SUPREME COURT OF QUEENSLAND

CITATION:	*Zabusky & Anor v van Leeuwen & Anor* [2013] QSC 83
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 NOS:	4405 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2012
JUDGE:	Daubney J
ORDER:	**The first respondent's application is dismissed with costs**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – OTHER MATTERS – where the first respondent applies for payment of moneys held pursuant to Court order – where order provides for moneys to be held pending determination of certain issues – where previous judgment did not resolve those issues – whether the application by the first respondent should be allowed PROCEDURE – COSTS – GENERAL RULE-COSTS FOLLOW THE EVENT – whether costs should be awarded against the first respondent *Zabusky & Anor v van Leeuwen & Anor* [2011] QSC 270 *Virgtel Ltd & Anor v Zabusky & Anor* [2011] QSC 269 *Viscaya Amadaora SA PMP Anguilla Limited v Virgtel Limited & Anor* (Unreported, British Virgin Islands Eastern

Caribbean Supreme Court in the High Court of Justice, Bannister J, 14 October 2011).
Jackson v Sterling Industries Ltd (1987) 162 CLR 612

COUNSEL: DR Cooper SC with C Wilson for the applicant
MM Stewart SC with S Monks for the first respondent

SOLICITORS: Tucker & Cowen for the applicants
James Conomos Lawyers for the first respondent

[1] The background to the litigation between interests associated with each of Mr van Leeuwen and Mr Zabusky has been set out in numerous judgments of this Court and the Court of Appeal, both in this proceeding and in what I will describe as "the principal proceeding" (Virgtel Ltd & Ors v Zabusky & Ors, BS 6547 of 2005). For the purposes of the present application, it is sufficient to note the following.

[2] On 6 April 2006, 2 August 2006, 1 September 2006 and 29 June 2007, costs orders were made against, *inter alia*, Mr Zabusky in the principal proceeding. The quantum of the costs recoverable under those costs orders was subsequently assessed. They totalled $282,307.19.

[3] On 15 January 2010, Mr van Leeuwen obtained the issue of an enforcement warrant to recover the unpaid judgment debts comprised in those assessed costs orders. The enforcement warrant was for the judgment debt of $282,307.19, interest on the debt of $43,776.94 and warrant costs of $245. The enforcement warrant was to be executed over Mr Zabusky's home on the Gold Coast. Pursuant to that enforcement warrant, the Sheriff, in April 2010, advertised that the property would be sold by public auction on 11 May 2010.

[4] On 29 April 2010, Mr Zabusky commenced this particular proceeding by an originating application issued in his own name and purportedly in the name of Virgtel Ltd against Mr van Leeuwen and against James Conomos Lawyers, the law firm acting for Mr van Leeuwen in the principal proceeding. The final relief sought in the originating application was, in short, to restrain Mr van Leeuwen from giving instructions in the name of Virgtel Ltd and to restrain the solicitors from taking any steps or otherwise acting on behalf of Virgtel Ltd in the principal proceeding.

[5] On 4 May 2010, Mr Zabusky issued, on his own behalf and purportedly on behalf of Virgtel Ltd, an interlocutory application in the present proceeding seeking an injunction to compel the present respondents to instruct the Sheriff not to proceed with the advertised sale of the property pending the determination of the principal proceeding.

[6] That application came on before me on 6 May 2010. Formal appearances were announced by counsel for the applicants and counsel for the second respondent. The application was resolved on the giving of certain undertakings and the parties (i.e. the applicants and the second respondent) consenting to certain orders. Those undertakings and orders were reduced to writing and provided to me in a form agreed to by counsel for the applicants and counsel for the second respondent on 7 May 2010. Accordingly, on 7 May 2010 I formally noted the following undertakings and made the following orders:

"**ORDER**

UPON the First Applicant, by his counsel, giving the usual undertaking as to damages;

AND UPON the Second Respondent, by its counsel, undertaking THAT, upon the Second Respondent's receiving a copy of a trust account receipt issued by the solicitors for the First Applicant, not later than 9.00 am on Tuesday 11 May 2010, confirming the receipt of cleared funds into the trust account of the solicitors for the First Applicant of the sum of not less than $326,329.13 by or on behalf of the First Applicant for the purposes of this order, the Second Respondent shall forthwith provide written instructions to the Sheriff of Queensland to take no further step to effect a sale of property pursuant to the Enforcement Warrant filed 15 January 2010 in proceedings BS 6547 of 2005 ('**the 2005 proceedings**').

THE ORDER OF THE COURT IS THAT:

(1) Any funds paid to the solicitors for the First Applicant as contemplated in the said undertaking of the Second Respondent (herein called 'the trust funds') shall, so soon as is reasonably practicable, be placed in an interest-bearing account or term deposit with a licensed Australian bank in the joint names of:

   a. Coyne & Associates, as the solicitors for the Second Respondent in this proceeding; and

   b. Tucker & Cowen, as the solicitors for the Defendants in the 2005 proceedings BS 6547 of 2005.

(2) The trust funds shall be held as provided in paragraph (1) of this order until:

   a. the determination, in the 2005 proceedings, of the 'retainer issues' (being the issues raised in paragraphs 95 to 97 of the Further Amended Defence filed 7 April 2009 in the 2005 proceedings, and paragraphs 27 and 28 of the Reply filed 2 November 2009 in the 2005 proceedings); or

   b. further order of the Court.

(3) No further step be taken in this proceeding pending the determination of the retainer issues or earlier order.

(4) Each party have liberty to apply on not less than seven (7) days' written notice.

(5) Costs reserved."

[7] There this proceeding rested until March 2011, when the applicants sought orders concerning certain monies which were to be paid as a consequence of a settlement of a separate dispute between Mr van Leeuwen and his former solicitors. It was also sought to join another of Mr Zabusky's companies, Amalia Investments Ltd. These applications were dismissed.[1] An appeal against that judgment was filed, but subsequently the appeal was, by consent, dismissed with costs.

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1 See *Zabusky & Anor v van Leeuwen & Anor* [2011] QSC 270.

[8] The current application is brought by the first respondent, Mr van Leeuwen, and seeks the following order:

> "That the funds described as 'the trust funds' in paragraph (1) of the order made by Daubney J on 7 May 2010, together with any accretions, be paid out forthwith to the first respondent, care of Virgtel Global Networks NV".

[9] The first respondent advanced several arguments in support of this application.

Determination of the "retainer issue"

[10] This argument hinged on the fact that in October 2011, judgment was given in certain proceedings before the Commercial Division of the High Court of Justice in the British Virgin Islands, the jurisdiction in which Virgtel Ltd is incorporated. The claimants in that proceeding were Viscaya Amadora SA and PMP Anguilla Ltd (both companies in the van Leeuwen stable) and Virgtel Ltd and Mr Zabusky as defendants.

[11] Counsel for the first respondent submitted:

> "9. In order to authoritatively dispose of Mr Zabusky's assertions about the ownership and control of Virgtel, it was also necessary for the van Leeuwen interests to bring proceedings in the BVI, Virgtel's place of incorporation. On 14 October 2011, following a 4 day trial, Bannister AJ gave judgment in the BVI High Court finding that Viscaya Panama was the legal holder of 318,001 Virgtel shares (53.002%), holding them as nominee for Viscaya Anguilla, until certain transfer formalities had been complied with.
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> 10. Bannister AJ also found that the directors of Virgtel were Mr Zabusky and Mr van Leeuwen, although on 10 January 2012 Virgtel in general meeting resolved to dismiss Mr Zabusky from the board, Furthermore on 13 June 2012 Virgtel in general meeting resolved, for the avoidance of doubt, to confirm and ratify the commencement of the principal proceedings and the retainer of Gadens Lawyers and subsequently James Conomos Lawyers to act on its behalf. The so-called retainer point is now dead and buried."

[12] The "retainer issues" to which reference is made in paragraph 2(a) of the order I made on 7 May 2010 are articulated in the current version of Mr Zabusky's defence in the principal proceeding (the second further amended defence filed 15 June 2012) as follows:

> "95. The First Applicant:-
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> (a) is not a shareholder of VTL;
>
> (b) did not resolve, by its directors, prior to the initiation of these proceedings, or at any time, to appoint solicitors to act on behalf of the First Applicant or authorise solicitors to prosecute these proceedings on behalf of the First Applicant (<u>as a shareholder of VTL</u>);
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> (c) <u>did not act, by any lawfully appointed attorney, prior to the initiation of these proceedings, or at any time, to appoint solicitors to act on behalf of the First Applicant or authorise</u>

solicitors to prosecute these proceedings on behalf of the First Applicant because the general power of attorney dated 7 August 2009 or any other power of attorney stated to be Virgtel in favour of Hendrik Van Leeuwen or late Mrs Van Leeuwen was not granted with the lawful authority of the members or directors of Virgtel;

(d) did not, by the powers of attorney pleaded at sub paragraph 95(c), authorize the Applicants to bring this proceeding for the benefit of VTL.

96. The Second Applicant did not resolved, by its directors, prior to the initiation of these proceedings, or at any time, to appoint solicitors to act on behalf of the Second Applicant or authorise solicitors to prosecute these proceedings on behalf of the Second Applicant (as a shareholder of VTL).

96A. The Third Applicant did not resolve, by its directors, prior to the initiation of these proceedings, or at any time, to appoint solicitors to act on behalf of the Second Applicant or authorise solicitors to prosecute these proceedings on behalf of the Second Applicant (as a shareholder of VTL).

96B. The Fourth Applicant did not resolve, by its directors, prior to the initiation of these proceedings, or at any time, to appoint solicitors to act on behalf of the Second Applicant or authorise solicitors to prosecute these proceedings on behalf of the Second Applicant (as a shareholder of VTL).

97. In the premises, these proceedings have been commenced and prosecuted by solicitors acting without the authority of either Applicant and without a valid retainer from either Applicant (as a shareholder of VTL)."

[13] A copy of the reasons for judgment of Bannister J in the High Court of the British Virgin Islands was in evidence before me. I was informed that Mr Zabusky had appealed against that decision, but little progress had been made in the prosecution of that appeal.

[14] In any event, Bannister J noted the following in the course of the introduction to his judgment:

"[5] What is at issue in these proceedings is the question who controls Virgtel. Since VTL went into receivership some years ago and has ceased to trade the question might be asked why it matters. The answer is that in 2005 Mr van Leeuwen caused Virgtel to launch a derivative claim on behalf of VTL in the High Court in Queensland claiming, as I understand, misfeasance on the part of Mr Zabusky in relation to the affairs of VTL. I stress that I have no idea and express absolutely no view as to whether those allegations are well founded or as to Virgtel's locus to maintain the Australian proceedings, but they have caused considerable distress to Mr and Mrs Zabusky (a search order was made and enforced against them by the High Court in Queensland). In April 2010 Mr Zabusky took steps here to assert that he is the sole director of Virgtel and to change its registered office. The present proceedings were Mr van Leeuwen's response

> and in May 2010 I granted an interim injunction restraining Mr Zabusky from holding himself out in this jurisdiction as solely entitled to give instructions on behalf of Virgtel. So what Mr Zabusky wants is a decision that he is, or is in a position to become, the only person with authority to give instructions on behalf of Virgtel and thus to bring the Australian proceedings to an end. This has required an exhaustive consideration of the dealing with Virgtel's shares and of the constitution from time to time of its board."

[15] Bannister J then undertook a close analysis of the dealings in Virtel's shares, and held:

> "[33] The upshot is that [Viscaya Panama] is the legal holder of 318,001 shares in the capital of Virgtel, which it holds as nominee for [Viscaya Anguilla]. Amalia [Investments Ltd] holds 239,999 shares and BZ [Investments Ltd] 32,000."

[16] The placement of these various companies in the respective van Leeuwen and Zabusky firmaments is explained in my judgment in *Virgtel Ltd & Anor v Zabusky & Anor*[2].

[17] Bannister J then turned to the evidence concerning the composition of the board of Virgtel Ltd. In the course of that part of the judgment, Bannister J referred to a contention that PMP Anguilla Ltd had been appointed sole director of Virgtel by reason of a written shareholders' resolution which Viscaya Panama (by Mr van Leeuwen) purported to pass on 15 June 2009. Bannister J held that the "resolution" was defective, on a proper construction of Virgtel's articles of association. His Lordship continued:

> "[40] In my judgment the resolution was also ineffective to appoint PMP as a director of Virgtel. Mr Carrington raised an interesting question about the validity of Article 82 of Virgtel's Articles of Association, which on its face appears to permit a members resolution to be passed in writing signed by the majority only of a company's shareholders without notice to the others, on condition only that a copy of the resolution must in that case be forthwith sent to all non-consenting members. I see no reason why members of a company should not agree to be bound by a regulation in this form, provided that its terms are strictly adhered to. If the minority is aggrieved by any step taken in reliance on the regulation, they have their remedy under section 1841 of the BCA. But in my judgment the validity of any resolution passed in reliance upon Article 82 depends upon scrupulous compliance with its terms. Although Mr van Leeuwen gave notice of the resolution to Mr Zabusky, no notice was given to Amalia or to BZ and in any event notice given on 6 August of a resolution passed on 15 June cannot be said to have been given forthwith. In my judgment, therefore, the purported resolution of 15 June 2009 was invalid."

[18] Bannister J held, at [41], that the "upshot is that the directors of Virgtel are Mr van Leeuwen and Mr Zabusky."

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2 [2011] QSC 269.

[19] It is said that, on 13 June 2012, a so-called "written resolution" of Virgtel Ltd was made. The evidence of this is through Mr van Leeuwen's Australian solicitor, who deposed to the following:

> "**Resolution of Shareholders of Virgtel Limited**
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> 7. I am informed by Mr Simonet a director of the second applicant in proceedings BS6547/05 and do believe that on 13 June 2012, Viscaya Armadora SA (Panama) (the majority shareholder of Virgtel Limited) made a written resolution as majority shareholder of Virgtel Limited concerning the conduct of proceedings BS6547/05. A true copy of that resolution provided to me is contained in the bundle marked **Exhibit 'ARP3'** at pages 7 and 8."

I note in passing that Mr Simonet is Mr van Leeuwen's factotum.

[20] The terms of the purported resolution include confirmation that Virgtel will continue to prosecute the principal proceeding, and a declaration that Virgtel "authorised the commencement and prosecution of the Queensland Proceedings, and the commencement, prosecution of defence of all other proceedings within the meaning of the Zabusky Proceedings, and the retainer of lawyers to act on behalf of the Company in such proceedings, and makes this declaration understanding that it may operate retrospectively".

[21] No evidence was put before me, however, to satisfy me either that this resolution was lawfully passed or that it is efficacious. As Bannister J observed in respect of the same article pursuant to which this written resolution was purportedly passed, the terms of the article must be strictly adhered to. The prudence of this approach is highlighted when one recalls that shareholders do not have an unlimited power to ratify or sanction conduct by directors, particularly if that conduct involves improper expropriation of a company's property.[3]

[22] Accordingly, for present purposes I place no weight on this purported resolution.

[23] I have set out above the matters determined by Bannister J in the High Court of the British Virgin Islands. They are limited to the identity of the shareholders and directors of Virgtel as at the date of that judgment. The issues decided by Bannister J clearly do not determine either the factual or the legal issues raised in the "retainer issues", the particulars of which I have set out above. It is therefore wrong to suggest, as the first respondent now does, that the judgment of Bannister J had the effect of determining the "retainer issues".

van Leeuwen's personal claim on the trust funds

[24] Counsel for the first respondent submitted that, in any event, control of Virgtel was not central to the first respondent's claim on the trust funds. It was submitted:

> "11. In any event, the control of Virgtel is not central to Mr van Leeuwen's claim to be entitled to the monies held in trust. The monies are the fruits of costs orders in the principal proceedings; they are partial recompense for costs expended by Mr van Leeuwen in bringing successful applications against Mr Zabusky, or in

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[3] See, for example, my observations in *Virgtel Ltd & Anor v Zabusky & Anor* [2011] QSC 269 at [48].

> defeating applications brought by Mr Zabusky. The funds that Mr van Leeuwen spent in doing this were not Virgtel's funds."

[25] The four costs orders referred to in [2] were made during a time when Gadens Lawyers acted for the van Leeuwen side of the record in the principal proceeding. In the course of determining the application referred to in [7], I said[4]:

> "[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:
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> (a) Mr van Leeuwen's own accounts;
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> (b) Mr van Leeuwen's late wife's accounts;
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> (c) Accounts of Viscaya Amadora SA (one of Mr van Leeuwen's companies), and
>
> (d) Accounts of Global.
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> [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.
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> [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:
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> '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.'[5]

[26] It may very well be the case that Mr van Leeuwen has a personal entitlement to receive monies which are payable under those four costs orders. Counsel for Mr van Leeuwen pointed to the significant amount of costs (some $2,440,506.80) which were paid to Gadens by Mr van Leeuwen, his late wife and, at his direction, Viscaya Panama, and submitted:

> "These matters alone are more than sufficient to require the orders made on 7 May 2012 (sic) to be discharged, and the funds paid out to Mr van Leeuwen."

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4 *Zabusky & Anor v van Leeuwen & Anor* [2011] QSC 270.

5 Affidavit of Paul Michael Simonet, filed 4 April 2011.

[27] Counsel for Mr van Leeuwen also pointed to the significant amount of interest which had accrued on the judgment debts constituted by the costs orders, the fact that significant costs orders had been made against Mr Zabusky in the Federal Court of Australia and in the High Court of the British Virgin Islands, that set-offs pleaded in the second further amended defence were irrelevant to the present application, and that any counterclaim which Mr Zabusky might plead in the principal proceeding is also irrelevant on the basis that a party is not entitled to security for its claim.[6]

[28] None of these matters, however, address the circumstance of the making of the orders in May 2010. As previously noted, the undertakings given and orders sought by consent of the parties who appeared on the application amounted to a compromise of the application which had been brought by Mr Zabusky. Mr van Leeuwen's then (and current) solicitors were a party to that compromise. It would be artificial in the extreme to consider that those solicitors had entered into that compromise without proper consideration of the ramifications of the consent orders which they sought on their client's ability actually to receive the funds paid pursuant to the undertaking. Those funds, described in the order as "the trust funds", are to be held pending the determination of the "retainer issues" in the principal proceeding.

[29] The rationale for the agreement to retain those funds pending determination of the "retainer issues" is clear enough – if Mr Zabusky succeeds in his argument that the principal proceeding was brought and prosecuted without proper lawful authority, then there will clearly be an argument as to whether any party on the van Leeuwen side of the register is entitled to recover any costs. On the other hand, if the van Leeuwen interests are held to have properly caused the principal proceeding to be commenced and maintained, then there should be no impediment to the van Leeuwen side recovering at least in respect of the four costs orders, which were the catalyst for the undertakings and orders made in May 2010, and the trust funds are in the meantime preserved for that purpose.

[30] In short, nothing in the first respondent's submissions persuade me that the regime consented to by the first respondent's solicitors in May 2010 for the preservation of the "trust funds" pending determination of the "retainer issues" ought be set aside.

Disposition of the application

[31] There is, in my view, no reason why the costs of this discrete application by the first respondent should not follow the event.

[32] Accordingly, it will be ordered that the application be dismissed with costs.

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6 Citing in that regard *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.