IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 85 of 1999

BETWEEN: ROBB EVANS
Claimant

AND: EUROPEAN BANK LIMITED
First Defendant

AND: BENFORD LIMITED
Second Defendant

Hearing: ***Thursday 5 February 2015***

By: ***Justice Stephen Harrop***

In attendance: ***Mark Hurley for the Claimant***
Garry Blake for the First Defendant
No appearance for the Second Defendant

Date of Judgment: Monday 9 February 2015

RESERVED JUDGMENT

Introduction

1. Following the judgment of Justice Spear in this longstanding case, reported at [2014] VUSC 23, and determination of appeals by the Public Prosecutor, European Bank Limited ("EBL") & others by the court of Appeal on 14 November 2014, reported at [2014] VUCA 38, three matters have been referred back to the Supreme Court. I have been favoured with the task of dealing with these.

2. As the background facts are fully set out in those judgments I will not repeat them here.

3. The three matters, referred to in paragraphs 48 to 57 of the Court of Appeal judgment, are:

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(a) Whether EBL should have been awarded indemnity costs by Justice Spear rather than merely standard costs with an enhanced hourly rate and an auditing function to be carried out by Mr Hurley, counsel for the claimant Robb Evans ("Evans"), and;

(b) Whether certain comments made by Justice Spear about the approach of EBL ought to be recalled and reconsidered by this Court; and

(c) Determination of an application filed by Evans in the Court of Appeal seeking an accounting of the way in which EBL has dealt with the funds and of the charges and expenses levied against them.

4. EBL has since abandoned pursuit the second of these three issues. Prior to progress being made between the parties, and if necessary by the Court, in respect of the other two issues, counsel have sought a preliminary ruling as to the meaning of paragraph 64 of the Court of Appeal's judgment. I heard extensive argument about the correct interpretation of this paragraph and received helpful written submissions from counsel.

5. As at 25 November 2014, EBL held US$8,236,252.53 on behalf of Benford.

6. In early December 2014 EBL in accordance with the Court of Appeal judgment remitted US$5,052,841.81 to Evans. It retained US$3,173,220.72. For present purposes it is not necessary to detail how the sum retained was calculated; it is sufficient to say that by far the majority of it relates to the award of the damages made by the High Court of Australia in the sum of AUS$1,251,088.33 on 10 March 2010 when that Court set aside the New South Wales Court of Appeal judgment and reinstated Gzell J's determination at first instance made on 20 September 2007. There has been substantial interest as well as costs added to the damages award.

7. Subject to a concession made by Mr Hurley at the hearing, Evans applies for an order that all of the withheld funds be remitted to it without delay. It says that on the proper construction of paragraph 64 of the Court of Appeal judgment, EBL has no right to withhold any of those funds.

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8. The concession to which I have referred is that Evans now accepts that EBL may on a without prejudice basis retain AUS$200,000 pending consideration of the appropriate payments for costs due to the Attorney-General and to Benford in this proceeding and in the related proceedings which were heard at the same time by Justice Spear.

9. For EBL, Mr Blake simply seeks a declaration at this stage that in principle the retentions were fully appropriate and in accordance with the Court of Appeal judgment. If I find in favour of EBL, the parties will try to agree on the next steps regarding resolution of the two outstanding issues.

Issues and essential contentions

10. The issue I need to determine in this judgment is what the Court of Appeal meant by paragraph 64 of its judgment, which reads: *"We confirm that all balance funds are to be released to Robb Evans to be treated as part of the funds it has recovered under its appointment in the USA. It is proper that any claim for or against it for damages or costs in respect of the proceedings in Australia or here should be under the supervision of the USA Courts. We specifically defer to the USA Courts the determination of whether the damages and costs to be paid by Robb Evans arising from the Australian litigation comes from the Benford money or is otherwise the responsibility of Robb Evans."*

11. The essential submission of Mr Hurley for Evans is that the second sentence in that paragraph means that EBL was required to remit to Evans all of the funds without deduction and that contrary to this EBL has wrongly deducted funds which effectively represent "a claim against Evans in respect of the proceedings in Australia." For EBL, Mr Blake submits that when looked at in proper context the Court of Appeal did not intend to differ from what Justice Spear had said on this issue, there having been no appeal raised by Evans (or anyone else) in relation to that aspect of Justice Spear's judgment. He submits that a literal reading of the second sentence of paragraph 64 does not accord with the intention of the Court of Appeal as divined from the surrounding circumstances in which it delivered judgment.

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12. I observe at the outset that this is not such a precise exercise as statutory interpretation. Further, particular care needs to be taken in seizing on a phrase or sentence out of context, especially when it is well known that the Vanuatu Court of Appeal's sessions involve hearing and issuing judgment on a significant number of appeals within a fortnight.

13. In order to gain a proper understanding of what Court of Appeal meant in paragraph 64 I consider it is essential to look not only at its judgment as a whole but also at Justice Spear's judgment and the content of the appeals from it.

14. On the relevant issue Justice Spear said at paragraphs 82 to 86 of his judgment:

> ***82.*** *Mr Blake also sought European Bank's award arising out of the Australian Court proceedings also to be paid out of the Benford funds. As previously mentioned, the High Court of Australia confirmed that Mr Evans was required to compensate European Bank in the sum of AUD 1,251,088.33 plus interest and legal costs. The total amount claimed by European Bank which appears to be both in respect of the Australian costs and the Vanuatu costs is AUD 2,571,463.28 made up of:-*
>
> *a. The damages awarded and confirmed by the High Court of Australia.*
>
> *b. The legal costs incidental to the Vanuatu proceedings.*
>
> *c. Other out of pocket costs.*
>
> *d. Interest on the compensation award.*
>
> ***83.*** *Kely Ihrig, of European Bank, at paragraph 5 of her sworn statement states, "to date Robb Evans and Associates have paid only AUD 244,668.84 of the damages award and have refused to pay the balance; instead instructing European Bank Ltd in writing to deduct the balance due from the "Benford monies. We are fully aware that Robb Evans and Associates were not empowered to give this instruction and the "Benford" deposit monies are frozen under 3 Vanuatu Supreme Court orders. "*
>
> ***84.*** *The position is that European Bank rightly considers that it is restrained from making the deduction or payment out from the Benford monies because of the Vanuatu Supreme Court orders.*
>
> ***85.*** *I cannot ignore the history of this matter which essentially came about because European Bank helped to facilitate the fraudster Tave through a "relaxed" approach to the establishment of the account. That was the consistent assessment of the various courts in Australia who have dealt with this matter. Be that as it may, it was Mr Evans who commenced the Australian proceedings, he was completely unsuccessful in that respect, and he is unlikely to have any assets remaining in that jurisdiction. Mr Evans is of course based in California. If the European Bank costs are not met from the Benford funds, it would leave European Bank having to navigate the rather tortuous path of seeking recovery on an Australian judgment in California. Furthermore, European bank can be seen, in its defence of the Australian litigation, effectively to be complying with the various orders of this court relating to the protection of the funds.*

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86. *It is necessary to draw a line across the page in respect of this now very long running matter.* ***To that end, European Bank is entitled to settlement of its costs incidental to the Australian litigation out of the Benford funds prior to any funds being transferred to Mr Evans as may be agreed with Mr Hurley on behalf of Mr Evans.*** (emphasis added)

15. For present purposes it is important to note that the evidence of Kely Ihrig referred to by Justice Spear in paragraph 83 of his judgment, which I do not understand to be disputed by Evans even now, was based on a letter sent by Evans' Los Angeles Attorneys to EBL's Australian solicitors on 14 April 2010. In that letter it was said: "Now, it has been determined by your High Court that the Receiver owes the Bank the principal sum of $1.020.472.65 (Australian Dollars), together with interest. Therefore, there is a mutuality of obligations between the Receiver and the Bank which gives rise to rights of setoff in favour of the parties".

16. The letter went on to say: *"As a result of this mutuality of obligations and the fact that the indebtedness owed to the Receiver vastly exceeds the amounts owed by it to the Bank, the Receiver need not make any payment to the Bank notwithstanding the High Court's Order and may set off its debt to the Bank against the Bank's debt to it. This further means that the Receiver's rights in and to the amount owing being held by the Bank in the Benford account is concomitantly reduced by the amount which the Receiver owes on account of the Australian judgment."*

17. Accordingly as matters stood at the issue of Justice Spear's judgment, a clear finding had been made in paragraph 86 that EBL was entitled to settlement to its costs incidental to the Australian litigation out of the Benford funds prior to any funds being transferred to Mr Evans. Justice Spear expressly considered and acknowledged the difficulty with which EBL would be faced if it were necessary for it to seek recovery on an Australian judgment in California. It is clear that Justice Spear reference to EBL's "costs incidental to the Australian litigation" means both the damages and the costs, together with interest thereon.

18. It is significant in my view that there was no appeal by Evans against Justice Spear's judgment on this or any other issue. Obviously if Evans had been dissatisfied with

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EBL deducting the Australian litigation-related costs before remission to it, Evans could have, despite succeeding before Justice Spear, lodged a cross-appeal. Any residence to do so arising from its overall success, would have been assuaged by it knowledge that the matter was, by dint of the various other appeals, going to the Court of Appeal anyway.

19. That Evans did not cross-appeal, or make any submission about this to the Court of Appeal, was not at all surprising as it was entirely consistent with its attitude as set out in the 2010 letter from its Los Angeles attorneys. In other words, both before and after Justice Spear's ruling, there was simply no dispute between Evans and EBL that the amount of the Australian judgment and related costs was properly deducted by EBL from the Benford funds and offset against the much greater sum EBL was required to remit to Evans. It there had been no appeal against Spear J's judgment, EBL would have paid Evans in the manner it now has and Evans would have readily accepted that.

20. For completeness I note that in the notice of appeal to the Court of Appeal which was jointly filed by the Attorney-General, the Public Prosecutor and EBL, there was a challenge to Justice Spear's finding at paragraphs 86 and 87 but only to the extent of the appointment of Mr Hurley on behalf of Evans as the person responsible to disburse the funds. There was also criticism of the wording of Justice Spear's orders. However, the ruling permitting deduction of the Australian litigation – related money was not in any way challenged (of course EBL had no issue with that and it did not concern the other appellants).

21. There was therefore no issue raised before the Court of Appeal by any party challenging Justice Spear's ruling that EBL was entitled to settlement of its damage/costs and interest incidental to the Australian litigation out of the Benford funds prior to remission to Evans.

22. What then did the Court of Appeal say in dealing with the appeals by the Attorney-General and EBL in the civil part of the case?

23. Between paragraphs 25 and 47 the Court discussed the propriety of the Benford funds being remitted to Evans (as opposed to someone else) as Justice Spear had ordered.

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The Court noted at paragraph 37 that the Attorney-General had been concerned, and properly so, to ensure that to the greatest extent possible the money which was in the name of Benford in European Bank should available to the victims. I acknowledged at paragraph 43 that a mechanism was urgently required to get the money back to the victims and ultimately determined that, in any absence of any sensible and less expensive alternative, the money should be paid to Evans because it was duly appointed by the United States District Court and was subject to the oversight by a relevant court and eventual accountability to the United States Federal Trade Commission.

24. The Court then turned to consider EBL's appeal and ancillary matters. I note again it was not being asked to consider any challenge to Justice Spear's ruling about the deduction of the Australian litigation-related funds. Everything it says in this part of its judgment must be read in that light.

25. At paragraphs 48 to 51 the Court dealt with the appeal by EBL for indemnity costs to be awarded. It commented, interestingly in this context, that Justice Spear had misunderstood the position of EBL and accepted that EBL had made the submission to His Lordship that it was a mere holder of the funds and should not have been out of the pocket in any way as a result its being forced to participate in the proceeding. While the Court did not finalise the matter, it clearly evinced a more sympathetic view of EBL's position than Justice Spear had (see especially the comments at paragraph 85 by Spear J), yet (even) Justice Spear had ultimately decided it would be unfair to EBL not to allow it to deduct the Australian-related damages and costs prior to remission to Mr Evans. There is nothing in paragraphs 48 to 51 which indicates the Court of Appeal taking a more adverse view of EBL's position than Justice Spear had; the contrary is true. This reduces the likelihood that at paragraph 64 the Court of Appeal intended to reverse what the more critical Spear J had ordered.

26. At paragraphs 55 to 57 the Court of Appeal noted the application which Evans had made for the accounting by EBL of all income earned on the funds over the years and the charges and expenses it had levied against them. Importantly it recorded in paragraph 57: *"It is not disputed that the costs that European Bank is entitled to receive should come out of the funds it holds for Benford. The quantum of that fund*

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requires consideration and certainly there is an urgent and overwhelming need for a proper accounting in respect of the funds during the time that this matter has been unresolved. It will not be difficult to consider the nature of costs for the Supreme Court case in 2011 at the same time."

27. I take the reference to "*the costs that the European Bank is entitled to receive*" to mean charges and expenses which the Court ultimately upholds as justified. Once those are fixed, those funds should clearly come out of the funds held for Benford, as they would with any customer. This is to be expected since EBL and Benford were in a banker-customer relationship which will no doubt have entitled to EBL to make such charges. Accordingly the Court of Appeal was certainly not suggesting that there need to be remission of funds to Evans without prior deduction of such fees and charges as were found to be properly due to EBL.

28. It is appropriate to set out in full paragraphs 58 to 65 of the Court of Appeal judgment. Under the heading "Costs" these paragraphs stated:

58. Spear J. dealt with costs in the following way:-

"81. The Attorney General, Mr Napuati for Benford Ltd and Mr Blake for European Bank are all entitled to standard costs for these proceedings at an enhanced hourly rate of VT25,000 per hour in respect to be agreed or taxed. All bills of costs in taxable form should be provided to Mr Hurley by 31 May 2014. In the event that Mr Hurley confirms agreement with any individual bill of costs, the appropriate deduction and payment may be made out of the funds held by European Bank for Benford. If no agreement is reached then the bill(s) of costs will need to be taxed in the usual manner.

82. Mr Blake also sought European Bank's award arising out of the Australian Court proceedings also to be paid out of the Benford funds. As previously mentioned, the High Court of Australia confirmed that Mr Evans was required to compensate European Bank in the sum of AUD 1,251,088.33 plus interest and legal costs. The total amount claimed by European Bank which appears to be both in respect of the Australian costs and the Vanuatu costs is AUD 2,571,463.28 made up of:-

a. The damages awarded and confirmed by the High Court of Australia.

b. The legal costs incidental to the Vanuatu proceedings.

c. Other out of pocket costs.

d. Interest on the compensation award."

59. There was no appeal against that orders for costs awarded to the Attorney-General in the Supreme Court on that formula and we do not interfere with that exercise of discretion. We trust that the application and implementation of the regime will not be problematic.

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60. As far as the appeal to this Court is concerned the Attorney General has been unsuccessful. There is no reason why there should be any award of costs in his favour nor in the circumstances against him.
61. There was no appeal in respect of the costs in favour of Benford in the Supreme Court so it does not require our attention.
62. We are at a loss to understand why Benford became involved in these appeal proceedings. The arguments which were advanced became impossible of comprehension in light of the total history of the matter. There is no order for costs in Benford's favour in this Court.
63. As far as claims which have been made by Robb Evans for costs in respect of any part of the proceedings we consider they are better dealt with in the US District Court. The full picture is not before the Courts in this country. It is essential that any court making costs orders should have the full circumstances available to assess and evaluate. We therefore refrain from making any costs orders as against the funds in the name of Benford in favour of Robb Evans but only because we consider that should occur in the US and not here.
64. We confirm that all balance funds are to be released to Robb Evans to be treated as part of the funds it has recovered under its appointment in the USA. It is proper that any claim for or against it for damages or costs in respect of the proceedings in Australia or here should be under the supervision of the USA Courts. We specifically defer to the USA Courts the determination of whether the damages and costs to be paid by Robb Evans arising from the Australian litigation comes from the Benford money or is otherwise the responsibility of Robb Evans.

29. I first note that the Court of Appeal did not include paragraphs 83 to 86 in its description of how Justice Spear dealt with costs. Arguably those paragraphs also needed to be considered to provide full context.

30. The Court of Appeal noted there had been no appeal against the award of costs to the Attorney-General as set out in paragraph 81 and therefore the Court did not interfere with that exercise of discretion. Here Mr Blake makes the point that the Court, entirely properly, indicates that it would deal only with matters in respect of which there ***was*** an appeal. It did not interfere with what Justice Spear had said about the Attorney-General's costs given that was no appeal and it was the exercise of a discretion.

31. Again, in paragraph 61, the Court of Appeal noted that there was no appeal in respect of the costs awarded to Benford in the Supreme Court, "*so it does not require our attention*".

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32. Mr Blake submits that what *should* then have followed in the Court of Appeal judgment was a similar observation so far as the award to the EBL was concerned except to the extent of the indemnity costs argument which had been expressly raised on appeal and which had been dealt by the Court of Appeal at paragraphs 48 to 51. Mr Blake says that the Court of Appeal should have said, there having being no challenge by Evans to Justice Spear's ruling about the deduction of the Australian debt-related sums, that it was not required to interfere.

33. Obviously however that is not the Court of Appeal said and it went on paragraph 63 and 64 to make further observations.

34. In paragraph 63 the Court was clearly expressing its concern that it was not in a sufficient position to assess any claim which Evans might make for costs in relation to any part of the proceedings and these were better dealt with in the US District Court in the absence of the full picture being before the Vanuatu courts. The Court therefore expressly refrained from making any costs orders as against the Benford funds in favour of Evans but only because that should occur in the United States and not here.

35. I observe at this point that there is no basis on which the Court of Appeal could properly have refrained from dealing with questions of EBL's costs in the Vanuatu courts because that was within its province and that of Justice Spear. But there had been no appeal about EBL's costs, leaving aside the indemnity issue. Equally, there is no reason why the US District Court should be in any better position that the Vanuatu courts to recognise the final and the binding nature of the High Court of Australia judgment. In another words "the full picture" was available here, by contrast with questions about what costs might be awarded *to* Evans, if any.

36. Turning then to the critical paragraph 64, in line with its earlier determination upholding Evans' position as Receiver to receive the funds, the Court recognised that should now occur without delay. In so ordering it effectively thawed the freezing orders made in the Supreme Court many years ago. It is obvious, as Mr Blake submits, that the word "balance" implies that Court contemplated *some* deductions from the funds otherwise to be remitted. But as Mr Hurley points out, the Court may have simply had in mind the charges and expenses referred to in paragraph 57 and the

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costs which would need to be paid to the Attorney-General and Benford as ordered by Justice Spear and in respect of which there was no appeal.

37. The wording of the first sentence of paragraph 64 does therefore not shed light on whether or not the intention was to authorise the retention by EBL of the Australian litigation-related sums.

38. The Court of Appeal then goes on to say, in what it is the critical sentence: *"It is proper that any claim for or against it for damages or costs in respect of the proceedings in Australia or here should be under the supervision of the USA Courts."*

39. I consider that *"it"* refers to Evans since it is clear from the preceding sentence that *"it"* refers to Evans and to Evan's appointment.

40. In my view the *primary* concern of the Court of Appeal in this sentence, as confirmed by paragraph 63 and by the last sentence of paragraph 64, was its wish to leave it to the USA Courts to determine what claims *Evans* might properly make on the Benford funds which the Court earlier described the victims' money. That is, the Court was concerned that Evans should not, without scrutiny by the USA Courts, be able to deduct money from the Benford funds particularly in respect of the Australian litigation where it had completely failed. It should be noted that although the Court had raised this concern it was certainly not saying that Evans' actions were inappropriate; earlier, at paragraph 26, the Court had said *"Although that was wholly unsuccessful, it is not a step which we are prepared to criticise. European Bank where the funds had been initially deposited in Port Vila had in turn placed them in Citibank in Australia and going there was an understandable course of action."*

41. I am satisfied that the main purpose of the comment about supervision being required by the USA Courts relates to any claim there might be *by* Evans for costs. But the Court also referred to any claim for damages and costs *against* Evans, implicitly relating to the way the Australian litigation had been conducted. The Court of Appeal was contemplating that Evans might apply for costs to be paid from the Benford funds in respect of his conduct of litigation both in Australia and here but it appears to have recognised there might be some counterclaim *against* Evans perhaps by a party, such as a victim, who claimed to be adversely affected by the way Evans had conducted

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litigation in Australia or here. Or perhaps the US Court or the FTC might call Evans to account.

42. Supporting the interpretation of the sentence as not referring to EBL's entitlement to payment of the debt relating to the Australian litigation, is the use of the word "claim". It does not make sense to describe the damages awarded by Gzell J, later upheld by the High Court of Australia, as a "claim". It was of course originally a claim but it was fully and finally resolved by the High Court of Australia so it became a judgment debt.

43. I therefore consider the Court of Appeal in the second sentence in paragraph 64 was referring to possible *future* claims for or against Evans, not to the undoubted and well-established debt owed by Evans to EBL arising from the Australian litigation.

44. I consider the final sentence of paragraph 64 is important as corroboration of this view. The Court of Appeal there refers to *"the damages and costs **to be paid** by Robb Evans arising from Australia litigation"* (emphasis added). This is a clear reference to the sum awarded by the High Court of Australia, which *has to be paid* by Evans. It is (rightly) not described as a claim. After 2010, there was never any dispute that Evans had to pay the appropriate sum to EBL, or at least to offset it. All the Court of Appeal was saying in the last sentence of paragraph 64 was that it would be for the USA Courts to decide the ultimate source and manner of that payment, it would *either* come from the Benford money (which presumably it would if the US court thought Evans had acted properly in relation to the Australian litigation) *or* it would be paid by Evans himself (which would presumably follow if the US court thought his taking or conduct of the Australian litigation was inappropriate and unjustified in the discharge of his duties as Receiver).

45. I see nothing inconsistent between what the Court of Appeal has said in paragraph 64 and the prior deduction of the funds by EBL. If EBL deducts the money which it is undoubtedly entitled to have from Evans as a result of the outcome of the Australian litigation, then it need no longer be involved. If the US court ultimately agrees it was appropriate for that debt be paid from the Benford money then nothing further need be done, because that will already have occurred. If however the US court decides

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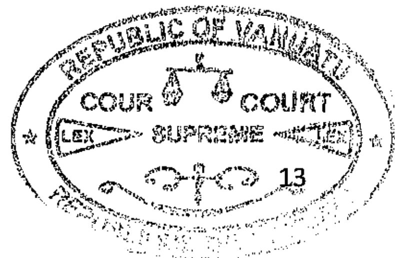
otherwise then it might direct that Mr Evans replenish the Benford funds from his own pocket. In the end, it is now all about an assessment by the US court of Evan's conduct of the receivership, not about the conduct of EBL. The High Court of Australia finalised the assessment of EBL's conduct in the litigation in that country in determining once and for all its damages claim. In paragraph 64 the Court of Appeal cannot have intended to leave EBL's award open for further consideration by the US courts.

46. I agree with Mr Blake that there is in any event is no reason to think that the Court of Appeal intended to differ from the findings that Justice Spear had made about deduction of the Australian litigation-related costs and damages from the Benford funds before remission. Nobody had suggested, whether by appeal or submission, to the Court of Appeal that that should not happen. In particular Evans as Receiver had not in any way suggested that it not occur. It had indeed, more than four years earlier, told EBL the appropriate course *was* , as the Court of Appeal was aware, to offset the judgment debt.

47. In case I am wrong about any of the above, I also consider the word "supervision" in the second sentence of the paragraph 64 to be important. Essentially the Court of Appeal was acknowledging that ***ultimately*** the USA Courts should be able to assess and supervise everything that has happened in connection with the Benford funds. In the unlikely event that it decided that the High Court of Australia should not have the awarded damages to EBL and therefore that EBL's deduction of them was unjustified, it technically at least retains the opportunity to do something about that. However, it seems most unlikely that a US District Court would not respect and accept the judgment of the High Court of Australia.

48. Whatever the position so far as the *current incidence* of payments from the Benford funds there remains an overriding supervisory jurisdiction for the US court. I therefore do not see that the authorisation by this Court of deduction of the Australian litigation-related damages and costs is inconsistent with the Court of Appeal's statement that this matter should be under the supervision of the US Courts.



49. I have therefore come to the clear view that EBL was entitled in principle to retain a sum representing the damages, costs and interest relating to the Australian litigation. It may be that other deductions (as well as the AU$200,000 accepted by Mr Hurley) were also justified but I have not been asked to make any finding on those matters, or at least not yet.

50. I acknowledge that in producing this judgment at short notice I have not traversed in a serial manner each of the arguments advanced by Mr Hurley and Mr Blake. I can assure the parties that they have all been taken into account.

51. Finally, although not necessary to my judgment, I mention an issue which was the subject of submissions: the jurisdiction of the Court of Appeal to vary Justice Spear's order or declaration in paragraph 86 of his judgment (that EBL was entitled to settlement of its costs incidental to the Australian litigation out of the Benford funds prior to any of the funds being transferred to Evans). I do not consider the Court of Appeal had jurisdiction to differ from that finding because there was no appeal by any party relating to it.

52. Often where is an appeal against a substantiative finding, at least a successful one, the Court of Appeal needs to reassess the costs awards in the Court below. However, the paragraph 86 ruling by Justice Spear was *not* a ruling on costs but an express finding in favour of the EBL based on what Mr Blake had sought on its behalf, as set out in paragraph 82 of Justice Spear's judgment. It was not a matter of discretion or an issue that the Court of Appeal had any jurisdiction to interfere with in the absence of an appeal against that ruling. I have already said I do not consider the Court of Appeal was intending in its judgment in paragraph 64 to interfere with what Justice Spear said, but if I am wrong then I consider there was, in the absence of an appeal or cross-appeal, no jurisdictional basis on which the Court of Appeal could have interfered with that part of Justice Spear's judgment.

53. I do not accept Mr Hurley's submission that, because there was an appeal by EBL seeking indemnity costs and various other matters raised on appeal by the Attorney-General and Benford, that somehow the Court of Appeal was vested with jurisdiction to change anything about Justice Spear's judgment it decided it was appropriate to

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change. Nor do I accept that once there is an appeal, the Court of Appeal has inherent jurisdiction to change any aspect of the judgment under appeal. If there is a matter which the Court does not consider was properly dealt with below, then rather than determining it, generally it will remit it to the Supreme Court, as indeed occurred with the three matters sent back in this case.

54. In any event, if the Court had been intending to make such a significant change to Justice Spear's finding in favour of EBL, so as to prevent its retention of such a large sum, it would have, as required by simple natural justice, given EBL the opportunity to make submissions. This point is reflected in a slightly different context in the proviso to Rule 5 of the Western Pacific Court of Appeal Rules 1973.

55. For all these reasons I accept Mr Blake's submissions as to the interpretation of paragraph 64 of the Court of Appeal's judgment and reject those of Mr Hurley.

56. EBL is entitled to costs on the application(s) which has led to this judgment but for now I reserve them pending further submissions of counsel on the way matters will now proceed.

57. There will be a further conference **at 9.30 am on Monday 23 February 2015.**

BY THE COURT

STEPHEN HARROP
Judge