

Superluck Enterprises, Inc. v. ROP, 6 ROP Intrm. 267 (1997)
SUPERLUCK ENTERPRISES, INC., et al.,
Appellants and Cross-Appellees,

v.

REPUBLIC OF PALAU,
Appellee and Cross-Appellant.

CIVIL APPEAL NO. 31-95
Civil Action No. 20-85 & 45-85

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: December 4, 1997

Counsel for Appellants: Johnson Toribiong

Counsel for Appellee: Kathleen Salii

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; ALEX R. MUNSON, Part-time Associate Justice.

BEATTIE, Justice:

This case concerns the amount of restitution due appellant Superluck Enterprises, Inc. (“Superluck”), the former owner of the motor vessel Aesarea, which was sold by the Republic of Palau (“ROP”) pursuant to a judgment of forfeiture which was reversed after the sale.

In 1985, after the Aesarea had remained in Palau beyond the time specified in its entry permit, the Attorney General filed a libel action and obtained a judgment which ordered that the vessel **L268** was “forfeited, together with her tackle, apparel, furniture and equipment to the Government of the Republic of Palau.” *ROP v M/V Aesarea*, 1 ROP Intrm. 244, 252 (Tr. Div. 1985). The judgment of forfeiture was reversed on appeal, *see ROP v. M/V Aesarea*, 1 ROP Intrm. 429 (1988), but by then the ROP had already sold the vessel, as no stay of the trial court’s judgment of forfeiture had been issued.

After the reversal of the forfeiture judgment, the ROP stipulated that Superluck was entitled to be paid restitution inasmuch as the vessel itself could not be returned to Superluck. The parties disagree, however, on the amount to which Superluck is entitled.

The trial court found that Superluck was entitled to restitution in the amount of \$73,600 for the value of the vessel, and \$20,000 for various items which the ROP removed from the vessel before it was sold. The court also awarded prejudgment interest in the amount of \$63,882.

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On appeal, Superluck contends that the trial court erred in holding that the sale of the Aesarea was properly conducted and that it erred by not awarding any restitution for life rafts allegedly taken from the vessel before its sale. For its cross-appeal, the ROP contends that the trial court erred in awarding any restitution for the items removed from the vessel because there was insufficient evidence regarding their value. It also contends that the trial court erred in awarding prejudgment interest on the restitution claim because the doctrine of sovereign immunity precluded an award of prejudgment interest.

I.

The parties agree that Superluck's entitlement to restitution stems from the Restatement of Restitution § 74, which provides that "[a] person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside. . . ." Comment d to § 74 provides that:

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, [the judgment debtor] 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.

¶269 The sale of the Aesarea was by private, sealed bidding after notice to potential interested parties. Superluck contends that the sale was not properly conducted because it should have been done by public auction. To support this contention, Superluck cites 7 PNC § 307, which provides that:

If, after due process of law, the court finds in favor of the libellant, the court shall condemn the vessel and declare her forfeited, together with her tackle, apparel, furniture and equipment. The court shall order the sale thereof at public auction or shall order the vessel forfeited to the President for the use of the Republic. . . .

Here, after the court declared Aesarea forfeited, it did not order that the vessel be sold at public auction. It only ordered that the vessel was forfeited to the Government of Palau. Superluck argues that 7 PNC § 307 nevertheless requires that any sale be by public auction.

As comment d to § 74 of the Restatement makes clear, the consequences of an improperly conducted sale are that the owner of the property sold is entitled to its fair market value rather than merely the amount received from the sale. In the instant case, the trial court found that the sale proceeds equaled the fair market value of the vessel and other items sold--in other words, that Superluck was awarded exactly what it would have been entitled to if the sale had been found to be improperly conducted. Thus, we need not dwell on the manner of sale, and we now address the question whether the finding that the sale was for fair market value was clearly erroneous.

II.

There was sharply conflicting evidence before the trial court regarding the fair market value of the vessel. Superluck argued that the value was \$4,000,000, the same as the book value of the vessel. The ROP argued that the sale price of \$73,600 was the fair market value. The trial court found that the vessel had no value as an operating vessel, but rather had only scrap value. This finding is supported by the testimony of David Moody, the fact that the vessel had never been put to commercial use from the time of its arrival in Hong Kong in 1981 until its departure for Palau four years later, and other evidence. A trial court's finding of fact will not be set aside unless it is clearly erroneous. *Umedib v. Smau*, 4 ROP Intrm. 257 (1994). There is ample evidence in the record to support the finding that the sale proceeds of \$73,600 was equal 1270 to the fair market value of the vessel at the time of sale. The finding that the fair market value of Aesarea was \$73,600 was not clearly erroneous.

III.

The trial court found that the fair market value of the items removed from the Aesarea by the ROP prior to its sale was \$20,000. Superluck and the ROP both contend that this finding was in error. We first address the arguments of Superluck.

Superluck contends that the trial court failed to take into account the life rafts which were removed from the vessel by the ROP. It claims that fifty life rafts were removed and that they were worth between \$10,000 and \$20,000 each. The trial court made no finding regarding the number of life rafts that were removed. The only witness who testified regarding the removal of life rafts said that, at most, five life rafts were removed. Although one witness called by the ROP said that life rafts of that type were worth \$10,000 to \$20,000 in Australia, the same witness said that every Aesarea life raft which he inspected had an expired inspection certificate--they were all out of date. The trial court did not place a value on each life raft removed, but did find that \$20,000 was the value of "the generator and any and all other items taken". Therefore, we see no indication that the trial court ignored the life rafts in determining the value of the items taken, nor was it clearly erroneous to find that Superluck failed to establish that the value of the out of date life rafts was \$10,000 to \$20,000.¹

The ROP argues that there was insufficient evidence to support the finding that the value of the items removed from the vessel was \$20,000 and that the finding was based upon mere speculation. There is evidence that some exercise equipment, furniture, life rafts, radios, a sea anchor, and a generator were removed. The trial court found that the value of the generator was \$3,000 but did not itemize the value of the other items. It simply held that the value of the generator and the other items amounted to \$20,000 and noted that the figure was consistent with the ROP's response to a discovery request that was admitted into evidence which stated that the value was "substantially less" than \$50,000. On this record, we see no reason to conclude that the trial court's finding was based upon speculation rather than on the evidence before the court. There was evidence from which a reasonable trier of fact could find that the value of the removed items was \$20,000, and therefore the finding was not clearly erroneous. *Umedib v.*

¹ None of Superluck's witnesses gave any opinion of the value of the life rafts.

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Smau, 4 ROP Intrm. 257, 260 ¶271 (1994).

IV.

The trial court held that Superluck was entitled to prejudgment interest because the obligation to pay restitution arose in an action in which the Republic of Palau had invoked the Court's jurisdiction--the forfeiture action. The trial court also noted that, in the ROP's Response to Motion for Restitution, the Attorney General said that the amount of restitution to which Superluck was entitled should be "based on what the Republic received [from the sale of the Aesarea], with interest." The ROP contends that the doctrine of sovereign immunity precludes the assessment of prejudgment interest against it. We are called upon for the first time to address the issue of sovereign immunity as it specifically relates to prejudgment interest.

The doctrine of sovereign immunity renders the ROP immune from lawsuits except to the extent that it has waived immunity by consenting to be sued. *Tell v. Rengill*, 4 ROP Intrm. 224, 227 (1994). A waiver of sovereign immunity must be unequivocally expressed by statute.² *Library of Congress v. Shaw*, 106 S.Ct. 2957, 2961 (1986); *U.S. v. Idaho*, 113 S.Ct. 1893, 1896 (1993). The Attorney General, therefore, has no power to waive sovereign immunity in the absence of statutory authority to do so. *See United States v. N.Y. Rayon Importing Co.*, 67 S.Ct. 601, 604-05 (1947), ("[i]t has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress.")

ROP has not claimed sovereign immunity on the restitution claim of Superluck. We assume, without deciding, that sovereign immunity on that claim has been waived by 14 PNC § 501(2). The waiver of immunity on the general claim does not, however, imply that immunity has been waived on the claim for prejudgment interest. *Library of Congress v. Shaw*, 106 S.Ct. 2957, 2961 (1986). Moreover,

[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent ¶272 necessary to waive the traditional immunity must be express, and it must be strictly construed. *United States v. N.Y. Rayon Importing Co.*, 67 S.Ct. 601, 604 (1947). Sovereign immunity has been held to prevent an award of interest even where a statute directs payment of the "amount equitably due" or payment of "just compensation".³ *Library of Congress*, 106 S.Ct. at 2964.

² This case does not present any issue concerning a contractual consent to the payment of interest.

³ This is so "even though it long has been understood that the United States is required to pay interest where the Constitution mandates payment under the Just Compensation Clause." *Library of Congress*, 106 S.Ct. at 2964. In the United States, to satisfy the constitutional mandate of the Fifth Amendment, "just compensation" includes a payment of interest. *See Smyth v. United States*, 58 S.Ct. 248, 252-53 (1937). Superluck does not argue that the instant case involves a taking of property for public use pursuant to Art. XIII, Sec. 7 of the Palau

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There is no Palau statute that waives sovereign immunity for prejudgment interest on the restitution claim. Nor could the immunity be waived by any language contained in the ROP's Response to Motion for Restitution. *United States v. N.Y. Rayon Importing Co., supra*. Therefore, the trial court erred in awarding Superluck prejudgment⁴ interest on the restitution claim.

CONCLUSION

For the foregoing reasons, we AFFIRM the trial court's decision except to the extent that it awarded prejudgment interest. We REVERSE the award of prejudgment interest and remand this matter to the trial court for entry of judgment consistent with our holding herein.

Constitution.

⁴ The issue of post judgment interest is not before us, and we therefore limit our discussion to the issue of prejudgment interest.