IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

PALAU CIVIL SERVICE PENSION PLAN,

Appellant/Cross-Appellee,

v.

KALEB UDUI Jr. personally, and FRANCIS REMENGESAU, in his capacity as Trustee for the Pacific Savings Bank Creditors' Trust.

Appellees/Cross-Appellants.

CIVIL APPEAL NOs.: 14-008/14-018

Civil Action No.: 07-220

OPINION

Decided: December 23, 2014

Counsel for Appellant/Cross-Appellee: Vameline Singeo, George Anthony Long
Counsel for Appellees/Cross-Appellants: William L. Ridpath, Enver W. Painter, Jr.

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable Arthur Ngiraklsong, Chief Justice, presiding.

PER CURIAM:

Plaintiff-Appellant/Cross-Appellee Palau Civil Service Pension Plan appeals the Trial Division's March 21, 2014 Order (Tr. Order) dismissing its case for failure to state a claim. Defendant-Appellees/Cross-Appellants Kaleb Udui Jr. and Francis Remengesau appeal a separate ruling (contained in the same order) denying Defendants' Rule 11

motion for attorneys fees.[1] For the reasons set forth below, the decision of the Trial Division is affirmed in its entirety.[2]

BACKGROUND

This appeal arises out of Appellant Palau Civil Service Pension Plan's (the Plan) attempt to recover $1,000,000.00 lost as a result of the collapse of the Pacific Savings Bank (PSB) in 2006. The Plan asserts that its deposit was subject to a "Deposit Agreement" between the Plan and PSB, which appears to grant the Plan a security interest in the form of a first lien on certain PSB assets.[3] The Agreement was signed on behalf of PSB on July 25, 2006 and on behalf of the Plan on September 26, 2006. However, on August 25, 2006, the Financial Institutions Commission issued an Order Imposing Restrictions on Operations (Restrictive Order) that prohibited PSB from taking certain actions, including accepting deposits greater than $10,000.00. PSB was placed in receivership shortly thereafter, on November 7, 2006.

On or about November 24, 2006, the Plan filed a claim with the Receiver,

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[1] For the sake of clarity, Palau Civil Service Pension Plan (the Plaintiff below) will be referred to as the Plan, and Udui and Remengesau (the Defendants below) will be referred to as Defendants.

[2] Pursuant to ROP R. App. P. 34(a), we determine that oral argument is unnecessary to resolve this matter.

[3] The Deposit Agreement, provided as an exhibit both to the Trial Division and to the briefing on appeal, references a certificate of deposit attached to the Deposit Agreement as "Exhibit A." However the Deposit Agreement, as provided, does not include any exhibits and therefore it is unclear what collateral allegedly was available for recovery.

Defendant Kaleb Udui Jr., in an attempt to recover the deposit or the collateral described in the Agreement. The Receiver denied the Plan's security interest and informed it that it would be treated as an unsecured creditor. The Plan filed this suit in response, claiming that the Receiver's actions breached the terms of the Deposit Agreement and were otherwise contrary to his duties as Receiver. The Plan sought a declaratory judgment that the Agreement was enforceable, an award of the $1,000,000.00 deposit with interest, an order requiring the Receiver to deliver the secured collateral to the Plan in lieu of refund of the deposit, and an order prohibiting the Receiver from disposing of or transferring title to the secured collateral.

Defendants opposed on numerous grounds, primarily arguing that the Deposit Agreement was not a valid contract because PSB was prohibited by the Restrictive Order from accepting deposits or pledging assets as collateral when the Plan accepted the proposed agreement—that is, the contract was signed significantly after the August 25, 2006 Restrictive Order.[4] Defendants also requested, and were granted, a stay of the suit for more than two years while related criminal proceedings were ongoing. Following the lift of the stay in 2010, the Trial Division set trial for February of 2011, a date that also was continued on Defendant's unopposed motion.

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[4] We recognize that the Defendants also disputed a number of key facts that may have factored into evaluation of this claim had it been decided on summary judgment or at trial. Because dismissal on the pleadings was appropriate even accepting all of the Plan's allegations as true, we need not address the evidence submitted.

No significant action took place until December of 2013, when the Trial Division issued an Order to Show Cause why the case should not be dismissed for lack of prosecution. Following briefing on the Order to Show Cause, Defendants filed a Rule 11 motion for sanctions and fees in which it appears Defendants first argued that the case presented a non-justiciable question. The Plan responded to Defendants' Rule 11 motion in all parts, including addressing justiciability. Finally, after the conclusion of briefing, the Trial Division denied Defendants' Rule 11 motion but dismissed the case, sua sponte, for failure to state a claim upon which relief could be granted. All parties filed timely appeals of the Trial Division's order.

STANDARDS OF REVIEW

A lower court's conclusions of law are reviewed de novo. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Whether or not a claim for relief is justiciable is a conclusion of law, so the Trial Division's decision to dismiss the case, whether for failure to state a claim or for non-justiciability, is reviewed de novo. *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012); *Gary G. v. El Paso Indep. Sch. Dist.*, 632 F.3d 201, 206 (5th Cir. 2011). A lower court's decision regarding Rule 11 sanctions or fees is reviewed for abuse of discretion. *Shmull v. Rosenthal*, 8 ROP Intrm. 261, 261–62 (2001). We may affirm a decision of the Trial Division for any basis apparent in the record. *Inglai Clan v. Emesiochel,* 3 ROP Intrm. 219, 222 (1992); *see also* 5 Am. Jur. 2d *Appellate Review* § 775.

ANALYSIS

The Plan asserts numerous issues on appeal, of which only a handful are relevant to the actual question at the core of their appeal—whether the Trial Division erred in dismissing the Plan's claims against either of the Defendants. Defendants challenge that the Trial Division erred in denying their request for Rule 11 sanctions and attorneys fees. Because we find that dismissal was appropriate and that the Trial Division did not abuse its discretion in denying Rule 11 sanctions, the decision of the Trial Division will be affirmed.

I. *Feichtinger v. Udui*

The Plan argues that the Trial Division erred when it determined that *Feichtinger v. Udui*, 16 ROP 173 (2009), required dismissal of the complaint. Correctly quoting this Court's opinion, it notes that it is "inaccurate to say that the court lacks subject matter jurisdiction over the claim." Plan Brief 9 (quoting *Feichtinger*, 16 ROP at 177). Based on this holding, the Plan argues that dismissal under Rule 12(b)(6) was improper because the Trial Division had jurisdiction to hear the claim. While we agree that the Trial Division possessed jurisdiction, we disagree with the Plan's interpretation of *Feichtinger*.

A court's jurisdiction to hear a case is a fundamentally different question than the whether the claim is justiciable—that is, whether or not the subject matter is appropriate for judicial consideration. *Baker v. Carr*, 369 U.S. 186, 198, 82 S. Ct. 691, 700 (1962), *adopted in part by Filibert v. Ngirmang*, 8 ROP Intrm. 273 (2001); *Fritz v. Republic of*

Palau, 4 ROP Intrm. 264 (Tr. Div. 1993) (applying the *Baker* political question analysis). While a lack of jurisdiction entirely forecloses judicial oversight or review, justiciability requires a case by case inquiry over subject matters that, while within the court's jurisdiction, may be inappropriate for consideration for other reasons. *Baker*, 369 U.S. at 198, 82 S. Ct. at 700. Justiciability is not just about whether a plaintiff can state a claim; it is about "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* Under Palauan law, justiciability doctrines are largely a product of statute, judicial prudence, and interpretation of constitutional provisions. *See Gibbons v. ROP*, 1 ROP Intrm. 634, 637 (1989) (holding that plaintiffs must demonstrate standing to show that a case is "a matter[] which traditionally require[s] judicial resolution"); *see also Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 104–105 (2004) (analyzing standing of the legislature); *Senate v. Nakamura*, 7 ROP Intrm. 8, 9–10 (1998) (same); *Salii v. House of Delegates*, 1 ROP Intrm. 708, 710–711 (1989) (holding that moot cases must be dismissed despite this Court's general jurisdiction).

Feichtinger held, unambiguously, that claims against a receiver in review of his decisions were nonjusticiable. *Feichtinger*, 16 ROP at 177–178. Despite this Court's broad subject matter jurisdiction, we recognized in *Feichtinger* several reasons that the Court should not decide the case: the policy basis behind creation of the receivership, the need for efficient resolution of claims against PSB, the necessity of autonomy of the

receivership, and respect for the statutory scheme enacted by the political branches of the government. *Id* at 176, 178. What we failed to do was give a clear explanation as to why these claims are nonjusticiable, so we now clarify *Feichtinger*'s holding by recognizing that claims against a receiver seeking review of his decisions in that capacity present nonjusticiable political questions.

The political question doctrine derives its roots, in both the United States and in Palau, from the separation of powers within the branches of government. *See* 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3534 (2nd E. 1984). In *Fritz v. Republic of Palau*, 4 ROP Intrm. 264 (Tr. Div. 1993), the Trial Division recognized that a question is political, and therefore nonjusticiable, where there is "**[1]** a textually demonstrable constitutional commitment of the issue to a coordinate political department; or **[2]** a lack of judicially discoverable and manageable standards for resolving it."[5] *Fritz*, 4 ROP Intrm. at 271–272 (quoting *Baker v. Carr*, 369 U.S. 186, 217,

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[5] *Fritz*, following *Baker*, actually recognized six discrete categories of political questions. In addition to the two categories quoted above, *Baker* recognized that questions may be political if they involve: "**[3]** the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or **[4]** the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or **[5]** an unusual need for unquestioning adherence to a political decision already made; or **[6]** the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Fritz*, 4 ROP Intrm. at 271–272 (quoting *Baker*, 376 U.S. at 217, 84 S. Ct at 710) (enumeration added). However, modern United States political question jurisprudence has focused exclusively on textual constitutional commitment and a lack of judicially manageable standards, treating categories three through six as examples of or mixed questions of the first two. *See Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 736 (1993). While we

84 S. Ct. 691, 710 (1962)) (enumeration added); *see also Filibert v. Ngirmang*, 8 ROP Intrm. 273 (2001) (citing *Fritz* for its analysis of political questions). Where cases present questions that are explicitly designated to a political branch by our Constitution or present questions which cannot be answered within the legal standards available for adjudication, this Court will generally refrain from interfering in the business of the political branches.

We would be remiss, however, if we did not take this opportunity to recognize the limits of a prudential doctrine such as the political question doctrine. Political questions, such as the validity of the actions of the Receiver, are not entirely immune to judicial review; they are insulated from a judicial substitution of our judgment for that of the political branches of government.

> One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of [the] proceedings. If the [Receiver] were to act in a matter seriously threatening the integrity of [the] results, [denying], say, upon a coin toss, or upon a summary determination that a [claimant] was simply 'a bad guy,' judicial interference might well be appropriate. In such circumstances, the [Receiver's] action might be so far beyond the scope of its [] authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. "The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder."

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express no opinion on whether a question could fall within only one of the latter categories and still be nonjusticiable in this Court, we recognize that awarding relief in this case would touch upon every category but the first.

Nixon v. United States, 506 U.S. 224, 253–54, 113 S. Ct. 732, 748 (1993) (Souter, J., concurring) (quoting *Baker*, 369 U.S. at 215, 82 S.Ct. at 709). But so long as the political branches provide a legitimate evaluation of such questions where the integrity of the results, whatever they may be, is not seriously disputed, the courts will not intervene.

Understanding *Feichtinger* as recognizing a political question, it becomes clear that the Plan's attempts to distinguish its claim misconstrue *Feichtinger*, justiciability, and the nature of due process itself. The Plan argues that, as a secured creditor, it holds a property interest in the secured collateral and that it was deprived of that interest without due process when the Receiver denied its claim.[6] While the *Feichtinger* Court did note that suits for recovery of funds lost in a bank failure do not "allege[ ] constitutional violations or need [] constitutional interpretation," that in no way means that *Feichtinger*'s holding can be circumvented merely by the perfunctory inclusion of a constitutional claim without alleging possible facts sufficient to support that claim. *See Feichtinger*, 16 ROP at 177.

The facts alleged by the Plan, even when assumed to be true, demonstrate only an unfavorable result—not a denial of due process—and do not materially distinguish this case from *Feichtinger* in any constitutional dimension. As the Trial Division correctly

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[6] The Plan also alleges that the Trial Division did not grant it an opportunity to be heard regarding whether *Feichtinger* applied to the case. Given that the *Feichtinger* issue was raised, in Defendants' Rule 11 motion, and responded to in the Plan's opposition, this contention is inaccurate.

noted, *both* secured and unsecured creditors hold a property interest in loaned or deposited funds, and a suit for recovery of funds or assets lost in a bank collapse seeks only the enforcement of such a contractual or property interest. *See id.* Having failed to allege any facts actually suggesting that the Receiver's adjudication was in any way invalid or illegitimate, the Plan's due process argument is supported only by the naked allegation that denial of its claim could *only* have resulted from actions contrary to law or that were otherwise improper. To resolve such an entirely unsupported allegation, the Trial Division would have to engage in a searching, de novo review of the Receiver's adjudication—exactly what we said in *Feichtinger* that we would not do when we held that such claims were nonjusticiable. The trial court correctly treated *Feichtinger* as binding precedent.[7]

Even assuming that the Plan has both the rights and injuries that it claims, no

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[7] The Plan also asserts that *Feichtinger*, which expressly precluded judicial reconsideration of actions of the Receiver, does not apply to claims made against Udui in his personal capacity because his actions were allegedly outside of his authority and in deprivation of due process. Because the Plan has failed to make out a constitutional claim we decline to speculate as to whether *Feichtinger* would preclude our consideration of such a case. However, we are unconvinced by the Plan's argument that the statutory authority for the Financial Institutions Commission to indemnify a receiver suggests that the legislature *intended* for receivers to be held liable in their personal capacity. Given that the receivership statute was enacted well before this Court's *Feichtinger* decision, it is far more likely that the indemnification authority was included to protect receivers from personal liability in the event that this Court had decided a case such as *Feichtinger* differently. Having determined that review of a receiver's decision is nonjusticiable the law allowing for indemnification now may be moot, but the existence of indemnification does not concede that the receiver is personally subject to suit any more so than the existence of an insurance policy concedes that a defendant is liable in tort.

judicially discoverable or manageable standards exist under which this Court could award relief to the Plan and similarly situated claimants. Each depositor or creditor in the wake of PSB's failure could bring an all but identical claim before this Court, and, assuming the validity of their claims, each might be entitled to judgment in full in fulfillment of its contractual or property rights. But if it were possible for this Court to make each legitimate claimant whole with payment in full from PSB's assets, PSB would never have failed in the first place.

Instead, the unfortunate reality of receivership is necessarily one of compromise: few, if any, significant claimants can be made whole, and having adjudicated the validity of the claims, it is the responsibility of the Receiver to fairly manage, liquidate, and/or distribute PSB assets amongst the claimants. Such decisions regarding relief are inherently discretionary and carry enormous national and social implications that the legislature and the executive have entrusted, in part, to the Receiver. *See* 26 PNC § 10.113 (providing the powers and duties of the receiver and allowing for certain dispositions where, in the opinion of the receiver, they are likely to help satisfy the failed bank's obligations). To evaluate whether the denial of the Plan's claim as a secured creditor was proper, or whether the eventual relief granted by the Receiver, if any, was sufficient, we would have to substitute our judgment for that of the lawfully appointed agent of the political branches. Doing so would require the joinder, comparison, and adjudication of every competing claim against PSB's assets, the consideration of which is

necessary to come to a reasonable conclusion where compromise is required. *See id.* § 10.114(b) (requiring all claims in a class abate in equal proportion where assets are insufficient to meet liabilities).

We are not unsympathetic to the Plan's losses in the wake of this financial disaster, but the question of how to resolve PSB's failure is one best left to the political branches of government. Absent any showing that they have abdicated their constitutional obligations to the people, it is inappropriate for the Judiciary to become involved.

II. The Trial Division's Denial of Rule 11 Sanctions.

The Trial Division disposed of Defendants' Rule 11 request for sanctions and fees in one paragraph, declining to award fees and finding that "Plaintiff's arguments, although unsuccessful, are [not] wholly without merit or in bad faith." Tr. Order 4. Given that Rule 11 sanctions are reviewed only for abuse of discretion, it is extremely rare that a meritorious basis for appeal of a Rule 11 decision will exist. *See Shmull v. Rosenthal*, 8 ROP Intrm. 261, 261–62 (2001). Generally, it can be problematic if a trial court rules on a motion for sanctions without giving much explanation of its reasoning, because such an order sometimes fails to provide sufficient explanation for the Appellate Division to review the decision. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 113–114 (1995). However, "even a perfunctory order may suffice if the [decision] was clearly appropriate from the record." *Id.* at 113 (quoting *Katz v. Household Int'l, Inc.*, 36 F.3d 670, 673 (7th Cir.

1994).

Several notable facts make it clear that the Trial Division applied the proper legal standard, evaluated Defendants' motion and the evidence, and did not abuse its discretion in denying relief. First, it is beyond dispute that the complaint, when filed, cannot have been frivolous or in bad faith under *Feichtinger*, because it was filed two years prior to *Feichtinger* being decided. The Trial Division eventually ruled that the factual differences between the Plan's case and *Feichtinger* did not sufficiently distinguish the cases as to warrant a different result, but it certainly appears from the record that a colorable legal argument was made. A pleading does not violate Rule 11 simply by being unsuccessful; it must be *wholly* without merit. *Rdialul v. Kirk & Shadel*, 12 ROP 89, 94 (2005). While Rule 11 also applies to parties' subsequent motions and papers, the record does not appear to contain clear evidence of any filings by the Plan that were so baseless, frivolous, or in bad faith as to require the Trial Division to impose sanctions or award fees. *See Kruger v. Rosenthal*, 9 ROP 105, 111 (2002).

Second, Defendants have repeatedly, before both the Trial Division and this Court, accused the Plan of "turn[ing] a blind eye to the fact that there is no enforceable deposit agreement" and of, "in the most conclusory of fashion, simply reiterat[ing] its unsupport[ed] claim that [the Plan] and [PSB] had entered into an enforceable 'Deposit Agreement.'" Defs.' Brief on Cross-App. 8, 7. Defendants, however, have also similarly reiterated *their* legal claim to this Court and treated it as adjudicated fact, despite having

not obtained any order or judgment declaring the Agreement invalid. The Deposit Agreement clearly sets out the general form of a contract and is signed by representatives from both parties that it purports to bind. While Defendants have offered extrinsic evidence suggesting PSB's offer may have been extinguished prior to acceptance by the Plan, the invalidity of a contract that appears, on its face, to be binding, is a legal conclusion for the courts—not the Defendants—to make. The Plan's attempts to enforce the Deposit Agreement do not appear to have been so wholly without merit that the Trial Division abused its discretion in denying fees.

Finally, Rule 11 sanctions are an unusual and somewhat extraordinary measure because their purpose is to be punitive and act as a deterrent to future conduct. *See Arugay v. Wolff*, 5 ROP Intrm. 239, 247 (1996). While it is certainly preferable that the Trial Division explain in detail the reasoning behind any and all judgments, it is far more important to create a record when *imposing* Rule 11 sanctions than when denying them, because denial of Rule 11 sanctions is the *default* in an ordinary case. *See id.* As discussed above, the record does not demonstrate the application of an incorrect legal standard nor show that the Trial Division failed to consider any established facts or contentions, so the Trial Division did not abuse its discretion in denying Rule 11 sanctions and fees.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

SO ORDERED, this 23rd day of December, 2014.

KATHLEEN M. SALII
Associate Justice

LOURDES F. MATERNE
Associate Justice

R. ASHBY PATE
Associate Justice