SUPREME COURT OF QUEENSLAND

CITATION:	*Zabusky & Ors v Virgtel Limited* [2024] QCA 2
PARTIES:	**HARVEY ZABUSKY** (first applicant) **EREZ ZABUSKY** (second applicant) **D. A. WERBER LIMITED** (third applicant) **v** **VIRGTEL LIMITED** (respondent)
FILE NO/S:	Appeal No 15827 of 2022 SC No 8849 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton – [2021] QSC 17 (Crow J)
DELIVERED ON:	25 January 2024
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2023
JUDGES:	Mullins P and Bond JA and Davis J
ORDERS:	**1. The application for extension of the time for filing and service of a notice of appeal is refused.** **2. The applicants must pay the respondents' costs of the application.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where the applicants commenced proceedings to seek the enforcement of a Nigerian money judgment – where, on the application of the respondent, the proceedings were permanently stayed on the basis that Queensland was a clearly inappropriate forum because the respondent had no assets in Queensland – where the applicants had one month to file a notice of appeal – where the applicants chose not to appeal and to pursue a different procedural course in an effort to have the permanent stay removed – where that course failed – where the applicants seek an order that the time for filing and service of a notice of appeal be extended – whether the Court should grant the application *Uniform Civil Procedure Rules 1999* (Qld), r 5, r 7, r 748

Cooper v Williams [1963] 2 QB 567, cited
Osachy v O'Sachy [2013] QCA 212, applied
Voth v Milandra Flour Mills Pty Ltd (1990) 171 CLR 538; [1990] HCA 55, cited
Zabusky & Ors v Virgtel Limited [2022] QCA 223, considered
Zabusky & Ors v Virgtel Limited [2022] QSC 46, considered

COUNSEL: T Brennan SC, with R Scheelings, for the applicants
S S Monks for the respondent

SOLICITORS: Kenmore Mediation & Law Centre for the applicants
James Conomos Lawyers for the respondent

[1] **MULLINS P:** I agree with Bond JA.

[2] **BOND JA:** By a judgment published on 12 February 2021, and on the application of the respondent (**Virgtel**), Crow J permanently stayed a proceeding which the applicants had commenced in August 2020 and by which the applicants had sought to enforce a Nigerian money judgment. Crow J accepted Virgtel's argument that Queensland was a clearly inappropriate forum because Virgtel had no assets in Queensland and, therefore, the proceeding had no utility.

[3] If they wished to appeal, the applicants were required to file a notice of appeal on or before 12 March 2021. They did not do so. Instead, and on senior counsel's advice, they made the forensic decision to chart a different course, namely to wait until a contemplated material change to Virgtel's circumstances had occurred and then, based on those changed circumstances, to bring an application to lift the stay which had been ordered by Crow J.

[4] As it happened, the applicants waited a little over a year before bringing the application. And they did so before circumstances had changed in the manner which had been the subject of senior counsel's advice. The application failed before the Chief Justice in April 2022, and an appeal to this Court from her Honour's decision failed in November 2022.

[5] After those losses, and having obtained different legal advice, the applicants decided to embark on the course they had previously rejected, namely to seek to appeal from the decision of Crow J made one year and 10 months earlier. Accordingly, on 16 December 2022 they filed an application to this Court seeking an order pursuant to rules 7 and 748 of the *Uniform Civil Procedure Rules* that the time for filing and service of a notice of appeal be extended to 16 December 2022.

[6] For the following reasons, that application must be refused

Background facts

[7] On 28 May 2019, the Federal High Court of Nigeria ordered Virgtel to pay the applicants a sum of ₦1,386,537,386 together with a further sum of ₦60 million for costs.[1] The Nigerian Naira is the official currency of Nigeria. As at the date of the judgment by Crow J, 1 Nigerian Naira converted to about 0.0035 Australian dollars, so at that time it appeared that the value of the judgment was of the order of $4.8 million for the principal sum and $210,000 for costs.

1 Reasons in the primary judgment at [3].

[8] The applicants subsequently sought to enforce the Nigerian judgment in Queensland. On 7 August 2020, the applicants were granted leave to serve the originating process outside of Australia in accordance with r 126 of the UCPR. On 17 August 2020, the applicants filed a claim and statement of claim.[2]

[9] On 15 October 2020, having been served with the originating process, Virgtel filed a conditional notice of intention to defend.[3] On 29 October 2020, Virgtel filed an application to stay the applicants' enforcement action.

[10] Before Crow J, Virgtel submitted that the company was a "mere 'empty shell'",[4] that it had no assets in Queensland and that it carried on no business in Queensland or elsewhere in Australia,[5] thus rendering Queensland an inappropriate forum in which to enforce the Nigerian judgment.

[11] The applicants opposed Virgtel's application, arguing that Virgtel had assets by way of its interest in two particular funds of monies held on trust. It is convenient to refer to those funds as the first trust fund and the second trust fund. Some further background must be set out to explain how those funds came to exist.

[12] The first trust fund came to existence in this way:

(a) In proceeding 6547/05 Virgtel and three other applicants (**the van Leeuwen interests**) sued Mr Harvey Zabusky, Mr Erez Zabusky (who are the first and second applicants before this Court) and four other respondents for damages and an account in respect of services which Virgtel alleged had been provided in Nigeria. It is convenient to refer to the respondents in that litigation as **the Zabusky interests**.

(b) Interlocutory orders made by Daubney J resulted in Mr Hendrik van Leeuwen and his wife Ms Maria van Hal satisfying orders requiring the van Leeuwen interests to pay security for costs and security for an undertaking as to damages by making three separate payments totalling about $650,000 into the trust account of the solicitors who acted for the Virgtel and the van Leeuwen interests, there to be held on trust. Virgtel itself had not been the source of any of those monies.

(c) Those monies are still held on trust, presumably awaiting an order by the Court directing the manner by which they may be dealt with.

[13] The second trust fund came to existence in this way:

(a) In proceeding 4405/10 Mr Harvey Zabusky as first applicant and Virgtel as second applicant (Mr Zabusky purportedly acting on behalf of Virgtel), filed an originating application against Mr Van Leeuwin as first respondent and the solicitors who had acted for Virgtel and the van Leeuwen interests in proceeding 6547/05 as second respondent, seeking injunctions to restrain Mr Van Leeuwin from providing instructions to those solicitors in respect of any proceeding including proceeding 6547/05.

(b) Interlocutory orders made by Daubney J resulted in a sum of not less than $326,329.13 being paid by the solicitors for the Zabusky interests into an

2 ARB1 at 14 to 21.
3 ARB1 at 22.
4 ARB2 at 36.
5 ARB2 at 205.

interest-bearing bank account there to be held on trust pending the determination of proceeding 6547/05 or further order by the Court. Those monies represented amounts which the Zabusky interests were required to pay consequent upon quantified costs orders made against the Zabusky interests in proceeding 6547/05 in favour of the applicants in that proceeding.

(c) The relevant costs which the applicants in proceeding 6547/05 had incurred (and which the Zabusky interests had been ordered to pay) were payments which had been made to their solicitors in that proceeding for legal fees. Since Virgtel had been entirely bereft of cash since 2001 the payments had been made personally by Mr Van Leeuwin, Mr Van Leeuwin's late wife, Ms Van Hal, and other companies controlled by Mr Van Leeuwin.

[14] Before Crow J Virgtel submitted that it had no interest in either of the trust funds.[6]

[15] Crow J observed that the "clearly inappropriate forum" test governed the exercise of the court's discretion to stay the action,[7] citing the reasons of Mason CJ and Deane, Dawson and Gaudron JJ in *Voth v Milandra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554:

> "First, a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case. Thirdly, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised 'with great care' or 'extreme caution'."

[16] Crow J observed, and the parties accepted, that if Virgtel had no assets in Queensland then Virgtel would have satisfied the *forum non conveniens* test.[8] His Honour noted that the applicants had been unable to identify any assets or chattel of Virgtel in Queensland outside of the funds held on trust, and then turned to consider whether those funds could be considered to be assets of Virgtel.

[17] Crow J concluded that the applicants had "[found] themselves in the difficult position of asserting that trust funds held by solicitors pursuant to two specific court orders [were] Queensland assets of Virgtel in circumstances where none of the money held in trust was contributed by Virgtel".[9] Crow J held that the money in the funds could not be considered the property of Virgtel "in any sense within (or even outside) the State of Queensland".[10] His Honour found that Virgtel did not have any assets in Queensland and, accordingly, Queensland was an inappropriate forum for resolution of the issues between the applicants and Virgtel. His Honour ordered that the proceedings initiated by the applicants to enforce the Nigerian money judgment be stayed, with the parties to provide submissions as to costs.

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6 ARB2 at 36.
7 Reasons in the primary judgment at [13].
8 Reasons in the primary judgment at [13].
9 Reasons in the primary judgment at [28].
10 Reasons in the primary judgment at [34].

[18] The applicants were disappointed in the outcome which they had obtained before Crow J. The first applicant, himself a recently admitted legal practitioner, thought that the applicants should appeal.

[19] On 14 February 2021, and to that end, the first applicant provided to the junior counsel who had argued the case before Crow J a six-page legal position paper together with relevant authorities. The first applicant suggested that he had identified critical errors both in fact and in law which had been made by Crow J.

[20] Junior counsel advised the first applicant against an appeal. He suggested that the first applicant should confer with senior counsel.

[21] By letter dated 15 February 2021, Virgtel's solicitor had advised the applicants of Virgtel's intention to seek an order that the applicants pay Virgtel's costs of the application before Crow J and of the proceeding.

[22] On 17 February 2021, the first applicant conferred with senior counsel. Save in the following respect, the applicants refused to waive privilege in relation to whatever occurred during that conference. The first applicant deposed that senior counsel advised that the applicants should "await the assessment of the expected costs order in favour of [Virgtel] … and then file an application to seek the lifting of the permanent stay ordered by Crow J."

[23] The applicants accepted junior counsel's advice not to appeal and senior counsel's advice just mentioned. As to the former, they did not cause a notice of appeal to be filed by 12 March 2021. As to the latter, on 19 February 2021, the applicants' solicitor sent to Virgtel's solicitor a letter, settled by senior counsel, which advised that the applicants could not resist a costs order against them, but which also communicated the applicants' position that once a costs order was assessed, Virgtel would then have an asset in Queensland, being the chose in action to recover assessed costs. The letter foreshadowed the applicants' intention at an appropriate time to seek to have the stay lifted.

[24] On 22 February 2021, Crow J ordered the applicants to pay Virgtel's costs of the proceeding and of the stay application.

[25] About a year later, on 21 February 2022, the applicants did apply to have the permanent stay lifted, although, contrary to senior counsel's advice, they had not waited for any assessment of Virgtel's costs payable pursuant to the order made by Crow J.

[26] On 14 March 2022, the application was argued before the Chief Justice. The applicants, by a new senior counsel, told the Chief Justice that there had been no appeal from the decision of Crow J and there was no challenge to the findings which his Honour had made. The applicants argued that there had been a material change of circumstances since the stay was granted, justifying an order lifting the stay on two grounds –

(a) first, as a consequence of Crow J having made the costs orders in Virgtel's favour, Virgtel did now have a substantial asset in Queensland; and

(b) second, in another proceeding subsequent to Crow J's decision, the applicants contended Virgtel had made a submission which ought to be construed as conceding that it did have assets in the jurisdiction.

[27] The Chief Justice published her reasons for judgment dismissing the application on 7 April 2022.[11]

[28] The Chief Justice rejected the first ground on the basis that she was persuaded that a third party had paid all the legal costs associated with the proceeding for Virgtel, and that the third party would be entitled to the benefit of any costs orders made in favour of Virgtel. Her Honour thought that the appropriate legal conclusion was that no one but the third party was entitled to the benefit of the costs order. The costs order was not, properly considered, an asset in the hands of Virgtel, to which resort could properly be had by a proceeding seeking to enforce a foreign judgment. Virgtel remained an entity with no assets in Australia or anywhere else.

[29] As to the second ground:

(a) The proceeding to which the argument related was proceeding 6547/05.

(b) The applicants in proceeding 6547/05 (which, it will be recalled, included Virgtel) had the benefit of a costs order against the respondents in that proceeding.

(c) Those respondents (which, it will be recalled, included the present first and second applicants) also had the benefit of costs orders against the applicants in that proceeding.

(d) The respondents had sought an order for payment out to them of a sum of money from the first trust fund.

(e) The group of applicants had submitted that the order should not be made because it was not clear that on a set off the costs order in favour of the group of respondents would exceed the costs orders in favour of the group of applicants by the amount of the monies in Court or at all.

(f) The Chief Justice rejected the present applicants' submission that the submission in proceeding 6547/05 could be read as Virgtel contending that it had assets within the jurisdiction. The submission that there could be a set off of the character suggested did not mean that Virgtel had an asset in Queensland.

[30] The applicants appealed the orders made by the Chief Justice. They filed their notice of appeal within time on 3 May 2022. The appeal was argued by the first applicant on behalf of the applicants on 5 September 2022 and the Court of Appeal published its reasons for judgment dismissing the appeal on 11 November 2022.

[31] The Court of Appeal rejected the applicants' argument that the costs order made by Crow J was a new fact entitling the applicants to be relieved from the stay (to use the language of r 668) or constituted a proper ground for lifting the stay (to use the language of Lord Denning MR in *Cooper v Williams* [1963] 2 QB 567 at 581).[12] The Court of Appeal concluded that the costs order was a consequence of the applicants' abuse of process in starting a proceeding in a clearly inappropriate forum, that conclusion being the effect of the primary judgment. The making of an order which would provide Virgtel with a partial indemnity for the consequences of

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11 *Zabusky & Ors v Virgtel Limited* [2022] QSC 46.

12 *Zabusky & Ors v Virgtel Limited* [2022] QCA 223 per Bradley J, with whom Mullins P and Cooper J agreed, at [7] to [15].

that misconduct did not change its position. It did not transform the Supreme Court of Queensland into a forum that was no longer clearly inappropriate for enforcement of the foreign judgment.

[32] Despite the fact that its view in relation to the costs order justified dismissing the appeal, the Court of Appeal examined and rejected the merits of the seven grounds of appeal argued before it. The Court concluded that the appellants had not established that the Chief Justice had made any error which would justify setting aside the orders which she had made.

[33] After his loss in the Court of Appeal, the first applicant sought the advice of two further senior counsel as to the prospects of an application to the High Court for special leave to appeal. Those senior counsel were not sanguine as to the prospects of such an application but advised that the primary judgment was "questionable". They advised the first applicant that if he was to undertake any appeal, he would be better off appealing the orders made in the primary judgment. The first applicant deposed that they advised "… the only issue in the way of that course was the fact that I had left it so long".

[34] The application presently before the Court was filed 16 December 2022.

Consideration

[35] Rules 7 and 748 of the UCPR are in the following terms:

> "**7 Extending and shortening time**
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> (1) The court may, at any time, extend a time set under these rules or by order.
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> (2) If a time set under these rules or by order, including a time for service, has not ended, the court may shorten the time.
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> *Note*—
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> A time allowed or provided for under these rules is calculated according to the *Acts Interpretation Act 1954*, section 38 (Reckoning of time).
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> **748 Time for appealing**
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> A notice of appeal must, unless the Court of Appeal orders otherwise—
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> (a) be filed within 28 days after the date of the decision appealed from; and
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> (b) be served as soon as practicable on all other parties to the appeal."

[36] Rule 7 is a general power and r 748 is the power specifically applicable to the applicants' circumstances. Obviously, those powers, like all discretions conferred by the rules, are to be applied by the Courts bearing firmly in mind the provisions of r 5, namely:

> "**5 Philosophy—overriding obligations of parties and court**

(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

(2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

Example—

The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court."

[37] In *Osachy v O'Sachy* [2013] QCA 212, Gotterson JA (with whom de Jersey CJ and Mullins J agreed), observed in relation to an application under r 748:

> "It is well settled that in considering applications of this kind, factors such as the explanation for the failure to commence within time; action taken by the applicant, such as informal notice to the respondent of the intention to appeal; prejudice to the respondent; potential for unsettling other people or established practices; the merits of the appeal which it is sought to institute and general considerations of fairness are all relevant factors to the exercise of the discretion."

[38] His Honour's remarks plainly were not intended to be exhaustive of the considerations which are relevant to an exercise of the discretion of the present kind. Nevertheless, it is as well to observe explicitly that considerations also necessarily relevant to the exercise of the present discretion include these related considerations (which may well overlap with some of the matters to which his Honour referred):[13]

(a) the philosophy stated in r 5;

(b) the public interest in the timely, cost-effective and efficient conduct of modern civil litigation; and

(c) the maintenance of public confidence in the administration of justice.

[39] The applicants initially chose not to appeal the orders made by Crow J in the primary judgment. Instead they chose an alternative forensic course which, on advice, they believed was best suited to the attainment of their goal of lifting the permanent stay which had been ordered by Crow J. That course involved

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13 *UBS AG v Tyne* (2018) 265 CLR 77 at [38]; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [34].

prosecution of an application before the Chief Justice and an appeal to the Court of Appeal. The chosen procedural course failed.

[40] The applicants suggest that there is no recognizable prejudice to Virgtel which would result from the course they now seek to pursue because Virgtel is a shelf company with no assets in the jurisdiction. That misses the point. The course they chose resulted in a third party incurring costs on behalf of Virgtel. If the applicants are permitted to start again, that party will be prejudiced. It would be quite unfair to that party and indeed to Virgtel to allow that course. It would be to sanction a gross breach by the applicants of their implied undertaking pursuant to r 5(3) of the UCPR.

[41] The applicants contend that there are merits to their appeal. They now want to argue, contrary to the way in which their case was argued before Crow J, that the *forum non conveniens* test does not apply to enforcement proceedings and, even if it did, the Nigerian judgment had utility because it might be used to found a set off in relation to costs orders made against the applicants in Queensland. It is not necessary to consider the merits of those arguments. The applicants assessed the merits of an appeal with the benefit of legal advice and rejected that course. The applicants cannot now be permitted to go back to revisit the course they initially assessed and rejected. To permit them so to do would fly in the face of the three considerations mentioned at [38] above. The applicants' explanation that their legal advice has now changed is not a sufficient justification for permitting that course.

[42] The application for an order that the time for filing and service of a notice of appeal be extended to 16 December 2022 must be refused. The applicants should pay the respondent's costs of the application.

[43] **DAVIS J:** I join in the orders proposed by Bond JA for the reasons his Honour gives.