SUPREME COURT OF QUEENSLAND

CITATION:	*Zabusky & Anor v van Leeuwen & Anor* [2011] QSC 270
PARTIES:	**HARVEY ZABUSKY** (first applicant) and **VIRGTEL LIMITED IBC NO 311178** (second applicant) **v** **HENDRIK VAN LEEUWEN** (first respondent) and **JAMES CONOMOS LAWYERS (A FIRM)** (second respondent)
FILE NO:	BS 4405 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	9 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2011
JUDGE:	Daubney J
ORDERS:	**1. The application for the joinder of Amalia Investments Ltd is dismissed.** **2. The application for interlocutory injunctive relief is dismissed.** **3. I will hear the parties as to costs including the costs of the hearing on 4 March 2011.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – OTHER MATTERS – where the applicants seek an order that a company be joined as an applicant – whether the company should be joined as an applicant PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – OTHER MATTERS – where the applicant makes an application for interlocutory injunctive relief – whether there is a cause of action that founds interlocutory injunctive relief – where application is founded on allegations

of misappropriation of money by the first respondent – where the only cause of action against the first respondent identified in the material is the claim pursued by the receiver of a third party in which the first applicant and first respondent indirectly had interest in – whether any cause of action by Virgtel against Mr van Leeuwen to found the claimed interlocutory injunction has been identified by the applicants

Uniform Civil Procedure Rules 1999 (Qld), rule 260A

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, cited
Deputy Commissioner of Taxation v Winter (1988) 92 FLR 327, cited
Patterson v BTR Engineering (Aust) Ltd (1989) 18 NSWLR 319, cited
Zucker v Tyndall Holdings plc [1993] 1 All ER 124, cited

COUNSEL: D R Cooper SC with C Wilson, for the applicants
G C Newton SC with S S Monks for the respondents

SOLICITORS: Tucker & Cowen for the applicants
James Conomos Lawyers for the respondents

[1] This is one of numerous pieces of litigation being waged in several jurisdictions between Mr van Leeuwen (and interests associated with him) and Mr Zabusky (and interests associated with him).

[2] In Queensland, the principal proceeding between them is No. 6547 of 2005 ("the principal proceeding"). As I have observed in an interlocutory judgment just delivered in that matter, the van Leeuwen side of the record in the principal proceeding contends that Mr Zabusky wrongly caused large sums of money which were supposed to have been paid to Virgin Technologies Ltd ("VTL"), a Nigerian company in which Mr van Leeuwen and Mr Zabusky indirectly had interests, to be diverted to the benefit of Mr Zabusky, other members of the Zabusky family, and other companies associated with him. In 2006, de Jersey CJ granted leave *nunc pro tunc* to Virgtel Ltd ("Virgtel") and Virgin Global Networks NV ("Global") to commence and continue with the principal proceeding as a derivative action on behalf of VTL. It is uncontroversial that the institution and continuance of the principal proceeding in the name of Virgtel and Global occurred at the behest and on the instructions of Mr van Leeuwen. A dispute has since arisen, however, as to whether Mr van Leeuwen had the authority to institute and maintain the principal proceeding through Virgtel, and consequently a distinct issue to be determined in the principal proceeding is whether the solicitors who have acted for the applicants in the principal proceeding were properly and lawfully retained to do so by Virgtel and Global ("the retainer issue"). That issue is also related to serious disputation between Mr van Leeuwen and Mr Zabusky, and parties associated with each of them, which is before the courts of several foreign jurisdictions about the identity and extent of the shareholdings in, inter alia, VTL and Virgtel.

[3] Be all that as it may, when Mr van Leeuwen first caused the principal proceeding to be instituted, the Melbourne office of Gadens Lawyers was engaged to act for the interests which Mr van Leeuwen claimed to represent, and Gadens acted as the

applicants' solicitors in the principal proceeding. That firm and Mr van Leeuwen fell into dispute over fees, and in August 2008 James Conomos Lawyers took over the conduct of the principal proceeding. The dispute with Gadens over the fees which had been charged led to proceedings being instituted in the names of Virgtel and Global (i.e. the applicants in the principal proceeding) against Gadens in the Victorian Civil and Administrative Tribunal ("VCAT") in February 2009.

[4] The trial of the proceeding in VCAT was listed to be heard on 22 and 23 February 2011. The trial commenced, but was settled. The terms of settlement are confidential. (A copy of the written terms of settlement were tendered in the hearing before me, and have been placed on the file in a sealed envelope.) It is sufficient to note that performance of the settlement involved payment of a sum of money to the applicants in the VCAT proceeding, i.e. Virgtel and Global. Additionally, the sum of $40,000 had been paid into VCAT on behalf of the applicants in the VCAT proceeding, and that sum was agreed to be released to the applicants in the VCAT proceeding.

[5] On 29 April 2010, Originating Application No 4405 of 2010 was filed in this Court naming Mr Zabusky and Virgtel as applicants and Mr van Leeuwen and James Conomos Lawyers as respondents. It is not in issue that this proceeding was commenced on Mr Zabusky's instructions. Mr Zabusky has a claim, being litigated in courts in foreign jurisdictions, that he is the sole lawful director of Virgtel, and accordingly contended that he had authority to institute this proceeding on behalf of Virgtel. This originating application sought a range of injunctions to restrain Mr van Leeuwen from acting or giving instructions on behalf of Virgtel and to restrain James Conomos Lawyers from acting on behalf of Virgtel, particularly in the principal proceeding. On 7 May 2010, certain orders were made in this proceeding to secure certain funds pending determination of the retainer issue in the principal proceeding and it was further ordered that "[n]o further step be taken in this proceeding pending the determination of the retainer issue or earlier order". The retainer issue has been pleaded as a defence to the principal proceeding.

[6] In early March 2011, the solicitors for the Zabusky interests sought to bring on an urgent application for an injunction to restrain disbursement of any moneys payable under the settlement of the VCAT proceeding. For reasons which were never made clear, the application was brought in the present proceeding, i.e. Originating Application No 4405 of 2010. The interlocutory application filed by leave on 4 March 2011 sought the following order:

> "That Gadens Lawyers pay into this Honourable Court any moneys due to be paid to Virgtel Limited pursuant to any terms of settlement of the proceedings in the Victorian Civil & Administration (sic) Tribunal between Virgtel Limited v Gadens Lawyers (being J20/2009)."

[7] Mr van Leeuwen had not been served with this urgent application and was not represented at the hearing for urgent interim relief. James Conomos Lawyers were represented by independent counsel and solicitors. At the conclusion of the hearing, interim relief was granted pending a further hearing, which restrained Mr van Leeuwen "by himself, his employees, agents and otherwise howsoever ... from removing from Australia or disbursing any money received or to be received from Gadens on account of Virgtel Limited".

[8] The matter returned before me on 12 April 2011. On that occasion, counsel for the applicants also announced themselves as appearing for Amalia Investments Ltd. (Amalia Investments is one of Mr Zabusky's corporate vehicles.) At the commencement of the hearing, counsel for the applicants filed by leave a further application seeking an order that Amalia Investments be joined as an applicant in the proceeding. The reason for making that application will become apparent later in this judgment.

[9] Counsel for the applicants in the present application argued for extension of the interim injunction until the determination of the hearing (or any appeal or further appeal) in:

(a) Matter No 217835/KG ZA 04-548 now pending in the Civil Law Division of the Rotterdam District Court;

(b) Matter No BVIH CV 2010/0054 now pending in the Eastern Caribbean Supreme Court in the British Virgin Islands High Court;

(c) Matter No BVIHC (COM) 131/2010 now pending in the Eastern Caribbean Supreme Court in the British Virgin Islands High Court,

whichever first occurs or until earlier further order.

[10] It is necessary to explain briefly the nature of these foreign proceedings.

[11] The proceeding in the Netherlands is a dispute between Mr van Leeuwen and the receiver of VTL (the receiver having been appointed on 6 October 2004 by a bank which held a mortgage debenture over VTL's assets). In October 2004, Mr van Leeuwen commenced proceedings in Rotterdam seeking to recover some USD$698,042.92 from VTL, being the amount which Mr van Leeuwen alleged was the balance of VTL's then current account due to him for an unpaid loan and unpaid allotments. The receiver counterclaimed in the Rotterdam proceeding for USD$2,606,466.37 which the receiver claimed was owed to VTL by Mr van Leeuwen. Included in that counterclaim is a claim for USD$950,000 which the receiver alleged had been wrongfully transferred by Mr van Leeuwen from a VTL account into a private account of Mr van Leeuwen's wife. In an affidavit sworn in the principal proceeding on 20 September 2005, Mr Jan Holthuis, the lawyer representing VTL in the Rotterdam proceedings, stated:

> "9. On 12 May 2004, Mr. Tamuno Nathan George, who has been appointed as receiver of Virgin, demanded Van Leeuwen to immediately return the amount wrongfully withdrawn out of the Virgin accounts in the Netherlands. Van Leeuwen has not paid this money.
>
> 10. According to Virgin's records, Van Leeuwen has an outstanding debt with Virgin to the amount of US$2,606,466.37 and NGN 635,490.00 (US$ 4,707.00).
>
> 11. Virgin states that Van Leeuwen has misused his authorisation to the Dutch bank accounts of Virgin for the purpose of self enrichment, and in doing so, deliberately jeopardised the continuity of Virgin.

Therefore, Virgin holds Van Leeuwen liable for the demise of the enterprise of Virgin and all resulting damage.

12. In stating its counterclaim, Virgin insists that Van Leeuwen should have acted with the company's interest in mind,, according to Dutch law as well as Nigerian law (article 279 of the *Companies and Allied Matters Act*). Virgin alleges that through his actions, Van Leeuwen blocked all resources, and is therefore liable for all damage caused by the deliberate withholding of funds, to be assessed by the court."

[12] In a further affidavit sworn on 30 September 2005, Mr Holthuis stated:

"3. On 12 May 2004, Mr. Tamuno Nathan George, who has been appointed as receiver of Virgin Technologies Ltd ("Virgin") in Nigeria, summoned Henrik Van Leeuwen ("Van Leeuwen") to immediately return the amount wrongfully transferred from the Dutch accounts of Virgin in the Netherlands to the private account of his wife, on or about 13 January 2004.

4. The counterclaim of UD$ 2,606,466,37, brought by Virgin against Van Leeuwen is based on a current account debt of Van Leeuwen with Virgin. The total current account debt of Van Leeuwen to Virgin amounts to US $2,606,466.37 and includes the wrongfully transferred sum of US$ 950,000.00 but does not include NGN 635,490.00 (US$ 4,707.00). This amount is comprised, at least in part, of a number of loans and transfers to Van Leeuwen which he is obliged to repay to Virgin. Exhibit "JVMH3" is a copy of the entries in the current account ledger of Van Leeuwen with Virgin.

5. Virgin alleges in its counterclaim that Van Leeuwen should have acted with the company's interest in mind and that Van Leeuwen has breached his director's fiduciary duties towards Virgin. Virgin alleges that through his actions, Van Leeuwen has deliberately deprived Virgin from important financial resources at a time that Virgin had direct liquidity needs and Van Leeuwen is therefore liable for all damage caused by the deliberate withholding of funds."

[13] On 5 October 2005, Mr Holthuis swore a further affidavit, in which he said:

"3. On 24 March 2004, Mr van Leeuwen made a prejudgement attachment of balances of Virgin Technologies bank accounts at Hollandsche Bank-Unie N.V. in Rotterdam after having obtained preliminary court approval from the Interim Provision Judge with the Rotterdam court to attach those accounts.

4. On 7 June 2004, Virgin Technologies brought interim injunction proceedings against Mr van Leeuwen claiming a withdrawal of the attachment and including a counterclaim of UD$2,606,466.37.

5. On 29 June 2004, the court in Rotterdam passed judgment in the interim injunction proceedings. The court concluded that there was too much conflicting evidence brought into the preliminary proceedings for the application to be examined on an interim basis, and that proceedings on the original substantive claim would be more appropriate to judge the dispute between the parties.

> 6. The court also ruled that, in the circumstances, the prejudgement attachment would not be withdrawn. Since Virgin Technologies brought the interim injunction proceedings, it was ordered to pay the costs.
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> 7. In the preliminary judgement, the court has not decided on the merits of the claims of either party and this judgement has no effect on the validity of the claims of each party in this dispute. Legal proceedings on the substantive claim have not been finalised."

[14] Both on the face of Mr Holthuis' affidavits and also by reference to other court documents filed in the Rotterdam proceedings, which are exhibited to the affidavit of Mr Zabusky filed in the present application, it is clear that the Rotterdam proceeding is being pursued by the receiver of VTL.[1]

[15] The first of the British Virgin Islands proceedings (Matter No. 2010/54) was instituted as a claim by parties associated with Mr van Leeuwen effectively to restrain Mr Zabusky and entities associated with him from holding Mr Zabusky out as the sole director of Virgtel. An interim injunction was granted to that effect on 6 May 2010. This action is one of the numerous disputes over the ownership and control of Virgtel.

[16] The second of the British Virgin Islands proceedings is a claim by Amalia Investments and Mr Zabusky against Mr van Leeuwen and numerous entities associated with Mr van Leeuwen which also seeks determination as to ownership and control of Virgtel.

[17] On the application before me, counsel for the applicants interests contended:

> "2. The parties are in dispute as to whether the settlement moneys are an asset of Virgtel and Virgtel Global Networks NV (a company registered in Holland) (Global), as Mr Zabusky and Virgtel submit, or Mr van Leeuwen, his deceased wife, Maria AJA van Hal van Leeuwen, Viscaya Armadora SA (a Panamanian company), and Global (or some of them), as Mr van Leeuwen submits. Whichever the court finds, a continuation of the restraint is apt.
>
> 3. Accordingly, the applicants seek with the application today:
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> (a) if (as the applicants submit) the settlement moneys are an asset of Virgtel and Global, continuation of the order under the court's inherent jurisdiction, or, alternatively, UCPR r 260A, on the principles applicable to Mareva (or freezing) orders; or
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> (b) alternatively, if (as the respondents contend) the settlement moneys are an asset of Mr van Leeuwen, his deceased wife, Viscaya, and Global (or one or more of them), continuation of the order under the court's inherent jurisdiction, or, alternatively, s 246 of the *Supreme Court Act* 1994 (Qld), on the principles applicable to asset preservation orders in the form of interlocutory prohibitory injunctions."

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[1] See, for example, the judgment in the interim injunction proceeding in the Rotterdam proceedings exhibited to Mr Zabusky's affidavit, filed 11 April 2011.

[18] The respondents to the present application argued that injunctive relief ought not be granted because none of the applicants have a cause of action to sustain the grant of an interlocutory injunction. The respondents argued that:

(a) the settlement moneys are not Virgtel's, but are a repayment of legal fees that were paid by Mr van Leeuwen (or persons and entities associated with him) to Gadens for the purpose of prosecuting the principal proceeding and the VCAT proceeding, and

(b) in any event, the material did not support the existence of a cause of action in any of the applicants.

[19] Regardless of whether the interlocutory injunction is sought on general principles as an asset preservation order or pursuant to specific "freezing order" provisions in the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), it is axiomatic that the claimants for the interlocutory injunction must show that they claim a legal or equitable right, and that the circumstances of their cause of action are such that interlocutory relief is required.

[20] To the extent that authority is required for this proposition generally, it is sufficient to refer to the following statement by Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*:[2]

> "The basic proposition remains that where interlocutory injunctive relief is sought in a Judicature system court, it is necessary to identify the legal (which may be statutory) or equitable rights which are to be determined at trial and in respect of which there is sought final relief which may or may not be injunctive in nature." (Omitting citations)

[21] Insofar as the present application is for a "freezing order" pursuant to r 260A of the UCPR, or a Mareva order, Gleeson CJ in *Patterson v BTR Engineering (Aust) Ltd* said:[3]

> "The [Mareva] remedy is discretionary, but it has been held that, in addition to any other considerations that may be relevant in the circumstances of a particular case, as a general rule a plaintiff will need to establish, first, a prima facie cause of action against the defendant, and secondly, a danger that, by reason of the defendant's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied."

[22] As to the first element identified by Gleeson CJ, i.e. that the plaintiff establish a prima facie cause of action, it is not necessary that the applicant for a Mareva order prove that the claim will ultimately be successful; all that is required is that it demonstrate a "good arguable case".[4]

[23] There is, in principle, a distinction between an asset preservation order and a Mareva (or "freezing") order, neatly described by the learned authors of Young, Croft, Smith, *On Equity* as follows:[5]

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2 (2001) 208 CLR 199 at [91].
3 (1989) 18 NSWLR 319 at 321-2.
4 See, e.g. *Deputy Commissioner of Taxation v Winter* (1988) 92 FLR 327 at 331.
5 (Lawbook Co, NSW, 2009), p 265, and omitting citations).

> "In the case or orders to preserve property pending litigation, the basis for the order is the protection of specific property rights, whereas Mareva orders are concerned with the risk that a person with a personal remedy may find that there are no assets to meet it."

[24] Consistent with this, r 260A(1) provides:

> "The court may make an order (a ***freezing order***) for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied."

[25] Underlying this, however, is the necessity for the applicant for Mareva-type relief to demonstrate that there is a good arguable case on an extant cause of action – indeed, there is no basis for the grant of a Mareva order, or a freezing order under r 260A, unless the applicant can point to a pre-existing cause of action which could be enforced immediately against a respondent arising out of an invasion, actual or threatened, of a legal or equitable right.[6]

[26] Gadens were retained to act in the principal proceeding, which is a derivative action on behalf of VTL against Mr Zabusky and other Zabusky parties. It is not in issue that Mr van Leeuwen has at all times been the prime mover behind the prosecution of the principal proceeding. On 6 April 2006, as already noted, de Jersey CJ granted leave *nunc pro tunc* to Virgtel and Global to commence and continue the principal proceeding as a derivative action on behalf of VTL. As a matter of history, the principal proceeding had actually been commenced in 2005 with VTL named as the sole applicant. The Chief Justice subsequently determined that the principal proceeding ought be brought in the name of Virgtel. In early 2006, the parties agreed that the principal proceeding should also be brought in the name of Global (another of Mr van Leeuwen's companies), and it was joined as a second applicant. The Chief Justice then heard and determined the application for leave to be granted *nunc pro tunc* for the principal proceeding to be brought and prosecuted as a derivative action on behalf of VTL. It was only several years later that the Zabusky interests, for the first time, raised the retainer issue in respect of Virgtel.

[27] The respondents to the present application led a significant amount of evidence to prove, and I accept, that none of the money paid to Gadens for legal fees and none of the money paid in respect of the VCAT proceeding came from Virgtel. Virgtel has effectively been bereft of cash since 2001 and did not have the means to make any of these payments. On the contrary, the evidence establishes that all of the money paid to Gadens and all of the money paid in respect of the VCAT proceeding came from four sources:

(a) Mr van Leeuwen's own accounts;

(b) Mr van Leeuwen's late wife's accounts;

(c) Accounts of Viscaya Amadora SA (one of Mr van Leeuwen's companies), and

(d) Accounts of Global.

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6 *Zucker v Tyndall Holdings plc* (1993) 1 All ER 124.

[28] The evidence also discloses that all of the Gadens' invoices were rendered to "Virgin Technologies Ltd care of Virgtel Global Networks NV". No invoices were rendered to Virgtel.

[29] The circumstances of the retainer of Gadens by Mr van Leeuwen are deposed to in an affidavit by, a director of Global and associate of Mr van Leeuwen, Mr Simonet. Mr Simonet's affidavit also details the payments made to Gadens, and the sources of the transfers (none of which was Virgtel). Mr Simonet deposed as follows:

> "7. Throughout the time of retaining Gadens, and since then, throughout the time of retaining James Conomos Lawyers, up until the present day, I have given instructions to, and liaised with, the solicitors on behalf of Mr van Leeuwen and the companies which he controls (including Virgtel and Global), either as an agent of Mr van Leeuwen or in my own capacity as a director, attorney or employee of the relevant company."[7]

[30] Counsel for the respondents to the present application submitted that the applicants, Mr Zabusky and Virgtel, could only have a cause of action if their own moneys had been used to pay Gadens but the payment of the settlement moneys and the VCAT refund were to be diverted by Mr van Leeuwen away from them. It was further submitted that this will be the case even if Mr Zabusky succeeds in his British Virgin Islands action in obtaining declarations that he is a director, or sole director, of Virgtel and that Amalia Investments is a 40 per cent shareholder of Virgtel. The respondents argued that neither Mr Zabusky nor Virgtel has a cause of action because it is clearly not the case that any of Virgtel's or Mr Zabusky's money was used to pay Gadens or in the VCAT proceeding.

[31] Counsel for the present applicants did not seek to advance any argument that Mr Zabusky personally had any cause of action against Mr van Leeuwen.

[32] The submissions for the present applicants therefore focused on Virgtel as an applicant for interlocutory injunctive relief. For completeness, I should also note that, whilst I have identified Global as a company associated with Mr van Leeuwen, the Zabusky interests contend that Global was supposed to have been incorporated as a new "umbrella" company through which the van Leeuwen interests and the Zabusky interests would hold their shareholdings in VTL but Mr van Leeuwen wrongfully caused his wife to be registered as the sole shareholder of Global. This is one of the issues to be determined in proceedings brought by Amalia Investments in Nigeria. The Zabusky interests contend that Global ought not be a shareholder in VTL. It does not, however, seem to be in issue that Global is, and has for many years been, under the control of Mr van Leeuwen.

[33] In any event, the argument advanced on behalf of the present applicant Virgtel was that the rights of each of Virgtel and Global to receive payments under the settlement agreement comprise an "asset" of each of those companies and is a proper object of both an asset preservation order and a freezing order. It was said that it was irrelevant that the payments made to Gadens had come from parties other than Virgtel and Global; properly characterised, the moneys were advanced by

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[7] Affidavit of Paul Michael Simonet, filed 4 April 2011.

those third parties to Virgtel and Global for payment to Gadens, and that the repayments under the settlement agreement are to be made to Virgtel and Global. At best, the third parties might have a right to claim against Virgtel and Global for repayment of the moneys which they paid to Gadens on behalf of those companies.

[34] Beyond this, however, no argument was advanced to identify a cause of action which Virgtel might have against Mr van Leeuwen which would catch the moneys which are due to be repaid.

[35] Apart from Mr Zabusky, the only named applicant for interlocutory injunctive relief was Virgtel. Given the "retainer issue" dispute which has been ventilated between the parties at the instance of the Zabusky interests since 2009, it seems to have occurred to the parties moving for interlocutory injunctive relief that they would be faced with a challenge to their authority to bring the present application in the name of Virgtel. This prompted the last minute application simply to join Amalia Investments as a further applicant. No other application was made; in particular, no application was filed seeking leave for Amalia Investments to have leave to pursue the present application for interlocutory injunctive relief as a derivative action on behalf of Virgtel. At best, the written submissions of counsel for the present applicants simply submitted that Amalia Investments is one of the shareholders of Virgtel and:

> "10. As a shareholder, Amalia falls within the so-called fifth exception to the rule in *Foss v Harbottle* ... in circumstances where the ownership and control of Virgtel is disputed in the principal Queensland action and elsewhere.
>
> 11. Accordingly, Amalia is a party within the contemplation of UCPR r 69(1)(b)(i) whose rights are, or may be, directly affected by any order that may be made, or refused, in the application."

[36] Even leaving to one side the failure to apply formally for leave to proceed as a derivative action, it is necessary to determine whether the material discloses an extant cause of action which can presently be pursued on behalf of Virgtel which would found the protection of interlocutory injunctive relief.

[37] In a lengthy affidavit filed in support of the present application, Mr Zabusky deposed to a litany of alleged defalcations by Mr van Leeuwen.

[38] Mr Zabusky said that Virgtel was incorporated in February 1999, and the purpose of its incorporation was to be "an umbrella company that would hold as a single block the shares of its individual shareholders in a Nigerian telecommunication company, Virgin Technologies Limited ("VTL"), to undertake the repayment of loans provided by its individual shareholders to VTL and interest thereof and to provide further investment/loans to VTL".

[39] Mr Zabusky described the initial shareholding of Virgtel, including the fact that he held 40 per cent of Virgtel's issued capital through Amalia Investments. He said that his initial investment in VTL at the time of Virgtel was agreed to be US$1,500,000, US$300,000 of which was to be treated as paid up capital of Virgtel to be invested in VTL, and US$1,200,000 to be treated as a loan "given to VTL through Virgtel". Mr Zabusky exhibited an agreement made on 16 May 1999

between the shareholders in Virgtel Ltd. The term "Shareholder Loans" in that agreement was defined as follows:

> "1.1.6 "Shareholder Loans" means the sum of $1,200,000.00 provided by WOL (already provided in full) and the sum of $1,200,000.00 already provided by AMALIA and BZ (together) to the COMPANY as term loans under agreed terms and conditions as set out below. A further $300,000.00 was provided by WOL and $300,000.00 by AMALIA and BZ (collectively) which have been capitalised into their share equity."

[40] Clause 5 of this shareholders' agreement provided:

> "5. Shareholder Loans
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> 5.1 Shareholder Loans will be repaid over 12 months in equal monthly instalments commencing three months after positive cashflows of VTL commence. Shareholder Loan repayments will be made on a pro-rata basis.
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> 5.2 Interest shall be calculated at an annual rate of 10% p.a. on a monthly basis on the outstanding shareholder loan."

[41] Mr Zabusky said that the loans by the shareholders, including Amalia Investments, to Virgtel can be confirmed by the fact that VTL granted a mortgage debenture to Virgtel to secure an advance by Virgtel to VTL of US$3,000,000.

[42] Mr Zabusky said that in November 2000, the shareholders of VTL resolved to hold their shares in VTL through a new umbrella company, Global, and that this agreement was recorded in a document called a "Protocol of Undertaking and Understanding" dated 20 October 2010 and signed by Mr Zabusky on behalf of Amalia Investments and Mr van Leeuwen on behalf of Viscaya Amadora SA. Mr Zabusky referred particularly to clauses 12 and 14 of that protocol:

> "12. The shareholders Loan provided by Viscaya and Amalia will be repaid soonest in equal monthly instalments, while the repayments will be made on a pro-rata basis as soon as the Viscaya loan is equal to the Amalia plus BZ loan. Dependent upon the financial position of the company, extra repayments will be made in mutual consultation (loan Viscaya US$1,466,520.00 – loan Amalia US$960,00). If in any case Viscaya has to put an additional loan for equipment etc., this loan will be added to the original loan amount and will be repaid in priority to the original share-holders loan (presently the additional loan provided by Viscaya is US$92,055 and US$174,465).
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> ...
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> 14. The loan of US$2,373,689.50 provided by Virgtel Ltd to VTL in Nigeria shall remain as follows: US$1,200,000 to Viscaya, US$960,000 to Amalia and US$213,698.50 to BZ."

[43] Mr Zabusky then deposed at some length to the circumstances under which he contends that Mr van Leeuwen "stole" Virgtel to himself, outlined the proceedings pending in the British Virgin Islands between the parties and also asserted that Mr van Leeuwen took all of the original financial records of Virgtel. Mr Zabusky stated:

> "50. Mr Holthuis deposes in his affidavits sworn 20 September 2005, 30 September 2005 and 5 October 2005 in the Principal Proceedings that VTL acted by the Receiver is suing Mr Van Leeuwen in Holland for misappropriating over US$2.6 million from VTL's bank accounts to his wife's and related entities accounts. Mr Van Leeuwen's misappropriation of VTL's funds is also pleaded in the Further Amended Defence filed on 7 April 2009 and my affidavit sworn 16 August 2010 in the Principal Proceedings. I exhibit Mr Holthuis' affidavits deposed to above without exhibits and the certified English translation of the Judgment in the interim injunction, referred to at paragraph 5 of Mr Holthuis' affidavit sworn 5 October 2005, at pages 278 to 292 of HZ-2.
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> 51. The funds misappropriated by Mr Van Leeuwen, deposed to above, prevented VTL from repaying through Virgtel or Global, the Amalia Investments loan of US$960,000 deposed to at paragraphs 8., 11. and 14. in accordance with their contractual undertaking deposed to above. Furthermore, I believe that these funds may have been used by Mr Van Leeuwen to finance the Principal Proceedings against me, in the name of Virgtel, a company of which I am the sole director and a substantial shareholder."

[44] I have already referred to Mr Holthuis' affidavits above.

[45] In short, the cause of action on which the Zabusky interests purport to rely in seeking the present interlocutory injunctive relief is founded in the alleged misappropriation by Mr van Leeuwen of some US$2.6 million which, as Mr Zabusky describes it, prevented VTL from repaying, through Virgtel or Global, the Amalia Investments loan of US$960,000. I observe in passing that he provides no factual basis for his statement of belief that the allegedly misappropriated funds have been used by Mr van Leeuwen to finance the principal proceeding. Be that as it may, however, it is clear in Mr Zabusky's affidavit that this not Virgtel's cause of action but is a cause of action which is being pursued by the receiver of VTL in the Rotterdam proceedings. That it put beyond doubt by the opening sentence in paragraph 50 of Mr Zabusky's affidavit.

[46] In summary, the causes of action relevantly disclosed by Mr Zabusky's evidence can be described as follows:

(a) Amalia Investments advanced money to Virgtel as a Shareholder's Loan; Amalia Investments may have the right to claim repayment of that money from Virgtel;

(b) Virgtel, in turn, advanced that (and other money from other Virgtel shareholders) to VTL; Virgtel may have a claim against VTL for repayment of those moneys;

(c) Mr van Leeuwen allegedly misappropriated money from VTL; this is the claim made by the receiver of VTL against Mr van Leeuwen in the Rotterdam court.

[47] The material does not, however, disclose a course of action by Virgtel against Mr van Leeuwen. The mere fact that Mr Zabusky suspects that Mr van Leeuwen has effectively funded the principal proceeding by utilising money which

Mr Zabusky alleges were misappropriated by Mr van Leeuwen from VTL does not give rise to a cause of action in Mr Zabusky personally, Virgtel, or Amalia Investments against Mr van Leeuwen.

[48] Nor is it sufficient to contend broadly, as the present applicants do, that the parties are in dispute about ownership of the settlement moneys. The only respondent to this application against whom interlocutory injunctive relief is now sought is Mr van Leeuwen, and the only cause of action against him identified in the material is the claim pursued by the receiver of VTL. No cause of action by Virgtel against Mr van Leeuwen to found the claimed interlocutory injunction has been identified by the present applicants.

[49] It follows that there is obviously no utility in ordering that Amalia Investments be joined as an applicant. It also follows from this finding that the application for interlocutory injunctive relief should be refused.

[50] For completeness, I should say that even if I had considered that there were a cause of action to sustain the grant of an injunction against Mr van Leeuwen and an arguable case as to whether Virgtel, as opposed to the van Leeuwen parties who paid the moneys to Gadens and VCAT, has an entitlement to receive the moneys under the Settlement Agreement and the refund from VCAT, Virgtel is, on the material, patently not able to give a valuable undertaking as to damages. The putative applicant in a derivative action on behalf of Virgtel, Amalia Investments, is a foreign company, which in turn is owned by a foreign company. There is no evidence that Amalia Investments has any assets in Australia, or anywhere else for that matter. No undertakings as to damages on behalf of either Virgtel or Amalia Investments were offered, and in any event there was no evidence that any such undertakings would be of value. In the absence of worthwhile undertakings as to damages, the application for interlocutory injunctive relief would have been refused in any event. Mr Zabusky offered an undertaking as to damages but, for the reasons outlined above, he clearly has no standing to make this application.

[51] Accordingly, there will be the following orders:

1. The application for the joinder of Amalia Investments Ltd is dismissed.

2. The application for interlocutory injunctive relief is dismissed.

3. I will hear the parties as to costs including the costs of the hearing on 4 March 2011.