IN THE SUPREME COURTOF **Civil**

THE REPUBLIC OF VANUATU **Case No. 15/601 SC/CIVL**

(Civil Jurisdiction)

BETWEEN: **Robb Evans of Robb Evans & Associates**

Claimant

AND: **Wanfuteng Bank Limited**

Defendant

Date of Hearing	27 February 2020
Before:	Justice G.A. Andrée Wiltens
Counsel:	Mark Hurley for the Claimant
	Garry Blake for Defendant
Date of Decision:	30 March 2020

JUDGMENT

A. Introduction

1. In 1999 the proceeds of a large United States of America ("US") credit card scam were deposited with European Bank Limited ("EBL") in Vanuatu by one of several entities used by the fraudsters to disperse and attempt to conceal their ill-gotten gains, namely Benford Limited ("Benford"). In December 2014, the balance of the funds, less certain fees and costs retained by EBL, were eventually remitted to Rob Evans of Robb Evans Limited ("RE") as the US Court-appointed receiver for Benford.

2. Since that time, RE has challenged the amounts retained by EBL as fees and costs. The current Claim alleges many wrongful deductions from the principal sum held by EBL before the balance was remitted, as well as inappropriate conduct by EBL in managing the account.

3. EBL has steadfastly maintained that RE has no standing in Vanuatu to make such a challenge. Twice applications to strike out the Claim have been advanced, each time without success. It now transpires, somewhat ironically, that EBL accepts that an error has

been made and concedes that a further US$ 844,528.04 should have been remitted to RE in 2014. As part of this action, interest is sought by RE in respect of this sum not remitted by EBL. **[Issue A]**.

4. That issue aside, RE maintains there are other sums which have been incorrectly deducted or withheld by EBL. There is also a challenge to the manner in which the Benford funds were dealt with resulting in unwarranted costs. All these allegations are strenuously defended by EBL which maintains all its actions were exemplary.

5. Counsel have helpfully provided a list of "agreed issues" to be determined by the Court. However, during the hearing other matters arose which, in my view, also require determination – for example Issue A above. The "agreed issues" are identified in the description of the background to this case along with other issues raised. Each will be given particular attention.

B. Background

6. EBL was registered as an international company in Vanuatu. The name of EBL has subsequently, in May 2018, been changed to Wanfuteng Bank Limited – hence the entituling of this case making no mention of EBL. However, it is accepted that if the bank in question is liable, that liability is EBL's.

7. On 22 September 1999, RE was appointed as the permanent receiver of Benford by the United States District Court in California. Prior to this, RE had been appointed receiver of other entities involved in the same credit card scam, but Benford's involvement in the scam was a late discovery.

8. RE was seeking to recover as much of the proceeds of the scam as possible. RE discovered that large amounts of funds had been transferred from US to Vanuatu by Benford and deposited with EBL. All were claimed to be tainted funds. Benford's banking with EBL commenced on 19 February 1999. There were four deposits made in all, as follows:

   - on 26 February 1999, US$ 97,900;
   - on 19 March 1999, US$ 2,800,000;
   - on 9 April 1999, US$ 750,000; and
   - on 9 April 1999, US$ 3,880,000.

9. EBL placed the funds on interest-bearing deposits on receipt, as instructed by Benford.

10. EBL became aware of the fraudulent nature of the funds on or about 27 or 28 May 1999. EBL accordingly, of its own accord, froze the funds on 31 May 1999. Then on 1 June 1999, EBL amalgamated all the funds (principal and interest earned) into one lump sum totalling US$ 7,431,924.56. This amount was placed into a current account in the name of Benford - account number 8901-116103-0106.

11. That same day, ostensibly due to EBL's policy of not paying interest on fraudulent funds, the interest then earned on the funds (calculated to be US$ 36,194.56) was deducted from Benford's account by way of "Interest write back". The appropriateness of this action is challenged by RE [**Issue B**].

12. The Benford funds remained frozen from late 1999, in Vanuatu and later in Australia, until late 2014 when a net balance was calculated and released to RE, following Vanuatu Supreme Court and Court of Appeal rulings.

13. As a result of the Court orders dealing with the freezing of the Benford funds, EBL considered it was unable to take from those funds its accrued costs and fees. This put Benford's current account, to which all the fees were posted, into overdraft. The size of that overdraft continued to grow up to either 2005 or 2007. At this point the funds placed with Citibank in Australia were "unfrozen" and remitted to EBL in Vanuatu. Allowing the current account to be placed into overdraft is now challenged by RE, and the resulting costs are sought to be reversed [**Issue C**].

14. The overdraft was cleared on 23 August 2007, when EBL states it received the unfrozen funds. RE points to the Australian judgment of Gzell J where he cites an order of Handley JA recording that the funds were released with interest to EBL on 24 March 2005. I allowed subsequent evidence to be filed, as to when the funds were available and when they were received by EBL. The timing was obviously in dispute and relevant to my considerations. Further, I was confident accurate records as to this must exist, if not with EBL, then certainly with Citibank. Given the consequences, I considered this a critical point.

15. The fees and costs charged by EBL were also challenged by RE. The EBL records as to this were not supplied to the Claimant until the day prior to the hearing without explanation. The nature and extent of the charges imposed was accordingly the subject of spirited cross-examination of the sole EBL witness, Mr Bayer [**Issue D**].

16. In the period of 2001 to 2005, there was significant litigation conducted in Australia, as EBL had placed the Benford funds, with other client money, with Citibank Australia. RE's attempts to gain control of the Benford funds in Australia failed. On the other hand, EBL's claims in Australia for damages against Benford succeeded. Significant sums were expended in legal fees and costs, which RE was ordered to pay to EBL.

17. Costs awarded on the indemnity basis are not disputed. However there is disagreement as to what costs EBL was entitled to as some were awarded by the Courts on a party-party basis. Mr Hurley submitted that those costs are restricted by the Court rulings. Mr Blake submitted that EBL was entitled, under the terms and conditions of the account opening contract documents with Benford, to recover all of its legal and associated costs. [**Issue E**].

18. Spear J, on 6 May 2014, confirmed that the costs awarded against RE in litigation instigated by RE in Australia, could be taken from the Benford funds held by EBL.

19. The Court of Appeal was subsequently asked to consider Spear J's decision relating to costs, as EBL was dissatisfied with the quantum it had been awarded. The Court of Appeal stated: *"It is not disputed that the costs that European Bank is entitled to receive should come out*

of funds it holds for Benford. The quantum of that fund 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 had been unresolved".* (emphasis added)

20. The Court of Appeal went on to conclude: *"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."*

21. These statements no doubt gave RE confidence to vigorously pursue attempts to gain control of as much of the Benford funds as possible, for eventual distribution among the US victims.

22. Following the upholding of Spear J's decision regarding the return of funds to RE, EBL remitted a sum of US$ 5,052,841.81 to RE on 9 December 2014. In arriving at that sum EBL held back a contingency fund of A$ 200,000 to deal with contingency costs. RE also challenges payments made from this amount, and seeks the correction of the fees and costs set off against this amount [**Issue F**]. EBL also determined other amounts it was able to retain, such as the legal costs for the Australian proceedings, the damages awarded in those proceedings, all EUT costs and charges, and various other sums.

23. There followed yet further litigation in Vanuatu, with Harrop J being asked for clarification as to the term *"all balance funds"* as expressed by the Court of Appeal. Harrop J determined in his decision that EBL was *"... entitled in principle, to retain a sum representing the damages costs and interests relating to the Australia litigation."* I note that that decision has not been challenged on appeal.

24. I further note that the Harrop J 2015 decision was made without consideration of the validity of the deductions made by EBL. Immediately following the Judge's "entitled in principle" finding referred to above, Harrop J stated: *"It may be that other deductions... were also justified but I have not been asked to make any finding on these matters, or at least not yet."*

25. That task has now been put squarely before the Court by this present case.

26. I will now go on to consider the issues identified. This follows a pronouncement by the Court of Appeal in 2014 that *"...an accounting by [EBL] in respect of all income earned on the funds during the past fifteen years and the charges and expenses which have been made against those funds ...should appropriately be dealt with [in the Supreme Court]."*

C. Issue A – Interest on the erroneously kept funds

27. It has now been agreed by EBL that the amount of funds remitted to RE on 9 December 2014 was short by US$ 844,528.04. EBL explains this as being due to compound, rather than simple interest, being charged in relation to the award of damages. The further consideration is whether RE should earn interest on that for the period it has been deprived of that amount.

28. There was a lack of submissions to the contrary by Mr Blake - he effectively left it to the Court's discretion in his written submissions. This leads naturally to the conclusion that there is no reason for interest to be denied. EBL has retained those funds and has had the

use of them over the period to the detriment of RE. In the circumstances, it would be unjust to allow EBL to profit by its own mistake or to deprive RE of complete reparation for the mistake made.

29. Accordingly, EBL is to pay interest on the agreed amount at the Supreme Court rate of 5% per annum from 9 December 2014 until the date the funds are remitted to RE.

D. Issue B – The "Interest write back"

30. As earlier referred to, Benford remitted several tranches of funds to EBL with instructions to place the same on interest-bearing deposit.

31. Once EBL became aware of the true fraudulent nature of those funds, all the investments were amalgamated into a lump sum of US$ 7,431,924.56 - on 1 June 1999. The next entry in the Benford account is styled "Interest write back", and this involved a deduction from the account of US$ 36,194.56. Mr Bayer explained in evidence that it was against EBL's policy to pay interest on fraudulent funds – hence the deduction of this interest from the Benford account.

32. However, what Mr Bayer found more difficult to explain is what then happened to the amount of US $ 36,194.56. He attempted to characterise that amount as EBL's funds, but unconvincingly in my opinion. He stated that the interest was initially credited to Benford but then later reversed. He reluctantly agreed that the interest was never again credited to Benford. The very easy explanation is that EBL simply kept the interest as its own. It was not entitled to do so, and the explanation provided that this was in accord with the official policy of EBL is unsupported in any way by the written material supplied to Court.

33. It is also inconsistent with the evidence of Ms Phelps who was an EBL employee and intricately involved with the initial setting up of the Benford accounts. Her evidence, as recorded by Palmer J in the Australian litigation was to the effect that the interest *"...was actually earned by European Bank monies which had not come into Benford's IBD account."*

34. My conclusion, given the inherent unlikelihood of Mr Bayer's version and the quite incomprehensible account by Ms Phelps, is that EBL was simply profiting by virtue of Benford's fraudulent funds having been remitted to it and the fact that those funds had earned interest.

35. As an additional challenge, Mr Hurley took Mr Bayer to the EBL tabulation of interest earned on Benford funds in the period 1999 to 2002. Mr Bayer accepted that there was a period from February to August 1999 in which no interest was paid. That was at Tab A of Mr Bayer's second sworn statement, page A 192-b.

36. Mr Hurley compared that information with pages A 174 - 191 being monthly (more or less) statements sent by EBL to Benford accounting for interest earned and fees charged. Mr Bayer agreed that on each of these statements there was an entry of interest having been earned.

37. Mr Bayer suggested that the interest earned in that period, as set out on A 174 – 191 accounted for the "Interest write back" figure of US$ 36,194.54. However, elementary arithmetic contradicts that explanation.

38. What this amounts to, is that, not only was the "Interest write back" simply kept as its own by EBL, but EBL similarly dealt with the interest earned on a monthly basis in the period of February to August 1999 in the same way. Mr Bayer was eventually compelled to accept that contention.

39. Mr Hurley's challenge relating to this is accordingly established. There is to be a reversal of this US$ 36,194.54entry, with EBL suitably reimbursing the Benford account. Interest is also to be calculated on this amount at 5% per annum as from 1 June 1999 until the day EBL pays out the Benford funds completely.

40. EBL was also not entitled to retain for itself the further interest earned in February to August 1999. Accordingly, there needs to be a recalculation of this, with interest being factored in at the Supreme Court rate of 5% p.a.

E. Issue C –The overdraft

41. As I understand the position, EBL maintains that the usual charges a bank imposes on clients for the due administration of their accounts were agreed to by Benford at the time of the opening of the account and the signing of the account opening documents. RE's ability to charge Benford is not challenged. The allowing of the account to lapse into overdraft is what is challenged.

42. The manner in which EBL's fees and costs were charged to Benford was through an intermediary entitled European Trust Company Limited ("EUT"). Although there is some reference in the material provided to PITCO, I was orally advised by Mr Blake that in fact it was only through EUT that charges were made and taken, and references to PITCO in the materials are erroneous. Mr Bayer confirmed that in his evidence and Mr Hurley did not challenge him on this point.

43. The funds initially remitted to EBL in the various tranches from February to April 1999 were promptly placed on interest-bearing term deposit. Then, after EBL froze Benford's funds on 31 May 1999, all the funds were credited to the Benford current account. That decision was made by EBL. It had the effect of freeing up the Benford funds for 4.5 months for EBL to use as and when it wished, entirely free of interest costs. At that stage, EBL had not yet been obligated by Court Order to preserve Benford assets, but this decision was nevertheless extremely advantageous to EBL.

44. The next movement of the funds was to transfer them to a deposit account "99-96" on 12 October 1999. This was presumably in response to the Supreme Court Order of 23 September 1999 requiring EBL to place the funds on interest bearing deposit.

45. The monthly charges that EBL then imposed resulted in the Benford current account going into overdraft. That overdraft eventually grew to US$ 1,014,594.90 and was only paid off on 23 August 2007, when the "unfrozen" EBL funds with Citibank in Australia were said by

EBL to have been received in Vanuatu. I agree with the submission that had the unfrozen funds been received by EBL on 24 March 2005, then the need for any continuing overdraft could no longer have been argued. Mr Raftesath, the only witness called for RE, was certainly of the view that the funds had been remitted in 2005 – but in my view, his knowledge relating to that was not first-hand.

46. While the Benford current account was in overdraft, EBL charged its customer at the usual rate for non-complying accounts which had lapsed into overdraft – 20% per annum on the amounts in overdraft. Given the size of the ultimate deficit, and the time that the account was in overdraft, those charges amounted to a significant charge on Benford's funds. Mr Hurley calculated the amount debited was US$ 757,222.69 of which US$ 707,407 was interest. That calculation has not been disputed.

47. RE challenged EBL's decision to permit the account to go into overdraft, especially as Benford was at all times in funds and had no need of overdraft facilities. RE sought a re-calculation in order that the fees and charges relating to the overdraft be reversed. RE effectively submitted that this conduct was unnecessary gouging by EBL.

48. In response, EBL pointed *inter alia* to the Supreme Court Order of 2 December 1999, of which EBL was given notice. This was said to have eroded EBL's ability to access Benford funds to pay itself the fees and charges imposed. That and other Supreme Court Orders in both the company case (Case No. 99/08) and the criminal case against Benford in relation to money laundering, need to be carefully considered. Five in particular have application to this issue.

49. As earlier stated EBL became aware of the true fraudulent character of the Benford funds in late May 1999. EBL subsequently applied to the Supreme Court for directions regarding the funds and what steps it could take to assist the authorities. This resulted in the Orders of 28 July 1999.

50. Of relevance is Order 2 which reads:

> "(a) Otherwise than as provided in sub-paragraphs (b) and (c) hereof, the Bank be and is hereby **restrained until further order of this Court from releasing or otherwise dealing with all or any funds** standing to the credit of the Company with the Bank, including but not limited to those funds held with the Bank in account number 8901-116101-0206.
>
> (b) The Bank be and is hereby authorised until further order of this Court to **deal with the assets of the Company for the purpose of preserving its capital.**
>
> (c) The Bank be and is hereby **authorised** until further order of this Court **to deal with the assets of the Company to meet the Banks costs** of and incidental to this application **and the due administration of the Company's funds** as levied in accordance with the bank's published schedule of fees, and the account opening forms of the company lodged with the Bank." (emphasis added).

51. As those paragraphs read to me, EBL was generally restrained from releasing or otherwise dealing with Benford's funds, except for the purposes of preserving Benford's capital and meeting it's own fees and costs.

52. There were differing views as to exactly whose assets were to be preserved. Mr Bayer in his evidence expressed the view that it was EBL's assets. When it was suggested to him in cross-examination that it was Benford's assets that were being protected by the Order, he "...did not necessarily agree." I found that answer to be evasive and lacking in conviction. Mr Hurley submitted that the Order was clearly referring to Benford's assets.

53. I agree with Mr Hurley's logical interpretation. It defies common sense that sub-paragraph (b) could relate to EBL's capital. EBL simply had no need to deal with Benford's funds in order to preserve EBL assets – the two are quite unrelated. I note that Spear J was also of this view, when commenting at paragraphs 85 and 86 of his judgment that EBL could be seen to be complying with the Court Orders to protect Benford's funds. I reject EBL's interpretation.

54. Sub-paragraph (c) plainly enabled EBL to meet its usual client fees and costs.

55. By a further Supreme Court Order of 24 August 1999, sub-paragraph (c) was clarified at EBL's request, by specifying "...the Order extends to the payment of invoices forwarded to [EBL] from PITCO in relation to the establishment and ongoing administration of [Benford]." Given Mr Blake's submissions and Mr Bayer's evidence, unchallenged by Mr Hurley, I take that to mean that EBL was able to access Benford funds to settle the EUT invoices.

56. The Supreme Court Orders of 25 August 1999 were sought by RE. They provided for a certain sum to held by RE's solicitor's to meet outstanding costs and as security for costs. Order 3 re-iterated the earlier order that EBL, including its servants and agents, was restrained from dealing with any Benford funds on deposit with EBL until further order of the Court.

57. The next relevant Court Orders are dated 23 September 1999. This Order was made on the application of RE, and reads in part:

> "1. That all of the funds held by [Benford] with [EBL] be forthwith placed in an interest bearing deposit account, otherwise, the terms of the Interim Orders of ...25 August 1999...are hereby extended until 17 November 1999, or until further order."

58. Finally, in the criminal proceedings against Benford, the Public Prosecutor obtained the Order of 2 December 1999, as follows:

> "[Benford] be restrained until further order of this Court from dealing with all and any moneys standing to the credit of Benford Limited with European Bank Limited."

59. The 28 July Orders clearly impact EBL. Apart from the later exceptions, those Orders clearly state that EBL is not to release or deal with Benford funds. There are however, 2 exceptions - in 2(b), which placed an obligation on EBL; and in (c), which enabled EBL to take its fees and costs. The Orders of 24 August 1999 specifically clarify that EBL fees and costs charged via EUT may be deducted from Benford funds. The 25 August 1999 Orders do not change that then-extant position. Mr Bayer accepted that.

60. Arguably, the 23 September 1999 Orders do affect obligations – as EBL was thereby instructed to place all Benford funds on term deposit. However, I note that EBL does not

rely on that as justifying their actions. I further note that this instruction was only complied with, if that is what drove the transaction, on 12 October 1999.

61. In my view the 2 December 1999 Order had no impact on EBL. That Order was directed at Benford. This view is consistent with EBL's conduct of 23 August 2007, in resolving the overdraft account and paying itself over US$ 1 million. At this time, all Court Orders remained in place undiminished in their effect. If the 2 December 1999 Order were truly preventative of EBL taking it's fees, this action would have been in contempt of those Court Orders. The second sworn statement by Mr Bayer, at Tab A–193 also shows subsequent EBL fees taken in contravention of the 2 December 1999 Orders, if EBL's interpretation is accepted. Clearly EBL did not feel constrained at those times. Mr Bayer's evidence before me to the contrary is therefore rejected.

62. The previous Orders continued to apply to EBL. I agree with Mr Hurley's submission that if there was some confusion, then EBL was obligated to seek Court clarification, as it did on 24 August 1999. That obligation stems from the Court-imposed requirement to preserve Benford's capital.

63. I note further that the 25 August 1999 Orders enabled a small portion of Benford funds to be set aside for a particular Court-approved purpose. EBL was in a position to seek the same in relation to its fees and costs which had previously been approved as deductable from Benford funds by the Court. This proposition is supported by EBL's account terms and conditions, namely paragraph ix) which authorises EVL to make such application at Benford's expense.

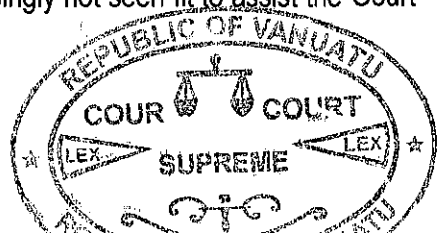
64. I consider, that given the obligation imposed on EBL by the 28 July 1999 Order 2(b), which was never amended or diminished in any way by subsequent Court Order, EBL should have foremost endeavoured to preserve Benford's capital. EBL should not have allowed the account to lapse into overdraft at an additional 20% per annum cost to Benford.

65. The fact that EBL chose to allow this to occur resulted in EBL effectively increasing its fees by 20% per annum on the amounts the account was in overdraft. Such conduct, described by Mr Bayer as a deliberate decision by EBL to lend funds to Benford, could be seen as EBL treating Benford as a tame, uncomplaining cash cow, ready to be regularly milked.

66. My conclusion is that EBL should not have allowed the account to lapse into overdraft. It was obligated to not permit that in order to preserve Benford's capital. There were other alternatives available, which would have better met EBL's Court-imposed obligation. The course of action chosen, failed in that regard. Instead, it enabled EBL to enhance the fees it made from handling the account.

67. In order to correct this, all the overdraft charges should be reversed. Further, interest should be calculated at the Supreme Court rate of 5% p.a. on each overdraft charge levied from the date of the charge to the date of EBL fully paying the outstanding funds to RE.

68. This finding means it is no longer of critical importance as to whether the funds were remitted from Australia to Vanuatu in 2005 or 2007. That is fortuitous as, in the 10 days window provided following the hearing, EBL has surprisingly not seen fit to assist the Court by providing the correct date.



F. Issue D – EBL's Charges

69. EBL only supplied the majority of the core information relating to this issue the day before the hearing. Even then it is incomplete. Mr Bayer in his evidence confirmed that there appears to be missing statements. However, the principle challenge is readily ascertainable even on the material provided. Essentially Mr Hurley submitted that EBL charges, utilising EUT, were unsupportable as being fair and reasonable.

70. Mr Bayer was tasked in cross-examination about the fees and charges imposed in 1999. Taking the long lapse of time involved into account, as well as the fact that he is virtually 80 years of age and suffering from Alzheimer's disease, Mr Bayer was far from loquacious in explaining what the charges related to - unlike at other times when giving his evidence. The following questions and answers illustrate this:

"Q. The accounting and managements fees – what are they for?

A. Keeping books of accounts and the supply of management to Benford.

Q. Sundry expenses and fees – what are they charged for?

A. I can't recall that.

Q. Typically?

A. I can't say.

Q. Statement 8 of 30 September 2001?

A. Yes.

Q. Accounting and management fees of US$ 951?

A. Yes.

Q. Less work involved?

A. Yes

Q. Statement 10 of 31 October 2001 even less work involved? US$ 494?

A. Yes

Q. Statement 11 of 30 November 2001, a large increase? US$ 5,752?

A. Yes.

Q. Why?

A. I can't recall. Obviously EUT's services were substantial relating to Benford.

Q. What was it?

A. I can't assist.

Q. What accounting services were provided to Benford?

A. Recording expenses and income. Annual accounts. Paying bills.

Q. What expenses and payment of bills were there for Benford in 2001?

A. I can't help.

Q. What management services were provided for Benford in 2001?

A. I can't help.

Q. Statement 16 of 30 April 2002? US$ 1,122?

A. Yes

Q. Statement 17 of 31 May 2002? US$ 880?

A. Yes.

Q. Statement 18 of 30 June 2002? US$ 6,098?

A. Yes.

Q. Can you explain why the amounts are so fluctuating?

A. No."

71. There is little doubt from the account opening documents that EBL was entitled to charge fees for its services to Benford, as indeed accepted by the Court in the Orders of 28 July 1999 and 24 August 1999. Notably that is not challenged by Mr Hurley.

72. However, the Court is entitled to infer additional terms of the contract, where such was always within the contemplation of the parties. In this regard, it is just and equitable to infer a term of the contract that all EBL fees and charges imposed on Benford be fair and reasonable. That is entirely consistent with the terms of Court Order 2(c) of 28 July 1999 which permitted EBL to access Benford funds to meet it's "costs of and incidental to...the due administration of [Benford's] funds as levied in accordance with the bank's published schedule of fees and the account opening form..."

73. A quick study of the actual amounts of the charges is illustrative. Each EUT statement addressed to Benford has provision for charges which are described as follows:

"Accounting and Management
Fax, Telephone, Telex
Photocopying
Sales Tax
Sundry Expenses/Fees".

74. Mr Bayer's explanation as to what the Accounting and Management fees comprised is incorrect in that he included annual Company Representation and annual Company Registration fees – in fact those items were billed separately. There were also, from time to time, "cheque clearance and other fees" levied – without further explanation of what that involved.

75. The variation in the Accounting and Management charges is stark. The lowest amount charged was in the 29 February 2004 statement of US$ 11.30. The largest amount was in the 28 February 2003 statement of US$ 18,679 - that appears a usuriously large figure considering that Benford was not an operating company, and was not engaging in a series

of financial transactions. Benford's investments were not being continually moved – the term deposit was simply rolled over, monthly. It is extremely difficult to see how such large charges could be justified – and Mr Bayer was certainly unable to do so.

76. The variation and the extent of Sundry Expenses/Fees charges are also large – on the majority of the EUT statements there are no such charges, but on others there are the following large examples: US$ 1,878.85, US$ 5,659.44, and US$ 5,867.37. Again, there is no apparent explanation for or justification of these charges.

77. To say that EBL did well out of Benford's decision to remit funds to Vanuatu for investment and concealment is an under-statement. A more accurate description could be that EBL took advantage of the situation it found itself in and over-charged Benford. This impression is given credence when comparing the actual charges levied with the apparently modest Standard Terms and Conditions and Fee Schedule for Benford Limited attached to Mr Bayer's first sworn statement.

78. My conclusion is that EBL was entitled to impose fair and reasonable charges. What EBL has taken as its fees and charges does not come within that description.

79. If counsel cannot agree on what could be considered reasonable monthly, given the situation Benford's funds placed EBL in, then it will be necessary for the Court to set an arbitrary figure. The charges levied are excessive in all the circumstances. There must be a re-calculation as to what is fair and reasonable and a balance calculated which needs to be remitted to RE. Perhaps some guidance could be gleaned from the rate of EUT's charging from 28 February 2014 to 31 January 2020, which amounted to only US$ 5,167.03 – although on an admittedly much smaller principal sum?

80. Interest is also to be calculated at the Supreme Court rate of 5% p.a., based on each of the charging periods until full remittance to RE is achieved.

G. Issue E – EBL's Indemnity

(i) Australian Proceedings, phase one

81. Throughout the challenges to EBL's conduct counsel have referred to the "Australian Proceedings". Mr Raftesath in his sworn statement has appended the decisions in the litigation conducted in Australia between RE and EBL and EBL and RE. The litigation can usefully be divided in that fashion, as I understand the position.

82. The first phase of litigation was an attempt by RE, for the benefit of the US victims of the credit card fraud, to follow the Benford cash to Australia, and an attempt to gain control of funds placed with Citibank by EBL. The first action ED 4999/99 was determined in a decision of Palmer J on 27 March 2003. Summarising a lengthy judgment, it appears to me that Palmer J declined to award RE the relief it sought for lack of jurisdiction. In CA 4039/03 RE unsuccessfully appealed Palmer J's decision. In S 154/04 RE sought special leave to appeal further, but that was declined.

83. Costs were awarded by the Court against RE on the indemnity basis in respect of all 3 proceedings. Those costs were eventually settled with Baker & McKenzie, the Sydney solicitors who had acted for EBL in June 2005 by an agreed payment of A$ 575,000. That was in full and final settlement of costs. Interestingly, those funds were paid out of the Benford funds, something which has led to critical comments by Mr Blake. In my view, whether those legal costs should have been paid out of Benford's funds is a matter for the superintendence of the actions of RE by the California Courts.

84. Mr Hurley has argued strongly that EBL's indemnity does not cover the legal costs involved in pursuing it's claims for damages, which I will deal with next. However, he concedes that the wording of the indemnity as "...other outgoings attributable to the account" does cover the balance of the Baker & McKenzie fees for the first phase of the Australian proceedings. He accordingly accepts that EBL is entitled to deduct from Benford funds A$ 52,394.60.

85. In the same way as interest is payable on the "Interest write back" amount, so too is interest payable on this amount at the Supreme Court rate of 5% per annum. That should be from June 2005 to the date of final payment.

86. I cannot see the term/condition "...other outgoings attributable to the account" referred to by Mr Hurley in paragraph 74 of his written submissions. However, I consider the additional Baker & McKenzie fees and costs are in any event covered by EBL's indemnity resulting from "any loss, damages or liability" (see below), so Mr Hurley's concession is appropriate in my view.

(ii) Australian Proceedings, phase two

87. There next followed a second series of cases in litigating EBL's claim for damages against RE. The damages arose as RE's litigation meant that EBL funds were tied up in a US$ investment and were unable to be changed. EBL maintained that if it had been able, it would at a certain point in time have changed the investment from US$ to euros, with a resulting far greater interest return. The first case ED 4999/99 resulted in A$ 1,251,088.33 damages being awarded by Gzell J. That decision was over-turned in CA 40713/07 by the Court of Appeal. The initial decision was subsequently re-instated on RE's appeal to the High Court of Australia in S 272/09.

88. This second series of cases resulted in RE being ordered to pay costs on the party/party basis as agreed between the parties or assessed. No approach has yet been made by EBL or it's solicitors, according to Mr Raftesath, in relation to the amount of costs sought. No assessment of those costs has been made either. That evidence was unchallenged.

89. Tab G of Mr Bayer's second sworn statement demonstrates the following payments were taken from Benford funds by EBL when it performed a general "wash up" of the account on 9 December 2014:

(a) The balance of the damages awarded: the sum awarded was A$ 1,251,088.33; part payment was made by taking the security for costs paid into Court of A$ 244,668.84; accordingly the balance taken at this time was A$ 1,006,419.84 [Not challenged by Mr Hurley];

(b) Interest on the outstanding balance of the damages awarded of US$ 698,775.60, described as interest "...to November 2014" [No longer challenged by Mr Hurley given the concession made by EBL];

(c) Baker & McKenzie's legal costs in relation the Australian proceedings, phase two: A$ 715,489.83 [Challenged by Mr Hurley];

(d) Ridgway Blake's legal costs in relation the Australian proceedings, phase two: A$ 15,072.06 [Challenged by Mr Hurley];

(e) Thornburgh Lawyers' legal costs in relation to the Vanuatu Court of Appeal hearing: US$ 55,196.03 [Challenged by Mr Hurley];

(f) EUT invoices from 1999 to 2007: US$ 168,656.47 [Challenged by Mr Hurley]; and

(g) Other invoices: US$ 32,316.03 [Challenged by Mr Hurley].

90. EBL maintains it was entitled to recover all those items due to its indemnity – as set out in the terms and conditions attaching to the Benford account opening documents of 19 February 1999 appended to Mr Bayer's first sworn statement.

91. In particular, the condition relied upon is found in Benford's Acknowledgment and Agreement document, at paragraph *viii*) which reads:

> "In the event the Bank or any of its officers or employees suffers **any loss or damage or incurs any liability (including any fine or penalty) as a direct or indirect result** of the assets deposited with the Bank being proven to be or suspected of being derived from proceeds of criminal activities, the account holder does hereby indemnify and continue to hold indemnified the Bank and each of its officers and employees against such loss, damages or liability." (emphasis added)

92. There is a second indemnity provided in the document headed "Indemnity, Instructions by Telephone, Telex, Facsimilie and/or E-mail". That relates solely where the Bank's interests are adversely affected as a result of instructions being given in such manner. That is not the case here.

93. What EBL has done might be described as self-help. It has paid itself all the legal costs in any way associated with its dealings with Benford – and, in the case of Baker & McKenzie, as if the costs awarded by the Court were costs on the indemnity basis. Mr Hurley submitted that the Court-directed costs were all that EBL was entitled to, namely party/party costs "as agreed or assessed".

94. Mr Hurley submitted that as there is still no agreement as to costs and no assessment of them, EBL should not have taken any Benford money as re-imbursement for the legal costs of the second phase of the Australian Proceedings.

95. Mr Hurley further submitted that the damages awarded did not in any event relate directly or indirectly to Benford's funds, but were awarded as EBL's funds had been frozen, thereby preventing EBL earning for itself yet greater profits. The terms and conditions that EBL

sought to rely only entitled EBL to recover "loss or damages" relating to the Benford account. Mr Hurley submitted that there was no loss in this instance. In addition, the consequences EBL sought to be relieved of, namely a smaller profit, did not relate to Benford. Accordingly, Mr Hurley submitted that EBL's indemnity should not be applied to the legal costs incurred in the Australian proceedings, phase two.

96. In relation to Ridgway Blake's fees, Mr Hurley accepted EBL was entitled to recover those legal costs that applied to the Australian Proceedings, phase one only. He submitted that, accordingly, the Ridgway Blake fees of A$ 15,072.06 should not have been recovered by EBL in December 2014.

97. Mr Hurley submitted that EBL's paying of the Thornburgh legal charges for its work, commented on disparagingly by the Court, in the Vanuatu Court of Appeal case was not appropriate, was not in the interests of EBL's client, and not justified given the obligation on EBL to preserve Benford's capital.

98. Mr Hurley challenged EBL's taking of EUT's fees and costs wholesale on the basis that EBL had not disclosed the underlying fee notes, and further that PITCO's fees were unauthorised. Those submissions fell away during the hearing. I have dealt with the quantum of EUT's fees and costs earlier. The ability of EBL to recover those costs is no longer in issue.

99. The final challenge to EBL's charging relates to "out of pocket employee expenses". This was advanced on the basis that no order has been made in relation to those costs being recoverable by EBL. Further some of the costs are said to relate to the Australian Proceedings, phase two.

100. EBL is indemnified by its client Benford in respect of both direct and indirect "...loss, damage or liability" once the funds are established or suspected to be the proceeds of criminal offending. There is no challenge to the contention that all Benford's funds which were remitted to EBL were the proceeds of criminal fraud. It follows therefore that all EBL's legal fees and costs for all litigation in which Benford funds are involved in any way are indemnified by Benford. I consider that this proposition holds good regardless of any subsequent Court Orders as to costs between the parties.

101. Mr Hurley's submissions are thorough, but in this instance neither compelling nor persuasive. My interpretation of the indemnity clause echoes that of Mr Blake. Where a Court awards costs at the conclusion of a case, those costs relate solely to that case. However, in this instance, there are legal obligations, freely entered into by the parties, which affect their entire commercial dealings. It is not, as Mr Hurley's submissions assume, a case of one or the other applying. I see no contradiction in the Court awarding party-party costs in relation to the Australian proceedings, phase two, and EBL claiming all further expenditure, over and above what was covered under the costs awarded by the Court, under its Benford indemnity.

102. Accordingly, all the challenges made by Mr Hurley regarding the general "wash up" as set out earlier must fail, save for the challenge to the EUT invoices from 1999 to 2007 totalling US$ 168,656.47 – which need to be re-calculated as earlier explained.

103. Finally in relation to this aspect of the dispute, Mr Hurley proposed that the matter of the outstanding legal costs for the second phase of the Australian proceedings be resolved by payment of 75% of Baker & McKenzie's costs, with no allowance for the Ridgway Blake invoice. He added that EBL had already enjoyed interest on the damages awarded and therefore there should be no accounting for interest on the "agreed" legal costs. Also, until there is agreement on the quantum of the legal costs, there is no liability on RE.

104. However, given my earlier finding that EBL was fully indemnified and has already taken full re-imbursement, this proposal is not something that I need to rule on.

H. Issue F – The Funds "held back"

105. This held back fund was sanctioned by Harrop J. on condition, namely:

> "...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."

106. The money was converted to US$ and became US$ 172,260. Deductions from that amount were taken for (i) Ridgway Blake fees for between 28 July 2014 and 14 June 2018 of US$ 24,305.28 and between 14 June 2018 and 13 June 2020 of US$ 13,561.48; and (ii) EUT fees for 28 February 2014 to 31 January 2020 of US$ 5,167.03.

107. Tab G of Mr Bayer's second sworn statement shows EUT and EBL deductions. Mr Bayer's explanation was that "Benford was still alive and EBL was still working for them". When it was put to Mr Bayer that there were no Courts Orders expressly permitting EBL to take fees from this amount, he answered that there were such Orders and he pointed to Harrop J's decision. Interestingly, he further stated that: "The hold-back is not Benford funds." I did not understand that comment.

108. Mr Hurley submitted that the appropriateness of those charges had yet to be considered, and were unauthorised and improper deductions. He submitted they should be reversed. Mr Hurley submitted that for EBL to take Ridgway Blake's fees post the Vanuatu Court of Appeal proceedings was quite unrelated to any loss attributable to Benford. In effect it was EBL determining that its legal costs were ordered at the indemnity basis, whereas in fact the Courts have yet to determine the issue of costs to be awarded in respect of the subsequent legal proceedings.

109. As already determined, all loss damages or liability arising from EBL's director indirect dealings with Benford funds are indemnified. This fund was to ensure that EBL was able to reimburse itself for such matters. I do not regard the reimbursements taken from this reserve fund to date as excessive or unauthorised.

110. However, on the assumption that this matter is finally coming to a close, there needs to be some finality brought to the Benford transactions and litigation. The balance of the held-back amount ought therefore to be remitted to Benford, together with the admitted shortfall and the various other amounts this judgment has referred to.

I. Conclusion

111. Counsel requested that once determinations of the agreed issues, and the additional matters raised at the hearing, were available, that a further hearing take place at which issues such as the exact calculations could be placed before the Court, and submissions as to costs could be advanced.

112. The date appointed for that to occur was 9am on 30 April 2020. Accordingly, I now invite counsel, if possible to agree on the calculations this decision dictates; and further to file such written submissions as they wish to advance as to costs. These may of course be augmented by oral submissions on the day.

113. This case is now adjourned to 9am on 30 April 2020. What I would hope to do then is set a date on which the final accounting between these parties can be completed with such money as is owing being remitted; and thereafter there being no further relations between the parties regarding this drawn out matter.

Dated at Port Vila this 30th day of March2020

BY THE COURT

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Justice G.A. Andrée Wiltens

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