IN THE SUPREME COURTOF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil

Case No. 15/601 SC/CIVL

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

Claimant

AND: **Wanfuteng Bank Limited**

Defendant

Date of Hearing	22 May 2020
Before:	Justice G.A. Andrée Wiltens
Counsel:	Mark Hurley for the Claimant
	Garry Blake for Defendant
Date of Decision:	10 June 2020

JUDGMENT

A. Introduction

1. By Judgment dated 30 March 2020, a number of issues between these disputing parties were determined in principle, subject to the actual calculations being completed.

2. Counsel are unable to agree as to how some of the determinations are to be calculated. Accordingly further submissions advancing their respective viewpoints were received in writing and further addressed orally. I reserved my position, indicating I would deliver a subsequent clarifying judgment on or before 10 June 2020.

3. This is my reserved judgment and the reasons for arriving at these determinations. This decision will of necessity refer back to my 30 March 2020 judgment throughout – I make no apology for that. I will adopt the same topical references.

B. Issue B – The "Interest write back"

(i) Previous findings (Paragraphs 30 - 40 condensed)

4. Benford remitted several tranches of funds to EBL to be placed on interest-bearing deposit. Once EBL became aware of the fraudulent nature of the funds, the investments were amalgamated on 1 June 1999 into a lump sum of US$ 7,431,924.56. There was then a deduction from the account of US$ 36,194.56 – the "Interest write back".

5. That interest was never subsequently credited to Benford - EBL simply kept the interest as its own, when not entitled to do so.

6. Further, there was a period in which no interest was paid to EBL – from February to August 1999, which EBL also kept as its own.

7. There is to be a reversal of the US$ 36,194.56 entry. Interest is payable on this amount at 5% per annum from 1 June 1999 until full payment is made.

8. 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.

(ii) Issue

9. Mr Hurley's position is that (i) apart from the reversed interest, there was an additional US$ 24,874.73 interest earned on the Benford funds in the period February to June 1999; and (ii) there was also interest earned on the Benford funds in the period 21 June 1999 to 12 October 2000, although there is a gap in the disclosed statements demonstrating what that amount was. Mr Hurley submitted that both amounts should be credited to Benford.

10. Mr Blake agreed with the first point, but the not the second. He submitted that the funds were then in a zero interest bearing account; and to attempt to calculate what interest might have been earned by EBL was equivalent to deeming EBL having actually earned such, and that this was outside the parameters of the original Claim.

(iii) Clarification

11. There is little evidence to establish that yet further interest was in fact earned on Benford's funds – although common sense dictates that EBL would not leave a large sum in a zero interest bearing situation. Mr Bayer's evidence, and Mr Blake's submissions, counter that common sense approach.

12. My intention was that EBL pay out the interest earned on Benford funds rather than retain the interest for itself. However, I am unable to discern from the information available what interest was actually earned between July and 12 October 1999. Much as it appeals to follow common sense, in the absence of evidence that is inappropriate. There is accordingly no further award in respect of this aspect.

13. As there is consensus on the interest earned, EBL is to now pay US$ 61,069.29 with interest at 5% p.a. from 21 June 1999 until payment in full – this takes into account the additional US$ 24, 874.73 interest earned.

14. There is one further over-lapping point to this which impacts on Issue D. This concerns the invoice for fees of 12 November 1999 in the amount of US$ 8,189.38 which was paid out of interest earned. This will be dealt with later to ensure there is no double-counting.

C. Issue C – The overdraft

(i) Previous findings (Paragraphs 41 - 68 condensed)

15. The monthly charges that EBL imposed resulted in the Benford current account going into overdraft. The overdraft grew to US$ 1,014,594.90, until paid off on 23 August 2007.

16. EBL should not have allowed the account to lapse into overdraft. It was obligated to prevent this occurring in order to preserve Benford's capital. Other alternatives were available, which would have better met EBL's Court-imposed obligations.

17. In order to correct this, 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.

(ii) Issue

18. Mr Blake argues that there is an assumption that EBL received payment immediately each charge was levied against the overdrawn account, whereas they were in actuality only book-keeping entries. Payment was not received until 23 August 2007. Mr Blake accordingly submitted that interest should not be payable for the periods prior to 23 August 2007.

19. Mr Hurley abided the Court's decision as to this aspect.

(ii) Clarification

20. Mr Blake's contention clearly makes sense and is therefore adopted. Accordingly, interest is no longer to be calculated from the date of each charge. Instead it is to run, at 5% p.a. from 23 August 2007 until payment in full.

D. Issue D – EBL's Charges

(i) Previous findings (Paragraphs 69 – 80 condensed)

21. Mr Hurley contended that EBL's charges via EUT were not supportable as being fair and reasonable.

22. The account opening documents evidence that EBL was entitled to charge fees for its services to Benford, as accepted by the Court in the Orders of 28 July 1999 and 24 August 1999.

23. The Court can infer additional terms of the contract, where such were always within the contemplation of the parties. In this regard, it is just and equitable to infer that a term of the contract is that all EBL fees and charges imposed on Benford be fair and reasonable.

24. The variation in the monthly (approximately) Accounting and Management charges is troublesome. The least amount charged was on 29 February 2004 - US$ 11.30. The largest amount was on 28 February 2003 - US$ 18,679. Given that Benford's investments were not continually being moved, and that the term deposit was simply rolled over each month, it is extremely difficult to see how such large charges could be justified.

25. The variation and the extent of Sundry Expenses/Fees charges are also excessive – for example: US$ 1,878.85, US$ 5,659.44, and US$ 5,867.37. There is no explanation or justification.

26. EBL was entitled to impose fair and reasonable charges. What EBL has taken as its Accounting and Management fees and charges does not come within that description.

27. If counsel cannot agree on what could be considered reasonable monthly, 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.

28. 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.

(ii) Issue

29. In relation to this aspect of the dispute, Mr Blake sought to produce additional information regarding the level of Accounting and Management fees charged. He maintained this was in order to "assist the Court". The information apparently consisted of a bundle of timesheets which could justify EUT's charges. Mr Hurley objected to their production.

30. This Court is unimpressed with the argument that the attempt to produce was "to assist the Court". EBL was given an opportunity to assist the Court following the hearing of 27 February 2020 by providing evidence as to when certain funds were remitted to it from Australia – either on 24 March 2005 or 23 August 2007. There was conflicting evidence, and the actual date was material to one of the matters the Court had to determine. It should have been a routine matter to ascertain the correct date of the remittance.

31. However, the Court's invitation to supply this information went unanswered. In the event, nothing turned on the date, but EBL was unaware of that until after the 30 March judgment was published. A suspicion lingers that the actual date may have been perceived as not being to EBL's advantage, and therefore co-operation would not be extended. In the circumstances, the phrase "to assist the Court" can easily be seen as a euphemism for "only if it advances EBL's cause".

32. The Civil Procedure Rules set out their overriding intent. Foremost is that the Rules enable the court to deal with cases "justly". That is defined as including, so far as practicable, the court

"ensuring that all parties are on an equal footing". This point is further expanded upon in Part 8 of the Rules which deals with disclosure.

33. Rule 8.2(1) provides that a party must disclose a document if relying on it, or if it materially adversely affects that party's case or supports another party's case. Rule 8.15(1) provides that a party who fails to disclose a document may not rely on it, unless the court allows.

34. The timesheets should have been disclosed to Mr Hurley prior to the hearing of 27 February 2020, and should have been produced at that hearing. EBL has known of this matter since 2015, yet it only attempted to produce and rely on the information subsequent to the judgment having been published.

35. This belated attempt to produce the timesheets is simply too late, and it would have been unfair to RE to allow it.

36. Accordingly, I disallowed Mr Blake's application to produce the timesheets.

37. Mr Blake's contention regarding EBL's charges is that all the EUT charges are covered by the bank's indemnity as established by the account-opening contract conditions. He relied on the evidence of Mr Bayer to support this. The submission advanced was that these charges related to the time EBL staff expended in preparing for the Benford-related litigation in Vanuatu and Australia.

38. Mr Hurley contended that the litigation involved EBL's funds and EUT's costs should not be deducted from Benford's funds. He submitted that a litigant's time costs ought not to be recoverable, and further that Baker & McKenzie's legal fees had already been recovered by EBL from Benford.

39. There is in fact scant evidence to support the submission that all the EUT fees and charges related to litigation occurring in Australia. I note that none of the statements/invoices provided make any reference to the fact that the charges relate to such activity.

40. When looking more closely at the statements, it is unlikely that the heading "Accounting and Management" would relate to time spent retrieving information relating to litigation. Possibly the item "Fax, Telephone, Telex" might indicate some connection, as might "Postage". Equally the heading "Photocopying", and "Sundry Expenses/Fees". In contrast, a heading such as "Annual Company Representation Fee" does not denote time spent on litigation – nor does the heading "Sales Tax".

41. I simply do not understand the heading and resultant fee headed "Credit card Charges". There is no evidence of Benford having any EBL credit cards; and if EBL used a bank credit card ostensibly on behalf of Benford, it should have paid for the additional expense itself. Similarly, I do not understand the charge relating to "Cheque Clearing and other charges".

42. Without attempting to do the exact mathematics, it is apparent from a brief scanning of the incomplete statements actually provided, due to what Mr Bayer attributed to "an oversight", that the proportion of the fees invoiced related to "Accounting and Management" is in the region of 50% of the total charged. It is simply conjecture as to what the complete picture would have looked like, had all the statements had been provided to the Court.

43. The other issue I take with Mr Blake's submissions as to the actual nature of the Accounting and Management charges, as opposed to those reported to the client, is that he is entirely reliant on Mr Bayer's evidence that all the charges relate to time charges incurred in relation to litigation. In my judgment of 30 March 2020 a large portion of Mr Bayer's evidence is set out in which he is asked, and frankly fails, to explain what the "Accounting and Management" charges related to. This is despite being given ample opportunity to do so.

44. There are two oblique references by Mr Bayer to the fees relating to litigation. Firstly, he agreed that his rationale for the Benford account going into overdraft was due to EBL's expenses incurred arising from the Australian litigation. I note that all EUT fees were charged to the overdrawn current account – thus providing a link. Secondly, in re-examination Mr Bayer was again asked why the Accounting and Management fees varied from month to month. In response, he said: "I imagine Benford was involved in litigation here or in Australia, and we had to supply information to lawyers."

45. The evidence to support Mr Blake's submission that all the fees related to the time costs incurred in participating in the litigation is scant. It does not pass the test of being more likely than not. Had it been the case that the fees charged resulted from such endeavour I would have expected the statements to reflect that. I also would have expected Mr Bayer to be strongly advocating exactly that. His imaginings, as set out above, are insufficient in my judgment to place weight on this contention.

46. I reject the proposition that EUT's Accounting and Management charges all relate to the time involved in preparing for litigation. The charges are described in the statements as Accounting and Management, with associated disbursements. That is what EUT was entitled to charge for.

47. In my decision of 30 March 2020, my conclusion was that some of the charging was usurious. Considering the reality of what was required of EBL, namely to manage and properly account to Benford for funds held for long periods in stable placements, I continue to be of the view that the fees charged are unsupportable as being fair or reasonable.

48. The penultimate paragraph of this part of the 30 March 2020 judgment invited counsel to give the matter consideration and to see if an agreed amount could be arrived at. Mr Blake made it plain that by not allowing EBL to charge the fees on the overdraft, EBL considered itself hard done by. That may have led to it not entering into discussions in relation to this aspect with the positive intent of resolution. Mr Hurley is certainly of that view. However, the reasons for the parties arriving at this impasse do not resolve it.

49. As indicated, if counsel could not agree, then an arbitrary figure must be adopted. In this regard, it was submitted by Mr Hurley that perhaps US $1,200 per annum would be a sufficiently "fair and reasonable" figure.

50. I note that, although a lesser sum than that originally placed with EBL was being managed, for the period February 2014 to January 2020 EUT charges amounted to US$ 5,167.03. This is an average of approximately US$ 750 p.a.

(ii) Clarification

51. There were undoubtedly greater requirements on EBL in the early years, compared to the latter period. A generous fair and reasonable charge for the entire period of Benford funds being held by EBL is accordingly set at US$ 1,500 p.a.

52. Dubious as I am regarding EBL's overall conduct relating to Benford, I cannot conceive of the disbursements set out in the monthly statements as being invented. Accordingly I conclude they are properly due to EUT, save for the items described as "Credit card Charges" and "Cheque Clearing and other charges". I cannot see how such charges were properly incurred at Benford's expense.

E. Issue E – EBL's Indemnity

(i) Previous findings (Paragraphs 81 – 104 condensed)

53. The first phase of litigation was an attempt by RE to follow the Benford cash to Australia, and gain control of funds placed with Citibank by EBL. The first action was determined in a decision of 27 March 2003. RE unsuccessfully appealed that decision, and was subsequently declined special leave to appeal further.

54. Indemnity costs were awarded against RE in respect of all 3 proceedings. Those costs were eventually settled with Baker & McKenzie in June 2005 by an agreed payment of A$ 575,000, in full and final settlement.

55. Mr Hurley conceded that the wording of the indemnity as "...other outgoings attributable to the account" covered the balance of the Baker & McKenzie fees. Interest is payable on this amount at 5% per annum from June 2005 to the date of final payment.

(ii) Issue

56. Counsel were unable to understand how the figure being the stated difference between what Baker & McKenzie were paid and what their total legal fees came to was arrived at in the 30 March 2020 judgment. That figure was incorrect. One confusing aspect was the different currencies involved. What was paid by way of the settlement was A$ 575,000, and what the fees amounted to was US$ 727,394.60. There was further an additional A$ 100,000 reimbursed, which was not taken into account in my judgment. The correct shortfall, converting the amounts to US$, was in fact US$ 114,693.10.

57. Mr Hurley submitted that interest on that shortfall was properly payable to EBL at the Supreme Court rate of 5% p.a. from 1 June 2005 (the date the agreed sum was paid) to 23 August 2007 (the date the overdraft was cleared from Benford funds remitted to EBL). Mr Hurley's assessment worked out at US$ 12,789.06.

58. Mr Blake approached this issue in a different way. He submitted that EBL had incurred legal costs throughout the litigation, and that as and when each invoice was paid, interest on that amount should accrue due to EBL. He relied on the bank's indemnity to recover all its costs in

this way; and he saw parity in looking at this aspect with the way the 30 March 2020 judgment had dealt with the overdraft aspect in Benford's favour.

59. Mr Blake submitted a schedule showing when each payment was made and reimbursed; and calculated the interest between those dates on the amounts involved. Mr Blake's calculations in respect of the first tranche of litigation came to a total of US$ 90,477.06.

60. Mr Blake further enhanced his case by submitting that the same consideration applied in respect of the second tranche of litigation; and he subsequently supplied a second schedule setting out the interest claimed in relation to that, which amounted to A$ 232,252.46.

61. The parity argument falls away, as earlier determined – see paragraphs 15 – 20 above.

62. Mr Blake submissions are quite different to the way the case was conducted and it raises new matters not previously considered. This argument is not seeking clarification of the 30 March 2020 judgment – rather it is putting forward a new basis on which EBL seeks to retain some of the Benford funds. As these contentions were presented in this way for the first time, the submissions in respect of both tranches one and two, are rejected.

63. The EUT statement as at 31 October 1999 invoiced Benford US$ 8,189.28. EBL paid itself this amount in November 1999 when it placed Benford funds on term deposit after deducting these charges. The statement apportions US$ 2,395.50 of the total amount to Accounting and Management fees. EBL is permitted by this decision to only charge US$ 125 per month plus the disbursements listed, and therefore this was an over-charging.

(iii) Clarification

64. The intention in the 30 March 2020 decision was that EBL should not be in a different position with regards interest to what Benford was. Each party ought to be awarded interest at the Supreme Court rate in respect of sums, as established at that hearing, are owed to it.

65. Accordingly, the clarification made is that EBL is entitled to 5% interest p.a. on US$ 114,693.10 from 1 June 2005 to 23 August 2007.

66. To rectify the November 1999 over-charging, EBL must pay US$ 2,270.50 plus interest at 5% p.a from November 1999 to the date of final payment.

F. Conclusion

67. The remaining matter of costs will be determined at 2pm on 17 June 2020.

Dated at Port Vila this 10th day of June 2020

BY THE COURT

Justice G.A. Andrée Wiltens

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