ROP v. Koshiba, 8 ROP Intrm. 243 (2000)

REPUBLIC OF PALAU,
Appellant,

v.

JOSHUA KOSHIBA, Individually and as
Class Representative on Behalf of All Past and Present Contributors
To the Republic of Palau Civil Service Pension Plan,
Appellees.

CIVIL APPEAL NO. 99-29
Civil Action No. 237-94

Supreme Court, Appellate Division
Republic of Palau

Decided: December 14, 2000[1]

Counsel for Appellant: David C. Perrin, Legal Counsel to the Office of the President

Counsel for Appellees: Bruce Lamka, Davis, Wright and Tremaine, LLP; Richard Brungard, Law Office of Brungard and O'Connor

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; JANET HEALY WEEKS, Part-Time Associate Justice.

NGIRAKLSONG, Chief Justice:

The Republic of Palau ("ROP") appeals from the trial court's September 10, 1999 Order awarding Appellees' counsel Davis, Wright and Tremaine ("DWT") $189,825.25 in attorneys' fees based on the common benefit doctrine. We affirm.

Background

On July 1, 1994, Appellee Joshua Koshiba brought this action on behalf of a class of government pensioners against the ROP, the Palau National Civil Service Pension Plan, ("Plan"), and several individual defendants, challenging the ROP's failure to fund the Plan adequately. In legislation that took effect in late 1994 and early 1995, the Olbiil Era Kelulau ("OEK") appropriated a total of $2.23 million to the Plan. Shortly thereafter, in February 1995, DWT entered an appearance as co-counsel with Appellees' original counsel, who later withdrew from the case. The OEK then appropriated another $1.5 million to the Plan on November 24, 1995.

[1] The parties have waived oral argument, and the Court agrees that oral argument would not materially advance the resolution of this appeal. *See Irikl Clan v. Renguul*, 8 ROP Intrm. 156, 156 (2000).

On December 6, 1996, the parties entered a Stipulation of Settlement, which stated that the Plan was actuarially sound, obligated the ROP to continue funding the Plan as necessary to keep it actuarially sound, and provided for dismissal of all claims other than those for attorneys' fees. DWT moved for attorneys' fees based on the common benefit doctrine, arguing that because the litigation prompted significant appropriations to the Plan, to the benefit of all Plan contributors, the court should award fees from the Plan's funds as a means of "spreading fees proportionately among those benefitted by the suit." *Boeing Co. v. Van Gemert* , 100 S.Ct. 745, 749 (1980).[2] The ROP responded that the doctrine was inapplicable and there were no legal grounds for awarding fees.

At a hearing held August 18, 1999, the trial court stated that it was inclined to apply the doctrine, proposed a method of calculating ⊥244 a fee award thereunder, and invited counsel to submit evidence supporting or contesting its proposed calculations. DWT submitted documents supporting the calculations. The ROP reiterated its contention that there was no legal basis for awarding fees, but did not address the fee calculation issue. In an Order dated September 10, 1999, the trial court held that the doctrine applied, concluded that the OEK's appropriations were a result of the litigation, and thus held that fees should be awarded from Plan funds so as to distribute litigation costs among all the Plan members who benefitted from the litigation.[3] The court, applying the calculation method it proposed at the August 18, 1999, hearing, calculated the value of the benefit conferred on the Plan because of DWT's efforts.[4] The court then awarded DWT its requested fees of $189,825.25, because this amount was slightly less than twenty-five percent of the benefit conferred, and the court found this percentage reasonable. The court entered a judgment dated September 14, 1999, which incorporated the December 6, 1996, Settlement Agreement and the September 10, 1999, fee award. The ROP then brought this appeal.

Analysis

A. Standing

DWT, citing several United States cases, contends that the ROP does not have standing to

---

[2] DWT filed this motion on remand, after this Court reversed the trial court's holding that sovereign immunity barred any award of attorneys' fees. *See Koshiba v. Alonz*, 7 ROP Intrm. 154 (1999).

[3] The ROP has not appealed the trial court's finding that the appropriations were a result of this litigation.

[4] Based on this calculation method, the court reasoned that but for the ongoing litigation, the OEK would not have appropriated the $1.5 million it appropriated during DWT's involvement in 1995 until September 1998, when several events eased economic pressures on the National Treasury. The court then calculated the time value of the Plan's receiving that sum three years earlier, by citing investment indices reflecting an 18.03% return on the $1.5 million, for a total return of $966,428 over three years. The court identified that return as the benefit conferred by the litigation.

appeal the fee award because the fees are to be paid by the Plan, not by the ROP. We disagree. Our Constitution's grant of judicial power over "all matters in law and equity" is broader than the U.S. Constitution's grant of judicial power over "cases" and "controversies." *See Gibbons v. ROP*, 1 ROP Intrm. 634, 640 (1989). The "extremely broad language of the Palau Constitution . . . compels us to adopt a very liberal approach in determining whether a plaintiff has standing." *Id.* at 637; *accord Becheserrak v. ROP* , 5 ROP Intrm. 63, 66 (1995). Thus, because Article X, section 5 of the ROP Constitution is "much broader" than Article III, section 2 of the U.S. Constitution, we must take a "broad view of what and by whom matters may be brought before the Court." *Skebong v. ROP Environmental Quality Protection Bd.,* 8 ROP Intrm. 83, 85 (1999). While "'[t]he key to standing is an actual or threatened injury,'" *Becheserrak,* 5 ROP Intrm. at 67, "[o]nly slight injury" is required, and "an identifiable trifle is enough for standing to fight out a question of principle." *Id*. at 67. Accordingly, although a plaintiff may not pursue claims that are "purely hypothetical" and could not result in concrete relief, *see Kruger v. Social Sec. Bd.,* 5 ROP Intrm. 91, 93 (1995), injury may be minor rather than severe, and may be threatened or potential rather than immediate.

The ROP's interests are sufficient to confer standing under these principles. While the ROP is not directly liable to pay a fee award assessed against the Plan's funds, it nonetheless has concrete interests therein. It was sued in this case based on its duty to ensure the soundness of the Plan, and is now bound by a decree that imposes ongoing ⊥245 financial obligations to the Plan.[5] Because of the ROP's obligations to maintain the actuarial soundness of the Plan, an assessment of fees against the Plan's funds affects the ROP and its liability to the Plan. Although the ROP is not directly, immediately, liable to reimburse the Plan for the fee award, [6] we have not required a direct, immediate, or severe impact on a party's interests, but rather have simply required a causal nexus between the issues at stake and the litigant's interests. *See, e.g., Gibbons*, 1 ROP Intrm. at 640, 641-42 (granting taxpayers standing to challenge a government contract as an "illegal or wasteful expenditure of tax money," although contract did not have direct or significant effect on taxpayers' interests); *Olikong v. Salii* , 1 ROP Intrm. 406, 412 (1987) (granting non-absentee voters standing to challenge absentee voting procedures on grounds that "[a]ny voter who discerns an illegal procedure . . . which has the effect of distorting or nullifying the votes cast has standing"). Under our Constitution's broad standing principles, the ROP's legal and financial obligations to the Plan give rise to a sufficiently concrete interest in this dispute over fees assessed against the Plan's funds to vest the ROP with standing to pursue this appeal.

While we base this holding on our own Constitution, we also note that, contrary to DWT's assertions, U.S. case law further supports this recognition of standing. DWT cites cases stating that defendants who have discharged their liabilities in the underlying case have no further interest in fee disputes between plaintiffs and their counsel. However, these cases

---

[5] *See* Consent Decree at 3 ("[t]he provisions cited . . . above obligate the Republic of Palau . . . to appropriate and contribute any additional sums needed to keep the Fund on a sound actuarial basis.").

[6] *See Koshiba*, 7 ROP Intrm. at 157-58 (noting that "there is not necessarily a one-to-one correspondence between payments made out of the Fund and payments to the Fund by the Republic").

commented on the defendant's apparent lack of interest in dictum, without addressing actual challenges to the defendant's standing. [7] Cases that have directly addressed the standing issue have held that a defendant may properly contest a fee award, even if it is not liable to pay the fees, under the doctrine of ancillary standing. *See Jackson v. United States,* 881 F.2d 707, 707-08, 711 (9th Cir. 1989) (recognizing government's ancillary standing to appeal fee award from settlement funds, although "settlement agreement [had] fixed the amount of the government's liability" because government's "interest in defending the underlying action . . . satisfies the . . . prerequisites to establishing [standing] under . . . the Constitution."); *accord Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1303 (9th Cir. 1990) (following *Jackson* and holding that, although plaintiffs' award was already fixed and defendant had no further obligations, defendant had ancillary standing to contest fee award). Thus, although there is "some question" as to standing when a government defendant has ⊥246 surrendered the funds from which fees would be paid, this issue "has been resolved in favor of affording the government standing." *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1265 n.1 (D.C. Cir. 1993) (citations omitted). These cases recognizing defendants' standing in circumstances similar to this case, despite the U.S. Constitution's more restrictive grant of standing, further confirm our conclusion that the ROP has standing to appeal the award of attorneys' fees.

B. The Common Benefit Doctrine

The trial court awarded DWT fees under what it described as the common fund doctrine, whereby a party who:

> recovers a common fund for the benefit of . . . other[s] . . . is entitled to a reasonable attorney's fee from the fund as a whole . . . . The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense . . . . Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit.

Boeing, 100 S. Ct. at 749 (citations omitted). The common fund doctrine is a variant of the broader common benefit doctrine, which applies not only where the litigation produces or preserves a distinct fund, but also where the litigation yields non-monetary relief that benefits a class of persons beyond the plaintiffs themselves. *See Rosenbaum v. MacAllister*, 64 F.3d 1439, 1444 (10th Cir. 1995). Courts, however, often use the terms interchangeably by defining "the

---

[7] *See Boeing*, 100 S.Ct. at 751 & n.7 (1980) (noting defendants' lack of a "cognizable interest in further litigation between the [plaintiff] class and its lawyers over the amount of fees ultimately awarded from money belonging to the class"); *id.* at 754 & n.4 (Rehnquist, J., dissenting) (noting that "respondents have not challenged standing"); *Florin v. NationsBank of Georgia, N.A.*, 34 F.3d 560, 562 n.1 (7th Cir. 1994) (observing that there was "no respondent" opposing fee petition because defendants had "no interest in the amount of fees . . . counsel want to extract from the fund"); *Rawlings v. Prudential-Bache Properties, Inc.,* 9 F.3d 513, 515 (6th Cir. 1993) ("Because the fees are to be paid from the common fund . . . defendants have no direct interest in . . . this appeal and did not file a brief or otherwise appear.").

term 'common fund doctrine' . . . broadly so as to incorporate the 'common benefit' doctrine." *Savoie v. Merchants Bank*, 84 F.3d 52, 56 n.3 (2d Cir. 1996) (citations omitted). [8] Thus, although the trial court used the narrower "common fund" terminology, we find it appropriate to consider both common fund and common benefit cases to elucidate the scope of judicial power to award fees under these doctrines.

The ROP does not dispute that a fee award from Plan funds would distribute litigation costs among those who benefitted from this litigation, but rather contends that the common benefit theory is inapplicable as a matter of law because the court did not have jurisdiction over the Plan's funds and because the benefits were conferred by the OEK rather than by a party to the case. Upon considering these questions of law *de novo, see Becheserrak v. ROP* , 8 ROP Intrm. 147, 147 (2000), we disagree.

1. Jurisdiction Over a Fund

Because our courts have not previously addressed the scope of the common benefit doctrine, we turn to the relevant U.S. case law, which demonstrates that a court need not exert jurisdiction directly over the funds in question in order to award fees under the common benefit doctrine. In *Mills v. Electric Auto-Lite Co.* , 90 S.Ct. 616, 625 (1970), the Court, in approving a fee award from corporate funds after the ⊥247 shareholder plaintiff obtained a judgment to set aside a merger, held that:

> [t]o allow others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense . . . . The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases . . . involved litigation that had produced or preserved a 'common fund' for the benefit of a group, *nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement* . . . .

Mills, 90 S.Ct. at 625-26 (emphasis added). The Court further observed that many cases had:

> departed . . . from the traditional metes and bounds of the [common fund] doctrine, to permit reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where *the court's jurisdiction over the subject matter of the suit makes possible* an award that will operate to spread the costs proportionately among them.

Id. at 626 (emphasis added).[9]

---

[8] *See also Bowles v. Washington Dep't of Retirement Sys.*, 847 P.2d 440, 449 (Wash. 1993) (noting that, although common fund and common benefit theories once "carried different requirements, they are now generally phrased in the same manner").

[9] *See also Fleischmann Distilling Corp. v. Maier Brewing Co.*, 87 S.Ct. 1404, 1407

This language clearly demonstrates that courts are not strictly confined to the traditional "metes and bounds" of the original common fund doctrine, and need not have direct control over a discrete monetary fund as a legal "prerequisite to [their] power" to award fees under the common benefit rationale, but rather have discretion to fashion fee awards that will distribute fees equitably.

The ROP cites the statement that "[j]urisdiction over the fund involved . . . allows a court to prevent . . . inequity" by awarding fees from the fund, *Boeing*, 100 S.Ct. at 749, and argues that this language imposes a requirement of jurisdiction directly over the fund. The broader language cited above compels us to disagree. While *Boeing* confirms that jurisdiction over a fund *enables* a court to fashion an appropriate fee award, it does not indicate that such jurisdiction directly over the fund is necessary. To the contrary, "a court's reach or control, though vital, can take many forms," so "a fund . . . in the hands of a court appointee . . . is not a necessity." *In re Air Crash Disaster*, 549 F.2d 1006, 1018-19 & n.16 (5th Cir. 1977). As is apparent from *Mills*, jurisdiction over the subject matter involving the funds and over the parties that control the funds can supply sufficient reach or control over the ⊥248 funds in question for a court to fashion an award that will equitably distribute litigation costs. *Mills*, 90 S.Ct. at 626 ("jurisdiction over the subject matter of the suit makes possible an award that will . . . spread the costs proportionately"). We therefore join the courts that have taken a pragmatic, flexible approach to determining whether a court has sufficient authority to reach the funds that will allow it to distribute fees equitably, [10] and hold that where, as here, the court has jurisdiction over the subject matter involving the funds and over the parties that control the funds, the court need not have jurisdiction directly over the funds in order to apply the common benefit doctrine. *See Bowles v. Washington Dep't of Retirement Sys.*, 847 P.2d 440 (Wash. 1993) (awarding fees from pension funds to plaintiffs who secured order requiring recalculation of benefit amounts, where court had jurisdiction over pension plan as a party but had not assumed jurisdiction over pension

---

(1967) (discussing "variation of the common-fund situation" where, although plaintiff had not "create[d] a common fund," plaintiff established precedent allowing "a discernible class of persons to collect upon similar claims," justifying fee award "for the same reasons that underlay the common fund decisions") (citations and internal quotations omitted); *Koppel v. Wien*, 743 F.2d 129, 134 (2d Cir. 1984) ("the non-monetary benefits resulting from plaintiffs' suit would fully justify a fee award") (citations omitted).

[10] *See McIntosh v. Pacific Holding Co.*, 928 F. Supp. 1464, 1473 (D. Neb. 1996) (stating that need for judicial control over funds is an "essentially pragmatic requirement" that "is generally satisfied by jurisdiction over a party that controls the fund") (citations and internal quotations omitted), *rev'd on other grounds*, 120 F.3d 911 (8th Cir. 1997); *Kerr v. Killian*, 3 P.3d 1133, 1138 (Ariz. Ct. App. 2000) (rejecting as "too technical" the argument that common fund theory was inapplicable where funds that were to benefit plaintiff class in the form of future tax refunds were not in court's control and were not segregated from other funds in government defendant's budget); *Community Care Ctrs., Inc. v. Indiana Family & Soc. Servs. Admin.*, 716 N.E.2d 519, 548 (Ind. Ct. App. 1999) (upholding fee award under common benefit doctrine although court "did not have jurisdiction over the fund," because "the *sine qua non* of control is the court's present authority to assess an attorney's fee proportionately and accurately from each beneficiary's traceable portion of a distinct pool of funds").

plan's funds); *Community Care Ctrs., Inc. v. Indiana Family & Soc. Servs. Admin.* , 716 N.E.2d 519, 546 (Ind. Ct. App. 1999) (awarding fees from additional medicaid reimbursements paid to class members because of injunction that increased reimbursements, on the grounds that there was "no appreciable difference" between such funds when paid directly to plaintiffs due to injunction and such funds if paid into court as damages).

In doing so we do not, as the ROP suggests, invite indiscriminate departures from the general rule that parties must bear their own litigation costs. The common benefit doctrine is a narrow exception to this rule that does not "saddle the unsuccessful party" with the litigation costs, but rather imposes such costs "on the class that has benefitted from them and that would have had to pay them had it brought the suit." *Id*. at 628. This exception has been carefully limited to circumstances where the class of persons benefitted by the litigation is "'small . . . and easily identifiable,'" the "'benefits [can] be traced with some accuracy,'" and there is "'reason for confidence that the costs [of litigation] could indeed be shifted with some exactitude to those benefitting.'" *Boeing*, 100 S. Ct. at 749 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 95 S.Ct. 1612, 1626 n.39 (1975)). In light of these clear limits on the scope of the common benefit doctrine, which are satisfied in this case, [11] we find no grounds for restricting the doctrine to cases where the benefit consists of a discrete fund under direct judicial control. We accordingly reject the ROP's contention that the trial court erred in applying the ⊥249 doctrine in the absence of judicial jurisdiction over the funds from which fees were awarded.

2. Involvement of a Non-Party

The ROP also asserts that the common benefit theory is limited to cases where the benefit is conferred by a party to the litigation, and thus is inapplicable here where the funds were appropriated by the OEK, which is not a party. We disagree. Even if we could find some legal authority limiting the common benefit doctrine in this manner, [12] we cannot accept the ROP's assertion that the benefits in this case were conferred by a non-party. While the OEK is a distinct legal entity, it is nonetheless a branch of the ROP national government. In passing the legislation that appropriated the funds, the OEK was not conferring a benefit on its own behalf. Rather, it was performing its role as a branch of the ROP national government by passing legislation, which took effect only when the President of the ROP signed it into law, and which directed funds from the National Treasury to a national government program, in order to relieve the ROP and the Plan from the pressures exerted by this litigation. [13] Thus, although the OEK played a

---

[11] The ROP does not dispute that in this case, which increased pension funding for the small and easily identifiable class of Plan beneficiaries, an award of fees against Plan funds will shift the costs with exactitude to this class of beneficiaries.

[12] The ROP cites cases describing the common benefit doctrine as applicable when "a litigant confers a substantial benefit . . ." *Cantwell v. City of San Mateo*, 631 F.2d 631, 639 (9th Cir. 1980). However, while litigation is obviously resolved most frequently by the litigants, we are unaware of any case holding that this is an additional legal requirement beyond the requirement that the litigation be a proximate cause of the benefits.

[13] Contrary to the ROP's objection that the OEK did not act pursuant to a judgment or settlement, "[f]ees may be awarded even when . . . the dispute has become moot because the relief sought is otherwise obtained." *Koppel*, 743 F.2d at 134.

role in making the appropriations, it did so in its capacity as part of the ROP national government, in conjunction with the President, using funds that belonged to the ROP national government, to serve the ROP national government's interest in resolving this litigation. Thus, the OEK's role in the appropriations process does not alter the fact that the benefit was ultimately conferred by the ROP. Because neither the lack of direct judicial control over the Plan's funds nor the OEK's role in making appropriations to the Plan rendered the common benefit doctrine inapplicable, we affirm the trial court's application of the doctrine in this case.

C. Fee Calculation

The ROP contends that the trial court abused its discretion in calculating the amount of fees it awarded under the common benefit doctrine because it took judicial notice of matters that are not proper subjects for judicial notice. DWT responds that the ROP waived any objections to the fee calculations by failing to raise them below. *See Koror State Gov't v. ROP* , 3 ROP Intrm. 314, 322 (1993). We agree. At the August 18, 1999 hearing, the trial court proposed a fee calculation method and invited the parties to make submissions supporting or challenging the proposed calculations. The ROP did not avail itself of this opportunity, but instead merely reiterated its contention that the common benefit doctrine did not apply. Contrary to the ROP's assertion that its challenge to the applicability of the common benefit doctrine "incorporates the rejection of any calculation of . . . fees," the issue of whether the doctrine applies is entirely distinct from the issue of how to calculate a fee award under that doctrine. By declining to make submissions on the latter issue, the ROP waived any challenge to the fee calculations. We thus affirm the fee award.

⊥250 **Conclusion**

For the foregoing reasons, we AFFIRM the trial court's Order awarding DWT attorneys' fees.