SUPREME COURT OF QUEENSLAND

CITATION:	*Zabusky & Ors v Virgtel Limited* [2021] QSC 17
PARTIES:	**HARVEY ZABUSKY** (first plaintiff/first respondent) **EREZ ZABUSKY** (second plaintiff/second respondent) **D.A. WERBER LIMITED (RC: 26128)** (third plaintiff/third respondent) **v** **VIRGTEL LIMITED (IBC NO 311178)** (defendant/applicant)
FILE NO/S:	BS No 8849 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 February 2021
DELIVERED AT:	Rockhampton
HEARING DATE:	10 December 2020
JUDGE:	Crow J
ORDER:	**1. The proceedings, BS No 8849 of 2020, be permanently stayed.** **2. If the parties cannot agree as to the appropriate costs order, then they are to file and serve submissions as follows:** **a. The respondents within seven days of the delivery of these reasons; and** **b. The applicant within 14 days of the delivery of these reasons.**
CATCHWORDS:	COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – GENERAL PRINCIPLES – where the respondents commenced proceedings in Queensland to enforce an order of the Federal High Court of Nigeria against the applicant company – where the applicant company seeks to have the proceedings permanently stayed on the basis there is insufficient, or no jurisdictional nexus at all with Queensland – where the applicant contends that Queensland is clearly the inappropriate forum – where the applicant has no real assets or chattels in Queensland or Australia – where the respondent contends that monies, totalling over $1 million, contained in two trust accounts pursuant to orders of

the Supreme Court of Queensland are assets of the applicant – whether the trust monies are assets of the applicant – whether there is sufficient jurisdictional nexus to Queensland – whether Queensland is the appropriate forum

Harmer v Commissioner of Taxation (1991) 173 CLR 264; [1991] HCA 51, followed
Voth v Milandra Flour Mills Pty Ltd (1990) 171 CLR 538; [1990] FCA 55, followed
White v Verkouille (1990) 2 Qd R 191; [1989] QSC 421, cited
Zabusky & Anor v Van Leeuwen & Anor [2011] QSC 270, cited

COUNSEL: S S Monks for the applicant
C Wilson for the respondents

SOLICITORS: James Conomos Lawyers for the applicant
Hayes & Co Lawyers for the respondents

[1] The current application of the defendant for a permanent stay of proceedings is the most recent instalment of a decades-long, multi-jurisdictional litigation between the first plaintiff, Mr Harvey Zabusky (and interests associated with him) and, now that both Mr Hendrik van Leeuwen and Mrs Maria van Hal have passed away, Mr Paul Simonet (and interests associated with him).

[2] The history of the first several years of litigation between 2005 and 2011 is described by Daubney J *in Zabusky & Anor v Van Leeuwen & Anor* [2011] QSC 270. Since then there have been several judgments by this court and the Court of Appeal, a final judgment of the Federal High Court of Nigeria on 28 November 2019 ("Nigerian judgment") and judgments of Bannister J in the British Virgin Islands. For completeness' sake, there were also proceedings instituted in the Victorian Civil and Administrative Tribunal ("VCAT"), however those proceedings were the subject of a confidential settlement.[1]

[3] Relevantly, in respect of the current application, on 28 May 2019, the Federal High Court of Nigeria ordered the defendant, Virgtel Ltd IBC 311178 ("Virgtel"), to pay to the plaintiffs the sum of ₦1,386,537,386 (Naira being the official currency of the Federal Republic of Nigeria)[2] together with a further sum of ₦60 million for costs.

[4] Under the *Foreign Judgments Act* 1991 (Cth),[3] a foreign money judgment is enforceable in Australia if it is a judgment of a court identified in the *Foreign Judgments Regulations* 1992 (Cth). The Federal High Court of Nigeria is not identified in the regulations. The *Foreign Judgments Act* 1991 (Cth) expressly preserves the common law by which a foreign judgment, made by a court not listed in the regulations, may be recognised.[4]

[5] Therefore, to enforce the judgment in Queensland, the plaintiffs must rely upon the common law rules permitting enforcement of foreign money judgments.[5]

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1 *Zabusky & Anor v Van Leeuwen & Anor* [2011] QSC 270 at [4].
2 One Nigerian Naira equals $A0.0035 (as at publication).
3 *Foreign Judgments Act* 1991 (Cth) ss 5, 6.
4 *Foreign Judgments Act* 1991 (Cth) s 12(3).
5 *White v Verkouille* (1990) 2 Qd R 191 at 194 per McPherson J.

Background

[6] On 5 August 2020 the plaintiffs, as applicants, filed an originating application in the Brisbane Supreme Court (BS No 8466 of 2020) seeking, *inter alia*, substituted service upon the defendant, Virgtel, a company incorporated in the British Virgin Islands.

[7] On 7 August 2020, Boddice J made orders for substituted service upon the respondent requiring service of the Claim and Statement of Claim to be effected upon the respondent by way of:

(a) courier service to the registered office of defendant in the British Virgin Islands;

(b) attachment to an email sent by the plaintiff's solicitor to the email address of the Registered Agent of defendant in the British Virgin Islands; and

(c) email attaching the Claim and Statement of Claim sent by the plaintiff's solicitors to Mr Paul Simonet, a director of the defendant, Virgtel.

[8] On the 17 August 2020, the plaintiffs then filed a Claim and Statement of Claim, to bring a claim at common law for the enforcement of the Nigerian Judgment, initiating the proceeding presently being dealt with (BS No 8849 of 2020).

[9] A conditional notice of intention to defend was filed on 15 October 2020, in which the defendant disputed the jurisdiction of the Supreme Court of Queensland.

[10] On 29 October 2020, the defendant filed an application seeking:[6]

1. A declaration pursuant to rule 16(b) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") that the originating process has not been properly served upon the defendant.

2. In the alternative to paragraph 1, an order pursuant to rule 16(f) of the UCPR, rule 127 of the UCPR, or the inherent jurisdiction of the court, that the service of originating process be set aside because of the plaintiff's non-compliance with:

    a. rule 128 UCPR; and

    b. paragraph 2 of the orders dated 7 August 2020 made by Boddice J in proceeding BS No 8466 of 2020.

3. Further or alternatively to paragraphs 1 and 2, an order pursuant to rule 16(g) UCPR, rule 127 UCPR, or the inherent jurisdiction of the court, that the proceeding be stayed because:

    a. the originating process had not been properly served; or

    b. there was and is no jurisdictional nexus, or no sufficient jurisdictional is insufficient jurisdictional nexus, between the claim and the Supreme Court of Queensland; or

    c. the Supreme Court of Queensland is a clearly inappropriate forum.

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6 Defendant's application filed 29 October 2020.

[11] Issues pertaining to service were later cured and as such the defendant does not pursue the orders sought in paragraph 1, 2 and 3(a) of their application.

[12] Virgtel submits that as they have no assets in Queensland and will never have any assets in Queensland, therefore the proceeding has no utility. This renders Queensland an inappropriate forum within the meaning of r 127(2)(b) of the UCPR and as such the court should stay the proceeding permanently on the basis of *forum non conveniens*.

Forum non conveniens

[13] The "clearly inappropriate forum" test governs the exercise of the court's discretion to stay the action:[7]

> "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'."

[14] The parties accept that, if Virgtel has no assets in Queensland, then Virgtel has satisfied the *forum non conveniens* test. Mr Simonet, director of Virgtel, deposes that Virgtel does not have any assets in Queensland nor carry on business in Queensland nor indeed in Australia.[8] The first plaintiff, Mr Harvey Zabusky has deposed that "…Virgtel has no assets anywhere in any jurisdiction anywhere in the world except in Queensland".[9]

[15] The plaintiffs are unable to identify any real assets or chattels in Queensland, instead submitting that money held in two separate trusts pursuant to court orders are assets of Virgtel in Queensland. The funds are held in two separate proceedings issued out of the Supreme Court of Queensland, namely proceedings BS No 6547 of 2005 and BS No 4405 of 2010. The monies total a little over $1 million.

[16] The issue distils itself to an assessment of the accuracy of that submission.

Funds Held Pursuant to Order in Proceeding BS No 6547 of 2005

[17] On 10 August 2005, Virgtel (and three other applicants) brought an action against Mr Harvey Zabusky, Mr Erez Zabusky (and four other respondents) for damages

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7 *Voth v Milandra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.
8 Affidavit of Paul Michel Simonet filed 17 November 2020.
9 Paragraph 105 to the affidavit of Harvey Zabusky filed 7 December 2020.

and an account in respect of very small aperture terminals ("VSAT") satellite-based telecommunications services provided by Virgtel in Nigeria. The action was framed as a derivative action on behalf of another company, Virgin Technologies Limited, and related to conduct occurring outside of Australia.

[18] On 29 February 2008, Daubney J made orders which provided, *inter alia*, that:

(a) Virgtel (and the other applicants) provide $400,000 as security for the respondents' costs of the action to the close of pleadings, to be held by the applicants' solicitors in their trust account pursuant to the order;

(b) Virgtel (and the other applicants) provide $250,000 as security for the applicants' undertaking as to damages given to the Chief Justice on 10 August 2005 and to Muir J on 9 November 2005 to be held by the applicants' solicitors in their trust account pursuant to the order.

[19] A copy of the order shows that paragraph 2(b) provided:[10]

> "The said $400,000 for security for costs is constituted as a part of the $500,000 presently held on trust by the Applicants' solicitors pursuant to the undertakings referred to in Order 1, and shall continue to be held by the Applicant's solicitors in their trust account pursuant to this Order for security for costs until further order."

[20] In similar terms as above, the applicants were required to cause the balance $100,000 of the $500,000 presently held on trust by the applicants' solicitors to be paid and then, by paragraph 3(b)(ii)(A) and (B), the applicants had a choice between payment of a further $150,000 into the trust account of the applicants' solicitors or by provision of security (to the Registrar's satisfaction).

[21] It is uncontroversial that the $650,000 was paid as follows:[11]

(a) On 4 August 2005 Mr Hendrik van Leeuwen paid €69,900 into the applicants' then-solicitors' account, Gadens Lawyers Melbourne. That represented a little over A$100,000.

(b) The second instalment paid by Maria Van Hal (Mr van Leeuwen's wife) on 14 November 2005 in the sum of €250,000. This represented an additional A$400,000 which constituted the original $500,000 as referred to.

(c) Further on 4 April 2008 Mr Hendrik van Leeuwen transferred a further A$150,000 pursuant to paragraph 3(b)(ii)(A) of the order of Daubney J directly to the applicants' then-solicitors James Conomos Lawyers.

[22] On 24 October 2008, Justice Daubney ordered:[12]

> "1. For the purpose of the order of Justice Daubney made on 29 February 2008 the reference to the Applicants' solicitors and the Applicants' solicitors' trust account shall mean James Conomos Lawyers.

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10 Exhibit APR-1, page 48-49 to the affidavit of Adrian Peter Robins filed 29 October 2020.
11 Affidavit of Paul Michel Simonet filed 17 November 2020.
12 Exhibit APR-1, page 51-52 to the affidavit of Adrian Peter Robins filed 29 October 2020.

2. The Applicants' solicitors, James Conomos Lawyers, shall file and serve an affidavit deposing to the receipt of the sum of $650,000 from the former solicitors of the Applicants', Gadens Lawyers Melbourne, within seven (7) days of receipt of that sum, which sum shall be held on the same basis as set out in the order of Justice Daubney on 29 February 2008."

[23] Mr James Conomos then provided an affidavit as requested which records the receipt of the sum of $650,000 and that he, as trustee, would hold that sum pursuant to the order of Daubney J.

Funds Held Pursuant to Order in Proceeding BS No 4405 of 2010

[24] On 29 April 2010, Harvey Zabuski as first applicant, and purportedly acting on behalf of Virgtel as second applicant filed an originating application against Hendrik Van Leeuwin as first respondent and James Conomos Lawyers as second respondent seeking injunctions to restrain Mr Van Leeuwin from providing instructions to James Conomos Lawyers in respect of any proceeding including proceeding BS No 6547/05.[13]

[25] Upon the provision of undertakings from the parties, Daubney J made an order by consent on 7 May 2010. Relevantly, one undertaking in particular, made by the second respondent, provided that following the successful deposit of the sum of not less than $326,329.13 by or on behalf of the applicant into the trust account of the applicant's solicitors, the second respondent would provide written instructions to the Sherriff of Queensland to take no further steps to effect the sale of property the subject of an enforcement warrant in proceedings BS No 6547/05.

[26] The order provided, *inter alia*, that the trust funds the subject of the undertaking be held until "the determination in the 2005 proceedings, of the 'retainer issues'…or until further order of the court".[14]

[27] The source of those funds is set out the reasons of Daubney J in *Zabusky & Anor v Van Leeuwin & Anor* [2011] QSC 270 at [27]. As found by Daubney J, Virgtel had been entirely bereft of cash since 2001 and accordingly, money was provided personally by Mr Van Leeuwin, Mr Van Leeuwin's late wife, Ms Van Hal, and companies controlled by Mr Van Leeuwin, namely Viscaya and Amadora SA.

Conclusion

[28] The plaintiffs find themselves in the difficult position of asserting that trust funds held by solicitors pursuant to two specific court orders are Queensland assets of Virgtel in circumstances where none of the money held in trust was contributed by Virgtel.

[29] In *Harmer v Commissioner of Taxation* (1991) 173 CLR 264 ("*Harmer*"), Mr Harmer, a solicitor (and two other solicitors), received a sum of money that had been paid into court by a company in inter-pleader proceedings. The money was then placed into an interest-bearing account pending the determination of the

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13 Exhibit APR-1, page 53-56 to the affidavit of Adrian Peter Robins filed 29 October 2020.

14 Exhibit APR-1, page 58 to the affidavit of Adrian Peter Robins filed 29 October 2020.

proceedings. The High Court determined that until the resolution of the competing claims in the inter-pleader proceedings, none of the claimants were presently entitled to an interest in the amount deposited within the meaning of s 97(1) of the *Income Tax Assessment Act* 1936 (Cth) since the money was not subject to an existing trust at the time it was deposited into the account.[15] Accordingly, the solicitors were required to pay tax upon the interest derived from the interest bearing accounts.

[30] In *Harmer* the High Court said:[16]

> "There are many circumstances in which trust money can be paid into court by a trustee either pursuant to an order made on the application of a beneficiary or pursuant to an application made by the trustee himself or herself…In such a case, the funds paid into court remain subject to any pre-existing trust notwithstanding the payment in. If some person or persons were presently entitled to the corpus or income before payment in, the fact of payment in to await the orders of the court will not, of itself, displace that present entitlement. If entitlement is disputed, the function of the court will be to identify existing interests in the money paid into court rather than to create new ones."
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> (Footnotes omitted.)

[31] The High Court went on to say:[17]

> "As the orders actually made demonstrate, the function of the court in the present case was to determine the conflicting claims and counterclaims of the claimants as against Riverhall as a debtor. The moneys paid into court were not themselves the subject matter of dispute but were held to satisfy any order, including any order for costs, made by the court consequent upon its determination of those conflicting claims and counterclaims. Once the moneys were deposited with the Building Society in the names of the appellants holding as trustees, the moneys were held by them in that capacity to be dealt with in accordance with the order of the court and not otherwise. It is unnecessary to consider whether the contingent interests of the claimants in the moneys paid into court could be aggregated into a totality of beneficial ownership or whether the powers of the Supreme Court to make orders affecting the moneys, including orders as to costs, meant that one of the elements of an ordinary non-purpose trust was lacking. It suffices to say that the trust upon which the moneys were held was a trust for statutory purposes…and that the legislative provisions, including Rules of Court, applicable to govern the payment of the moneys into court and their subsequent application effectively overrode any need of that element."
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> (Footnotes omitted.)

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15 *Harmer v Commissioner of Taxation* (1991) 173 CLR 264.
16 *Harmer v Commissioner of Taxation* (1991) 173 CLR 264 at 272.
17 *Harmer v Commissioner of Taxation* (1991) 173 CLR 264 at 274.

[32] In the present case, the $650,000 is held on trust by James Conomos Lawyers subject to the specific orders made of Daubney J.

[33] Similarly, in respect $326,329.13 is held on trust pursuant to the order of Daubney J of 7 May 2010 in BS No 4405/10, these are trust funds held pursuant to the specific provisions of that order, namely that the money be held until the determination of the retainer issues in the 2005 proceedings or further order of court.

[34] The funds of money cannot be considered the property of Virgtel in any sense within (or even outside) the State of Queensland. Even the trusts resulting from payment by Mr van Leeuwin, Ms van Hal, Viscaya and Amadora SA have been displaced by the trusts created by the court orders. I conclude that Virgtel does not have any assets in Queensland and accordingly, Queensland is the inappropriate forum for resolution of the issues between the current plaintiffs and defendants. As Queensland is clearly an inappropriate forum it is not necessary to consider whether the Nigerian judgment could be recognised at common law.

Orders

[35] As I consider that Queensland is an inappropriate forum, the proceedings ought to be permanently stayed. I order that:

1. The proceedings, BS No 8849 of 2020 be permanently stayed.
2. If the parties cannot agree as to the appropriate costs order, then they are to file and serve submissions as follows:
    a. The respondents within seven days of the delivery of these reasons; and
    b. The applicants within 14 days of the delivery of these reasons.

[36] I will deal with any costs issues on the papers.