SUPREME COURT OF QUEENSLAND

CITATION:	*Virgtel Limited & Anor v Zabusky & Ors* [2006] QSC 66
PARTIES:	**VIRGTEL LIMITED** (ACN 107 156 972) (first applicant) **VIRGTEL GLOBAL NETWORKS NV** (second applicant) **v** **HARVEY ZABUSKY** (first respondent) **AMALIA ZABUSKY** (second respondent) **EREZ ZABUSKY** (third respondent) **COMMSLOGIC PTY LTD** (ACN 109 057 543) (fourth respondent) **SOFTQUEST SOLUTIONS PTY LTD** (ACN 057 679 599) (fifth respondent) **VIRGIN TECHNOLOGIES LIMITED** (sixth respondent)
FILE NO/S:	SC No 6547 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 April 2006
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2006
JUDGE:	de Jersey CJ
ORDER:	**1. On the application filed by the applicants on 16 December 2005, there will be a declaration that the applicants were entitled to commence, and may continue this proceeding, as a derivative action on behalf of the sixth respondent, against the first to fifth respondents; and that the first to fifth respondents pay the applicants' costs of and incidental to the application to be assessed** **2. On the application of the first to fifth respondents filed on 20 December 2005, there will be an order that the application be dismissed, and an order that those applicants (being the first to fifth respondents in the proceeding) pay the respondents' (being the**

applicants Virgtel Limited and Virgtel Global Networks NV in the proceeding) costs of and incidental to the application to be assessed

CATCHWORDS: CORPORATIONS – MEMBERSHIP, RIGHTS & REMEDIES – MEMBERS' REMEDIES & INTERNAL DISPUTES – PROCEEDING ON BEHALF OF COMPANY BY MEMBER – STATUTORY DERIVATIVE ACTION – procedural validity of derivative proceeding, under general law – summary determination thereof – subject company incorporated in Nigeria – whether issue governed by Nigerian or Queensland law – significance of receivership of company – standing of shareholders to bring proceeding – "justice", or 5th , exception to the rule in *Foss v Harbottle* – issue of *forum non conveniens*

Companies and Allied Matters Act 1990 (Nigeria) s 182, s 303, s 393, s 494
Corporations Act 2001 (Cth) s 236, s 266, s 267
Federal Court of Australia Act 1976 (Cth) s 5
Foreign Corporations (Application of Laws) Act 1989 s 7
Foreign Judgments Act 1991 (Cth)
Foreign Judgment Regulation 1992 (Cth)

The following cases were cited:
Adetona v Edet (2004) 6 NWLR 338
Advent Investors Pty Ltd & Ors v Goldhirsch & Ors (2001) 37 ACSR 529
Aloridge Pty Ltd v West Australian Gem Explorers Pty Ltd (1995) 127 ALR 410
Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316
Biala Pty Ltd & Anor v Mallina Holdings Ltd & Ors (No 2) (1993) 13 WAR 11
Bidjara Aboriginal Housing and Land Co Ltd v Sharma (Federal Court of Australia, Q 113/2003, 10 December 2003)
Cadwallader v Bajco Pty Ltd (2001) 189 ALR 370
Carre v Owners Corporation [2003] NSWSC 397
Ebbage v Manthey [2001] QSC 4; SC No 6609 of 2000, 17 January 2001
Ernst & Young v Tynski Pty Ltd (2003) 47 ACSR 433
Ex Parte Pollard; Re Courtney (1840) Montague & Chitty Bankruptcy Reports 239, 250-1; 4 Deacon's Bankruptcy Reports 40
Foodco Management Pty Ltd v Go My Travel Pty Ltd [2001] QSC 291; SC No 3549 of 2001, 10 August 2001
Foss v Harbottle (1843) 2 Hare 461; 67 ER 189
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125
Gunn v Harper (1901) 11 Ontario Law Reports 611
Harding v Wealands [2004] EWCA Civ 1735
Hausman v Buckley 299 F 2d 696 (2nd Cir 1962)
Henry v Henry (1996) 185 CLR 571
Intercontractors Nigeria Ltd v National Provincial Fund

Management Board (1988) 2 NWLR 288
Intercontractors Nigeria Ltd v UAC of Nigeria Ltd (1988) 2 NWLR 305
Irawan v AWB Ltd [2001] VSC 374
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503
Karam v Australia and New Zealand Banking Group Ltd (2000) 34 ACSR 545
Konamaneni & Ors v Rolls Royce Industrial Power (India) Ltd & Ors (2002) 1 WLR 1269
Locals 302 and 612 of the International Union of Operating Engineers – Employers Construction Industry Retirement Trust v Blanchard (2005) WL 2063852 (SDNY)
Mancini v Mancini [1999] NSWSC 800
Mesenberg v Cord Industrial Recruiters Pty Ltd (1996) 39 NSWLR 128
Nece Pty Ltd v Ritek Incorporation; Ritek Incorporation v Nece Pty Ltd (1997) 24 ACSR 38
Newhart Developments Ltd v Cooperative Commercial Bank Ltd [1978] QB 814
Nurcombe v Nurcombe [1985] 1 WLR 370
Oceanic Sun Line Special Shipping Co v Fay (1988) 165 CLR 197
OZ-US Film Products Pty Ltd (in liq) v Heath [2000] NSWSC 967
Paramount Acceptance Co Ltd v Souster [1981] 2 NZLR 38
Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204
Regie Nationale Des Usines Renault SA v Zhang (2002) 210 CLR 491
Ruralcorp Consulting Pty Ltd v Pynery Pty Ltd (1996) 21 ACSR 161
Scarel Pty Ltd & Yates v City Loan and Credit Corporation Pty Ltd (No 2) (1988) 79 ALR 483
Smith v Croft (No 2) [1988] Ch 114
Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460
The Prince's case, National Commercial Bank v Wimborne (1979) NSWLR 156
United States Surgical Corp v Hospital Products International Pty Ltd [1982] 2 NSWLR 766
Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538
Watts & Anor v Midland Bank PLC (1986) VCLC 15

COUNSEL: P H Morrison QC with D J Williams for the first and second applicants
D A Savage SC with S J Lee for the first to fifth respondents
No appearance for the sixth respondent

SOLICITORS: Gadens Lawyers for the first and second applicants
Minter Ellison for the first to fifth respondents
No appearance for the sixth respondent

de JERSEY CJ:

Background facts

[1] This proceeding concerns alleged misdealing in the property of the sixth respondent (VTL). VTL is a Nigerian company which conducted a business of providing satellite based telephone services in that country. A secured creditor Afribank Nigeria plc placed VTL into receivership on 8 March 2004. By December of that year, Afribank's debt had been fully discharged. The receivership has not yet however been formally terminated. (The receiver has yet to render his accounts of the receivership.)

[2] The proceeding is promoted by Mr van Leeuwen, who became involved in VTL in October 2000, at the invitation of the party prominent on the other side of the present ledger, the first respondent Mr Zabusky. Mr Zabusky lived in Nigeria and was actively involved in the day-to-day management of VTL, although the applicants deny that Mr Zabusky was an employee of that company.

[3] Before the involvement in VTL of Mr van Leeuwen, 85% of the shares in VTL were owned by the first applicant (Virgtel). Virgtel had three shareholders: Amalia Investments Ltd, a company associated with Mr Zabusky; White Owl Ltd, associated with a Mr Gazal; and BZ Investments Ltd, a company associated with a Mr Shaibu, and latterly, his widow. In October 2000, Mr van Leeuwen caused his company, Viscaya Armadora SA, to acquire the shares in VTL held by White Owl. That gave Viscaya a majority holding in, and control of, VTL.

[4] The second applicant (Virgtel Global) was incorporated in August 2001 by Mr van Leeuwen. Virgtel Global remains under his control. The applicants contend that Virgtel Global was incorporated in order to act as a general agent for VTL in relation to VTL's dealings with multinational customers and suppliers. On the other hand, the respondents say that Virgtel Global was incorporated with a view to becoming the sole shareholder in VTL. That is said to emerge from a "Protocol of Understanding and Undertaking" dated 20 October 2000 between Amalia and Viscaya. While accepting that the protocol was agreed upon, Mr van Leeuwen's position is that it was terminated or disbanded because of Mr Zabusky's alleged failure to secure a transfer of other shares as contemplated by it.

[5] Whatever the ultimate significance of that, disputes about shareholdings in VTL came to a head at VTL's Annual General Meeting in London in February 2004. That led to proceedings in the High Court of Nigeria, concerning the shareholdings in VTL, involving those recorded by the Nigerian Corporate Affairs Commission, through its registration of a "form CO2" on 15 November 2000. That form dated 14 November 2000 was lodged purportedly pursuant to a resolution, but one which the van Leeuwen interests deny was ever passed. Those proceedings are extant. (I return later to some detail of them.)

[6] The vast bulk of the affidavit material filed by Mr van Leeuwen and other deponents for the applicants, if accepted, establishes a prima facie circumstantial, and in some respects direct, case in support of the following allegations:

1. that Mr Zabusky used his position as a director of VTL, and through his day-to-day involvement in its management, improperly to divert substantial sums of money from VTL to himself, and to his wife and son (the second and third respondents), and to entities associated with him and them (the fourth and fifth respondents);
2. that Mr Zabusky and his son Erez improperly sold VTL assets and retained the proceeds for themselves; and
3. that Mr Zabusky and Erez improperly removed and retained computers, information storage devices, information and records belonging to VTL, and brought them to Queensland, where the Zabusky family now resides.

[7] The applicants contend that the misappropriated monies referred to in paras one and two above, found their way into the substantial real estate holdings in the Gold Coast region now owned by Mr and Mrs Zabusky, Erez and their companies; and into the companies Commslogic (the fourth respondent) and Softquest (the fifth respondent). The applicants assert an entitlement to declarations of the consequent existence of constructive trusts affecting that property, and invoke a tracing remedy.

[8] The respondents comprehensively deny those various factual allegations.

The court proceeding

[9] The applicants commenced the proceeding by means of an ex parte application for Mareva injunctions and an Anton Piller order. Those orders were granted on 10 August 2005. After execution of the Anton Piller order, the respondents successfully challenged that order on the ground it did not adequately protect their right to claim legal professional privilege.

[10] The substantial quantity of seized documents remains quarantined under a regime of consent orders and undertakings. The Mareva injunctions, in modified form, remain on foot by consent.

[11] The pleadings in the proceeding have been completed. A mountain of affidavit material has been generated in the course of various interlocutory applications. It has been necessary for me to read all of that material, notwithstanding the issues presently agitated are of rather narrower scope, and susceptible of determination on uncontroversial factual material.

The instant applications

[12] The applicants filed an application on 16 December 2005 in which they sought leave *nunc pro tunc* to commence and continue the proceeding, as a derivative action on behalf of VTL, against the first to fifth respondents. (The application also sought the joinder of Virgtel Global, but that had already been accomplished.)

[13] On 20 December 2005, the first to fifth respondents filed an application in which they sought the summary dismissal or stay of the proceeding. The respondents have advanced four major grounds in support of that application: that Nigerian law precludes this derivative proceeding; that because of the receivership of VTL, the proceeding is incompetent in the absence of the receiver's consent or the leave of a Nigerian court; that the proceeding cannot succeed factually anyway (raised formally); and by reliance on the principle *forum non conveniens*.

Is the proceeding factually untenable?

[14] I set aside for the moment the questions of the competence of this derivative proceeding under Nigerian law and otherwise, and any significance in the absence of the leave of a Nigerian court or the agreement of the receiver, and the question of the suitability of the forum.

[15] The respondents did not press, in their written submissions or orally, a contention that on the merits, the factual case was doomed to fail. I mention it insofar as it is formally raised by their application; and because if on the merits the proceeding were fatuous, the court would not trouble to confirm its procedural legitimacy.

[16] As would be apparent from my earlier reference to there being a prima facie circumstantial or direct case in support of the applicant's allegations, taken with my view that those allegations are not necessarily convincingly countered by the contrary material advanced for the respondents, I do not consider that basis for the respondents' application could possibly be sustained.

[17] There is plainly a host of matters warranting determination, as necessary, by way of trial (cf. *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2001] QSC 291; SC No 3549 of 2001, 10 August 2001 para 8).

Summary determination

[18] The applications raise the procedural competency of what is presented as a derivative proceeding. It is possible to determine that issue by reference to uncontroversial facts and circumstances. No party suggested otherwise.

[19] It is appropriate, where possible, to determine this particular issue on a preliminary basis, so that if the proceeding is incompetent, that may be declared early in the piece, and possibly substantial costs avoided. There may be great utility in following that course, if a preliminary determination can safely be made: *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 221-2 (notwithstanding reservations expressed in *Aloridge Pty Ltd v West Australian Gem Explorers Pty Ltd* (1995) 127 ALR 410, 414).

[20] The question is whether the applicants have shown "a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v Harbottle*" (p 221). See also *Smith v Croft (No 2)* [1988] Ch 114, 145.

[21] I stress that reference to a "prima facie" case. As will emerge, I propose making a declaration that the applicants "were entitled to commence, and may continue this proceeding as a derivative proceeding…". That is because I am satisfied they have established a prima facie entitlement in that regard. I say now that I consider I should make that declaration, on the applicants' application, rather than simply refusing the respondents' application for summary dismissal or stay (which attracts the *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130 approach). The parties are entitled to a determination at this stage, to that extent, as to the procedural validity of the proceeding.

[22] In the approach I have taken, I have relied on uncontroversial facts and circumstances. There was, as I have said, no objection to my proceeding in this way. In fact, both parties, at least implicitly, urged my doing so.

The significance of the receivership

[23] The charge which authorised the receivership extended over the whole of the company's assets and undertaking. The receiver has not been discharged. The respondents submitted s 393(4) of the *Companies and Allied Matters Act* 1990 (Nigeria) precluded this proceeding.

[24] That provision says:

> "(4) As from the date of appointment of a receiver or manager, the powers of the directors or liquidators in a members' voluntary winding up to deal with the property or undertaking over which he is appointed shall cease unless and until the receiver or manager is discharged."

[25] That provision relates to the exercise of the powers during receivership by the directors and liquidators. For present purposes, it is important to note that it says nothing as to an exercise of rights by shareholders, as for example by the commencement of a derivative action.

[26] Section 303 recognizes that "right" (subject to leave), in the following way:

> "**303.** (1) Subject to the provisions of subsection (2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.
>
> (2) No action may be brought and no intervention may be made under subsection (1) of this section unless the court is satisfied that -
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> (a) the wrongdoers are the directors who are in control, and will not take necessary action;
>
> (b) the applicant has given reasonable notice to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
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> (c) the applicant is acting in good faith; and
>
> (d) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued."

[27] Had it been intended to prohibit the commencement of a derivative action during a receivership, one would have expected that to be expressed as a matter of prohibition, perhaps in s 303(4). My conclusion is that the Nigerian legislation does not preclude a proceeding of this character, where otherwise justified.

[28] The parties filed affidavits expressing opinions as to the relevant Nigerian law. There were differing views. In an affidavit filed by the respondents, Mr Onigbanjo asserted that "the receiver alone has exclusive rights to bring an action on behalf of the company". On the other hand, in an affidavit filed by the applicants, Mr Igbokwe says that the power of the receiver is not necessarily exclusive.

[29] Because of his close association with the interests of Mr Zabusky, among other matters, Mr Onigbanjo is prima facie a much less attractive source of opinion on relevant Nigerian law – in the event of dispute – than the much more obviously independent Mr Igbokwe. I prefer the latter's views, and in this particular context, Mr Igbokwe's analysis of the relevant Nigerian cases, *Intercontractors Nigeria Ltd v UAC of Nigeria Ltd* (1988) 2 NWLR 305, *Intercontractors Nigeria Ltd v National Provincial Fund Management Board* (1988) 2 NWLR 288 and *Adetona v Edet* (2004) 6 NWLR 338. But in view of what I have said in paras 22 to 24 above, it is not necessary to decide as between those deponents.

[30] The correct position at common law is stated in *Newhart Developments Ltd v Cooperative Commercial Bank Ltd* [1978] QB 814, 819:

> "…the provision in the debenture deed giving (the receiver) (the power to institute proceedings to bring in the assets of the company to protect the interests of the debenture holder) is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the company of their power, as the governing body of the company, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially on the position of the debenture holders by threatening or imperilling the assets which are subject to the charge."

See also pp 819-821. The applicants submit that by parity of reasoning, the residual right of a shareholder to commence a derivative proceeding is similarly preserved, provided its pursuit will not jeopardize the charged assets. I accept that submission, which is plainly correct, and has the added attraction of being commercially common-sensical.

[31] *Newhart* was followed by the New Zealand Court of Appeal in *Paramount Acceptance Co Ltd v Souster* [1981] 2 NZLR 38, 42-3. The Full Court of the Federal Court took a similar approach in *Ernst & Young v Tynski Pty Ltd* (2003) 47 ACSR 433, 438-9. See also *Bidjara Aboriginal Housing and Land Co Ltd v Sharma* (Federal Court of Australia, Q 113/2003, 10 December 2003).

[32] These shareholders are at their own risk funding the proceeding, not drawing on or jeopardizing any of the assets of the company marshalled by the receiver for the purpose of the receivership. Simply put, the outcome of this case cannot impact adversely, financially, on the receivership. There is therefore no reason why the subsistence of that receivership should preclude this proceeding. Consistently with *Newhart* and that other authority, it should in those circumstances be permitted to proceed.

[33] The respondents separately contend, however, that because the receiver has not paid a suggested outstanding tax liability of VTL, the derivative proceeding cannot stand.

[34] Sections 182(1) and 494(1) of the Nigerian legislation rank any tax debt in priority to the debt of the secured creditor. In that context, if it were a genuine tax liability, it seems odd that the receiver would have been prepared to pay out the secured debt without attending first to the payment of a current tax debt.

[35] The evidence about the existence, or continued existence, of any tax liability is patchy. There is evidence that on 5 September 2003, the Federal Inland Revenue Service called for the lodgement of full returns and appropriate withholding tax; and on 23 March 2004, claimed $1,408,754 (largely, it seems, referable to withholding tax and penalties). There is no evidence of an actual assessment from the Federal Inland Revenue Service.

[36] One Victor Oladapo, Assistant General Manager Information Technology and Systems with Afribank, seconded to VTL in April 2004, deposed that VTL owed taxes amounting to $1.9 million. There is no explanation for the difference between that sum and the lesser amount of $1.4 million approx.

[37] The form of some supposedly supporting material is unsatisfactory and objectionable (eg in document 108, paras 2-5 exhibit JNW 16).

[38] It is relevant to note that there is no evidence of any current demand from the taxation office itself: there is no direct evidence emanating from the taxation office about this matter. All that is known is that a couple of years ago the taxation office was asserting an entitlement to be paid a certain amount, substantial though that amount may have been.

[39] In his affidavit material (see, eg, document 99, para 18), Mr Zabusky seeks to link an attempt by the receiver to sell property in Lagos held by D A Werber Ltd (owned by his family) with an intention to liquidate a taxation liability, but in the end that amounts to no more than speculation.

[40] Also importantly, while the solicitors for the applicants have sought to contact the receiver to seek an expression of his attitude to the applicants' role in these proceedings, he has made no response. With regard to the present issue, he has not, for example, asserted that the proceeding is incompetent or should not be proceeding while ever any taxation liability remains outstanding and the receivership has not been formally terminated.

[41] To the extent there is evidence before the court on the taxation issue, it is in an unsatisfactory state, and I am not persuaded (by the respondents) it provides grounds for concluding the litigation as presently constituted should not be proceeding. It fell to the respondents to establish this as a bar to the proceeding.

[42] I am in any case unpersuaded that even were such a tax liability properly established as current, that circumstance would preclude this derivative proceeding, in view of the considerations set out in para [32] above.

Whether Nigerian law excludes this derivative proceeding

[43] Under Nigerian law, as has been seen, only a company may complain of wrongs done to it, unless another party obtains the leave of the Federal High Court to bring an action in the name of or on behalf of the company. No such leave has been obtained or sought. (Insofar as it may arise, I accepted the view of Mr Igbokwe that the requirement for leave from the Federal High Court of Nigeria applies only to proceedings in Nigeria, and has no wider international significance.)

[44] The issue which arises here is whether the manner of commencement of this proceeding was regulated by Nigerian law or the law of Queensland.

[45] Counsel for the respondents submitted that the law of Nigeria applies, because of the Nigerian incorporation of VTL. They relied on s 7(3) of the *Foreign Corporations (Application of Laws) Act* 1989 (Cth) of the Commonwealth of Australia. That provides that the law of the place of incorporation applies when determining any question relating to, (e) "the rights…of the members or officers of a foreign corporation…"; (g) "the internal management and proceedings of a foreign corporation"; and (b) "the membership of a foreign corporation".

[46] I do not consider that regulating the manner in which a derivative action may be brought falls within any of those statutory categories. For example, although whether a shareholder has the right to launch a derivative action is to be determined here by Nigerian law (and that body of law accords such a right, albeit subject to a grant of leave), that does not extend to the manner of exercise, or the fulfilment of pre-requisites to the exercise, of that right, an aspect to which I return.

[47] But significantly, and those matters aside, one notes the words of s 7(1) (the full text of the section follows):

> "7(1) The section applies in relation to the determination of a question arising under Australian law (including a question arising in a proceeding in an Australian court) where it is necessary to determine the question by reference to a system of law other than Australian law.
>
> (2) Any question relating to whether a body or person has been validly incorporated in a place outside Australia is to be determined by reference to the law applied by the people in that place.
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> (3) Any question relating to:
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> (a) the status of a foreign corporation (including its identity as a legal entity and its legal capacity and powers); or
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> (b) the membership of a foreign corporation; or
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> (c) the shareholders of a foreign corporation having a share capital; or
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> (d) the officers of a foreign corporation; or
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> (e) the rights and liabilities of the members or officers of a foreign corporation, or the shareholders of a foreign corporation having a share capital, in relation to the corporation; or
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> (f) the existence, nature or extent of any other interest in a foreign corporation; or
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> (g) the internal management and proceedings of a foreign corporation; or
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> (h) the validity of a foreign corporation's dealings otherwise than with outsiders;
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> is to be determined by reference to the law applied by the people in the place in which the foreign corporation was incorporated.
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> (4) A matter mentioned in subsection (2) or (3) is not to be taken, by implication, to limit any other matter mentioned in those subsections."

[48] I agree with the view expressed by Helman J, in *Ebbage v Manthey* [2001] QSC 4; SC No 6609 of 2000, 17 January 2001, that in a case like this, it is not necessary to

determine the issue (whether a derivative proceeding has been duly commenced) by reference to "a system of law other than Australian law". That is because, that question being procedural, Queensland law applies, a matter to which I later revert in more detail. See his Honour's analysis in para eight of the reasons for judgment.

[49] Mr Savage SC, who appeared for the respondents, submitted that s 7(3) should be read as prevailing over subsection 1 (and that s 7(3) covered the present issue). But the sub-sections may be read harmoniously without resorting to ranking. Sub-section (1) posits a situation where foreign law is to apply, and the question is which body of foreign law. In relation to specified subjects, sub-section (3) assists by designating that body of law. Here, for the reason I have expressed, there is no question of the application of <u>any</u> system of foreign law.

[50] One must address the question discussed in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, para 99, whether the manner of setting up such a proceeding is substantive or procedural. If procedural, the law of the State of Queensland applies. This court could – other matters aside – go on to declare the competence of the proceeding, as necessary *nunc pro tunc*.

[51] In my view the present question is procedural. It concerns the mechanics of litigation, what formalities must be met before a proceeding may go forward (*John Pfeiffer*, pp 542-4): it does not concern the "existence, extent or enforceability" of the right (to bring a derivative proceeding), just the manner of its exercise (para 99).

[52] Compelling support for the view I have expressed may be gathered from *Scarel Pty Ltd & Yates v City Loan and Credit Corporation Pty Ltd* (No 2)(1988) 79 ALR 483, 489; *Ebbage v Manthey*, paras 4 and 6; *Karam v Australia and New Zealand Banking Group Ltd* (2000) 34 ACSR 545, para 30; *Advent Investors Pty Ltd & Ors v Goldhirsch & Ors* (2001) 37 ACSR 529, paras 31-34, 37, 39 and 40. See also *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, para 68 and *Harding v Wealands* [2004] EWCA Civ 1735, para 62.

[53] In *Scarel Pty Ltd & Yates v City Loan and Credit Corporation Pty Ltd*, Gummow J said, of the origins of representative actions (p 488):

> "Representatives actions were the product of equity procedures and the rule in *Foss v Harbottle* and its exceptions have generally been considered part of the powers and procedures of modern courts of equity of which this court (in respect of matters otherwise within its jurisdiction) is one: *Federal Court of Australia Act* 1976 (Cth) s 5(2)."

[54] In *Ebbage v Manthey*, the plaintiff claimed to be no more than the equitable owner of the relevant shares, which does not confer standing to bring a derivative proceeding. It was suggested the law as to standing differed as between Queensland and Vanuatu, and that that was significant to the resolution of the case. Helman J said (para 6):

> "The rule in *Foss v Harbottle* and its exceptions have generally been considered part of the powers and procedures of modern courts of equity: *Scarel Pty Ltd v City Loan & Credit Corporations Pty Ltd* (1988) 17 FCR 344, at p 349: and *Karam v ANZ Banking Group Ltd* (2000) 34 ACSR 545, at p 554. It follows that the rule as to the lack of standing of a beneficial owner of shares to institute a derivative

> proceeding is procedural. Matters of procedure are governed by the *lex fori*, so that the rule as to the lack of standing of one whose name does not appear on a company's register of members to bring a derivative proceeding, as it is understood in this jurisdiction, governs this case."

[55] The third of those cases, *Karam v Australia and New Zealand Banking Group Ltd*, addressed the significance of the substitution, for the right to bring a derivative action under the general law, of the procedure under s 236 of the *Corporations Act* 2001 (Cth). Santow J characterized the right to bring a derivative proceeding as procedural (para 30):

> "The plaintiffs strenuously argue that while the derivative action may be viewed as procedural, its removal, like the denial of a right of action, under a limitation statute, is substantive. In that regard they may have found some support in *John Pfeiffer*. But such a view ignores the fact that what is really happening is the substitution of what the various law reform bodies thought was an improved procedural right for that which had been removed. So regarded, it is by no means self-evident that its removal can be viewed in isolation from what is substituted and considered to be substantive with the interpretative consequence that it is not retroactive in relation to accrued rights."

[56] In *Advent Investors Pty Ltd v Goldhirsch*, Warren J (as she then was) was, likewise, faced with the significance of the substitution for the general law right, of the statutory right. She dealt with the characterization of the general law right as follows (paras 31-34):

> "**[31]** In order to better apprehend whether the amendment to the Law was procedural or substantive it is instructive to analyse the nature of the derivative action. The derivative or, as it was previously called, the representative action was a procedural device of courts of equity. In *Scarel Pty Ltd v City Loan & Credit Corp Pty Ltd* (1988) 17 FCR 344, Gummow J considered the rule in *Foss v Harbottle* and its exceptions and (at 348-9) cited Browne-Wilkinson LJ, as he then was, in *Nurcombe v Nurcombe* [1985] 1 WLR 370 at 378 where his Lordship said:
>
> > 'Since the wrong complained of is a wrong to the company, not to the shareholder, in the ordinary way the only competent plaintiff in an action to redress the wrong would be the company itself. But, where such a technicality would lead to manifest injustice, the courts of equity permitted a person interested to bring an action to enforce the company's claim. The case is analogous to that in which equity permits a beneficiary under a trust to sue as plaintiff to enforce a legal right vested in trustees (which right the trustees themselves will not enforce), the trustees being joined as defendants. Since the bringing of such an action requires the exercise of the equitable jurisdiction of the court on the grounds that the interests of justice require it, the court will not allow such an

> action to be used in an inequitable manner so as to produce an injustice.'
>
> **[32]** Immediately after citing this passage, Gummow J continued, at 349:
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> 'Representative actions were the product of equity procedures and the rule in *Foss v Harbottle* and its exceptions have generally been considered part of the powers and procedures of modern courts of equity of which this [Federal] Court (in respect of matters otherwise within its jurisdiction) is one.'
>
> **[33]** Furthermore, in *Nurcombe v Nurcombe*, Lawton LJ observed, at 376:
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> 'It is pertinent to remember, however, that a minority shareholder's action in form is nothing more than a procedural device for enabling the court to do justice to a company controlled by miscreant directors or shareholders.'
>
> **[34]** In my view Pt 2F.1A provides for rules of practice and procedure by prescribing a mode of proceeding under which the rights of a company are to be enforced as distinguished from the substantive law which gives or defines those rights."

[57] I do not accept various submissions made for the respondents, in response to those authorities, that the cases should be confined to their own facts or betray confusion as to terminology, or that they necessarily involve expressions of view which were not required for the purpose of determining the actual issue. Whether or not in one or other of those cases the expression of view was strictly essential for the determination of the precise issue, all those expressions of view are highly persuasive and should at this stage be followed in this proceeding.

[58] Mr Savage relied on the dictum of Lawrence Collins J in *Konamaneni & Ors v Rolls Royce Industrial Power (India) Ltd & Ors* (2002) 1 WLR 1269, 1284. That obiter could not prevail over the other authority to which I have referred, at least for present purposes. He also relied at the oral hearing, among many other North American authorities, on the decision of the United States District Court in *Locals 302 and 612 of the International Union of Operating Engineers – Employers Construction Industry Retirement Trust v Blanchard* (2005) WL 2063852 (SDNY), at pp 2-4, and *Hausman v Buckley* 299 F 2d 696 (2nd Cir 1962).

[59] The position in the United States is different from that which prevails in this jurisdiction: *Restatement (Second): Conflict of Laws*, sections 302-308 confirm the country of incorporation principle, while admitting an exception, albeit an "unusual" exception, where the law of another country has a "more significant relationship" to the corporation and the parties.

[60] Further, those cases, which were the subject of oral submissions, may be distinguished from this. *Locals 302* was influenced by expert evidence – with no parallel here – whether under Canadian law, the content of the derivative regime was substantive or procedural. *Hausman* concerned not how a derivative action might be brought, but whether it might be brought by a minority shareholder at all.

[61] In Mr Savage's reply, with Mr Lee, to the applicants' supplementary written submissions, Counsel embark, in paras 10 to 38, on a comprehensive examination of North American cases. In light of what I have said above, in paras 51 to 60, I do not consider it necessary to deal in this judgment with those submissions, while intending no disrespect to Counsel.

[62] In any event, there is authority that Australian law will apply to both the substantive and procedural aspects of any proceeding here for fraud, alleging constructive trusts or seeking the remedy of tracing. See *OZ-US Film Products Pty Ltd (in liq) v Heath* [2000] NSWSC 967 (paras 19-22).

[63] I set out those passages from the judgment of Young J:

> "19. In *The Prince's case, National Commercial Bank v Wimborne* (1979) NSWLR 156, Holland J had to deal with a case where a foreign bank sued a NSW resident in NSW. The defendant sought to file a cross claim against the bank. The bank objected to the Court's jurisdiction to hear the cross-claim. Holland J struck out the cross-claim. His Honour, at page 165, made it clear that unless the bank could be said to have a presence in NSW, the Court had no jurisdiction to entertain the cross-claim.
>
> 20. In an earlier round of *The Prince's case* (1978) 5 BPR 11, 958, 11, 982 Holland J, said:
>
> > 'The Equity court has long taken the view that because it is a court of conscience and acts *in personam*, it has jurisdiction over persons within and subject to its jurisdiction to require them to act in accordance with the principles of equity administered by the court wherever the subject matter and whether or not it is possible for the court to make orders in rem in the particular matter. In short, if the defendant is here, the equities arising from a transaction to which he is a party ascertained by New South Wales law and the equitable remedies provided by that law will be applied to him.
> >
> > The Equity Court determines according to its own law whether an equity exists, its nature and the remedy available….'
>
> 21. The passage I have just set out was followed by McLelland J in *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 797. The *USSC* case concerned Blackman who (as the judge found) was appointed a distributor for Australia of the plaintiff's products under an agreement whose proper law was New York or Connecticut. The plaintiff was an American corporation. Blackman, in Australia, breached the fiduciary duty that he owed the plaintiff. His Honour said at page 798:
>
> > '…since the rationale of the availability of relief in such cases is that the court acts in personam to regulate the defendant's conscience, it would seem sufficient that the defendant whilst resident within the forum was guilty of

> conduct which, by offending against those principles, gave rise to the occasion for such regulation….'
>
> 22. The fact of the proper law of the contract is irrelevant. Contractual obligations and fiduciary obligations have different conceptual origins (*USSC* case at 779). The point was also dealt with by Lord Cottenham LC in *Ex Parte Pollard; Re Courtney* (1840) Montague & Chitty Bankruptcy Reports 239, 250-1; 4 Deacon's Bankruptcy Reports 40, 41 where he said that:
>
> > 'the courts of this country…in administering equities between parties who reside here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.'"

[64] This is such a case. I do not accept, as submitted by Mr Savage, that the approach discussed in that case should apply only to the determination of substantive issues in proceedings already duly constituted, as opposed to determining the validity of the manner of constituting the proceedings. Mr Savage relied on *Gunn v Harper* (1901) 11 Ontario Law Reports 611, 615, for the submission that it is not enough for the applicants to point to such considerations as the respondents' residence within this jurisdiction, and the location here of the property subject to the tracing claim. I do not consider such a limitation can be drawn from *Gunn*, but in addition, as pointed out for the applicants, the respondent Commslogic has since 9 May 2005 been receiving, in this jurisdiction, allegedly improper payments under the so-called "Gateway agreement" dated 6 May 2005, those being payments allegedly improperly redirected away from VTL by Mr Zabusky.

Should leave be granted?

[65] This is to be determined by reference to the common law, not sections 266 and 267 of the *Corporations Act*. That is because VTL, and the applicants Virgtel and Virgtel Global, are all unregistered foreign corporations. Accordingly, common law principles apply: cf. *Irawan v AWB Ltd* [2001] VSC 374, paras 37-41.

[66] A question arose, early in the course of the oral hearing, whether it was necessary at common law for the applicants to secure a grant of leave, as such, for their commencement of this derivative proceeding. Mr Savage suggested it was not.

[67] What the applicants in reality seek through their application is a preliminary adjudication of the competence of the proceeding, a preliminary determination of the character mentioned in *Prudential Assurance Co Ltd v Newman Industries Ltd*, supra, 221-222. That is effectively what the applicants seek through their prayer for a grant of leave *nunc pro tunc*. I approach their application on that basis. As was agreed with counsel at the oral hearing, the determination of the applicants' application depends on the outcome of the respondents' application, for it is by that application that the respondents raise all challenges they seek to mount to the competence of the proceeding.

[68] In support of the competence of their proceeding, the applicants pointed to there being tenable, substantive claims to be urged on behalf of VTL against the

respondents. I accept there are. Further, it was submitted, there is no effective means by which VTL of its own accord could progress those claims here. That is because of uncertainty about its internal affairs, as evidenced by the ongoing Nigerian litigation over the identity of its shareholders and directors. As submitted, "the company is paralysed by internal dissent and uncertainty". In addition, there is the subsistence of the receivership. The receiver, for his part, has shown no interest in this proceeding. He has not even responded to the applicants' requests.

[69] The Air Virgo Ltd proceedings in Nigeria involve the following parties:

(a) Air Virgo Limited as Plaintiff; and
(b) the following Defendants:
  (i) 1st: Virgin Technologies Ltd;
  (ii) 2nd: Virgtel Global Networks NV;
  (iii) 3rd: Viscaya Armadora SA;
  (iv) 4th: Amalia Investments Ltd;
  (v) 5th: BZ Investments;
  (vi) 6th: Ray Wilson Enterprises Ltd;
  (vii) 7th: Corporate Affairs Commission.

[70] The orders made in those proceedings are relevantly in these terms:

> "1. That the Defendants, whether by themselves, their servants, privies and/or assigns are hereby restrained from effecting any further and or any act pursuant to the changes made in the particulars contained in the 1st Defendant's Corporate Affairs Commission's form CO2 filed on 15/11/2000 pending the determination of the substantive suit.
>
> 2. The 1st, 2nd, 3rd and 4th Defendants whether by themselves, their servants, privies and/or assigns are hereby restrained from calling any meeting of the 1st Defendant with a view to effecting any further and or carrying out any act pursuant to the changes made in the particulars contained in the 1st Defendant's Corporate Affairs Commission's forms CO2 pending the determination of the substantive suit.
>
> 3. The 1st-7th Defendants are also restrained from giving effect in any manner whatsoever to any of the decisions and or resolutions passed at the Annual General Meeting of the 1st Defendant company held on the 13th of February 2004 at the London Hilton Metropole, Edgware, London pending the determination of the substantive suit."

[71] In the Amalia proceedings, the Petitioners are:

(a) 1st: Amalia Investments Ltd; and
(b) 2nd: Harvey (formerly known as Avraham) Zabusky.

The Respondents in that case are:

(a) 1st: Virgtel Global Networks NV;
(b) 2nd: Viscaya Armadora SA;
(c) 3rd: BZ Investments Ltd;
(d) 4th: Virgin Technologies Limited;
(e) 5th: Corporate Affairs Commission.

[72] The current orders in the Amalia proceedings, made on 15 March 2006 (and communicated to me subsequently to the oral hearing), are relevantly in these terms:

> "1. That the Petitioners and the 1st-3rd Respondents, their servants, agents, privies and or successors in title are hereby restrained from taking any action or steps detrimental to the continued existence of the 4th Respondent as a going concern, or that will jeopardize the ability of the 4th Respondent to meet its contractual obligation pending the hearing and determination of the substantive suit.
>
> 2. That the 1st-3rd Respondents, their servants, agents, privies and or successors in title are hereby restrained from removing the 2nd Petitioner as a Director of the Board of the 4th Respondent or as a signatory to all the Company's accounts pending the hearing and determination of the substantive suit.
>
> 3. It is hereby directed that the status quo (before the crisis affecting 4th Respondent broke out in February, 2004) be maintained as regards the management of the 4th Respondent's affairs and its mandate of signatories to all its banking accounts.
>
> 4. That the 5th Respondent is directed not to entertain any changes and or accept for filing any resolutions or forms (particularly the C.A.C. Forms CO2 and CO7) changing or purporting to change and or alter the 4th Respondent's Board of Directors and or its shareholding structure pending the hearing and determination of the substantive suit.
>
> 5. That all the banking accounts of the 4th Respondent are directed to be managed from the Company's head office in Lagos by the duly constituted management of the Company pending the hearing and determination of the substantive suit.
>
> 6. That the suit stands adjourned to the 10th day of April 2006 for mention."

[73] It will be seen that under the Nigerian injunctions, relevant parties are constrained, in the "Amalia" proceeding, to maintain the status quo "as regards the management of VTL's affairs". In the other proceeding, in which Air Virgo Ltd is plaintiff, they are prohibited from calling any meeting of VTL to carry out any act pursuant to the changes apparently effected to the shareholding of VTL in accordance with the form CO2 filed on 15 November 2000 with the Corporate Affairs Commission.

[74] It would be difficult if not impossible, in light of those orders particularly, to convene a meeting of VTL, or a meeting of its board of directors, to consider a motion, say, that VTL commence proceedings of this character, or for the reconstitution of its board to facilitate the passing of such a resolution, or for the purpose of promoting active consultation between VTL and the Nigerian receiver to seek to encourage the receiver to cause the company to bring such proceedings.

[75] I accept that if the applicants are not permitted to proceed in this way, it is unlikely these apparently not insubstantial claims will ever be ventilated effectively through court proceedings.

[76] The respondents nevertheless raise three particular considerations in their opposition to the competence of the proceeding: (a) that Virgtel is not a shareholder of VTL; (b) that Virgtel Global is contravening injunctions issued by the Nigerian court; and (c) that the subject complaints could be dealt with in Nigeria.

(a) Virgtel's shareholding

[77] The applicants' contention has been that notwithstanding the form CO2 registered with the Nigerian Corporate Affairs Commission on 15 November 2000, which recorded Virgtel Global as a 99 percent shareholder in VTL, Virgtel has always held an 85 percent stake in that company – in other words, that that form was inaccurate. In para 50 of the statement of claim, the applicants plead that Virgtel is entitled to be registered as owner of 85 percent of the issued shares in VTL. Alternatively, the applicants have relied on Virgtel Global's registered 99 percent interest as giving it standing to bring the proceeding.

[78] Contrary to Mr Savage's submission, Virgtel's claim to that 85 percent is not properly styled as being merely equitable. Virgtel has claimed full legal ownership of that shareholding. Its contention has been that the registered CO2 form is erroneous. Significantly, on 25 October 2005, the Federal High Court of Nigeria restrained VTL and Virgtel Global (and others) from "effecting any…act pursuant to the changes made in the particulars contained in the…form CO2 pending…". In other words, nothing was to be done on the assumption that the CO2 form was accurate.

[79] Virgtel's ownership in law of its 85 percent shareholding in VTL was not affected by registration of the form CO2 with the Corporate Affairs Commission. It is important to note that that was not a registration entered upon the share register of VTL; it was a "registration" by a statutory government authority. (And it is a registration which Virgtel has said misrepresented the true position.)

[80] I consider Virgtel's legal shareholding in VTL established to the point where that prerequisite for a derivative proceeding is met.

(b) Whether Virgtel Global is contravening the Nigerian injunctions

[81] The respondents submitted that by promoting this proceeding, (the alternative applicant) Virgtel Global is contravening the provision of the injunction quoted above, in that it is "effecting an…act" on the basis it holds the 99 percent shareholding recorded on the registered form CO2. It was submitted that Virgtel Global therefore does not come to this court with "clean hands", and the court should not consider assisting a party "in contempt" of the order of another court. It is not necessary to determine whether there is contempt, or illegality as elsewhere asserted. Any contravention is technical in character and without impact on the membership the injunction obviously seeks to protect.

[82] Virgtel Global was included as applicant to address a contention – made by the respondents – that because of the "registration" of the CO2 document, Virgtel lacked the standing it could otherwise assert. Because of the relevance of the

shareholding issue, it was probably always necessary to have Virgtel Global as a party in this proceeding – as was accepted at the hearing. It is without practical consequence whether it be applicant or respondent: it is an arguably interested and necessary party on whichever side of the proceeding. At an earlier stage in the matter, counsel for the applicants said that Virgtel Global was not an "ideal applicant", and that may be, but it would seem to be a necessary party, and there is in my view no likely adverse practical consequence in now confirming the legitimacy of its presence in the proceeding.

(c) Alternative proceedings possible in Nigeria

[83] I sufficiently deal with this issue in considering the question of *forum non conveniens* below.

***Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189**

[84] The question arises which exception to the rule in *Foss v Harbottle* might avail the applicants in this situation. The fourth and fifth fell for consideration.

[85] In *Watts & Anor v Midland Bank PLC* (1986) VCLC 15, 19, Peter Gibson J pointed out that "there is an exception to the rule (that only the company can sue) where what has been done amounts to fraud and the wrongdoers are themselves in control of the company: in this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others". This fourth exception does not apply here, however, because the shareholding upon which each of the respective applicants relies is a majority shareholding.

[86] In response to a submission to that effect from Mr Savage, Mr Morrison QC, who appeared for the applicants, rather surprisingly sought – at the conclusion of the oral hearing, in reply – to demonstrate, for the first time, that Virgtel is in fact a minority shareholder. He referred to the 1999 return for VTL, which showed Virgtel as the holder of 4.25 million shares, amounting to 85 percent of those issued. He then referred to the form CO2 dated 14 November 2000, recording an allotment of 49,500,000 shares to Virgtel Global, without, he submitted, any evidence of withdrawal of shares previously issued. On this basis, he submitted, aggregating all shares, the ultimate Virgtel shareholding would amount to only about eight percent of the overall issued share capital in VTL. Mr Morrison again raised this approach in his further written submissions of 17 March 2006.

[87] Such a contention does not sit comfortably with the position taken to date in these proceedings by the applicants, which has been that the majority shareholder is VTL (or assuming the validity of the impugned form CO2, Virgtel Global) and would raise contentious issues of fact which I could not possibly determine at this stage. It is unnecessary for me to traverse the factual issues raised by Mr Savage in paras 57 to 68 of his (and Mr Lee's) submissions in reply dated 24 March 2006.

[88] The applicants may however rely on the so-called "fifth exception" to the rule in *Foss v Harbottle*, that is, that the justice of the case warranted and warrants the proceeding. I say "so-called" because of debate as to its standing. Mr Savage has submitted it does not exist, and he relies on the lack of supporting Australian appellate authority.

[89] But that exception is, I believe, plainly established to the point where it should regulate the outcome of these applications. See *Biala Pty Ltd & Anor v Mallina Holdings Ltd & Ors (No 2)*(1993) 13 WAR 11, 69; the cases collected by Gummow J in *Scarel Pty Ltd & Yates v City Loan and Credit Corporation Pty Ltd*, supra, p 489; *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128, 132F; *Cadwallader v Bajco Pty Ltd* (2001) 189 ALR 370, 420 (para 233); *Ruralcorp Consulting Pty Ltd v Pynery Pty Ltd* (1996) 21 ACSR 161, 166-168; *Nece Pty Ltd v Ritek Incorporation; Ritek Incorporation v Nece Pty Ltd* (1997) 24 ACSR 38, 44; *Aloridge Pty Ltd v West Australian Gem Explorers Pty Ltd* supra, 414; *Carre v Owners Corporation* [2003] NSW SC 397 paras 31-40; Meagher Gummow and Lehane's *"Equity Doctrines and Remedies"* (4th ed, 2002, by Meagher, Heydon and Leeming), p 732.

[90] For the considerations previously listed (see paras 67-74), and especially bearing in mind the inability of the applicants to secure the cooperation of the receiver in causing VTL to bring proceedings, it is just that this proceeding be permitted to go forward. Those considerations are sufficient to demonstrate the justice of this course (*Mancini v Mancini* [1999] NSWSC 800, para 12).

[91] The fifth exception, I should add, is not limited to a situation where the applicant is a minority shareholder. That emerges implicitly from *Biala*, p 848, and more generally, from there being no expression of any such limitation in the relevant case law. I adopt Mr Morrison's description of this exception as "a flexible catch-all where the interests of justice require", and consider restricting its availability to minority shareholders would be inconsistent with that. As this case illustrates, a majority shareholder may not be able to secure a majority vote to cause the company to take a proceeding or the appointment of directors who will do so.

[92] I have had regard to Morrison's supplementary submissions (dated 17 March 2006) on this topic, notwithstanding Mr Savage's objection. I have also of course had regard to Mr Savage's submissions in reply dated 24 March 2006. The issue is largely one of law. That is a fair way to proceed.

[93] In concluding the proceeding is competent, I have taken account of evidence bearing on the issues going to competence alleged in paras 9-53 of the statement of claim. They are the paragraphs dealing with questions of shareholdings and directorships, and the circumstance of the receivership, bearing on the claim (paras 51, 53) for "leave, *nunc pro tunc*, to commence and conduct this proceeding". One of the alternative claims for relief of the first to fifth respondents, in their application, is an order striking out those paragraphs of the statement of claim. They should not be struck out.

[94] One of the matters on which Mr Savage relied for his contention, with which I deal below, that Queensland is not an appropriate forum, is the prospect of differential findings, on the same questions, as between the courts of Queensland and Nigeria.

[95] The factual matters I have taken into account in reaching this view as to the competence of the proceeding are, I believe, uncontroversial. In some cases, I have proceeded on alternative hypotheses – eg. as to the respective shareholdings of Virgtel and Virgtel Global. It should probably not be necessary to traverse those factual issues further, in terms of findings, as the proceeding now progresses substantially, thus removing any sufficient prospect of differential findings on the

same questions in divergent proceedings (cf. *Henry v Henry* (1996) 185 CLR 571, 590-1).

Forum non conveniens

[96] The respondents submit, finally, that this principle warrants a stay of the proceeding. They raise a number of considerations: Virgtel Global's alleged contravention of the Nigerian injunction; suggested overlap between the issues involved in the current proceeding and those current in the Nigerian proceedings; the fact that VTL is incorporated in Nigeria, and that the case bears on the internal working affairs of that company; the relevance of events in Nigeria; that a majority of potential witnesses live in Nigeria – or at least overseas; the presence of relevant documentation within Nigeria; the relevance of the issues in the case to Nigeria, and Nigerian law; and substantial involvement of Nigerian lawyers to date. They raise other matters as well, but I would see those as the principal factors upon which they rely.

[97] On the other hand, the applicants emphasize these considerations: the respondents reside within this jurisdiction; they have assets here which could be utilized to satisfy a judgment; the computers, information storage devices and documents claimed to be the property of VTL are with the respondents here in Queensland, as are the assets into which the applicants seek to trace VTL's funds; oral evidence could be given by video link with a view to lessening any burden on foreign-based witnesses, and such facilities are readily available; Mr Zabusky, a potentially major witness, has sworn that he "cannot return to Nigeria", either because of fears for his life or because of the existence of a Nigerian immigration "stop order"; it is not clear there would be a court in Nigeria which would assert jurisdiction over all of the parties in the case; there is risk that a Nigerian court, asked to authorize service upon a respondent out of that jurisdiction, may refuse leave, for example because Mr Zabusky and Erez Zabusky are no longer residents of Nigeria, and the third, fourth and fifth respondents have never been residents of that country; and even were jurisdiction accepted by a Nigerian court, any judgment obtained there would have to be enforced in Queensland, given the likelihood the respondents would by then have no assets in Nigeria: since Nigeria is not included in the *Foreign Judgment Regulation* 1992 (Cth), enforcement would be regulated by the common law, a more cumbersome procedure than under the *Foreign Judgments Act* 1991 (Cth).

[98] Mr Morrison made a number of other points orally: that there is no actual or necessary identity between the parties in the Nigerian proceedings and those joined in the instant proceeding; the subject matters of the respective proceedings are different, so that it is not a matter, as Mr Savage contended, of "fighting the same battle on different fronts"; challenged payments within this jurisdiction, under the so-called "Gateway agreement", are continuing; Mr Zabusky has not identified any particular prospective witness from overseas as having said he or she would not be prepared to attend in Brisbane if necessary for the purposes of the trial; there is no evidence of substantial difference between relevant Nigerian and Australian law; and the Nigerian lawyers have been involved in working on quite different cases from that involved in this proceeding.

[99] (A copy of the so-called "Gateway agreement" is exhibit SJW-3 to the affidavit of Sarah Worsfield filed 3 October 2005. Muir J sealed that on 20 October 2005, so as

not to jeopardize any privilege claim. At the hearing before me on 3 March 2006, Mr Morrison relied on that affidavit, without objection, and I made a facilitating order that the sealed envelope be opened. Of its contents, I have had regard only to the "Gateway agreement".

[100] On 16 March 2006, the solicitors for Mr Zabusky's interests informed me that it was through inadvertence or mistake that no objection was made on 3 March, and sought to have me exclude any reference to the affidavit of Ms Worsfield in any aspect.

[101] The Gateway agreement was the subject of substantial submissions before me, it is obviously relevant, and it was the subject of a great deal of evidence – from both sides.

[102] I do not consider I should at this stage exclude the document as such from consideration, where it was effectively put before me at the hearing without objection, and had assumed, in a lot of material, from both sides, some centrality of significance.

[103] It is not necessary for me to address directly the issue whether any privilege was waived: if it were necessary, I would consider it was waived in these circumstances.)

[104] This court would only refuse to entertain the proceeding were it to regard this jurisdiction as a "clearly inappropriate forum", such that continuing the proceeding here would be "oppressive or vexatious": see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564, 556; *Regie Nationale Des Usines Renault SA v Zhang* (2002) 210 CLR 491, 504. Those are the authorities in which the High Court expressly rejected the less rigorous "more appropriate forum" test favoured in the United Kingdom, as per *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460.

[105] There is manifest convenience in proceeding in this jurisdiction, and it could not sensibly be suggested doing so would be oppressive or vexatious. Deane J in *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197, 247 said the terms "oppressive" and "vexatious" should be understood in this context as meaning "seriously and unfairly burdensome, prejudicial or damaging…productive of serious and unjustified trouble and harassment". That was endorsed by the court in *Voth*, p 564. I accept the factual submissions made on this aspect by Mr Morrison.

[106] It was accepted costs should follow the event, unless I were unable to determine the matter because of issues of fact which could not be resolved.

Orders

1. On the application filed by the applicants on 16 December 2005, there will be a declaration that the applicants were entitled to commence, and may continue this proceeding, as a derivative action on behalf of the sixth respondent, against the first to fifth respondents; and that the first to fifth respondents pay the applicants' costs of and incidental to the application to be assessed.

2. On the application of the first to fifth respondents filed on 20 December 2005, there will be an order that the application be dismissed, and an order

that those applicants (being the first to fifth respondents in the proceeding) pay the respondents' (being the applicants Virgtel Limited and Virgtel Global Networks NV in the proceeding) costs of and incidental to the application to be assessed.