HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

EUROPEAN BANK LIMITED APPELLANT

AND

ROBB EVANS OF ROBB EVANS & ASSOCIATES RESPONDENT

European Bank Limited v Robb Evans of Robb Evans & Associates
[2010] HCA 6
10 March 2010
S272/2009

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 April 2009 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

R J Webb SC with D T Kell for the appellant (instructed by Baker & McKenzie)

A S Martin SC with G M Drew for the respondent (instructed by Norton Rose Australia)

CATCHWORDS

European Bank Limited v Robb Evans of Robb Evans & Associates

Damages – Assessment – Remoteness – Usual undertaking as to damages – Supreme Court Rules 1970 (NSW) ("the Rules") – Respondent gave usual undertaking as to damages to court pending application for special leave to appeal to High Court – Court ordered money to which appellant otherwise entitled be paid into court in United States dollars – Appellant would have converted money from United States dollars to euros but for the order – Nature of "usual undertaking as to damages" in Pt 28 r 7(2) of the Rules – Relevance of contractual remoteness principles in *Hadley v Baxendale* (1854) 9 Exch 341 [156 ER 145] – Equitable origin of usual undertaking as to damages in Pt 28 r 7(2) of the Rules – What is "just and equitable" or "fair and reasonable" in the circumstances – Whether loss of preferential movement in exchange rates and interest flowed directly from order – Whether kind of loss could have been foreseen by respondent.

Words and phrases – "usual undertaking as to damages".

Supreme Court Rules 1970 (NSW), Pt 28 r 7(2).
Uniform Civil Procedure Rules 2005 (NSW), Pt 25 r 8.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. In litigation in the Equity Division of the Supreme Court of New South Wales[1], Gzell J ordered the present respondent ("Mr Evans") to pay to the appellant ("European Bank") the sum of A$1,251,088.33 as compensation pursuant to an undertaking as to damages which previously had been given by Mr Evans to the Court of Appeal. Thereafter, on appeal by Mr Evans, the Court of Appeal (Basten and Campbell JJA and Gyles AJA)[2] set aside the judgment and orders of Gzell J. On appeal to this Court, European Bank seeks the reinstatement of the orders made by the primary judge.

The course of the litigation

2 Mr Evans had given the undertaking as to damages pending an application for special leave to appeal to the High Court. The litigation between the parties in the Supreme Court had begun in 1999. In that year Mr Evans instituted proceedings in the Equity Division alleging that, as receiver of Benford Limited ("Benford"), he was entitled to a United States dollar account held in the name of European Bank with Citibank Limited ("Citibank") in Sydney. Both Benford and European Bank are incorporated in Vanuatu.

3 Mr Evans had been appointed receiver of Benford and other persons and companies involved in alleged systematic and extensive credit card fraud practised by a resident of California, Mr Kenneth Taves, upon residents of the United States, in violation of the provisions of the *Federal Trade Commission Act* 1914[3]. The appointment as receiver was made by the United States District Court for the Central District of California on the application of the Federal Trade Commission.

4 In the equity suit, Mr Evans contended (i) that a portion of the proceeds of the fraud (some US$7.5 million) had been transferred by indirect means from the United States to an interest-bearing deposit account opened in Vanuatu by European Bank in the name of Benford; (ii) that several months later an amount equivalent to that held in the Benford account had been deposited by European Bank with Citibank in a Sydney account in the name of European Bank; and

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1 *Evans & Associates v Citibank Ltd* [2007] NSWSC 1004.

2 (2009) 255 ALR 171 at 208.

3 15 USC §§41-58.

(iii) that this debt owed by Citibank to European Bank was held on trust for Benford.

5 The suit was dismissed by Palmer J[4] and an appeal by Mr Evans was dismissed by the Court of Appeal (Spigelman CJ, Handley and Santow JJA)[5] on 25 March 2004. The Court of Appeal on the same day allowed an appeal by European Bank against the decision of Palmer J on its cross-claim against Citibank with respect to the deposit in the Sydney account[6]. The Court of Appeal (Spigelman CJ, Handley and Santow JJA) ordered that judgment be entered for European Bank for the debt sued for together with interest at a rate or rates applicable in United States dollars[7].

6 Mr Evans was minded to institute an application for special leave to appeal to this Court. On 18 May 2004, upon him giving the usual undertaking as to damages, the Court of Appeal ordered that an amount of US$8,731,023.73 that, pursuant to its decision on the successful appeal by European Bank, otherwise was to be paid by Citibank to European Bank in discharge of its indebtedness, be paid into court to abide the outcome of the High Court application. Upon payment into court the amount was to be invested by the Prothonotary in an interest-bearing deposit with Westpac Banking Corporation.

7 The application for special leave to this Court was dismissed by Gleeson CJ and Gummow J on 11 March 2005[8]. Thereafter by consent the Court of Appeal ordered that the Prothonotary pay the judgment debt to European Bank with the interest that had accrued. On 29 March 2005 the total sum of US$8,855,975.16 less US$3,077.71 was paid out to European Bank. The sum of US$3,077.71 was deducted pursuant to provision made by cl 13 of the Supreme Court Regulation 2000 (NSW)[9].

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4 *Evans and Associates v Citibank Ltd* [2003] NSWSC 204.

5 *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75.

6 *European Bank Ltd v Citibank Ltd* (2004) 60 NSWLR 153.

7 (2004) 60 NSWLR 153 at 167.

8 [2005] HCATrans 142.

9 Now Civil Procedure Regulation 2005 (NSW), cl 19, with minor amendments.

8 On 11 May 2005 European Bank moved in the Equity Division for an order for the assessment of the amount of compensation payable by Mr Evans to it pursuant to the undertaking as to damages he had given to the Court of Appeal on 18 May 2004. The content of the expression "usual undertaking as to damages" was given by Pt 28 r 7(2) of the Supreme Court Rules 1970 (NSW)[10] in the following terms:

> "The 'usual undertaking as to damages', if given to the Court in connection with any interlocutory order or undertaking, is an undertaking to the Court to submit to such order (if any) as the Court may consider to be just for the payment of compensation, to be assessed by the Court or as it may direct, to any person, whether or not a party, affected by the operation of the interlocutory order or undertaking or of any interlocutory continuation, with or without variation, of the order or undertaking."

9 The sum awarded by Gzell J as compensation principally was the product of increases in the value of the euro against the United States dollar, although it also included a component reflecting the higher rates of interest earned on euro accounts in the relevant periods. His Honour expressed the finding in terms of United States dollars at US$800,000, but subsequently, by a consent order made on 27 September 2007, required Mr Evans to pay A$1,251,088.33 as the Australian dollar equivalent of US$800,000.

The contract analogy

10 The primary judge[11] approached the assessment of compensation on the basis that the criteria for the treatment of remoteness in cases of breach of contract would be appropriate and that it would be just for the payment of compensation to be assessed having regard to the rule in *Hadley v Baxendale*[12]. This was in reliance upon what was said by Aickin J in *Air Express Ltd v Ansett*

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10 Now Uniform Civil Procedure Rules 2005 (NSW), Pt 25 r 8, with minor amendments.

11 [2007] NSWSC 1004 at [5]-[13], [69], [78].

12 (1854) 9 Exch 341 [156 ER 145].

Transport Industries (Operations) Pty Ltd[13], repeating, amongst other things, references to *Hadley v Baxendale* by Brett LJ in *Smith v Day*[14].

11 Something immediately should be said respecting the significance for the issues in this appeal of the rule in *Hadley v Baxendale*. The rule is, of course, associated with the assessment of damages in actions for breach of contract. The principle with respect to damages at common law for breach of contract recently was confirmed by this Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[15] as that stated by Parke B in *Robinson v Harman*[16]. The plaintiff is to be placed in the same situation with respect to damages, so far as money can do it, as if the contract had been performed.

12 As Toohey J remarked in *The Commonwealth v Amann Aviation Pty Ltd*[17], the rule in *Hadley v Baxendale* does not detract from what was said in *Robinson v Harman*. The rule is concerned with the question of remoteness and marks out the limits of the heads of damage for which the plaintiff is entitled to receive compensation. In the same case, McHugh J said of *Hadley v Baxendale* that the rule is a limit on, rather than a ground of, liability, marking out the boundary of the liability for loss or damage caused by a breach of contract[18].

13 The formulation of the rule in *Hadley v Baxendale* states the entitlement of the plaintiff to recover such damages as arise naturally, that is, according to the usual course of things, from the breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of both parties concerned at the time they made the contract as the probable result of the breach. In *The Commonwealth v Amann Aviation Pty Ltd*[19] Mason CJ and Dawson J, with reference to the speeches of Lord Reid and Lord Upjohn in *C Czarnikow*

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13 (1981) 146 CLR 249 at 262-267; [1981] HCA 75.

14 (1882) 21 Ch D 421 at 427-428.

15 (2009) 236 CLR 272 at 286 [13]; [2009] HCA 8.

16 (1848) 1 Exch 850 at 855 [154 ER 363 at 365].

17 (1991) 174 CLR 64 at 136; [1991] HCA 54.

18 (1991) 174 CLR 64 at 174.

19 (1991) 174 CLR 64 at 92.

Ltd v Koufos[20], said that the two limbs of the rule in *Hadley v Baxendale* represent the statement of a single principle and that the application of that principle may depend on the degree of relevant knowledge possessed by the defendant in the particular case. Lord Reid had used the expression "on the cards"[21].

The nature of the undertaking

14 Reliance upon the rule in *Hadley v Baxendale* in an application such as that before Gzell J must be only by way of analogy[22]. The point made by Farwell LJ in *Re Hailstone; Hopkinson v Carter*[23] and repeated by Cussen J in *Victorian Onion and Potato Growers' Association v Finnigan (No 2)*[24] and by Neill LJ in *Cheltenham & Gloucester Building Society v Ricketts*[25] is important here. It is that the undertaking as to damages is given to the court, for enforcement by the court; it is not a contract between parties or some other cause of action upon which one party can sue the other. It is worth repeating the obvious proposition that such an undertaking is not lightly to be given.

15 The undertaking as to damages and its origins in equity practice of the 19th century, if not earlier, were explained by Aickin J in *Air Express*[26] and by Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ in *Mansfield v Director of Public Prosecutions (WA)*[27]. The authorities discussed in *Mansfield* included *Russell v Farley*[28], where Bradley J had explained the requirement of the

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20 [1969] 1 AC 350 at 385, 421.

21 [1969] 1 AC 350 at 390.

22 Cf *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 361.

23 (1910) 102 LT 877 at 880.

24 [1922] VLR 819 at 823.

25 [1993] 1 WLR 1545 at 1550; [1993] 4 All ER 276 at 281.

26 (1981) 146 CLR 249 at 260-261.

27 (2006) 226 CLR 486 at 497-499 [30]-[34]; [2006] HCA 38.

28 105 US 433 at 438 (1881).

undertaking as a response to the anxiety entertained by the court that otherwise its interlocutory order might lead to damage for which there could be no redress except by an order for costs.

16 In *Air Express*, Mason J said that there was little to be gained from an examination of the authorities dealing with causation of damage in contract, tort and other situations; the Court was better advised to look to the purpose which the undertaking as to damages is to serve and to identify the causal connection or standard of causal connection which is most appropriate to that purpose[29].

17 A party seeking an equitable remedy is required to "do equity" and this is the origin of the requirement that the party giving an undertaking as to damages submit to such order for payment of compensation as the court may consider to be just. Given its origin and application to varied circumstances in particular cases, the process of assessment of compensation cannot be constrained by a rigid formulation.

18 These considerations, bearing upon the interests of justice in the particular circumstances of the litigation, support the following statement by Aickin J in *Air Express*[30], made with respect to interlocutory injunctions, but applicable to the interlocutory order made by the Court of Appeal against European Bank. His Honour said:

> "In a proceeding of an equitable nature it is generally proper to adopt a view which is just and equitable, or fair and reasonable, in all the circumstances rather than to apply a rigid rule. However the view that the damages should be those which flow directly from the injunction and which could have been foreseen when the injunction was granted, is one which will be just and equitable in the circumstances of most cases and certainly in the present case."

The phrase "could have been foreseen" should be noted.

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29 (1981) 146 CLR 249 at 324.

30 (1981) 146 CLR 249 at 266-267. See also *R v The Medicines Control Agency, Ex parte Smith & Nephew Pharmaceuticals Ltd* [1999] RPC 705 at 714.

The findings of fact

19 The findings made by Gzell J are of great importance. They were made in circumstances where a bank was being kept out of its money, Mr Evans did not give evidence, and Ms Ihrig, a manager employed in Vanuatu by European Bank, was cross-examined at some length and her evidence was accepted by his Honour.

20 The findings made by Gzell J included the following:

(a) At the time the undertaking was given to the Court of Appeal, Mr Evans knew that European Bank, a Vanuatu bank carrying on business there, and dealing exclusively in foreign currencies, earned income from interest rates and from currency differentials and he understood the payment into court would have the effect of denying to European Bank the opportunity to convert the funds from United States dollars to other currencies so as to take advantage of market fluctuations in the values of such currencies[31];

(b) But for the interlocutory order made on 18 May 2004 European Bank would have converted in early July 2004 the funds invested by the Prothonotary from United States dollars to euros[32]; and

(c) The amount European Bank would have made in addition to the interest earned on the Prothonotary's account was US$800,000[33].

21 It is important to note that these findings were challenged in but not disturbed by the Court of Appeal. The Court of Appeal upheld one ground of appeal. This was that Gzell J had erred in holding, in the terms of *Hadley v Baxendale*, that the loss claimed by European Bank was a natural consequence of the interlocutory order of 18 May 2004, and should have held, as did the Court of Appeal, that the loss was too remote.

22 In the course of argument in this Court, Mr Evans sought leave to file out of time a Notice of Contention to the effect that the Court of Appeal should also

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31 [2007] NSWSC 1004 at [76]-[77].

32 [2007] NSWSC 1004 at [59].

33 [2007] NSWSC 1004 at [86]-[88].

have found that a conversion from United States dollars to euros would have involved European Bank "in departing from its usual practice". In dismissing that application, the Court noted that this submission had not been made in the Court of Appeal and continued:

> "Rather, the alleged departure from normal practice was advanced in the courts below as a basis for not finding, as the trial judge did, in terms of paragraph 59 of his judgment that it was probable that European Bank would have converted the funds invested by the Prothonotary from US dollars to euros but for the order of 18 May 2004.
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> The respondent[] submitted in paragraph 20 of [its] submission in the Court of Appeal that the 'trial judge erred in making that finding'. The Court of Appeal rejected the attack on the trial judge's finding and the respondent does not maintain that attack in this Court."

The reasons of the Court of Appeal

23 Basten JA said that the movement in exchange rates was "extrinsic" to the reason why European Bank was kept out of its money and that its consequential loss was too remote to be characterised as compensable. His Honour said that the relevant principle turned on a distinction between losses intrinsic to a breach of duty and those which are extrinsic or coincidental. He referred to a passage in the reasons of Dixon J in *Potts v Miller*[34]. In that passage Dixon J was considering the measure of damages in an action of deceit as consisting in the loss of expenditure furnished by the plaintiff in consequence of the inducement upon which he relied, diminished by any corresponding advantage in money or money's worth obtained by him on the other side. His Honour referred to authority that a plaintiff who is induced by misrepresentation to buy an article which, whilst in his possession, is destroyed or damaged can only recover the difference between the value as represented and the real value at the time of purchase and cannot add any further deterioration from some other supervening cause. Dixon J then said[35]:

> "This reasoning makes it necessary to distinguish between the kinds of cause occasioning the deterioration or diminution in value. If the cause is inherent in the thing itself, then its existence should be taken into

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34 (1940) 64 CLR 282 at 298; [1940] HCA 43.

35 (1940) 64 CLR 282 at 298.

> account in arriving at the real value of the shares or other things at the time of the purchase. If the cause be 'independent,' 'extrinsic,' 'supervening' or 'accidental,' then the additional loss is not the consequence of the inducement."

24 These distinctions are of little assistance in a case such as the present. Even if they were to be adopted they would not, given the findings by Gzell J, support the conclusion reached by Basten JA[36]:

> "The movement in exchange rates was extrinsic to the reason why European Bank was kept out of its money."

His Honour also said that Gzell J had considered the knowledge of Mr Evans of the likely losses which would flow from keeping European Bank out of its funds "at a high level of generality". This appears to assume acceptance of the proposition for which Mr Evans contends in this Court that it was for European Bank to prove actual foresight on his part.

25 Campbell JA was influenced by an analogy he saw between entry into a contract, and the giving of the undertaking, both being "legally enforceable devices for risk allocation". That premise assumed too close an analogy and controlled what followed in his Honour's reasons. He said that the scope of the power given to the court to make an order "as the court may consider to be just" was to be exercised with regard to "the extent of the risk that the giver of the undertaking is reasonably to be understood as agreeing to bear"[37]. His Honour continued[38]:

> "That risk would ordinarily include the risk of making good the consequences that would flow in the ordinary course of things from it eventuating that the plaintiff does not have the underlying right."

In his Honour's view the scope of the undertaking would be construed as extending beyond that limit only if, at the time the undertaking was given, there were particular facts known to the plaintiff to support the inference that the plaintiff was undertaking some greater risk.

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36 (2009) 255 ALR 171 at 176.

37 (2009) 255 ALR 171 at 186.

38 (2009) 255 ALR 171 at 186-187.

26 Gyles AJA, like Basten JA, discounted the findings of the primary judge as made at "a very general level"[39]. His Honour described the case for European Bank as seeking to recover the loss of profit on a business speculation where the loss was not the natural consequence of the undertaking and was too remote to be classed as "just" compensation[40]. His Honour also said[41]:

> "Properly analysed, European Bank did not need this particular parcel of money to speculate in currencies by switching from US dollars to euros. There is no principled basis upon which the European Bank should be underwritten in placing a hypothetical bet on a hazardous enterprise because it can show in retrospect that the bet would have been successful. There is no reason for earmarking this particular money for making that particular bet."

27 The references to speculation and betting were pejorative and distracted attention from the issues which had been presented on the evidence to the primary judge. Risk taking is an inevitable part of decision making to switch currencies.

Conclusions

28 The appropriate outcome in this case was to be reached by the following path.

29 On the inquiry before Gzell J the first question was "What is the loss that is now alleged?", the second "Did that loss flow directly from the order of 18 May 2004?" and the third "Could the loss sustained have been foreseen at the time of that order?" The inquiry presented by the third question is an inquiry as to whether a *loss of the kind* actually sustained *could have been* foreseen. Contrary to the submission by the respondent, Mr Evans, the inquiry is not as to whether the *actual loss* suffered *was* foreseen at the time the undertaking was given. In the present case there was a finding by the primary judge, as indicated above, that the loss directly flowed from the order and his Honour further found

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39 (2009) 255 ALR 171 at 206.

40 (2009) 255 ALR 171 at 204.

41 (2009) 255 ALR 171 at 204.

that the loss could have been foreseen. That result should not have been disturbed.

Orders

30 The appeal should be allowed with costs, the orders of the Court of Appeal made on 2 April 2009 set aside, and in place thereof the appeal to that Court be dismissed with costs.