IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

Evans v European Bank Ltd & Benford Ltd & Attorney General & Public Prosecutor
Civil Case No. 85 of 1999 (consolidating Company Case 8 of 1999)

Public Prosecutor v Benford Ltd
Criminal Case No. 5 of 2011

Public Prosecutor v Benford Ltd
Proceeds of Crime Case No. 01 of 2011

Counsel:

Juris Ozols *for Robb Evans (Case taken over by Mark Hurley)*

Garry Blake *for European Bank*

Less John Napuati *for Benford Ltd*

The Attorney General, Ishmael Kalsakau with Florence Williams *for the Republic of Vanuatu* ***and with Simcha Blessing*** *for the Public Prosecutor*

RESERVED DECISION OF JUSTICE ROBERT SPEAR

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1. It is convenient to issue a combined decision in respect of these cases that were indeed all heard together with the consent of all the parties.

2. Each of the cases relates directly to the substantial sum of USD 7,527, 900 that was deposited to the account of Benford Ltd with European Bank at Port Vila in February, March and April of 1999. Those funds (*the Benford funds*) were part of the proceeds of serious criminal activity undertaken by one Kenneth Taves and his criminal associates in the United States of America.

Evans v European Bank Ltd & Benford Ltd & Attorney General & Public Prosecutor
Civil Case No. 85 of 1999 (consolidating Company Case 8 of 1999)

3. The first proceeding in time is cc 85 of 1999 in which Mr Evans of the USA sought the following orders in respect of the Benford funds:-

   a) *"A declaration that Robb Evans of Robb Evans and Associates as Permanent Receiver of J.K. Publications Inc, MJD Service Corp., TAL Services Inc., and their affiliates and subsidiaries, and as Receiver over the assets of Kenneth Taves and Teresa Taves, appointed in Civil Action No. 99 – 00044 ABC (AJWx) entered on 16 March 1999 in the New United States District Court, Central District of California, Western Division is entitled to receive and to give to European Bank Ltd a good discharge for the receipt of all monies standing to the credit of an account in the name of Benford Limited;*

   b) *An order that (Robb Evans) as Permanent Receiver be at liberty to transmit the said money out of the jurisdiction of this Court to the credit of an account in the name of Rob Evans, Receiver of J.K. Publications Inc., et al, and Associates for the Receiver of JK Publications Inc, City National Bank, 8012 Vineland Avenue, Sun Valley, CA 91352, ABA #1222-2943-9, Account # 01075829."*

4. This claim is opposed only by The Attorney General and the Public Prosecutor and incidental to their subsequent claim on behalf of the State that the Benford funds should be either forfeited to or confiscated by the State.

5. European Bank Ltd took no active part in this proceeding other than to assist the Court and to indicate that it would abide the decision of the Court.

Public Prosecutor v Benford Ltd
Criminal Case No. 5 of 2011

6. Criminal Case 05/11 is the prosecution of Benford Ltd for an offence under s. 20(1) of the Serious offences (Confiscation of proceeds) Act 1989. The charge is:

"Benford Ltd, being a body corporate registered and incorporated in the Republic of Vanuatu, between 1st January, 1999 and 31st May, 1999 received and brought into Vanuatu the sum of seven million (five) hundred thousand United States of America Dollars (US $ 7,500,000) which money is reasonably suspected of being proceeds of crime, namely conspired or arranged with Kenneth Howard Taves, Gretchen Buck, citizens of the United States of America and others to transfer the said sum which had been derived from a fraud conducted in the United States of America and elsewhere into the European Bank Ltd, Vanuatu, Account No. 8901-1161 to the credit of Benford Ltd".

7. Benford pleaded guilty to this charge on 24 March 2011. Sentencing submissions were presented at that time. However, it was agreed by the relevant parties at that time that the determination and imposition of the sentence should be deferred until resolution of both cc 85 of 1999 and an intended application by the State for the forfeiture or confiscation of the funds as the proceeds of crime.

Public Prosecutor v Benford Ltd
Proceeds of Crime Case No. 01 of 2011

8. Within POCA Case 001 of 2011, the Attorney General sought the following orders:-

a) That the Benford funds be **forfeited** to the State - *pursuant to s. 15 (1) (a) and 90 of the Proceeds of Crimes Act [CAP 284]*;

alternatively

b) That the Benford funds be **confiscated** by the State as the proceeds of crime - *pursuant to s. 2 of the Serious Offences (Confiscation of Proceeds) Act No. 50 of 1989.*

9. Unsurprisingly, this claim was defended by Mr Evans in his capacity as receiver of Benford.

Generally

10. The rather unusual approach of having all three cases heard together and to be the subject of a joint decision was agreed to by all the parties. It is unquestionably an expedient means of addressing the issues raised by these cases. All the evidence filed in each of the three cases was, similarly by consent, available for consideration in the other cases.

11. Mr Blessing for the Public Prosecutor presented a detailed and most helpful summary of facts that explains the significant background to this matter. While that summary of facts was agreed as between the Public Prosecutor and Benford, Mr Ozols took issue on behalf of Mr Evans with the assertion in the summary that the funds would not be distributed to the victims of the fraud perpetrated by Kenneth Taves and others. This issue was addressed in a sworn statement from Mr Brick Kane who also gave evidence before me.

12. Mr Kane is the President and Chief Operating Officer of Robb Evans and Associates LLC which is the USA corporate entity that supports Mr Evans in respect of this particular receivership. Mr Kane's evidence in this respect was the subject of close and careful cross-examination by the Attorney General but Mr Kane was certainly not shaken on his assertion that any funds received back by Mr Evans within the receivership had to be accounted for by Mr Evans to the USA Federal Trade Commission (FTC) which had the statutory responsibility to distribute those recovered funds to the victims of Mr Taves' crimes.

13. I say now that Mr Kane was an impressive witness and I have been left in no doubt at all by the evidence presented for Mr Evans that, if any of the Benford funds are recovered by Mr Evans, he will have to account for them to the FTC as required by the terms of his appointment as receiver. The FTC has the statutory responsibility to distribute any recovered funds to the victims of the Taves' fraud. I will return to this issue in due course.

14. CC 85/99 was originally part-heard before another Judge. However, the court file was completely destroyed in the 2007 fire of the Port Vila Court House. The file had to be

reconstructed and by the time that was completed it became convenient to assign the file to another Judge. Additionally, the attention of the parties was diverted for a time by related litigation in both Australia and the USA initiated by Mr Evans and which Mr Evans clearly hoped would obviate the need for continued litigation in Vanuatu.

The Background

15. Benford was incorporated in Vanuatu on 18 February 1999 as an international company. Its sole director is another international company. It is clear that Benford was incorporated for one purpose and one purpose only and that was to hide funds dishonestly obtained by Taves. No search of public records in Vanuatu would have revealed any reference to Taves or any of the various entities or associates that he used to perpetrate and support the fraud

16. Kenneth Taves is a citizen of the USA. He committed a substantial fraud having obtained details of approximately 900,000 credit card accounts in the USA held with various USA banks and other financial institutions. Taves and his associates then dishonestly charged those credit card accounts with small amounts of around USD 20 per month and moved the dishonestly obtained funds into various bank accounts under Taves' control through different corporate vehicles. The best calculation is that the total funds dishonestly obtained by Taves amounted to approximately USD 47.5 million.

17. In 1998, most of the dishonestly obtained funds were transferred out of USA bank accounts. A substantial portion of those funds was deposited in a USD account in the name of Media Buying Services Ltd (another of Taves' companies) with Eurobank Corporation (*Eurobank*) which was then a small bank incorporated in the Cayman Islands, British West Indies. Eurobank is not to be confused with the defendant European Bank Ltd which is an international company incorporated in Vanuatu and the holder of a Vanuatu banking licence.

18. The Taves fraud was first detected by the US authorities in late 1998. On 6 January 1999, on the application of the FTC, the United States District Court (Central District of California, Western Division) ordered that Mr Robb Evans of Robb Evans and

Associates LLC be appointed the temporary receiver of all the assets of JK Publications, MJD and their subsidiaries and affiliates; all companies known to be under Taves control).

19. Taves then endeavoured to move the proceeds of his fraudulent activities further away from the reach of the USA authorities. With the assistance of one Ivan Purchase, a Senior Assistant Manager of Eurobank, the decision was made to move funds at the rate of USD 500,000 per week out of the Eurobank account. Ivan Purchase suggested Vanuatu and Uruguay as places where money might be sent and held undetected in secret bank accounts.

20. On 3 February 1999, Ivan Purchase sent a facsimile to the European Trust Company Ltd (*ETCL*), a company incorporated in Vanuatu and associated with European Bank Ltd. Ivan Purchase enquired about opening an account in Vanuatu for a client of Eurobank. This enquiry was dealt with by Susan Phelps who was a director then of both ETCL and European Bank.

21. On 8 February 1999, Ivan Purchase asked Susan Phelps to arrange for the formation of a company in Vanuatu to be named Benford Ltd and then to open an account for Benford with the European Bank.

22. Susan Phelps arranged for Benford to be incorporated in Vanuatu on 18 February 1999. An interest bearing deposit account was then opened by Susan Phelps in Benford's name with European Bank. The following amounts were then deposited into the Benford IBD a/c:-

26/2/99	97 900
19/3/99	700 000
19/3/99	700 000
19/3/99	700 000
19/3/99	700 000
13/4/99	4 630 000
Total	7 527 900

23. It is clear that Susan Phelps arrange for the incorporation of Benford and the opening of the Benford IBD account with European Bank without taking appropriate steps to establish and verify the identity of the person or persons controlling Benford and the Benford IBD account or to ascertain the ultimate source of the substantial funds which were deposited in that account. The identity proffered for the purpose of opening the account was that of one Vanessa Clyde, a person holding joint USA and British citizenship. Vanessa Clyde had no prior known association or connection with Vanuatu nor did Susan Phelps have any direct involvement with her incidental to the formation of Benford and the opening of the account with European Bank. Subsequent investigations in the USA established that Vanessa Clyde had provided a copy of her British passport to an associate of Taves and she then signed certain blank documents (no doubt relating to the formation of Benford) all in return for a promise to be paid USD 10,000 for the use of her identity.

24. On 15 March 1999, the Californian Court extended the receivership and ordered that Mr Evans be appointed permanent receiver of all the assets of Mr and Mrs Taves, JK Publication, MJD, TAL, Discreet and their subsidiaries and affiliates – all corporate vehicles under Mr and Mrs Taves' control. Mr Evans was not then appointed receiver of Benford's assets because the USA authorities were still not then aware of Benford's existence.

25. Mr Evans eventually traced the movements of funds from various USA Banks to Eurobank which, at that time, was a bank in financial difficulties. On 11 May 1999, "Controllers" were appointed for Eurobank by the Cayman Islands' Executive Council.

26. On 25 May 1989, Vanessa Clyde contacted European Bank in Vanuatu after having received some correspondence from that bank. At that time, Vanessa Clyde claimed to have no knowledge of the account that had been opened for Benford ostensibly on her instructions and or that money had been deposited into that account. After speaking with Susan Phelps of European Bank and confirming her identity, Vanessa Clyde requested that European Bank freeze the account and place a security password on it to prevent the funds from being moved from the account.

27. The Controllers of Eurobank eventually traced the movements of funds from Eurobank into Benford's account with European Bank. On 28 May, 1999 European Bank received notice from the Controller's attorneys that Mr Evans had been appointed as receiver of all the assets of Mr and Mrs Taves and their associated companies which assets were noted as being the proceeds of serious fraudulent conduct on the part of Taves and his associates. From that time, European Bank was on express notice that Mr Evans, as the receiver, asserted a claim to the funds in Benford's account.

28. On 31 May 1999, European Bank froze the Benford IBD account and transferred all the funds (by then USD 7,431,924.96) into a current account in the name of Benford.

29. On 28 July 1999, this Court ordered that European Bank be restrained from releasing or otherwise dealing with any funds standing to the credit of Benford with the European Bank save for purpose of preserving the capital.

30. On 25 August 1999, Mr Evans successfully obtained a further order of this Court freezing all Benford's account with European Bank.

31. On 21 September 1999, Mr Evans commenced proceedings (cc 85/99) in this Court against European Bank and Benford seeking the declarations that are identified in paragraph 2 above.

32. On 22 November 1999, the US District Court amended its orders of 15 March 1999 retrospectively to include Benford in the receivership.

33. On 23 September 1999, this Court amended the freezing order of 25 August 1999 to require *"all of the funds held by Benford with European Bank be forthwith placed in an interest bearing deposit account"* and extending the term that applied to the prohibition on any other dealings with the Benford funds.

34. On 12 October 1999, European Bank transferred the then current balance of the Benford funds amounting to USD 7,378,378.01 from Benford's current account back into Benford's IBD account.

35. In order to obtain a return on the funds held for Benford, European Bank initially invested the Benford funds locally. However, on 20 October 1999, European Bank invested the Benford funds with Citybank Ltd of Sydney, Australia (*Citybank*). The total amount of the Benford funds at that time was USD 7,593,532.48.

36. Mr Evans eventually ascertained what had happened to the funds and gave notice to Citybank on 30 November 1999 that the Benford funds were the proceeds of fraud and that they were required to be collected by him as the receiver of Benford.

37. The matter then became somewhat complicated as the funds had by that time been re-invested by Citybank with Citybank's associate company in New York, Citybank NA . On 20 November 2000, no doubt as a result of a complaint from Mr Evans, the FBI served a warrant on Citybank NA seeking seizure of the funds held which then amounted to USD 8,110,073.

38. Proceedings were then commenced by Mr Evans in the US District Court on 21 December 2000 in relation to the *"seized funds"*. On 4 December 2001, the US District Court held that those proceedings before it should be held in abeyance pending the outcome of other court proceedings which had, by then, been commenced by Mr Evans in the Supreme Court of New South Wales, Australia.

39. Mr Evans claimed in the NSW Supreme Court that he was entitled to the funds that had been invested by European Bank of Vanuatu with Citybank particularly on the basis that European Bank and Citybank held the funds in trust for him. European Bank cross-claimed against Citybank for an order that the funds be returned to it.

40. Both Mr Evans' claim and European Bank's cross-claim in the NSW Supreme Court failed.[1] That decision was appealed in both respects to the NSW Court of Appeal

41. Mr Evans appeal to the NSW Court of Appeal also failed[2]. In a decision given on 25 March 2004, Spigelman CJ (delivering the decision of the court) determined relevantly that while Benford held the stolen funds under a presumed or resulting trust for the

[1] Evans & Associates v Citibank Ltd and Ors [2003] NSWSC 204
[2] Robb Evans of Robb Evans * Associates v European Bank Ltd [2004] NSWCA 82

benefit of the defrauded credit card holders, and had a corresponding duty to refund the money to those victims of Taves' crimes as soon as those victims could be ascertained, Citibank did not hold funds in trust for Benford or Mr Evans.

42. In a separate decision[3], the NSW Court of Appeal allowed the appeal by European Bank and entered judgment against Citibank for the amount of the investment together with interest and costs. The Court of Appeal emphasised that European Bank did not have "money in (Citibank)" arising from its placement of funds with Citibank. Rather, that European Bank acquired a debt payable by Citibank in respect of the investment – at para. 61;

> *[61] It is important to keep these principles in mind. People commonly speak of having money in the bank, but the use of this expression in judicial reasoning can lead to error. In* Foskett v McKeown *[2001] 1 AC 102 at 127–128, Lord Millett said:*
>
> > *"We speak of money at the bank, and as money passing into and out of a bank account. But of course the account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder. The bank gives value for it, and it is accordingly not usually possible to make the money itself the subject of an adverse claim. Instead a claimant normally sues the account holder rather than the bank and lays claim to the proceeds of the money in his hands. These consist of the debt or part of the debt due to him from the bank. We speak of tracing money into and out of the account, but there is no money in the account. There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder. No money passes from paying bank to receiving bank or through the clearing system (where the money flows may be in the opposite direction). There is simply a series of debits and credits which are causally and transactionally linked ... ."*

43. Mr Evans applied to the High Court of Australia for special leave to appeal the decision of the NSW Court of Appeal on the cross-claim by European Bank for the return or refunding of the funds. Mr Evans was required to support his application for special leave with an undertaking as to damages. Additionally, the High Court required that the funds in question be paid into court and held by the Prothonotary in an interest bearing account.

44. The High Court eventually dismissed Evans' application for special leave to appeal. The case then reverted to the NSW Court of Appeal which ordered on 29 March 2005

[3] European Bank Ltd v Citibank Ltd 60 NSWLR 153

that the total sum held of USD 8,855,975.16 less USD 3,077.71 be paid to European Bank.

45. In a subsequent side-action, European Bank commenced fresh proceedings in May 2005 in the NSW Supreme Court for an assessment of compensation payable to it pursuant to the undertaking given by Mr Evans at the time he sought leave to appeal to the High Court. In the Supreme Court, Gzell J assessed the compensation at USD 800,000 which was eventually treated as AUD 1,251,088.33. Mr Evans successfully appealed that determination to the NSW Court of Appeal. However, in a final Australian fling to this matter, the High Court of Australia overturned the Court of Appeal decision and reinstated the compensation order made in the Supreme Court.

46. The outcome of the Australian proceedings has some bearing on the issues now before this Court as European Bank seeks the outstanding balance of the compensation order made in its favour to be settled out of the funds held by it in the Benford account. Clearly, a consideration of European Bank's application depends on a favourable outcome for Mr Evans in respect of the Benford funds but raises other considerations to which I will return in due course.

47. It is accepted by all the parties that all the funds received by Benford Ltd and deposited with the European Bank are the proceeds of crime perpetrated by Taves and his Associates.

48. The principal but competing claims are accordingly between the Attorney General for either forfeiture or confiscation of those funds (so that they become the property of the Republic of Vanuatu) and Mr Evans who seeks the declarations and related orders detailed in paragraph 2 above effectively allowing the funds to be gathered in by him and then paid on to the FTC for distribution to the victims of the Taves' fraud.

49. It is convenient to deal first with the application for confiscation or forfeiture.

Attorney-General's application for confiscation or forfeiture

50. The application by the Attorney General is brought, as mentioned, on an alternative basis. Initially, the Attorney General seeks a forfeiture order under ss. 15.1 (a) and 20 of the Proceeds of Crimes Act [Cap.284].

> ***15. Application for forfeiture order or pecuniary penalty order on conviction***
>
> *(1) If a person is convicted of a serious offence committed after this Act commences, the Attorney General may apply to the Court for either or both of the following orders:*
>
> *(a) a forfeiture order against tainted property in relation to the offence;*
>
> *(b) . . ..*
> *(2) – (5) . . . .*
>
> (emphasis added)
>
> ***20. Forfeiture order on conviction***
>
> *(1) If:*
> *(a) the Attorney General applies to the Court for a forfeiture order against property in relation to a person's conviction of a serious offence; and*
>
> *(b) the Court is satisfied that the property is tainted property in relation to the offence;*
>
> *the Court may order that the property, or so much of the property as is specified by the Court in the order, be forfeited to the State.*
>
> *(2) In deciding whether property is tainted property, the Court may infer:*
>
> *(a) if the evidence establishes that the property was in the person's possession at the time of, or immediately after, the offence was committed – that the property was used in, or in connection with, committing the offence; and*
>
> *(b) if the evidence establishes that the property (in particular, money) was found, during investigations before or after the person was arrested for and charged with the offence:*
>
> > *(i) in the person's possession; or*
> >
> > *(ii) under the person's control in a building, vehicle, receptacle or place –*
> > *that the property was derived, obtained or realised as a result of the person's committing the offence; and*
>
> *(c) if:*
>
> > *(i) the evidence establishes that the value, after the person committed the offence, of all the person's ascertainable property is more than the value of all the person's ascertainable property before the person committed the offence; and*
> >
> > *(ii) the Court is satisfied that the person's income from sources unrelated to criminal activity cannot reasonably account for the increase in value–*
>
> *that the value of all or part of the increase represents property that the person derived, obtained or realised directly or indirectly from committing the offence.*

(3) If the Court orders that property (other than money) be forfeited to the State, the Court must specify in the order the amount that it considers to be the value of the property when the order is made.

(4) In considering whether to make a forfeiture order against property, the Court may take into account:

(a) any right or interest of a third party in the property; and

(b) the gravity of the offence concerned; and

(c) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and

(d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.

(5) If the Court makes a forfeiture order, the Court may give any directions that are necessary or convenient to give effect to the order.

51. The immediate complication is that s. 15(1) restricts the right of the Attorney General to apply for a forfeiture order against tainted property where the offender is convicted of a "serious offence" ***but only where the offence was committed after the Act commenced.*** The Proceeds of Crimes Act commenced on 3 February 2003. Just having simple regard to s.15(1), the Attorney General is not entitled to apply for forfeiture of tainted property given that the offence was committed back in 1999 when the funds were deposited to the credit of Benford with the European Bank.

52. This application is not saved by s. 90.

90. Transitional *A request or order that was made under the Serious Offences (Confiscation of Proceeds) Act No. 50 of 1989 and has not been finalised at the commencement of this Act is taken to be a request or order made under this Act.*

53. There would need to have been such a request or order made under the Serious Offences (Confiscation of Proceeds) Act No. 50 of 1999 that had not been finalised before that transitional provision could apply. There has been no evidence placed before me that such a request or order was made before the Proceeds of Crimes Act commenced. However, even if a request had been made prior to the Proceeds of Crimes Act commencing, the Benford funds should still not be forfeited for reasons that I will explain in due course.

54. The alternative part of the application is brought for confiscation of the Benford funds under the Serious Offences (Confiscation of Proceeds) Act 1989. If Benford obtained

the funds as a result of the commission of a serious offence then the Court may give consideration to a confiscation order under sections 2, 3, 4 and 5 of the Act. While this Act was repealed by the Proceeds of Crimes Act [CAP284], it was argued that it continued to apply to this case. However, I do not consider that this application should succeed even if the Serious Offences (Confiscation of Proceeds) Act 1989 survived repeal so as to apply to this case.

55. The relevant sections of the Serious Offences (Confiscation of Proceeds) Act 1989 are:

PART 2 - CONFISCATION ORDERS

APPLICATION FOR CONFISCATION ORDER

2. (1) An application for a confiscation order against a person in respect of any serious offence of which the person has been convicted may be made by an appropriate person in accordance with this section.

(2) An application under, subsection (1) may be made -

(a) to -

(i) the court before which the defendant was convicted; or

(ii) the Supreme Court; and

(b) in respect of one, or more than one, serious offence.

(3) Where an application under subsection (1) in respect of an offence has been determined on its merits no further application for a confiscation order against that person in respect of that offence shall be made unless the court gives leave on being satisfied -

(a) that a determination on the further application, pursuant to section 3(1)(a), would be in relation only to alleged profits obtained by the person which were not identified until after the determination of the previous application; and

(b) that it is in the interests of justice that the further application be made.

(4) The appropriate person making an application under subsection (1) shall give notice of the application to the defendant.

(5) An application under subsection (1) shall not be made in respect of an offence after the expiration of the period of 12 months after the day on which the defendant was convicted of the offence.

DECISION ON APPLICATION FOR CONFISCATION ORDER

3. (1) The court to which an application is made under section 2(1) -

(a) shall determine whether the defendant obtained proceeds from the commission of any serious offence in respect of which the application is made; and

(b) shall, if it determines that he has so obtained proceeds, assess the value of the proceeds.

(2) Where an application is made under section 2(1) in respect of more than one offence, the court -

(a) shall make a separate determination under subsection (1)(a) in respect of each offence; and

(b) may, where it makes an affirmative determination in respect of more than one offence, make a single assessment under subsection (1)(b) in respect of the offences.

(3) The Schedule shall apply for the purpose of the making of a determination or assessment under subsection (1).

CONFISCATION ORDERS

4. (1) Where the court makes an affirmative determination under section 3(1)(a), it may order the defendant to pay to the Government a pecuniary penalty of such amount as it thinks fit, but not exceeding the value of the profits assessed pursuant to section 3(1)(b).

(2) A confiscation order shall -

(a) specify the offence or, as the case may be, the offences in respect of which it is made; and

(b) if it is made in respect of more than one offence, indicate the amount of the pecuniary penalty attributable, in the opinion of the court, in relation to each of the offences.

(3) An amount payable by a defendant to the Government under a confiscation order is, for all purposes, deemed to be a civil debt due to the Government.

(4) A confiscation order made by a court may be enforced as if it were an order made by the court in civil proceedings instituted by the Government against the defendant to recover a debt due by him to the Government.

CONFISCATION ORDERS - SUPPLEMENTARY PROVISIONS

5. (1) Subject to subsection (2), where a person is convicted of a serious offence, a confiscation order in respect of the offence may be made either -

(a) before; or

(b) after,

the person is sentenced or otherwise dealt with for the offence.

(2) Where a person is deemed to have been convicted of a serious offence by virtue of section 1(4), a confiscation order may be made in respect of the offence after the defendant is deemed to have been so convicted.

(3) Where a confiscation order is made as provided in -

(a) subsection (1)(a), the court shall, when so sentencing or otherwise dealing with the defendant, take account of the confiscation order before -

(i) imposing a fine on the defendant; or

(ii) making any order involving any payment by the defendant by way of restitution or compensation,

but subject to that, shall leave the confiscation order out of account in determining the appropriate sentence or other manner of dealing with the defendant;

(b) subsection (1)(b), the court shall, when determining the amount of the pecuniary penalty under section 4(1), take account of -

(i) any fine imposed on the defendant; and

(ii) any order made which involves a payment by the defendant by way of restitution or compensation, in respect of the serious offence; or

(c) subsection (2), the court shall; when determining the amount of the pecuniary penalty under section 4(1), take account of -

(i) any fine imposed on the defendant; and

(ii) any order made which involves a payment by the defendant by way of restitution or compensation,

in respect of the serious offence of which the person was convicted, as provided in section 1(4)(a).

56. Pursuant to s.3(1), upon application being made under s.2(1) for confiscation, the Court is required to consider whether Benford obtained proceeds from the commission of a serious offence and if so then to assess the value of those proceeds. That is, the Court is required to determine the extent to which the defendant benefited from the commission of that serious offence. At that stage, the Court is required to determine an amount that Benford pay to the State by way of a pecuniary penalty and not exceeding value of the *"profits assessed pursuant to s. 3 (1) (b)."*

57. This application is required to be brought by the Public Prosecutor and in this respect the Attorney General represents the Public Prosecutor. Nothing turns on this.

58. It is noted that *"serious offence"* for the purposes of s. 3, as defined in s.1(1), is an offence carrying a, *"maximum penalty for which is imprisonment for not less than 3 years or the proceeds from the commission of which is not less than 1 million vatu"*. Again, there is no quibble with the relevant offence being such a "*serious offence*"

59. Furthermore, s. 1(5) of the 1989 act provides that

s.1(5) For the purposes of this Act -

(a) a person obtains proceeds from the commission of an offence if he receives a payment or other reward, or derives a pecuniary advantage, as a result of -

(i) the commission of the offence; or

(ii) any part of a course of conduct the person, alone or in association with any other person, having as its purpose or one of its purposes the carrying out or furtherance of criminal activities, of which the commission of the offence is shown to be part; and

(b) the value of those proceeds is the aggregate of the values of the payments, rewards or pecuniary advantages so received or derived.

60. Mr Ozols argued that the Benford has not derived a payment, a reward or a pecuniary advantage from the commission of the offence as it never gained title to the funds and that, *"the funds held in the Benford account are, as found by the New South Wales Supreme Court of Appeal (sic), stolen funds held on a presumed or resulting trust (by Benford) for the defrauded credit card holders"*. The funds held on the account of Benford were accordingly not the proceeds of crime as that term is contemplated for the purposes of forfeiture under the 2002 act or confiscation under the 1989 act.

61. I entirely agree with Mr Ozols' submission to that extent which correctly attributes the conclusion to the decision of the NSW Court of Appeal[4] applying (what has often been described as"*the Theft Principle*").

62. The NSW Court of Appeal held:

[111] As the Vanuatu emanation of the fraudsters, Benford Ltd held the stolen funds as trustee for the defrauded credit card holders ...

[112] The trust so created is, in my opinion, better described as a presumed or resulting trust, rather than as a constructive trust. There is no authoritative statement as to when trusts should be classified as presumed, resulting or constructive. ...

[113] A case of simple theft involves a transfer of property about which the transferor was entirely unaware. The transferee holds any property into which the stolen property has been converted on trust in a manner which should be seen as automatic. (See Chambers, Resulting Trusts, especially at 22–23, 116–118.) The Australian authorities indicate that a trust arises immediately upon the acquisition of the property, not when recognised by a court. (As in Black v S Freedman & Co, see also Rasmanis v Jurewitsch (1969) 70 SR (NSW) 407; [1970] 1 NSWR 650.)

63. That being so, it follows that Benford stands as a mere trustee of the funds that it has received and for the benefit of the victims of the Taves' fraud. The funds are not available to be taken into account in the assessment of any value that Benford has derived from the receipt of the funds for the purposes of s.1 (5) of the 1989 Act. Indeed, there is no evidence that Benford ever received a benefit in relation to the funds particularly given that they were correctly identified as trust funds in 1999 and

[4] Robb Evans v European Bank Ltd 61 NSWSR 75; [2004] NSWCA 82

have been held secure accordingly. That conclusion defeats the application for confiscation under the 1989 Act.

64. I confirm that these are not funds which are capable either of being forfeited under the 2002 Act or confiscated under the 1989 Act. They are certainly different say to cases where profits are made as a result of drug dealing or even cases of theft where the victims cannot be identified. In any event, it would be quite unjust for the identified or identifiable victims of a crime to be deprived of the recovery of their stolen property by operation of a domestic law designed to ensure that a fraudster is not able to benefit from his dishonest activities.

65. If that were not the case, it would be tantamount here to enabling the State to benefit from Taves' dishonesty.

66. The decision of the NSW Court of Appeal also dealt with the relationship between Benford and European Bank and explained that it was one of debtor and creditor albeit one coloured by the notice that European Bank received back in 1999 that the funds received were the product of fraud.

> *[155] (European Bank) did no more than receive a deposit. This created a simple debtor/creditor relationship. The money that was deposited became the property of the bank, able to be applied by it for any purpose it chose. It applied the funds immediately to a US dollar account in its own name, and at a marginally higher rate of interest, eventually with Citibank, again creating a simple debtor/creditor relationship. This in turn became part of a current account between Citibank and Citibank NA.*

And earlier,

> *[94] One of the difficulties faced by (Mr Evans) is that he has a perfectly good claim for the debt, a legal rather than an equitable right, constituted by the initial deposit with Eurobank and enforceable in Vanuatu. There are no findings or admissions as to why (Mr Evans) prefers to pursue its remedies in this Court, rather than in Vanuatu. Two matters were, however, raised in the course of submissions.*
>
> *[95] First, there is a risk that some or all of the funds may be forfeited to the Republic of Vanuatu pursuant to the legislation to which I have referred above. Secondly, it appears that a number of charges have been made to the account by the respondent, including for the cost of litigation in Australia, which deductions the appellant would prefer to avoid. There may be other reasons. The issue was not fully explored in this Court. It was not submitted that*

anything turned on the motivation of the appellant for seeking to proceed in this Court.

67. The NSW Court of Appeal also dismissed any risk that the Benford funds would be forfeited or confiscated to Vanuatu as being highly improbable:

> ***[119]*** *At the time of the laying of the information in Vanuatu in 1999, the Serious Offences (Confiscation of Proceeds) Act (Vanuatu) made provision for the imposition of a pecuniary penalty with respect to the proceeds of crime. It appears that under s 3 and s 4 of this Act the amount able to be imposed by way of pecuniary penalty could not exceed the interest accrued on laundered funds. However, under the Proceeds of Crime Act 2002 (Vanuatu), which commenced on 3 February 2003, the whole of the proceeds of a fraud may be forfeited to the government.*
>
> ***[120]*** *Section 89 of the Proceeds of Crime Act (Vanuatu) repeals the Serious Offences (Confiscation of Proceeds) Act (Vanuatu). The transitional provision, s 90, provides: "A request or order that was made under the Serious Offences (Confiscation of Proceeds) Act No 50 of 1989 and has not been finalised at the commencement of this Act is taken to be a request or order made under this Act".*
>
> ***[121]*** *Part 3 of the Proceeds of Crime Act (Vanuatu) deals with "Forfeiture orders, pecuniary penalty orders and related matters". A forfeiture order may be made following conviction for a serious offence if the court is satisfied that the property is "tainted property" in relation to the offence — namely property used in, or proceeds of, the offence (s 20). In the alternative, the Attorney-General may apply for a pecuniary penalty order on conviction, equal to the value of the person's benefit from the offence (s 28). Section 28(2) requires the court to assess the value of the benefit derived by a person from the offence, in accordance with the statutory procedure laid out in s 29–s 33. Section 29(1) provides that "If a person obtains property as a result of, or in connection with committing, a serious offence, the person's benefit is the value of property so obtained". The amount to be recovered from a person under a pecuniary penalty order is, as provided in s 31, the amount that the court assesses to be the value of the person's benefit from the offence.*
>
> ***[122]*** *The limited concept found in s 3(1)(b) of the Serious Offences (Confiscation of Proceeds) Act (Vanuatu), restricting confiscation orders to "the value of the profits assessed" — that is, the interest accrued on the monetary proceeds of crime — does not appear in Proceeds of Crime Act (Vanuatu).*
>
> . . .
>
> ***[127]*** *It is unnecessary, indeed inappropriate, for this Court to resolve issues of Vanuatu law. No attempt was made to establish the law of Vanuatu in an appropriate way. This Court was invited, effectively, to construe the Vanuatu statutes. This Court should limit itself to an assessment of the risks. The appellant bore the onus of establishing that the risks were of such an order that a court of equity should act to protect the appellant. In my opinion that onus has not been discharged.*
>
> ***[128]*** *I am not satisfied that there is real risk that the entirety of the funds may be confiscated by the Vanuatu Government. There is a higher risk of loss of earned interest. No reason was advanced why this possibility should create a right where none exists.*

68. The application for forfeiture or confiscation in proceeds of crimes act case No. 001 of 2011 is dismissed.

69. It is then necessary to determine the claim by Mr Evans as to whether he is entitled to the funds as the receiver of Benford and that European bank should be directed to release the funds to him.

70. As previously mentioned, I am satisfied on the evidence that Mr Evans was duly appointed by the Californian Court as the receiver of inter alia Benford and that he is required to account to the FTC for any funds recovered by him. In turn, the FTC is required to apply any recovered funds to the victims of the Taves' fraudulent activities.

71. I am again assisted greatly by the NSW Court of Appeal for its summary[5] of the Californian proceedings which resulted in Mr Evans being appointed as receiver of Benford and other entities and established the basis on which any assets recovered were to be treated[6]:

> ***[25]*** *On 6 January 1999, the Californian Court made a temporary restraining order, which the included the appointment of a receiver. On 15 March 1999, the Californian Court issued a preliminary injunction against Mr and Mrs Taves and certain corporations he controlled.*
>
> ***[26]*** *On 22 September 1999, the Californian Court retrospectively amended its orders of 15 March 1999, so as to appoint the appellant permanent receiver of Benford. On 7 April 2000, the Californian Court granted the Federal Trade Commission's motion for summary judgment against Mr and Mrs Taves and certain of the controlled corporations. After a further hearing before a US District Court judge, the court computed damages in the amount of US$37,566,577 in a judgment of 9 August 2000.*
>
> ***[27]*** *Several aspects of the United States statutory regime and its enforcement, which are relevant for the purposes of deciding the present appeal, are set out in the findings and conclusions of the judgment of 9 August as follows:*
>
> ***[28]*** *The findings and conclusions in the judgment included the following:*
>
> > *"1. Defendants Herbal Care, JKP and MJD violated section 5 of the FTC Act, 15 USC §45(a). ...*
> >
> > *2. Defendants Ken Taves, Herbal Care, JKP and MJD engaged in the unfair practice of operating a fraudulent scheme by which they debited and charged card numbers without the cardholders' authorization. ...*

[5] Robb Evans of Robb Evans & Associates v European bank 61 NSWLR 75 (paras 22-30)
[6] Ibid

3. This practice resulted in substantial injury to an untold number of consumers.

4. Defendants Ken Taves, Teresa Taves, Herbal Care, JKP and MJD are jointly and severally liable for the corporate defendants' unfair practices.

5. In proper cases, Section 13(b) of the Federal Trade Commission Act provides that the Federal Trade Commission 'may seek, and after proper proof, the court may issue, a permanent injunction'. 15 USC §53(b).

6. The authority granted by section 13(b) 'includes the "authority to grant any ancillary relief necessary to accomplish complete justice" '. FTC v Pantron I Corp, 33 F 3d 1088, 1102 (9th Cir 1994) (quoting FTC v H N Singer, Inc, 668 F 2d 1107, 1113 (9th Cir 1982)). This power includes the power to grant monetary equitable relief, such as restitution. Id (citing FTC v Amy Travel Serv, Inc, 875 F 2d 564, 571 (7th Cir 1989)).

7. 'The remedy of restitution seeks to correct unjust enrichment, and is therefore particularly suited to remedying economic injuries'. Pantron I Corp, 33 F 3d at 1102.

8. Where it would be impracticable to reimburse all of the consumers who have been injured by the defendants' unlawful practices, the district court has the discretion to order some remedy which requires the defendants to disgorge their unjust enrichment. Id at 1102–03 n 34.

...

14. To the extent that the defendants contend that the amount of profits and not consumer loss is the proper measure of damages, the Court rejects this argument. 'A major purpose of the Federal Trade Commission Act is to protect consumers from economic injuries. Courts have regularly awarded, as equitable ancillary relief, the full amount lost by the consumer'. Febre, 128 F 3d at 536. Here, the Court holds that the unauthorized credit and debit card charges that the defendants caused to be deposited into their merchant accounts (without consideration of the defendants' profits) provide the appropriate measure of restitution. ...

15. To the extent that it would be impossible or unfeasible for the FTC to distribute all of the $37,566,577 to injured consumers, the unpaid funds shall be deposited into the United States Treasury. See FTC v Gem Merchandising Corp, 87 F 3d 466, 469–70 (11th Cir 1996) (district court had power to order payment of excess award to the US Treasury); Febre, 128 F 3d at 537 (same); cf Pantron I, 33 F 3 at 1102–03 ('If the court reasonably concludes that it would be impossible or impracticable to locate and reimburse all of the consumers who have been injured ... it may order some other remedy which requires [the defendants] to disgorge its unjust enrichment'). "

***[29]** On 31 August 2000, the Californian Court made similar orders of default judgment, permanent injunctive and ancillary relief against other Taves companies named in the original Federal Trade Commission complaint.*

***[30]** In the orders of 31 August 2000, a consumer redress program was proposed in the following terms:*

"The Commission may apply all or any funds received from TAL and Discreet Bill, as well as the Receiver, pursuant to this Order, and any interest received thereon, to a consumer redress program and to related administrative expenses. If the Commission determines a consumer redress program is not feasible, or if there are funds remaining after full implementation of the redress plan, the Commission will deposit these funds into the United States Treasury.
In implementing a redress plan, the Commission shall have full and sole discretion to:

> *1. Determine the criteria for participation by individual claimants in any consumer redress program implemented pursuant to this Order;*
>
> *2. Determine the manner and timing of any notices to be given to consumers regarding the existence and terms of such programs; and*
>
> *3. Delegate any and all tasks connected with such redress program to any individuals, partnerships, or corporations; and pay the fees, salaries, and expenses incurred thereby from the payments made pursuant to this Order."*

72. The NSW Court of Appeal dealt initially with the issue as to whether Mr Evans could enforce his position as receiver of Benford (vis-a-vis the funds) in the Australian courts. That required a consideration of, *"the rule of private international law that an Australian court will not entertain an action for the enforcement of a penal, revenue or other public law of a foreign state (the exclusionary rule.*" [7]

73. It is unnecessary to do more than acknowledge that the same principle or rule (the exclusionary rule) should apply equally in Vanuatu as it does in Australia. However, I also accept, with respect and without reservation, the conclusions expressed so clearly by Spigelman CJ for the NSW Court of Appeal to the effect that the exclusionary rule does not apply to the proceedings relating to the Taves fraud and the appointment of Mr Evans as receiver of Benford – per Spigelman CJ at para 84-89

[84] *By legislation, the United States has established a standard of commercial behaviour, the breach of which can lead to a number of consequences. One of the consequences is the reimbursement to persons of the loss or damage suffered by reason of the breach of the standard. In the circumstances of this case, the application of the statutory standard would not relevantly differ, in this regard, from the common law right to the recovery of amounts of which the individual consumers were defrauded. Indeed, in any civilised system of law simple theft, of the character that occurred in this case, will give rise to a right to recover the monies stolen.*

[7] Ibid: para 1

[85] As is so often the case, particularly with conduct affecting persons in their capacity as consumers, the cost of litigation over small amounts is such that, in the absence of special measures, the individuals would not be able to recover their losses. The State has provided a mechanism which enables that to occur.

[86] The Federal Trade Commission Act (US) empowers the Federal Trade Commission to approach the Court for a range of relief, some of which would have the requisite governmental character. However, the aspect of the relief which is indirectly sought to be enforced in these proceedings is not of that character.

[87] The substance of these proceedings is to recoup funds so that they can be placed in a pool of funds to be used for the purpose of reimbursing persons defrauded, in the manner hitherto described. The particular funds sought to be recouped in these proceedings will be placed in a pool. They will not be directly refunded to the particular individuals whose credit cards were the subject of the specific deductions which, assuming that it is practicable to do so, can be traced through various steps in the transmission of the funds to Sydney. However, the pool will include the recoupment of funds which will be made available to those particular credit card holders from other accounts into which monies from other credit card holders had found their way.

[88] No doubt because the particular mechanism of fraud involved monthly deductions, the funds that happened to be taken from individual credit card holders went via different routes from time to time. Pooling the funds in the manner proposed for the purposes of the consumer redress program appears to be the sensible and, perhaps, the only practical, course. This aspect of the relief ought not be used to characterise the transaction as somehow constituting the exercise of a power to serve a governmental interest.

[89] The recoupment of funds with a view to their return to persons deprived of those funds is a normal consequence of the application of the civil law. In my opinion, as a matter of substance, that is, what is occurring in the present proceedings. There is nothing in this case of the character of a governmental interest in the sense in which that concept is applied in the Australian authorities, that is, as the exercise of a power peculiar to government. In my opinion the particular proceedings before the Court should not be characterised in that manner. The exclusionary rule does not apply and this Court should not decline jurisdiction

74. Spigelman CJ had earlier dismissed the argument that there was a real risk that, if the funds were recovered by Benford and through the direction of Mr Evans were accounted for to the FTC, some or all of the funds might be forfeited to the US Government. The learned Chief Justice dismissed that risk as being improbable and emphasising again that the USA proceedings and appointments were (at para 83), *"designed to compensate persons who have been defrauded"*

82] The combined effect of the fact that what is involved in these proceedings is only a proportion of the total funds defrauded, the overwhelming probability that there will be leakages in the system and the costs involved in the enforcement processes, strongly suggests that the probability that there will be a surplus not able to be distributed so small as not to be of any relevant legal significance in determining whether the exclusionary rule should be applied.

> *[83] The scheme does contemplate the possibility that some of the funds may not be able to be distributed to the consumers who were defrauded. In that contingency, provision is made for the payment of any surplus to the United States Treasury. With the benefit of hindsight it may appear that, as matters work themselves out, there was a penal element in the orders made. However, nothing in the materials before the Court suggests that this is anything other than an allowance for a contingency which is not expected to eventuate. In my opinion, it cannot be used to characterise the nature of the proceedings. As the High Court emphasised in the* Spycatcher *case, relying on earlier authorities, the issue is one of substance not of form. In my opinion, as a matter of substance, this is a proceeding designed to compensate persons who have been defrauded.*

75. Finally, I confirm that I find that the appointment of Mr Evans as receiver of Benford in these circumstances is one that is to be treated with respect by the Courts of Vanuatu particularly in the absence of any other rightful claimant to the funds deposited to Benford's account with European Bank. It is a matter of comity between nations.

76. In CC 85/99, the declaration and the order sought in the originating summons dated 21 September 1999 are accordingly made subject to such adjustment or assignment as may best reflect the current situation.

The Criminal Proceeding

26. It is appropriate for a fine to be imposed on Benford to mark this Court's condemnation of the actions of those who might have considered or might consider that Vanuatu is a safe haven for the proceeds of crime. This offence carries with it a maximum penalty of Vt 50 million. While Benford does not have the benefit of any of the invested funds to meet any fine, and it is understood otherwise to be completely lacking in substance, its insolvent position raised by a fine might well result in Benford being placed in to liquidation by the Registrar whose responsibility it is to recover the fine. The Director or Directors of Benford may then find itself or themselves liable for the debt created by the fine under the relevant provisions of the Companies Act. Be that as it may, it is still necessary to ensure that the fine is a proportionate response to the criminal offending involved here.

27. This offending is clearly at the higher end of the scale of seriousness for offending of this nature. It requires a substantial fine to be imposed to recognise the seriousness of

the offending and for the purposes of deteriorating others who might consider Vanuatu to be a safe place to deposit the proceeds of crime.

28. Benford Ltd is fined Vt 25,000,000. I am required to specify a time by which the fine is to be paid and I specify that to be by 31 May 2014. The recovery of the fine is now a matter for the Registrar.

Finally

77. The last report from European Bank is dated 16 August 2011 signed by two directors of that bank and it confirms that, as at that date, the balance of the Benford Account is USD 8,295,194.74 which is held in an interest bearing term deposit.

78. As to costs, the Attorney General, Mr Napuati for Benford Ltd and Mr Blake for European Bank all seek to have their costs to be paid out of the Benford funds prior to those funds being transferred to Mr Evans.

79. While Mr Napuati acted in a formal sense for Benford Ltd, that could only have been on the instructions of Mr Evans as the receiver of Benford. It enabled the criminal prosecution to be completed.

80. Mr Ozols confirmed that, in the unusual circumstances of this case, he had been instructed by Mr Evans to consent to orders of costs in those respects. However, the Court must exercise some oversight in respect of the quantum of the individual costs' awards to ensure that they are reasonable.

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 Vt 25,000 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.

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.

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.

87. I leave it for counsel to confer towards drafting orders to give effect to this judgment and to then submit them to Harrop J for consideration. Leave is also reserved to refer this matter back to this court if agreement cannot be reached.

88. That concludes all matters in this case. In conclusion, I wish to acknowledge the passing of Mr Ozols and give due credit to him for his excellent presentation of the case for Mr Evans. I also regret that delay in the delivery of this judgment.

DATED this 6th day of May 2014

BY THE COURT