SUPREME COURT OF QUEENSLAND

CITATION:	*Meijer & Anor (Executors, Estate of Hendrik van Leeuwen Dec'd) v Zabusky & Anor* [2014] QCA 40
PARTIES:	**ROB MEIJER AND JOOST KOEDOOT AS EXECUTORS OF THE ESTATE OF THE LATE HENDRIK VAN LEEUWEN (DECEASED)** (appellants/Hendrik van Leeuwen) **v** **HARVEY ZABUSKY** (first respondent/first applicant) **VIRGTEL LIMITED IBC NO 311178** (not a party to the appeal/second applicant)
FILE NO/S:	Appeal No 3947 of 2013 SC No 4405 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 October 2013
JUDGES:	Fraser and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. The appellants must pay the respondent's costs of the appeal to be assessed.**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – VARIATION AND SETTING ASIDE OF CONSENT JUDGMENT – where there was a substantial dispute in the principal proceeding between the interests of Mr van Leeuwen (as the applicants) and the interests of Mr Zabusky (as the respondents) – where the respondents were ordered to pay certain costs of the applicants in the principal proceeding – where the costs were assessed and the subject of costs orders made by the registrar – where the applicants obtained an enforcement warrant for the costs orders – where Mr Zabusky commenced another proceeding to obtain an injunction to restrain Mr van Leeuwen and his solicitors acting on behalf of the applicants in the principal proceeding – where Mr Zabusky paid the amount due under the costs

orders to his solicitors' trust account (the trust funds) to be held pending the determination of the retainer issues in the principal proceeding or further order of the court – where the solicitors for the applicants in the principal proceeding undertook in the injunction proceeding to stop the enforcement of the costs orders – where consent orders were made in the injunction proceeding with the consent of Mr Zabusky and the solicitors for the applicants in the principal proceeding – where the undertakings and consent orders formed a contract between the parties – where Mr van Leeuwen's subsequent application that the trust funds be paid out to him was dismissed by the primary judge – where there had been a change in circumstances since the making of the consent orders – whether there was an error by the primary judge in balancing the relevant factors to conclude there should be no change to the regime set up by the consent orders

Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593, followed
Siebe Gorman Co Ltd v Pneupac Ltd [1982] 1 WLR 185, considered
Venz v Moreton Bay Regional Council [2009] QCA 224, considered
Virgtel Ltd & Anor v Zabusky & Ors [2011] QSC 269, related
Virgtel Ltd & Anor v Zabusky & Ors (No 2) [2008] QSC 316, related
Virgtel Ltd & Anor v Zabusky & Ors (No 2) [2009] QCA 349, related
Viscaya Amadaora SA & Anor v Virgtel Limited & Anor [2011] ECarSC 198, related
Zabusky v Virgtel Ltd [2013] 1 Qd R 285, [2012] QCA 107, related

COUNSEL: S L Doyle QC, with S S Monks, for the appellants
L D Bowden for the first respondent

SOLICITORS: James Conomos Lawyers for the appellants
Provest Law for the first respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Mullins J and the orders proposed by her Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Mullins J and with the reasons given by her Honour.

[3] **MULLINS J:** There has been much litigation in the Supreme Court arising out of a dispute between interests associated with Mr van Leeuwen and interests associated with Mr Zabusky. The principal proceeding in the Trial Division is numbered 6547 of 2005. Some of the background to the litigation and procedural history can be gleaned from *Virgtel Ltd & Anor v Zabusky & Ors* [2011] QSC 269 (the joinder decision).

[4] Virgtel Limited (Virgtel) and Virgtel Global Networks NV (Global) which are respectively the first and second applicants in the principal proceeding obtained

costs orders against the first to fifth respondents in the principal proceeding that were assessed and the subject of four registrar's orders dated 27 June 2008 for the total sum of $282,307.19 (the costs orders). Mr Zabusky is the first respondent in the principal proceeding. The second to fifth respondents in the principal proceeding are related or related entities to Mr Zabusky. The sixth respondent in the principal proceeding Virgin Technologies Ltd (VTL) was incorporated in Nigeria and formerly operated a telecommunications business in that country. It is the company on whose behalf Virgtel and Global bring the principal proceeding as a derivative proceeding.

[5] Mr Zabusky and the second, third and fifth respondents applied unsuccessfully in the principal proceeding for a stay of the costs orders until the determination of the principal proceeding or earlier order: *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2008] QSC 316. The appeal against the dismissal of the stay application was dismissed: *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349.

[6] Virgtel and Global obtained an enforcement warrant for the seizure and sale of the property of Mrs Zabusky (who is the second respondent in the principal proceeding), in order to recover the judgment sum of $282,307.19 under the costs orders and a further sum of $44,021.94 for interest and costs. A sheriff's auction of the property was scheduled for 11 May 2010. As a matter of urgency, Mr Zabusky (as the first applicant) with Virgtel named as the second applicant commenced proceeding 4405 of 2010 (the injunction proceeding) against Mr van Leeuwen as the first respondent and the solicitors acting on behalf of the van Leeuwen interests in the principal proceeding, James Conomos Lawyers (Conomos), as the second respondent. In general terms, the relief that was sought in the injunction proceeding was to restrain Mr van Leeuwen from providing instructions to Conomos or any other legal practitioner on behalf of the second applicant in respect of any step on behalf of the second applicant in any proceeding in the Supreme Court including the principal proceeding.

[7] Mr van Leeuwen was not served with the originating application and did not appear on 7 May 2010 when the application for interlocutory relief in the injunction proceeding came before Daubney J who was the judge supervising the principal proceeding. The application in the injunction proceeding resolved on that day upon mutual undertakings being given to the court by Mr Zabusky and Conomos and orders were made with the consent of those parties (the consent orders). The terms of the undertakings and consent orders are:

> "UPON the First Applicant, by his counsel, giving the usual undertaking as to damages;
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> 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**').
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> BY CONSENT, 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."

[8] The retainer issues can be described briefly as the identity of the shareholders of VTL and the allegations by the Zabusky interests that the van Leeuwen interests did not control Virgtel or Global at the relevant time and were never authorised to cause either Virgtel or Global to instruct solicitors in 2005 to bring and thereafter prosecute the principal proceeding.

[9] The relevant funds were paid into the trust account of Mr Zabusky's solicitors (Coyne & Associates) and Conomos provided the written instructions to the sheriff to cancel the auction.

[10] In February 2011 Virgtel and Global applied for the joinder of a Panamanian incorporated company Viscaya Amadaora SA (Viscaya Panama) and another company of the same name, but incorporated in Anguilla (and referred to as Viscaya Anguilla), as applicants in the principal proceeding. The application was made on the basis that Viscaya Anguilla or, alternatively, Viscaya Panama is a shareholder of VTL and is a proper applicant in the derivative action and the presence of those parties was appropriate for the purpose of resolving the retainer issues. Daubney J concluded at [43] of the joinder decision that, subject to certain conditions, Viscaya Panama and Viscaya Anguilla should be joined *nunc pro tunc* as applicants in the principal proceeding. The appeal against the joinder decision was unsuccessful: *Zabusky v Virgtel Ltd* [2013] 1 Qd R 285. As a consequence of the joinder decision, the retainer issues were extended to similar allegations against the additional applicants.

[11] Mr van Leeuwen filed an application on 30 May 2012 in the injunction proceeding seeking an order against Mr Zabusky, but with notice given of the application to Coyne & Associates, that the trust funds referred to in paragraph 1 of the consent orders together with any accretions (the trust funds) be paid out forthwith to Mr van Leeuwen care of Global. That application was heard on 19 July 2012 by

Daubney J and the application was dismissed with costs: *Zabusky & Anor v van Leeuwen & Anor* [2013] QSC 83 (the reasons). It is Daubney J's refusal to make the order requested by Mr van Leeuwen that is the subject of this appeal.

[12] Mr van Leeuwen died after the appeal was filed. Mr Meijer and Mr Koedoot as executors of Mr van Leeuwen's estate were substituted as appellants in place of Mr van Leeuwen by order made by Gotterson JA on 18 September 2013.

The reasons

[13] One of the matters that prompted the application for payment out of the trust funds was a judgment given in the Commercial Division of the High Court of Justice in British Virgin Islands (BVI): *Viscaya Amadaora SA & Anor v Virgtel Limited & Anor* [2011] ECarSC 198 (the BVI judgment). Virgtel was incorporated in BVI.

[14] The parties to the BVI proceeding were Viscaya Panama and another company associated with Mr van Leeuwen, PMP Anguilla Limited, as the claimants, Virgtel as the first defendant and Mr Zabusky as the second defendant. What was in issue in the BVI proceeding was who controlled Virgtel: [5] of the BVI judgment.

[15] In April 2010 Mr Zabusky had asserted in BVI that he was the sole director of Virgtel and took steps to change its registered office. An interlocutory injunction was then granted in the BVI proceeding by Bannister J restraining Mr Zabusky from holding himself out in BVI as solely entitled to give instructions on behalf of Virgtel. Bannister J concluded at [33] of the BVI judgment that Viscaya Panama was the legal holder of 318,001 shares (53.002 per cent) of the capital of Virgtel which it held as nominee for Viscaya Anguilla (until certain transfer formalities had been complied with). Bannister J also concluded (at [41]) that the directors of Virgtel were Mr van Leeuwen and Mr Zabusky and therefore granted a final injunction (at [42]) against Mr Zabusky in the same terms as the interlocutory injunction.

[16] In [14] to [18] of the reasons, Daubney J set out [5], [33], [40] and [41] of the BVI judgment.

[17] Subsequent to the BVI judgment, on 13 June 2012 Viscaya Panama as the majority shareholder of Virgtel made a written resolution concerning the authorisation of the conduct of the principal proceeding. Daubney J noted at [21] of the reasons that no evidence had been adduced to satisfy him that the resolution was effective and therefore, at [22] of the reasons, did not place any weight on the resolution. (That aspect of Daubney J's reasons was not pursued on the hearing of the appeal.)

[18] Daubney J concluded at [23] of the reasons in relation to the effect of the BVI judgment:

> "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'."

[19] Although the argument had been advanced before Daubney J on behalf of Mr van Leeuwen that the BVI judgment resolved the retainer issues, the matter was also argued on behalf of Mr van Leeuwen on the basis that there had been sufficient change in circumstances since the making of the consent orders to warrant the trust funds being paid out to Mr van Leeuwen.

[20] Daubney J noted at [24] to [27] of the reasons the submissions based on the evidence that the moneys that paid the legal costs which were the subject of the costs orders came from the accounts of Mr van Leeuwen, his late wife, Viscaya Panama and Global; Mr van Leeuwen may have a personal entitlement to receive from Virgtel and Global; the moneys payable under the costs orders; Mr van Leeuwen, his wife and Viscaya Panama had paid some $2,440,506.80 in costs to the former solicitors who had first acted for the applicants in the principal proceeding; the significant amount of interest which had accrued on the judgment debts constituted by the costs orders; and there were significant costs orders made against Mr Zabusky in other proceedings involving Mr van Leeuwen or his entities.

[21] Daubney J was unpersuaded by the arguments advanced on behalf of Mr van Leeuwen as to why the trust funds should be released to pay the amount owed under the costs orders, concluding at [28] and [29] of the reasons:

> "[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 proceedings.
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> [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 proceedings 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."

[22] Daubney J summarised his conclusion at [30] of the reasons:

> "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."

Grounds of appeal

[23] The executors rely on a threshold issue that Daubney J erred in principle in not treating Mr van Leeuwen as a non-party to the consent orders and therefore not bound by them.

[24] The executors identify six additional errors in the reasons that are relied on to support the appeal:

(1) Focusing on the circumstances of the making of the consent orders rather than considering whether there were factors justifying the departure from the regime imposed by the consent orders;

(2) Treating the compromise between the parties that resulted in the consent orders as largely immutable;

(3) The rationale expressed in [29] of the reasons is wrong when the costs orders were the result of judgments that have been entered and were neither appealed nor stayed;

(4) The rationale expressed in [29] of the reasons was overtaken by the joinder of Viscaya Panama as an applicant in the principal proceeding *nunc pro tunc* and Viscaya Anguilla as an applicant in the principal proceeding from 7 August 2009 (which was its date of incorporation);

(5) Not finding that there was a change in circumstances constituted by the BVI judgment;

(6) Not finding that the increase in the quantum of outstanding costs owed by the Zabusky interests to the van Leeuwen interests since the making of the consent orders was a relevant circumstance.

The nature of the consent orders

[25] Submissions had been made to Daubney J by reference to *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593.

[26] The proceeding in *Fylas* arose out of an alleged breach of contract in relation to development of land where the plaintiff claimed it had been squeezed out of the proposed development to exclude it from sharing in profits. It made a claim to land referred to as the composite parcel or that the proceeds of its sale were to be held in trust for the plaintiff. Before the allegations had been taken to trial, the development of all stages of the composite parcel was proceeding. The plaintiff applied for an interlocutory injunction to restrain the disposition of the land and the proceeds of sale of the subdivided lots. Protracted negotiations took place which resulted in a written consent order embodying undertakings by the plaintiff and cross-undertakings by the seventh defendant. The consent order provided for the application to be adjourned to a date to be fixed with liberty to apply and costs reserved. Although the undertakings were not expressly limited in duration until trial, they were treated (at 596) as intended to be interlocutory and not final, if only for the reason that the trial was yet to occur. The seventh defendant subsequently complained that the undertakings given by the seventh defendant imposed too great a restraint upon its freedom and sought to be released from the obligation in its undertaking to invest the net proceeds of sale of certain of the subdivided lots.

[27] McPherson SPJ (as his Honour then was) (at 599) treated the order as being made or the undertaking given in consequence of an agreement between the parties or as an element of such an agreement and noted:

> "Such an order is capable of being set aside or varied, but essentially only on grounds or for reasons, such as mistake or misrepresentation, that would enable a contract to be invalidated or varied."

[28] McPherson SPJ also noted at (599-600):

> "However, in *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 WLR 485, Buckley LJ on behalf of the Court of Appeal said that 'an order or undertaking to the court expressed to be until further order by implication gives a right to the party bound by the order or undertaking to apply to the court to have the order or undertaking discharged or modified if good grounds for doing so are shown'. The explanation was, he said, that it was not an attempt to modify the contract implicit in the order or undertaking; it was an application in accordance with the contract, and as such the exercise of an express right reserved by the contract to the party bound by the terms of the order or undertaking. The Court of Appeal nevertheless refused to permit the defendants to re-open the order that had been made in that case because there had been no significant change in circumstances or evidence of new facts that justified a reconsideration of the matter."

[29] McPherson SPJ concluded that the seventh defendant was not entitled to the relief sought, because the undertakings that it gave were the result of or form terms of an agreement between the parties and was what was referred to by Lord Denning in *Siebe Gorman Co Ltd v Pneupac Ltd* [1982] 1 WLR 185, 189 as "a real contract between the parties." McPherson SPJ continued (at 601):

> "Their agreement is unlimited in point of duration. It may fairly be assumed and implied that the undertakings are intended to subsist only until trial or determination of the action. Apart from that, it cannot be assumed or implied that they were intended to be limited only until further order of the Court. The absence of any such express limitation of the duration of the undertakings means that the Court is without power to discharge or vary the undertakings except in circumstances in which, independently of the order of the Court, the undertakings, or the agreement that gave rise to them, would be discharged or varied without the consent of both parties … ."

[30] In view of the fact that Mr Zabusky had previously been unsuccessful in the principal proceeding in obtaining a stay of the enforcement of the costs orders, the injunction proceeding had been unlikely to succeed in the absence of Mr Zabusky being able to negotiate an agreement with the van Leeuwen interests that would have the effect of a stay of the enforcement of the costs orders. Not every order made by consent in the court is the manifestation of a contract between the parties: *Siebe Gorman* at 189 and *Venz v Moreton Bay Regional Council* [2009] QCA 224 at [23]. In the circumstances that prevailed between Mr Zabusky and Mr van Leeuwen at the time the consent orders were made, the undertakings and the consent orders must reflect a contract between the parties to the consent orders.

[31] That conclusion, however, does not mean that the consent orders were immutable. The agreement that is reflected in the terms of the consent orders is that the parties

had agreed that the trust funds paid to Mr Zabusky's solicitors on account of the amount then owing under the costs orders would be held until the determination in the principal proceeding of the retainer issues or "further order of the Court." The terms of the consent orders can be distinguished from the undertakings in *Fylas* which were not limited by reference to the further order of the court. In accordance with the agreement between Mr Zabusky and Conomos reflected in the consent orders, the parties contemplated a further application could be made to the court to re-visit the terms of the consent orders. Such a limitation to the operation of a consent order that was the result of a contract between the parties was contemplated in the passage quoted above from the judgment of McPherson SPJ in *Fylas* at 601.

Threshold issue

[32] The injunction proceeding was commenced as a matter of urgency to prevent the imminent enforcement of the costs orders against Mrs Zabusky's property. Although Mr van Leeuwen was not served with the application and did not appear, his solicitors were made a party and did appear. As Conomos was acting on behalf of the van Leeuwen interests in enforcing the costs orders, it is a matter of inference that the agreement that Conomos reached with Mr Zabusky that resulted in the consent orders could have been done only with the acquiescence of Mr van Leeuwen. There is no error in the approach of Daubney J set out in [28] of the reasons in treating Mr van Leeuwen, in effect, as having given the instructions that permitted Conomos to give the undertaking and consent to the making of the consent orders.

Grounds (1) and (2)

[33] Despite the brevity with which Daubney J expressed his ultimate analysis in [30] of the reasons, in the context of a number of factors being advanced on behalf of Mr van Leeuwen since the making of the consent orders to warrant the trust funds being paid out to him (or Virgtel and Global) instead of being held until the determination of the retainer issues in the principal proceeding, Daubney J's balancing of those various factors resulted in the conclusion that the regime set up by the consent orders should remain.

[34] It is clear from the reasons as a whole that Daubney J considered whether the developments between the parties since the making of the consent orders warranted altering that regime. The focus in the reasons on the agreement that resulted in the consent orders was appropriate as that was the reason that the consent orders were made. That agreement remained a relevant factor in considering whether the regime put in place with the approval of the parties should be altered, as a result of the subsequent events. Daubney J did not treat the consent orders as immutable, but was entitled to give the underlying agreement the significant weight which he attached to it.

Grounds (3) and (4)

[35] Daubney J in [29] of the reasons referred to the practical explanation that must have resulted in Mr van Leeuwen giving instructions to Conomos to give the undertakings and reach the agreement with Mr Zabusky that resulted in the consent orders. It is a wrong interpretation of [29] to suggest that Daubney J is referring to the position that would apply to the enforcement of those costs orders (absent the

consent orders), rather than the logic that was affecting the principal protagonists in seeking the consent orders. That rationale was a factor that could be taken into account in the application.

[36] The joinder of Viscaya Panama and Viscaya Anguilla as applicants in the principal proceeding was a step taken by the van Leeuwen interests to respond to the retainer issues. That resulted in Mr Zabusky and the other respondents amending the defence to expand the retainer issues in respect of Viscaya Panama and Viscaya Anguilla. The principal proceeding remained extant after the joinder decision. Ground (4) is tantamount to suggesting that Daubney J should have determined the retainer issues for the purpose of the application to pay out the trust funds. That was not required.

Ground (5)

[37] It was properly conceded on the hearing of this appeal on behalf of the appellants that the retainer issues were not finally disposed of by the BVI judgment. It is argued that the conclusion in the BVI judgment must weaken the strength of the retainer issues in the principal proceeding. The BVI judgment was part of the factual matrix before Daubney J, but it was not a decision that disposed of the retainer issues for the reasons that Daubney J set out in [23] of the reasons. The fact that Daubney J has given little or no weight to the BVI judgment in deciding the application that was before him is not an error in the circumstances.

Ground (6)

[38] Daubney J did take into account at [24] to [27] of the reasons the increase in the quantum of outstanding costs owed by the Zabusky interests to the van Leeuwen interests since the making of the consent orders, but that was not a factor that tilted the balance in favour of displacing the regime set up by the consent orders.

Conclusion

[39] It was a matter for Daubney J to balance the relevant factors in deciding whether or not the events that had transpired since the making of the consent orders should result in a change to the regime set up by the consent orders which reflected an underlying agreement between the principal parties. It was open in all the circumstances for Daubney J to reach that conclusion that the regime should not be altered at that stage. The executors have not succeeded in showing that there was any appellable error in the task that was undertaken by Daubney J.

Orders

[40] The orders which should be made are:

1. The appeal is dismissed.
2. The appellants must pay the respondent's costs of the appeal to be assessed.