was a service contract and not subject to competitive bidding. The court then dismissed ROP and Salii and, *sua sponte*, Gorones.

THE ISSUES

Plaintiffs bring forth three issues on appeal:

- I. Whether plaintiffs have standing as taxpayers to challenge allegedly illegal government contracts.
- II. Whether plaintiffs' complaint fails to state a claim on which relief can be granted.
- III. Whether plaintiffs were improperly denied leave to amend their complaint.

I. TAXPAYER STANDING

Plaintiffs, as taxpayers and citizens of Palau, have brought this action to, *inter alia*, prohibit defendant ROP from appropriating tax money to Orion pursuant to the contract. The threshold issue before the court is that of plaintiffs' standing as taxpayers to bring an action based upon a claim of future injuries to the general public by virtue of alleged illegal or wasteful expenditure of tax money.

Plaintiffs have filed this action as taxpayers and their status as such is not in dispute. All of plaintiffs' theories are based upon rights which accrue to them as members ¶637 of the general public.

The starting point of our analysis here must be the Constitution of the Republic of Palau. Article X, Section 5, of the Palau Constitution specifically states that "[t]he judicial power shall extend to all matters in law and equity." (emphasis added). Obviously, the use of the term "all matters" is much broader in scope than the terms "cases" or "controversies" used in Article III, Section 2, of the United States Constitution. The jurisdictional language of the Palau Constitution expresses the intent of the Framers that this Court exercise jurisdiction over any and all matters which traditionally require judicial resolution. The extremely broad language of the Palau

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Constitution thus compels us to adopt a very liberal approach in determining whether a plaintiff has standing to bring a particular action. For this reason alone, we must hold that plaintiffs possess standing in this case.

Yet even an analysis based on United States case law corroborates our conclusion that standing must be granted plaintiffs in this case.

The resolution of the standing issue requires the court to determine, based primarily on the allegations contained in the complaint, (1) whether the plaintiff was injured in fact and (2) whether the injury was to a legally protected right. *Colorado General Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985). The key to standing then is an actual **¶638** or threatened injury to plaintiffs, *Valley Forge v. Americans United*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982), for the very essence of civil liberty provides every individual the right to claim the protection of the laws whenever he receives an injury. *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803).

Generally, taxpayers have not been accorded standing to challenge an improper government act based solely on their status as taxpayers. Rather, some distinctly personal injury, distinguishable from that of other taxpayers generally, must be shown. *Frothingham v. Mellon*, 262 U.S. 447, 487, 43 S.Ct. 597, 601, 67 L.Ed.2d 1078 (1923). However, in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), the United States Supreme Court rejected the special injury requirement where Congress violated a constitutional limitation on its spending power. Since that time, many states have greatly liberalized taxpayer standing to allow taxpayer suits against any improper expenditure of public funds without need to show special injury to the plaintiff. See, *Akau v. Olohana Corp.*, 652 P.2d 1130, 1133 (Hawaii 1982), and cases cited therein.

The rationale behind the federal requirement of particularized injury for plaintiffs to maintain taxpayer actions is based, in large part, on the substantial population of the United States. In the United States, with its total population numbering in the hundreds of millions, an individual **¶639** taxpayer's interest in the moneys of the federal treasury is "comparatively minute and indeterminable." *Frothingham v. Mellon, supra*, 262 U.S. at 487, 43 S.Ct. at 601. Thus, no basis for equitable relief can be afforded without a distinct injury distinguishable from any injury to taxpayers as a whole. However, when comparing the interest of an individual Palauan living in a Republic of approximately 15,000 people, the distinction between the Palauan taxpayer and one in the United States, though one of degree, is obvious. See, *Reynolds v. Wade*, 249 F.2d 73, 76 (9th Cir. 1957). In Palau, the interest of the individual taxpayer to moneys in the treasury is not so "minute and indeterminable" as to require a distinct and separate injury in order to have standing to bring a taxpayer action.

The issue of standing is determined by the courts as a matter of policy. If individual taxpayers can do no more than ratify in the voting booth political decisions that have already been made or support with his vote some general policy trend, they are left without the ability to influence the day-to-day affairs of state. These daily decisions determine how far and in what direction this young democracy will advance. Consequently, the individual must be able to take

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the initiative through taxpayer's suits to keep the government accountable. *See, Farley v. Cory*, 78 Cal. App.3d 583, 590, 144 Cal. Rptr. 923, 926 (Cal. App. 1978). This Court's willingness to permit individual taxpayers to assert rights to challenge ¶640 allegedly unlawful government action is consistent with previous decisions allowing citizens to challenge the legality of the Compact of Free Association. *See, Koshiha v. Remeliik*, 1 ROP Intrm. 64, 70 (Tr. Div. 1983); *Gibbons v. Salii*, 1 [FSM sic] Intrm. 333, 336 (App. Div. 1986).

We hold, therefore, that a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered or will suffer some injury in fact from the contested action.

In the instant case, plaintiffs allege that they will suffer injury in fact by virtue of ROP's contractual obligation to pay Orion. Thus, plaintiffs must be accorded standing to maintain a taxpayers' action.

II. CLAIMS FOR RELIEF

A. The Joint Venture Agreement - Government Liability.

The trial court granted defendants' motions for judgment on the pleadings pursuant to Rule 12(c) of the Palau Rules of Civil Procedure. Since Rule 12(c) mirrors Rule 12(c) of the Federal Rules of Civil Procedure, case law interpreting the federal rule is helpful to our analysis here.

Judgment on the pleadings is appropriate when, after the pleadings are closed, the court determines that there is no material issue of fact presented and that one party is clearly entitled to judgment. *Flora v. Home Federal Savings and Loan ¶641 Assn.*, [685 sic] F.2d 209, 211 (7th Cir. 1982). The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain. Wright and Miller, *Federal Practice and Procedure*, Vol. 5, § 1367, 1987 supp., p. 352.

In this case there is no dispute that 1) ROP did not put the contract in question up for bid prior to awarding it to Orion and 2) Orion does not have a foreign investor's business permit.

Plaintiffs allege that since the joint venture agreement between PNCC, as a public corporation wholly owned by the government, and Orion will be financed in whole or in part by funds appropriated by the Olbiil Era Kelulau (OEK) and these appropriations will amount to more than \$5,000, public bidding is mandated by 40 PNC §§ 402 and 403.

Plaintiffs claim that ROP "shall be obligated to pay Orion certain sums of money" pursuant to the joint venture agreement between PNCC and Orion. Plaintiffs' assertion that ROP is bound by this joint venture agreement is based on paragraph 2 of that agreement which reads as follows:

For purposes of this Agreement, the PNCC shall be understood to include

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the government owned corporation called the Palau National Communications Corporation (“PNCC”), the Government of the Republic of Palau and such other officers and agencies of the government having authority over the communications system of Palau.

¶642 A plain reading of this paragraph indicates that the agreement contemplated that PNCC would include ROP. Thus, plaintiffs’ allegation that ROP would be obligated to provide funds pursuant to this agreement was sufficient to provide them with standing to bring this action. However, as a matter of law, ROP cannot obligate funds which must be appropriated by the OEK unless written certification is obtained that the funds sought are available. 40 PNC § 401. In this case, no certification was obtained and, therefore, the joint venture agreement must be considered void to the extent that it purports to bind ROP.

B. The Business Permit - Enforcement.

The second prong of plaintiffs’ second cause of action relates to the failure of Orion to obtain a foreign investor’s permit pursuant to 28 PNC §§ 141, *et seq.* Any noncitizen doing business without a business license is guilty of a misdemeanor and subject to imprisonment for not more than one year and a fine of not more than \$1,000. 28 PNC § 167.

The trial court found that, as a matter of law, the decision whether to prosecute for failure to obtain a business permit rests with the Attorney General. Notably, the penalties for failure to obtain such a permit (e.g., imprisonment) indicate the necessity for prosecution by the government, not a private right of action.

Therefore, plaintiffs have failed to state any cause of action against PNCC or Orion and the trial court’s ruling ¶643 granting said defendants’ motion for judgment on the pleadings must be affirmed.

C. The Gorones Contract - Goods or Services?

Subsequent to the court’s granting of the Rule 12(c) motion brought by Orion and PNCC, defendants ROP and Salii filed a motion to dismiss with respect to plaintiffs’ first cause of action. This cause of action alleges that the contract between ROP and Gorones for management of the Aimeliik Power Plant is void as no bidding was engaged in prior to the awarding of the contract and plaintiffs are burdened by the sums being paid Gorones by ROP out of the public funds.

In granting ROP and Salii’s motion the trial court reviewed the contract in question as well as the affidavit of Raphael Ngirmang. Although the contract was incorporated by reference into the complaint, the affidavit is clearly a matter outside the pleadings. Where matters outside the pleadings are considered pursuant to a motion to dismiss for failure to state a claim, the motion must be treated as a summary judgment motion. *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir. 1987).

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In this case there is no dispute that the contract between ROP and Gorones was for an amount in excess of \$5,000 and no competitive bidding process was engaged in as contemplated by 40 PNC §§ 402 and 403. The issue here is whether this is a contract for the “purchase of goods, commodities or 1644 materials” which would necessitate competitive bidding or whether, as the trial court held, this is a service contract and need not be let out for bid.

Construction and legal effect to be given an unambiguous contract is a question of law to be decided by the court. *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 682 (DC Cir. 1985); This is so even though the ultimate inquiry in the interpretive process is the intent of the parties - an issue ordinarily considered inherently factual. See, *Calamari v. Perillo, Contracts*, 43 n.13 (2d ed. 1977). Cf. *Pullman-Standard v. Swint*, 102 S.Ct. 1781, 1784 (1982). Because the unambiguous terms of the contract are presumed to embody the intent of the parties, submission of questions of interpretation to the trier of fact is unnecessary. *NRM Corp. v. Hercules, Inc.*, *supra*, 758 F.2d at 682 n.16.

A plain reading of the contract between ROP and Gorones indicates that it is for services. Plaintiffs contend that the cost of the fuel for the power plant (goods) is in excess of \$5,000. However, paragraph 4 of the contract clearly indicates that all fuel, supplies, parts and other goods needed for the operation of the power plant will be supplied by the government. Similarly, paragraph 13 obliges the government, not Gorones, to supply trucks and equipment. Since this contract is for services, the provisions of 40 PNC §§ 402 and 403 are not applicable.

1645 Based on the foregoing, the order of the trial court dismissing ROP, Salii and, *sua sponte*, Gorones, must be affirmed.

III. LEAVE TO AMEND

The trial court denied plaintiffs’ motion to amend their complaint as untimely. Review of a trial court’s refusal to permit the filing of an amended complaint generally implicates an abuse of discretion standard. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Failure to grant leave to amend pleadings is ordinarily not reversible error, although the court’s discretion must not be abused and refusal to permit amendment must have a justifying reason. *Williams v. Shipping Corporation of India, Ltd.*, 354 F. Supp. 626, 630, (SD Ga. 1973).

In this case, plaintiffs sought leave to amend their complaint the day before the scheduled hearing on PNCC and Orion’s motion for a judgment on the pleadings. We find no abuse of discretion on the part of the trial court in denying leave to amend at such a late date.

CONCLUSION

Plaintiffs possess standing pursuant to their allegation of future appropriations to PNCC. However, plaintiffs have failed to state any claim in which relief can be granted because 1) ROP is not a party to the PNCC-Orion joint venture agreement as no funds have been certified as 1646 available for this agreement, 2) there is no private right of action with respect to foreign investors permits, and 3) the Gorones contract is for services and not subject to the bid

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requirements of 40 PNC § 402. Finally, the trial court's denial of plaintiffs' motion for leave to amend was not an abuse of discretion.

Based on the foregoing, the orders of the trial court granting PNCC and Orion's motion for judgment on the pleadings and granting ROP, Sali, and sua sponte, Gorones' motion to dismiss are hereby AFFIRMED.