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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

**MARIA A. GANGE, JESUS CRUZ CHARFAUROS,
ANA A. CHARGUALAF, JESUS G. AGUIGUI,
for themselves and on behalf of all others similarly situated,
Plaintiff-Appellants,**

v.

**GOVERNMENT OF GUAM, GUAM ANCESTRAL LANDS
COMMISSION, by and through its individual Commissioners (for injunctive
relief) and DOES One (1) through Three Hundred (300), inclusive,
Defendant-Appellees.**

Supreme Court Case No.: CVA15-029

Superior Court Case No.: CV1461-10

OPINION

Cite as: 2017 Guam 2

Appeal from the Superior Court of Guam
Argued and submitted on October 25, 2016
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.¹

TORRES, C.J.:

[1] Plaintiffs-Appellants Maria Gange, Jesus Cruz Charfauros, Ana A. Chargualaf, and Jesus G. Aguigui (collectively, the “Excluded Beneficiaries”) are Guam Ancestral Land Bank Trust (“Trust”) beneficiaries who succeeded before the Superior Court in enjoining the Commissioners (the “Commissioners”) of the Guam Ancestral Lands Commission (the “Commission”) from transferring two large lots from the Trust corpus as mandated by Guam Public Law 30-158. The Excluded Beneficiaries appeal an order of the Superior Court that concluded the doctrine of sovereign immunity deprives the courts of the subject matter jurisdiction necessary to award attorney’s fees and costs in this action.

[2] At issue is the Superior Court’s application of our recent decision in *Bautista v. San Agustin*, 2015 Guam 23, to the facts at bar; its determination that the Trust performs a governmental, rather than proprietary, function; and its conclusion that the Guam Legislature (“Legislature”) has not waived sovereign immunity on these facts.

[3] For the reasons set forth below, we determine that the Superior Court did not err, and we dismiss this appeal for want of jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[4] “[W]orld war, and attendant national security interests of the United States, motivated the taking of vast tracts of Guamanian lands by the United States,” but many takings were “unconscionable, unfair, unjust and inequitable.” Guam Ancestral Lands Act, Guam Pub. L. 25-045:2(c) (June 9, 1999). The Guam Ancestral Lands Act of 1999, codified at 21 GCA Chapter

¹ The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

80, sought to rectify these injustices by establishing the Commission, which is tasked with restoring lands taken by the United States federal government to ancestral landowners.

[5] In establishing the Commission, the Legislature recognized that some “ancestral landowners . . . by virtue of continued government or public benefit use cannot regain possession or title to their ancestral lands.” 21 GCA § 80104(e) (2005). The Commission was statutorily tasked with establishing the Trust on behalf of these dispossessed ancestral landowners and instructed to use the income derived from the Trust corpus—certain non-ancestral lands—to pay compensation to dispossessed landowners. The Trust corpus includes Lot Naval Radio Station and Lot Andersen South, large tracts of several hundred acres each.

[6] On July 13, 2010, Acting Governor Mike Cruz signed Bill No. 278, which became Guam Public Law 30-158. This act instructed the Commission to deed Lot Naval Radio Station and Lot Andersen South to “ancestral landowners of Tiyan properties, whose properties were not returned to them and were retained by the A.B. Won Pat International Airport Authority.” Guam Pub. L. 30-158:1 (July 13, 2010) (emphasis omitted). These particular dispossessed ancestral landowners were to take a share of the new property proportionate to that “retained and not returned to them by [the Airport Authority] based on a value for value or size for size basis at the discretion of the [Commission].” P.L. 30-158:3 (emphasis omitted). The Act would not benefit dispossessed ancestral landowners with claim to property not used by the Airport Authority and it would not have compensated the Trust or the Excluded Beneficiaries for the land to be taken.

[7] The Excluded Beneficiaries filed their complaint, seeking declaratory relief and requesting the Superior Court enjoin the Commissioners from transferring Lot Naval Radio Station and Lot Andersen South from the Trust corpus. In the alternative, they sought payment of just compensation.

[8] The Superior Court granted the Excluded Beneficiaries a temporary restraining order. Subsequently, the Excluded Beneficiaries amended their complaint. The Superior Court thereafter entered partial summary judgment in favor of the Excluded Beneficiaries, enjoining the land transfer as a taking without valid public purpose. The Government of Guam (“Government”) did not appeal.

[9] The Excluded Beneficiaries then filed a motion for attorney’s fees and costs, which the Superior Court granted in part. The Superior Court reasoned that fees were appropriate under the common fund doctrine, an exception to the American Rule under which litigants bear their own expenses. The common fund doctrine applies “when [a litigant’s] representative action creates or traces a ‘common fund,’ the economic benefit of which is shared by all members of the class,” *Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973), or where litigation “‘corrects or prevents an abuse which would be prejudicial to the rights and interests’ of . . . others,” *id.* (quoting *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970)).

[10] Following the Superior Court’s Decision and Order, this court issued *Bautista*, 2015 Guam 23, deciding that sovereign immunity precluded the award of attorney’s fees under the common fund doctrine in a suit brought against the Trustees of the Government of Guam Retirement Fund. *Bautista*, 2015 Guam 23 ¶ 53. The court found sovereign immunity precluded the award in *Bautista* even though the capital was merely held in trust for the beneficiaries and was not part of the general treasury.

[11] In response, the Government filed a motion for reconsideration of the Superior Court’s decision to grant attorney’s fees and costs in this case. The Superior Court granted the Government’s motion, finding that the reasoning of *Bautista* precluded awarding fees and costs from funds in the Government’s possession, that the Commissioners—acting through the Trust—

carried out a governmental function, and that the Legislature had not waived sovereign immunity.

II. JURISDICTION

[12] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-24 (2017)); 7 GCA §§ 3107, 3108(a) (2005). The Excluded Beneficiaries timely appealed from the Superior Court judgment. However, as explained below, sovereign immunity acts to deprive courts of subject matter jurisdiction where it applies. This is such a case.

III. STANDARD OF REVIEW

[13] This court reviews jurisdictional issues *de novo*, *Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25 ¶ 11 (citing *Core Tech Int'l Corp. v. Hanil Eng'g & Constr. Co.*, 2010 Guam 13 ¶ 16), including the question whether sovereign immunity has been waived, *id.* (citing *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 7).

IV. ANALYSIS

[14] “The Government of Guam enjoys broad sovereign immunity,” *Bautista*, 2015 Guam 23 ¶ 18 (quoting *Guam Fed'n of Teachers v. Perez*, 2005 Guam 25 ¶ 18), when engaged in governmental functions, *see Guam Police Dep't v. Superior Court of Guam (Lujan)*, 2011 Guam 8 ¶ 13. Sovereign immunity is not narrowly constrained to the Government and its instrumentalities; “[a] suit against an officer constitutes a suit against the sovereign if the judgment sought would expend itself on the public treasury or domain” *Bautista*, 2015 Guam 23 ¶ 19 (quoting *Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 19).

[15] As a general rule, the doctrine of sovereign immunity does not bar an action seeking only injunctive relief,² see, e.g., *Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 21, but an award of attorney's fees is barred by sovereign immunity where it applies, see *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991). If sovereign immunity is applicable and would otherwise act to deprive the courts of subject matter jurisdiction, only duly enacted legislation can waive this immunity, and any waiver must be express. See 48 U.S.C.A. § 1421a (Westlaw through Pub. L. 115-24 (2017)); see also *Bautista*, 2015 Guam 23 ¶ 18; *Lujan*, 2011 Guam 8 ¶¶ 7-8; *Sumitomo Constr.*, 2001 Guam 23 ¶ 9.

[16] Accordingly, we first discuss application of *Bautista* to determine whether the funds at issue are sufficiently within the Government's possession or control to implicate sovereign immunity; second, we apply the governmental/proprietary distinction to the facts of this case; and third, we assess whether 7 GCA § 26602 or 21 GCA § 15112 acts as an express legislative waiver of sovereign immunity under these circumstances.

A. Sovereign Immunity as Applied to Non-Treasury Funds in the Government's Possession—Application of *Bautista v. Agustin*, 2015 Guam 23

[17] The *Bautista* court clarified application of the sovereign immunity doctrine in scenarios where the money at issue is in the Government's possession but not part of the general treasury. The *Bautista* court held that "sovereign immunity applies as long as the government is in possession of the property" and recognized that "[t]he policy behind sovereign immunity is driven, not only by the protection of public funds, but also by the efficient and uninterrupted administration of government functions." 2015 Guam 23 ¶ 52.

² This is because of the generally prospective effect of an injunction. See *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). It is not enough, however, to label relief as equitable if "it is in practical effect indistinguishable in many aspects from an award of damages against the State." *Id.* at 668.

[18] The Excluded Beneficiaries argue that the Trust is private, and for this reason sovereign immunity does not bar recovery of attorney's fees in this action even under the reasoning of *Bautista*. Appellants' Br. at 9 (May 4, 2016). The Excluded Beneficiaries contend that the Commission's enabling legislation did not establish the Trust as an entity of the Government. *Id.*

[19] The Government responds that this case is materially indistinguishable from *Bautista*. Appellee's Br. at 17 (June 6, 2016). In each case, the relevant plaintiff sought injunctive relief against officials in their official capacity within instrumentalities of the Government—the Trustees of the Retirement Fund in *Bautista* and the Commissioners in the case at bar.³ *Id.* In both cases, the underlying prospective injunctive relief is not barred by sovereign immunity, *see, e.g., Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 21, but, the Government argues, sovereign immunity bars an award of attorney's fees against funds in the Government's possession.

[20] In *Bautista*, we declined to follow *Pensioners Protected Ass'n v. Davis*, 150 P.2d 974 (Colo. 1944) (en banc), in which the Supreme Court of Colorado held that sovereign immunity does not bar recovery of attorney's fees from pension funds because it does not contain public money—the government being only a custodian of the funds. *Bautista*, 2015 Guam 23 ¶¶ 48, 52. Instead, the *Bautista* court relied on more recent federal cases, *id.* ¶¶ 49-51, holding that possession of the funds was the true measure for applicability of sovereign immunity, *id.* ¶ 52.

[21] While the Excluded Beneficiaries argue the Trust is “private,” Appellants' Br. at 9, counsel at oral argument conceded that the Commission acts at least as a temporary custodian of the funds. Indeed, the statutory scheme makes the Commission's possession of the money unmistakable. “The Commission shall establish rules and regulations pursuant to the Administration Adjudication Law for the Guam-based trust,” and any income derived from the

³ The Retirement Fund is an autonomous agency of the Government pursuant to 5 GCA § 6102, and the Commission is “within” the government pursuant to 21 GCA § 80103.

Trust corpus “shall be used to provide just compensation for those dispossessed ancestral landowners.” 21 GCA § 80104(e). As the Superior Court recognized, in order to use the income to pay compensation the Commission must be in possession of the proceeds just as they hold title to the properties as trustees. Record on Appeal (“RA”), tab 151 at 16-17 (Dec. & Order, Nov. 25, 2015). Thus, sovereign immunity applies as an initial matter under the reasoning of *Bautista*, 2015 Guam 23.

B. The Proprietary Function Exemption to Sovereign Immunity

[22] The court is aware that some state judiciaries recognize application of the governmental/proprietary dichotomy while others reject it, extending immunity to all acts of the government where it has not expressly waived immunity. Compare *Jones v. Cross*, 260 S.W.3d 343, 345 (Ky. 2008) (accepting the dichotomy), and *Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321, 1328 (Kan. 1997) (accepting the dichotomy), with *Guthrie v. N.C. State Ports Auth.*, 299 S.E.2d 618, 624 (N.C. 1983) (rejecting the dichotomy), and *Univ. of Alaska v. Nat’l Aircraft Leasing, Ltd.*, 536 P.2d 121, 128 (Alaska 1975) (rejecting the dichotomy). The court is also aware that the Organic Act instructs that the Government “shall have power to sue [under its name], and, *with the consent of the legislature evidenced by enacted law*, may be sued,” 48 U.S.C.A. § 1421a (emphasis added), and that the Legislature has asserted that “[t]he authority and power to waive the immunity to suit of the government of Guam, or any of its authorities, departments, agencies, or instrumentalities is vested solely in the Guam Legislature,” 1 GCA § 405 (2005). But we decline the Government’s invitation to consider rejecting this common-law dichotomy—which we have previously applied, *see, e.g., Bautista*, 2015 Guam 23 ¶¶ 33-34—because of the limited briefing and argument before this court and because, in this instance, application of the distinction is not outcome determinative.

[23] Sovereign immunity may not apply where the government is acting in a proprietary rather than governmental function. *Lujan*, 2011 Guam 8 ¶ 13. “Proprietary functions are those ‘conducted in the government’s private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government.’” *Id.* (quoting *Galveston Indep. Sch. Dist. v. Clear Lake Rehab. Hosp., L.L.C.*, 324 S.W.3d 802, 807 (Tex. App. 2010)). These functions are “exercised when an enterprise is commercial in character or is usually carried on by private individuals or is for the profit, benefit, or advantage of the governmental unit conducting the activity.” *Id.* (quoting *Newman Mem’l Hosp. v. Walton Constr. Co.*, 149 P.3d 525, 535-36 (Kan. Ct. App. 2007)). On the other hand, “Governmental functions are generally those ‘performed for the general public with respect to the common welfare for which no compensation or particular benefit is received.’” *Id.* (quoting *Newman Mem’l Hosp.*, 149 P.3d at 535-36).

[24] “Despite the application of the governmental/proprietary test by many courts, the distinction has received much criticism and has been regarded as difficult, if not impossible, to apply.” *In re Camacho*, 2006 Guam 5 ¶ 47 (collecting cases). But “certain functions are generally viewed as proprietary, such as, ‘the construction and maintenance of municipal water and light plants, . . . the constructions and operation of garages and parking facilities for motor vehicles, and generally the management of property owned by the municipality.’” *Id.* ¶ 43 (alteration in original) (quoting 15 McQuillin § 53.30.10 (3d ed. 1987)).

[25] The Excluded Beneficiaries argue that the Trust’s function is to act as a manager and developer of municipal property. They argue that this is akin to the functions this court said were clearly proprietary in *In re Camacho*, 2006 Guam 5 ¶ 43.

[26] In *Bautista*, this court looked to three factors—derived from persuasive authority—in determining the Retirement Fund’s activities were governmental: (1) whether the action was

expressly authorized by statute; (2) whether the action was necessary for the instrumentality to carry out its fiduciary duties and to promote the public welfare generally; and (3) whether the instrumentality furthers a public purpose. See 2015 Guam 23 ¶¶ 41-43. Application of these factors in the instant case leads us to hold that the Commissioners perform a governmental function through the Trust.

[27] First, the Trust operations are expressly authorized by statute:

The Commission shall establish a Guam-based trust to administer all assets and revenues of the land bank of the aforementioned lands and manage the lands, and act as the developer of the lands, if necessary, to the highest and best use. The Commission shall establish rules and regulations pursuant to the Administration Adjudication Law for the Guam-based trust. The resulting income shall be used to provide just compensation for those dispossessed ancestral landowners.

21 GCA § 80104(e).

[28] Second, the actions that the Excluded Beneficiaries claim are nongovernmental are nonetheless necessary for the Commissioners to carry out their fiduciary duties and to promote the public welfare generally; and third, the Trust furthers a public purpose.⁴

[29] The Excluded Beneficiaries characterize the action at issue in this case as “that of a private developer seeking to develop trust property to its ‘highest and best use’ to generate funds to compensate its beneficiaries who consist of a defined and permanent group of individuals.” Appellants’ Br. at 10 (citation omitted). But the Superior Court properly ascertained the scope of enquiry when it decided that “[t]he proper unit of analysis is the Commissioners’ operation of the Land Bank Trust as an integral part of the policy of the Ancestral Lands Act, not merely the management of any particular parcel of real estate.” RA, tab 151 at 23 (Dec. & Order).⁵

⁴ The Superior Court analyzed the last two prongs together. We agree that there is significant overlap in their enquiry and proceed here to treat them together.

⁵ In *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, the Kansas Supreme Court acknowledged, “If we viewed each investment action and decision separately as only a commercial

[30] Deriving income from the Trust corpus for dispossessed land owners is part of the Commissioners' statutory and fiduciary duty, *see* 21 GCA § 80104(e), and an examination of Guam's unique history supports our holding that the Trust's function furthers a public purpose.

[31] In the Legislative Background, Findings and Intent of the Guam Ancestral Lands Act, Guam Pub. L. 25-045:2, the Legislature memorialized the fraught history of land takings on Guam and the failure of past legislative remedies to fully address these historical injustices. As the Superior Court wrote, "Establishing an effective remedy was not a minor parochial concern of the Government, but a major concern for Guam as a whole." RA, tab 151 at 24 (Dec. & Order).

[32] Ancestral landowners experienced "[w]ar's devastation, tardy rehabilitation, displacement from their family estates and therewith the economic basis for their survival, livelihood and economic independence, and the dispossession from their estates for no, or less than just compensation" Guam Pub. L. 25-045:2(c) (1999). As the Superior Court also recognized, RA, tab 151 at 24-25 (Dec. & Order), the United States House of Representatives Committee on Natural Resources acknowledged that ongoing land dispossession had "limited economic growth," "created a serious housing problem," and was a "major issue[] impacting U.S.–Guam relations." Guam Pub. L. 25-045:2(b) (quoting H.R. Rep. No. 103-391 at 3 (1993)).

transaction . . . we could find the acts to be proprietary in nature." 941 P.2d at 1341; *see also* *Bautista*, 2015 Guam 23 ¶ 38 (explaining *Reimer & Kroger Assocs.*). Instead, the Kansas Supreme Court took "a broader perspective of the entire problem." *See Kan. Pub. Emps. Ret. Sys.*, 941 P.2d at 1341; *see also* *Bautista*, 2015 Guam 23 ¶ 38.

Similarly, in *Commonwealth v. Dauphin County*, a property owner defaulted on mortgage payments, resulting in a sheriff's sale in which the Commonwealth purchased the property as an asset for the retirement system. 6 A.2d 870, 871 (Pa. 1939). The Commonwealth leased some of the land to private tenants and did not pay taxes to the city or county. *See id.* Adjudicating the appeal in a suit to recover unpaid taxes, the Pennsylvania Supreme Court looked to the purpose of the retirement fund as a whole in determining its actions were governmental. *See Bautista*, 2015 Guam 23 ¶ 40 (discussing *Dauphin Cnty.*).

[33] The Guam Ancestral Lands Act must be viewed against this backdrop, and an integral part of this scheme was continued compensation for ancestral landowners who would not be able to take title to their land because of ongoing government or public use. *See* 21 GCA § 80104(e).

C. Legislative Waiver of Sovereign Immunity

[34] The Legislature may waive sovereign immunity where it would otherwise apply. *See Bautista*, 2015 Guam 23 ¶ 18. Waivers of sovereign immunity must be unequivocally expressed and are strictly construed. *See United States v. King*, 395 U.S. 1, 4 (1969).

[35] The Excluded Beneficiaries argue that the Legislature has waived immunity for the suit at bar in two provisions: 7 GCA § 26602 and 21 GCA § 15112. These arguments were not made before the Superior Court, *see, e.g.*, RA, tab 150 (Supp. Br. Re Sovereign Immunity, Aug. 24, 2015) (making no mention of 7 GCA § 26602 or 21 GCA § 15112); RA, tab 148 (Mem. Supp. Mot. Recons., Aug. 24, 2015) (same), and the Superior Court did not contend with these statutes, RA, tab 151 at 18-20 (Dec. & Order). Nonetheless, we choose to exercise our “discretion to address the issue” because “it is purely one of law.” *Abalos v. Cyfred Ltd.*, 2006 Guam 7 ¶ 18 (citing *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 n.1).

[36] We first consider 21 GCA § 15112, which reads:

In any inverse condemnation action instituted by a private landowner to obtain fair compensation for land that has been expropriated by the government of Guam for public purposes and for which no action in eminent domain has been instituted, the court may award the landowner reasonable attorney’s fees and court costs in addition to fair compensation.

21 GCA § 15112 (2005). The Excluded Beneficiaries argue that they fall under the ambit of the statute because they sought, in the alternative, just compensation and were successful in their suit overall—even if that success was not under a theory entitling them to compensation. Appellants’ Br. at 11-12.

[37] Contrary to the Excluded Beneficiaries' claim, this was not an inverse condemnation action. Because of the Superior Court's injunction, no taking occurred. But even if this were not the case—and we were to consider this an inverse condemnation action because the Excluded Beneficiaries prayed, in the alternative, for just compensation—we could not hold that the Legislature *expressly* exempted the facts at bar when it provided that “the court may award the landowner reasonable attorney’s fees and court costs *in addition to fair compensation.*” 21 GCA § 15112 (emphasis added). The statutory language suggests that attorney’s fees are available in cases where just compensation is awarded. This is not such a case.

[38] We consider next 7 GCA § 26602, which reads:

Except as otherwise expressly provided in this Title costs are allowed of course to the plaintiff upon a judgment in his favor in the following cases:

- (a) In an action for the recovery of real property;
- (b) In an action to recover the possession of personal property;
- (c) In an action for the recovery of money or damages;
- (d) In a special proceedings;
- (e) In an action which involves the title or possession of real estate.

7 GCA § 26602 (2005). Specifically, the Excluded Beneficiaries argue this is a case involving the title or possession of real property.

[39] The Excluded Beneficiaries' argument has some intuitive force to it. The statute says that costs are available to a litigant who is successful in a menu of actions, “[e]xcept as otherwise expressly provided in this Title.” 7 GCA § 26602. Nothing in the rest of the Title excludes the Government.

[40] But this is not an *express* waiver. It does not mention suit against the Government or, like 21 GCA § 15112, deal with subject matter which renders its purpose unmistakable. The

Excluded Beneficiaries' argument also proves too much. If we recognized this argument for actions that comport with 7 GCA § 26602(e) (involving “the title or possession of real estate”), then it would apply with equal force to actions sounding in, for instance, 7 GCA § 26602(c) (involving “the recovery of money or damages”). This would be an absurd result, waiving immunity for a great many suits at the heart of sovereign immunity's protection.

V. CONCLUSION

[41] We hold that sovereign immunity bars recovery of attorney's fees and costs in this case. Accordingly, this court lacks subject matter jurisdiction to hear this appeal, and the appeal is **DISMISSED**.

/s/

F. PHILIP CARBULLIDO
Associate Justice

/s/

KATHERINE A. MARAMAN
Associate Justice

/s/

ROBERT J. TORRES
Chief Justice