Superluck Enterprises, Inc. v. ROP, 4 ROP Intrm. 290 (Tr. Div. 1994)

SUPERLUCK ENTERPRISES, INC., et al.,
Plaintiffs,

v.

REPUBLIC OF PALAU,
Defendant.

CIVIL ACTION NOS. 20-85, 45-85

Supreme Court, Trial Division
Republic of Palau

Decision and order
Decided: February 3, 1994

LARRY W. MILLER, Justice:

After a judgment of forfeiture was entered by the Trial Division, but before the reversal of that judgment by the Appellate Division, the Republic of Palau sold the vessel M/V Aesarea to a third party. By stipulation in Civil Action No. 20-85 and by non- objection in Civil Action No. 45-85, the Republic has agreed that Superluck Enterprises, Inc. ("Superluck"), the owner of the Aesarea, is entitled to restitution in connection with that sale. Now before the Court are the respective submissions of the Republic and Superluck as to the measure, as a legal matter, of the restitution to be paid. Treating those submissions as cross-motions for summary judgment, they are both denied, and this matter is set for trial in accordance with the discussion in Part I below.[1]

I. THE LEGAL MEASURE OF RESTITUTION.

Although the parties are sharply divided as to the conclusions ⊥291 they believe the Court should reach, they are in agreement in at least some respects as to the analysis the Court should undertake. First, both agree that pursuant to 1 PNC 303, [2] the Court must consult the Restatement of Restitution to find the appropriate legal rule to be applied here. Although Superluck argues that 7 PNC 309 is a relevant "written law" within the meaning of § 303, see n.2 supra, and that § 309 constitutes an "absolute" direction that the Aesarea be returned to Superluck, see p.9 infra, it nevertheless concedes that the impossibility of such return requires the Court to look elsewhere -- and, in particular, the Restatement -- for an appropriate remedy. See Plaintiffs' Reply Brief at 4, 11 (" 1 PNC 303 MANDATES THE APPLICATION OF THE

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[1] Superluck's motion to strike two affidavits submitted by the Republic is dealt with in Part II below.

[2] "The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute . . . shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law applicable under section 301 . . . or local customary law applicable under section 302".

RESTATEMENT IN THIS CASE").[3]

A. Does Comment d Apply?

Looking to the Restatement, although the parties reach differing conclusions, they again agree to the appropriate starting point. The Republic rests its argument on Section 74, entitled "Judgments Subsequently Reversed", and, in particular, Comment d ⊥292 to that section. While Superluck argues that other sections provide the appropriate rule, it does not appear to contest that § 74 is, on its face, the most specific statement of the Restatement's views on the situation (i.e., reversal of a judgment) in which the instant right to restitution arises. See Plaintiffs' Reply Brief at 21 ("Sec. 74 is clearly the Restatement section applicable in this case"). Rather, it argues that the rule of law contained in Comment d depends on pre-conditions that are not met here, and that the Court is required to look elsewhere in the Restatement to find an appropriate rule. In other words, there seems to be no dispute that the Court should start with § 74, the question is whether it should end there. As the Court concludes below, in its view, § 74 provides the answer even if Comment d is found not to apply. See pp.13-14 infra.

The Republic derives its proposed measure from the following language from Comment d:

> "If the debtor's property has been sold to a stranger and the proceeds paid to the judgment creditor, the judgment debtor is entitled to recover the amount thus received by the judgment creditor with interest; unless the judgment was void, he cannot recover the value of the property sold, if the action was brought in good faith and the sale was properly conducted, since the creditor was acting lawfully."

According to the Republic, this passage exactly describes the situation at hand and entitles Superluck to no more than the money the Republic received when it sold the Aesarea in 1986. Superluck strenuously disagrees, raising a number of objections, some insubstantial and some substantial.

⊥293 1. Was the judgment valid?

There is no question that the judgment of the Trial Division forfeiting the Aesarea to the government, even though ultimately found to be erroneous, was within its jurisdiction and was accordingly not void. E.g., *Swift & Co. v. United States* , 48 S.Ct. 311, 316 (1928) (where "the court had jurisdiction of the subject matter and of the parties, . . . even gross error in the decree would not render it void").

2. Was the action brought in good faith?

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[3] Similarly, although Superluck contends that it is entitled to compensation under the "takings" clause of the Palau Constitution, see Art. IV, Sec. 6, it looks only to the Restatement for the measure of the compensation owed. Accordingly, the Court need not address the Republic's response that that clause is not relevant here.

Nor is there any serious question that "the action was brought in good faith". The commencement of Civil Action No. 20-85 came on the heels of the Aesarea's failure to comply with a stipulation and order in Civil Action No. 1-85 requiring the Aesarea to obtain an extension of its entry permit or to depart Palau's waters by February 12, 1985. That the judgment of forfeiture in this case was reversed is obviously not enough reason to find the government to have acted in bad faith in seeking it. To the contrary, the fact that the government's forfeiture theory was thought to be correct by a former Chief Justice of this Court is prima facie evidence of good faith, notwithstanding that the Appellate Division ultimately concluded otherwise.

In its argument, Superluck emphasizes the following language from the appellate opinion:

> "We hold that the mere failure of a vessel to depart Palau waters upon expiration of the vessel's entry permit is not commission of an unlawful act within the meaning of 7 PNC 207(b) and does not subject the vessel to forfeiture under ⊥294 that statutory provision." *ROP v. Aesarea*, 1 ROP Intrm. 429, 437 (1988).

Superluck reads from this passage a declaration by the Appellate Division that the Aesarea was not acting unlawfully at all when it was seized by the Republic. But that is not what was said. The quoted language says merely that the Aesarea's overstay was not the "commission" of an "unlawful act" as those words are used in 7 PNC 207(b). On the preceding page of its opinion, however, the Court left no doubt that it believed that the Aesarea had violated the law: "Plainly, the vessel's failure to depart or, in the alternative, to obtain permission to stay within the Republic of Palau, constituted failure to comply with 7 PNC 202, and would have been punishable under 7 PNC 207(a)." 1 ROP Intrm. at 436. Thus, while the government's chosen remedy was rejected, its authority to take some enforcement action against the Aesarea was in no way questioned.[4]

3. Was the sale properly conducted?

A more difficult question is posed as to whether it is clear on this record that "the sale [of the Aesarea] was properly conducted". Superluck raises three objections: first, that the sale should not have been conducted at all; second, that the form of the sale was per se improper; and third, that the sale was not carried out properly in any event. The Court finds that the first two objections are not well taken, but that the third should be ⊥295 resolved at trial.

a. Was the Republic barred from selling the Aesarea at all?

Superluck's first objection is based primarily on an order issued by Chief Justice Nakamura in No. 20-85 on October 8, 1985. Entitled "ORDER STAYING EXECUTION OF JUDGMENT", it reads in pertinent part:

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[4] To be sure, for whatever reason, the Republic chose not to act pursuant to 7 PNC § 207(a) even after remand. But that inaction does not obliterate the finding that there existed a factual basis for an enforcement action against the Aesarea.

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> "IT IS HEREBY ORDERED that execution on judgment duly made and entered by this Court on August 2, 1985, and all proceedings for the enforcement thereof be, [and] are hereby stayed until the hearing and disposition of the Appeal of the defendant.
>
> "A supersedeas bond in the amount of $2,000,000 is hereby fixed."

Superluck argues that this Order unconditionally stayed the judgment in 20-85 and therefore barred the sale of the Aesarea pending appeal. On its theory, the posting of or failure to post the $2,000,000 bond set by the Court did not affect the stay, but related solely to whether the Aesarea would remain in the hands of the Republic (if the bond was not posted) or be returned to Superluck (if it was).

Although Superluck's contention is an arguable one on the basis of the October 8 Order alone, the Court concludes based on its reading of the Order, the understanding of previous courts and the prior understanding of the parties themselves, that it is not the correct one.

In the first place, while there is some sense to an order having taken the form envisioned by Superluck -- that is, having the bond serve as the condition for release of the vessel rather than the stay -- there is no clear sign in the Order itself that ⊥296 that was what the Chief Justice had in mind. ROP Civ. Pro. R. 62(d) provides that "the appellant by giving a supersedeas bond may obtain a stay" (emphasis added). If the Chief Justice had intended the order to constitute something other than the usual stay-conditioned-on-payment-of-bond, one would have expected him to say so explicitly.

Moreover, two days later on October 10, the Chief Justice issued another order requiring that the bond be posted within 45 days. That order makes no sense if Superluck's reading were correct. If the bond related only to the question of possession, there would be no reason to set any deadline; presumably, since the stay was, by hypothesis, already in place, Superluck should have been able to post the bond at any time during the pendency of the appeal. The more logical reading is that the October 8 Order did condition the stay on the posting of the bond, and the October 10 Order clarified how long Superluck would have to do so.

This reading is supported by the fact that the Appellate Division in the initial appeal of 20-85 also interpreted the Order as granting a conditional stay. As stated in the appellate opinion:

> "A motion for stay of proceedings to enforce judgment was filed. This resulted in an order staying execution of judgment on the condition of a $2,000.00 [sic] supersedeas bond being posted, but no supersedeas bond was posted within the time allotted." 1 ROP Intrm. at 432.

Superluck is right that this language was not necessary to its decision of the appeal and is thus not strictly "law of the case" binding on this Court. It is nevertheless some confirmation that ⊥297 this Court's reading of the disputed order was shared by the Justices who sat on the

appellate panel.

Perhaps even more significant, the language of the appellate opinion is almost a direct quotation taken from the "Statement of the Case" contained in the appellate brief filed by Superluck:

> "On September 24, 1985 a motion for stay of proceedings to enforce judgment was filed which resulted in an order entered October 8, 1985 staying execution of judgment on condition of a $2,000,000.00 bond being posted . On October 10, 1985 an order was entered setting a time within which to post the supersedeas bond. No supersedeas bond was posted within the time allotted." Appellant's Brief in Civil Appeal No. 16-85 (March 24, 1986) at 1 (emphasis added).

Thus, this Court's understanding of the disputed Order turns out to be no different from that of Superluck's counsel at the time, who had argued the motion for stay before Chief Justice Nakamura. In such circumstances, Superluck's current counsel is hardly in a position to suggest otherwise.

As a matter of completeness, the Court should note Superluck's argument that its (current) reading of the Order was shared by the government in one of its previous filings. Superluck quotes the following sentence from the Republic's Memorandum on Measure of Restitution Compensation, filed in No. 20-85 on June 5, 1990:

> "The Republic filed a Motion to Require a Supersedeas Bond on September 25, 1985, in which the Republic agreed to 'release custody of the subject vessel to the Defendant, thereby substituting the bond for the vessel itself.'" Id. at 4.

But Superluck fails to quote the remainder of the paragraph that follows:

> "The Court ruled against the Republic, granting Intervenor's Motion to Stay Proceedings but requiring a $2 million supersedeas bond. Intervenor was given 45 days during which to post the bond but failed to do so. On November 25, 1985, ⊥298 Intervenor's time to post the bond lapsed and, on January 10, 1986, the Republic sold the vessel." Id.

Read in context, the Republic's statement concedes only that it had asked for an order of the sort now claimed by Superluck. However, consistent with the understanding of Superluck's counsel at that time, it believed that that request had been denied and that the October 8 Order conditioned the maintenance of the stay on the posting of the supersedeas bond.

Superluck makes the additional contention that 7 PNC 309 imposed an absolute duty upon the Republic to return the Aesarea, which it violated by selling the vessel while the appeal was pending.[5] The Court believes that §309 speaks merely to the obligation of the government if

[5] Section 309 provides in pertinent part:

it loses after trial, but is not intended to address the situation where a judgment is reversed on appeal. Section 309 must be read in conjunction with, and as the counterpart to, sections 307 and 308, which permit the forfeiture and sale of a forfeited vessel in the event the government succeeds after trial. Those sections nowhere state that a sale should be postponed pending the result of any appeal and the better reading, in the Court's view, is that they do not so require, but instead leave such matters to be dealt with -- as the Court has found was done here -- in accordance with the usual requirements for stays ⊥299 of execution pending appeal.[6]

b. Was the Republic barred from disposing of the Aesarea except by execution sale?

Relying on the fact that the Aesarea was sold privately after the soliciting of bids, Superluck next contends that, as a matter of law, a sale other than by execution is not "properly conducted" with the meaning of Comment d. Superluck cites no authority on this precise question, but relies on Illustration 12 following the Comment, which refers to an execution sale.

The Court disagrees, finding no indication that the authors of the Restatement meant to impose such an absolute limitation. Rather, it seems more likely that in focusing on the typical judgment where a monetary sum is awarded and property is seized and sold to pay off that amount, they simply did not contemplate the situation of a forfeiture judgment where the property itself is awarded and subsequently sold. Moreover, in attempting to illustrate improper conduct, the Restatement in Illustration 17 refers to an execution sale in which there is "improper conduct by [the judgment creditor] which discourages bidding". The focus, therefore, is on the substance of the sale rather than its form: ⊥300 Just as Illustration 17 demonstrates that a sale on execution is not, as a matter of law, properly conducted, the Court finds that a sale other than by execution should not be deemed, without more, to have been improperly conducted.

> "Upon the entry of judgment in favor of a claimant who is the owner . . . , all the property seized or arrested shall be returned forthwith to the claimant or his agent . . ."

[6] Superluck attempts to bolster its reading of § 309 with an excerpt from the deposition of the Minister of Justice in office at the time of the sale. But it is the "province of the court to determine and decide questions of law." 75A Am. Jur. 2d, Trial § 714 at 341. That the Minister of Justice -- who was not an attorney -- may have perceived some duty to return the Aesarea simply has no bearing on the question whether any such duty was imposed by § 309. See 31A Am. Jur. 2d, Expert and Opinion Evidence § 138 at 146 ("whether or not a legal duty exists under a given set of facts" is an inadmissible legal conclusion).

c. Did the Republic properly conduct the sale?

A stickier question concerns whether the sale was, in fact, properly conducted. For several reasons, the Court believes that this issue cannot be resolved without a trial.

First, there appears to be some factual dispute as to how the government conducted the sale of the Aesarea. Although there is affidavit evidence that the availability of the Aesarea was publicly advertised, Superluck questions the existence and scope of such advertising, and points out that the Republic has produced no documentary evidence on that score. Moreover, Superluck has produced at least one affiant who states that he was a potential buyer of the Aesarea, but received no notice of the Republic's intention to sell it. See Affidavit of Roman Tmetuchl, 12/5/89, in No. 45-85. Given this dispute and given the stakes, the Court believes that this issue should be fully developed at trial.

Second, there is a sharp dispute as to the condition of the Aesarea at the time of the sale and, in particular, whether the Republic's removal of certain items from the vessel improperly depressed its sale value. Is it the case, as the Republic contends, that the Aesarea was in poor condition to begin with and that the objects removed did not materially affect its value; or did the Republic, as Superluck contends, strip an otherwise ⊥301 did the Republic, as Superluck contends, strip an otherwise seaworthy vessel so that its only remaining value was as scrap? [7] The Republic not dispute that it must pay to Superluck the value of the removed items; the question nevertheless is whether the removal of those items made the value of the sum of the parts considerably less than the value of the whole. For example, while the value of a car without hubcaps plus the value of its hubcaps is probably the value of the intact car, the value of a chassis and a body and an engine sold separately is probably considerably less.

Finally, there is the question of -- and the parties' sharp dispute over -- the Aesarea's fair market value. When asked at oral argument whether the fair market value was relevant to the determination whether the sale was properly conducted, the Republic's counsel replied that the price obtained by the sale was the fair market value. That, of course, assumes the conclusion that the Republic is arguing for. Clearly, evidence tending to establish the fairness of the sale will tend to show that the sale price was fair market value. The Court believes, however, that if Superluck can produce credible, persuasive evidence for its contention that the Aesarea's value was substantially in excess of the sale price, it will tend conversely to show that the sale was not properly conducted. See 47 Am. Jur. 2d, Judicial Sales § 196 ⊥302 at 454 ("[W]here the highest bid received is so inadequate as to shock the judicial conscience, the disparity between the sale price and the market value of the property is often said to give rise to a presumption of fraud"). [8]

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[7] Superluck addresses its "stripping" argument to the question of the Republic's good faith. See pp. 4-5 supra. The Court believes that while the Republic's actions in this regard are of marginal relevance to the question of whether it acted appropriately in seizing the Aesarea in the first place, they are relevant in assessing the propriety of the sale.

[8] This is not to say that any disparity between value and sale price will be conclusive on the question of whether the sale was properly conducted. Illustration 12 describes a situation where property with a "value of $4000" is sold, but "[a]lthough the sale is properly conducted, the property brings but $3000". Thus, a sale that has been fairly conducted should be upheld and

B. What If Comment d Does Not Apply?

What if Superluck is right and the sale of the Aesarea was not properly conducted? Superluck contends that, in that event, the Court must look to other sections of the Restatement. As the Court sees it, if Comment d does not limit the amount of restitution to the sale price, then § 74 itself provides that Superluck will be entitled to the Aesarea's fair market value -- the result Superluck seeks -- even without reference to the sections it relies upon.

Illustration 17, discussed above, see p. 10 supra, posits a situation where property "worth $4000, is sold on execution sale to a stranger and, because of improper conduct by [the judgment creditor] which discourages bidding, the property brings only $3000." In that circumstance, "[the judgment debtor] is entitled to restitution from [the judgment creditor] of $4000." Thus, evidence of fair market value will be relevant not only to the question whether Comment d should apply, but what should happen if ⊥303 Comment d is found not to apply.[9]

In light of the foregoing, the Court need not discuss independently the applicability vel non of Sections 151 and 154 of the Restatement, to which Superluck points as alternative measures.[10] Each of those sections dictates a market value measure, and thus, assuming that Comment d does not apply, each yields the same result that the Court finds in Section 74 itself.[11]

Nor is there any need to dwell on the various case authorities cited by the parties. Superluck relies primarily on *In re 1969 Chevrolet, 2-Door* , 134 Ariz. 357, 656 P.2d 646, 650 (Ct. App. 1982), which ordered a market value recovery based on Section 154, while the Republic cites *State v. A.N.W. Seed Co.* , 116 Wash. 2d 39, 802 P.2d 1353, 1358 (1991), which

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Comment d applied even if the sale price does not precisely correspond to some theoretical fair value. Moreover, although the Restatement does not address the issue, the critical question will be the Aesarea's value at sale in Palau. See generally 22 Am. Jur. 2d, Damages § 430.

[9] In reality, this result follows from Comment d itself, which states that the debtor "cannot recover the value of the property sold" if the conditions discussed above are met. See p.3 supra. By negative implication, if the conditions are not met, then the debtor is entitled to recover the full value of the property.

[10] As the Republic points out, Superluck faces an uphill battle in trying to establish that the Republic engaged in tortious conduct (as required by § 151) or was a converter (as required by § 154). The general rule is that a valid judgment "constitutes a sufficient justification for all acts done in its enforcement" and that "[a]cts done under such a judgment cannot be made the basis for an action in tort." 5 Am. Jur. 2d, Appeal and Error § 997 at 424 (footnotes omitted); *see also State Nat'l Bank v. Ladd*, 162 P. 684, 685 (Okla. 1916) (sale pursuant to erroneous judgment does not constitute a conversion) (attached to Intervenor's Rebuttal Memorandum, 6/27/91, in No. 20-85).

[11] Sections 151 and 154 differ from each other (and from Section 74) only insofar as the former permits recovery of "a higher value if this is required to avoid injustice where the property has fluctuated in value or additions have been made to it." Since there is no claim here that the Aesarea appreciated in value after its sale, this additional consideration is not relevant in any event.

found Section 74, Comment d, [⊥304 sic] "directly on point". The Court believes that these cases are reconcilable with each other and not inconsistent with the Court's views as stated above.

A.N.W. Seed distinguishes *Chevrolet* on the ground that the Arizona "court carefully drew the distinction that the seizure was unlawful in contrast to this case where the execution was authorized by court rule." 802 P.2d at 1358 (emphasis in original). Although the Arizona court did not explain its rationale, the Court agrees that its decision can be explained as having rejected Comment d because, insofar as it was commenced on the basis of an unconstitutional search and seizure, the action there was not "brought in good faith" and the government could not be said to have been "acting lawfully". Since the Court has concluded above that the initial seizure of the Aesarea was undertaken in good faith, see pp. 4-5 supra, *Chevrolet*, even if correct on its facts, is not controlling here.

At the same time, *A.N.W. Seed* , which involved execution sales as to which no impropriety was alleged, see 802 P.2d at 1358 (noting that the sales "are unchallenged as being procedurally proper"), obviously does not preclude a further inquiry into whether the sale was "properly conducted", and the conditions of Comment d met, in this case.

C. Is Superluck Entitled To Anything Else?

Finally, the Court believes it is worthwhile, because they must be addressed eventually and because it may facilitate settlement discussions, to discuss two other issues debated by the [⊥305 sic] parties.

1. Must the Republic pay interest?

First is the question of interest. The Republic argues that Superluck should not be entitled to prejudgment interest, [12] or, in the alternative, that it should receive interest only from the reversal of the initial judgment herein in January 1988. It is clear that this Court has the power to award prejudgment interest in appropriate cases. See, e.g., *NECO v. Rdialul* , 2 ROP Intrm.211, 213 (1991). Moreover, Comment d, on which the Republic relies, specifically states that "the judgment debtor is entitled to recover the amount . . . received by the judgment creditor with interest" (emphasis added).

The only question, then, is whether the Restatement should be ignored in this respect because the Republic is the party that must pay it. The Court thinks not. The Republic relies on the rule that interest does not run on a claim against the United States in the absence of specific provision by contract or statute, or express consent by Congress. *See generally Library of Congress v. Shaw* , 106 S.Ct. 2957, 2961-63 (1986). Even assuming the same rule is generally applicable to the Republic, however, the Court believes it does not bar the payment of interest in the present circumstances. The rule is an aspect of the general immunity, absent waiver, of the United States from suit. See 106 S.Ct. at 2962. But the Republic has not asserted a sovereign

[12] Superluck's entitlement to postjudgment interest is dictated by statute, 14 PNC 2001, and is not contested.

immunity [⊥306 sic] defense with respect to the claim for restitution, but has instead expressly agreed to pay such a claim. [13] While the Court is thus not called upon to rule on the Republic's immunity from restitution generally, the Court believes that the same considerations that presumably prompted the Republic not to claim immunity with respect to restitution as such -- i.e., that the obligation arose in and is part of an action in which the Republic itself had invoked the Court's jurisdiction -- suggest that there should also be no immunity from paying interest as part of that restitution. [14] Indeed, when the Republic first agreed to the payment of restitution, it suggested that the "proper figure" should be "based on what the Republic received, with interest". Republic of Palau's Response to Motion for Restitution, 3/21/90, at 3 (emphasis added).

As to the timing of any interest award, the Court agrees with the Republic's contention that interest should be awarded from the [⊥307 sic] date of the Appellate Division decision reversing the judgment of forfeiture, i.e., January 14, 1988. This result is dictated by Section 156 of the Restatement, which sets the duty to pay interest "from the time [the party owing restitution] committed a breach of duty in failing to make restitution". No such duty arose until the Appellate Division concluded that the forfeiture of the Aesarea was not in accordance with law. Accord, F. Woodward, The Law of Quasi Contracts (1913), § 235 at 372 ("The obligation to make restitution arises when the judgment is reversed, and interest from that date should be allowed."); but see 5 Am. Jur. 2d, Appeal and Error § 1005 (stating that interest should be paid from the date of sale).

Finally, as to the amount of interest, the Republic, citing 28 U.S.C. § 2516, argues for a fluctuating rate based on the interest rates of U.S. treasury bills. Were the measure set forth in § 2516 peculiarly calibrated for government defendants, there might be logic to the Republic's position. In fact, however, § 2516 is not a "government rate" but is precisely the same measure applied to private defendants. See 28 U.S.C § 1961(a). Accordingly, the Court sees no justification for departing from the 9% interest rate generally provided for in 14 PNC 2001. See e.g., *NECO*, 2 ROP Intrm. at 215 (awarding 9% prejudgment interest).

2. Must the Republic pay for the use of the Aesarea?

The second issue is Superluck's contention that it is entitled not only to the value of the

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[13] The Court is aware that the Republic has asserted a sovereign immunity defense with respect to the claims sounding in tort in No. 45-85. The Court does not mean to express any view on the merits of that defense by its discussion here.

[14] The Court has been cited to no case which deals with the immunity of the U.S. from restitution claims, much less one that discusses the question of interest. *United States v. North American Transp. & Trading Co.*, 40 S.Ct. 518 (1919), cited by the Republic, involved a claim for compensation for the use of land that had been filed in the Court of Claims, as to which a specific statute barred interest. *Republic Nat'l Bank v. United States*, 113 S.Ct. 554 (1993), cited in the most recent appellate opinion in No. 20-85, concludes that the reversal of a judgment of forfeiture would not be "useless", and thus indicates quite plainly that the government would have an obligation to return property if it were determined that it had been wrongfully forfeited. It does not, however, address the recoverability of interest on the returned property.

Aesarea but to the lost value of its potential use from the time of the seizure forward. The Court rejects this contention based on the following analysis. First, ⊥308 it is clear that Comment d to Section 74, when applicable, is meant to set a clear limit on the amount owed by a judgment creditor. Thus, if the Republic prevails on that issue, no further compensation should be required. Second, it is also clear that even if Superluck prevails, and the Republic is required to pay the value of the Aesarea, the Republic will not be responsible to pay for its potential use after the time at which it is to be valued, i.e., as of its sale in January 1986. As the Restatement recognizes, because that value should encompass the potential future use of the vessel, to add additional compensation for such use would be a form of double-counting.[15]

Thus, the only question is whether, on the assumption that Superluck prevails on the issue of valuation, the Republic should be required to pay for the use of the Aesarea from the time of its seizure to the time of its sale. As the Court understands the rule set forth in Section 157(1) of the Restatement, the Republic is ⊥ 309 required (a) "to account for the direct product" of the Aesarea which it received, and (b) to provide such additional compensation "as will be just to both parties in view of the fault, if any, of either or both of them." It appears undisputed that the Republic received no "direct product" as that term is defined. See Section 157, Comment b. [16] Moreover, as noted earlier, on the Court's understanding of the prior Appellate Division decision and the facts, the seizure of the Aesarea was a good faith response to the Aesarea's failure to abide by the terms of the stipulated order in Civil Action No. 1-85. Given these circumstances, the Court does not believe that justice requires any other compensation to be paid for the Aesarea's use.

II. SUPERLUCK'S MOTION TO STRIKE AFFIDAVITS.

In conjunction with the briefing on the subjects discussed above, the Republic submitted affidavits of Russell E. Weller, Jr., and Philip D. Isaac, a former Attorney General and Assistant Attorney General of the Republic, respectively, who were in office at the time of the seizure and subsequent sale of the Aesarea. Superluck has moved to strike the affidavits on the ground that

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[15] See Section 157, Comment e: "Nor is there restitution even for the direct products of the subject matter after the time fixed for the valuation of the subject matter, since the damages given are for the value of the subject matter at that time, including as an element of value the prospect of receiving such direct product." See also *Alkmeon Naviera, S.A. v. M/V Marina L.*, 633 F.2d 789, 797 (9th Cir. 1980) ("The discounted future earning power of a ship, represented by the charter, is a factor to be used in determining present market value; it is not a separate item of damages. Where . . . the lost ship had a readily ascertainable market value, and that value is awarded, we will not award potentially duplicative items of damage in order to compensate; market value accomplishes this.").

Superluck's reliance on Comment e to § 74 in this regard is misplaced. That Comment deals with the situation where the property has not been sold but has remained in the possession of the creditor.

[16] "The phrase 'direct product' means that which is derived from the ownership or possession of the property without the intervention of an independent transaction by the possessor."

portions of them are inconsistent with the Republic's prior discovery responses and are outside of the competence of the affiants. The motion is denied without prejudice to Superluck's right to raise its evidentiary objections at trial.

As a discovery matter, it appears to be the case that while ⊥310 Weller and Isaac were identified by the Republic as potential witnesses, at least one of the subjects of their affidavits -- the operating condition and seaworthiness of the Aesarea -- was not identified as a potential subject of their testimony and was, moreover, a subject about which the Republic claimed to be without knowledge. Nevertheless, the motion to strike is denied because those aspects of the two affidavits were not necessary in reaching the legal conclusions reached above, and because any potential prejudice relating to their testimony at trial can be cured by the taking of their depositions before trial.[17]

As to the objection that these witnesses are incompetent to offer opinions on these subjects, the Court believes that those objections are best dealt with at trial or, at the earliest, by a motion in limine. Again, because the weight, if any, to be accorded the challenged opinions was not germane to the legal issues decided above, the Court sees no reason to address their admissibility at this time.

[17] The Court assumes that the affidavits now set forth the full scope of Mr. Weller's and Mr. Isaac's prospective testimony. If the Republic intends them (or either one) to address any additional subjects, it should so inform Superluck in advance of any deposition and well in advance of trial.

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Counsel are directed to appear for a status conference on February 17, 1994, at 11:00 a.m., and to be prepared to discuss any further discovery they wish to take and the scheduling of the trial in this matter.