HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Jun 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S26/2021
File Title:	Deputy Commissioner of Taxation v. Huang
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	03 Jun 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **DEPUTY COMMISSIONER OF TAXATION**

Appellant

and

CHANGRAN HUANG

Respondent

APPELLANT'S REPLY

PART I: FORM OF SUBMISSIONS

1. This reply is in a form suitable for publication on the internet.

PART II: REPLY TO THE RESPONDENT'S ARGUMENT

2. The Respondent's Submissions (**RS**) overstate the requirements imposed by the language of r 7.35(4) of the FCR and seek to give to those requirements a field of operation they do not have, contrary to the rule's terms, context and purpose.

3. ***Re RS [7]-[9]:*** At FC [42]-[43] [**CAB 65-66**], the Full Court imposed upon r 7.32 a requirement which was mandatory and jurisdictional: see Appellant's Submissions (**AS**) at [17]-[18].[1] Rule 7.32 imposes no condition that it is "necessary" that an applicant prove, or "satisfy [a] test" (FC [47] [**CAB 67**]), that there be a realistic possibility of enforcement in any foreign state to which the order relates. The requirement was "additional" as it was unsupported by, or impermissibly glossed, the terms of r 7.32, which mention neither "enforcement" nor a "realistic possibility".

4. Contrary to the unstated assumption underlying RS [9], r 7.35(4) does not limit the Court's power under r 7.32.[2] It was r 7.32 that the Full Court identified as the source of the mandatory jurisdictional precondition it discerned, from the purpose described

[1] In his judgment granting the stay pending special leave, Besanko J did not deny that the Full Court had imposed a jurisdictional precondition: *Huang v DCT* [2020] FCA 1518 at [16]-[17] [**ABFM 125-126**].

[2] This is confirmed by the development of the harmonised court rules, which "make it crystal clear that those criteria [including as reflected in r 7.35(4)] are not exhaustive and are not set in stone": Biscoe, "Freezing Orders Hot Up", *Bar News* (Summer 2005/2006) 59 at 61; see also *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 321G (Gleeson CJ) and 327D-G (Rogers A-JA), eschewing inflexible rules.

Filed on behalf of the Appellant by:
Craddock Murray Neumann Lawyers
Level 21, 227 Elizabeth Street
Sydney NSW 2000
DX 1411 Sydney

Date of this document: 3 June 2021
Ref: KXM:2100118
Telephone: (02) 8268 4000
Email: KMetlej@craddock.com.au

in r 7.32 and the use therein of the word "danger": FC [42]-[43] [**CAB 65-66**]. If r 7.32, on its proper construction, does not impose such a precondition, then nothing in r 7.35(4) operates by implication to limit or condition the power it confers. For that reason alone, r 7.35(4) cannot be "fatal" to the Deputy Commissioner's case: cf RS [9]. Indeed, it is difficult to see how it is even relevant. That conclusion is reinforced by the fact that nothing in r 7.35(4) affects the power to make a freezing order if the Court considers it is in the interests of justice to do so (r 7.35(6)); and nothing in Div 7.4 diminishes the inherent, implied or statutory jurisdiction to make such an order (r 7.36).

5. ***Re RS [10]-[13]:*** The unstated and incorrect assumption that r 7.35(4) limits the Court's power under r 7.32 infects the entirety of RS [10]-[13]. However, even if the Respondent was justified in his extensive focus upon r 7.35(4) (which is denied), his submissions concerning that rule should be rejected. The causal connection required by the word "because" in r 7.35(4) is neither as specific nor as exhaustive as suggested at RS [10]. Rule 7.35(4) is satisfied where, having regard to all the circumstances, there is "a danger that a judgment or prospective judgment will be wholly or partly unsatisfied" because *any* of the three circumstances in para (a) and (b) "might occur" – namely that "the judgment debtor, prospective judgment debtor or another person absconds" (r 7.35(4)(a)); the assets of such a person are "removed from Australia or from a place inside or outside Australia" (r 7.35(4)(b)(i)); or such assets are "disposed of, dealt with or diminished in value" (r 7.35(4)(b)(ii)). Provided there is a "danger" that a judgment will be wholly or partly "unsatisfied" because of the possible occurrence of any of those circumstances, the rule is engaged.

6. In the context of both r 7.32 and r 7.35(4), "unsatisfied" means "unpaid". It does not mean "unenforced". Where r 7.35 requires the Court to have regard to whether there is a sufficient prospect that a judgment will be <u>enforced</u>, it does so expressly: see rr 7.35(2) and 7.35(3)(b), which apply, respectively, to a judgment given, or a cause of action justiciable, in another court. The express stipulation, in those limited circumstances, of a condition that there be "a sufficient prospect that the judgment will be … enforced by the Court" tells against construing references to whether a judgment may be "unsatisfied" as depending upon prospects of enforcement. That is particularly so given that the events that enliven r 7.35(4) are stated in terms that make no mention of enforcement, as they could reasonably have been expected to do had enforcement been intended to be relevant (given the terms of r 7.35(2) and (3)(b)).

7. For the above reasons, r 7.35(4) does not require an *ex parte* applicant to prove the availability of an enforcement mechanism in relation to assets located in every foreign state where assets may be held. All that is required is that the possible occurrence of any of the circumstances expressly identified in r 7.35(4)(a)-(b) would cause a danger that the judgment or prospective judgment would be wholly or partly unsatisfied.

8. The evidence before, and unchallenged findings made by, Katzmann J (see AS [9]) satisfied this causal requirement. The circumstances of Mr Huang's departure from, and inability to re-enter, Australia; his removal of assets from Australia; his gross understatement of income; his steps to sever ties with Australia; and the ease with which he was able to move assets between jurisdictions, created a danger that the (then-prospective) judgment would be wholly or partly unsatisfied by reason of one or more of the circumstances in r 7.35(4)(a)-(b).

9. ***Re RS [7](a), [12]:*** The reasoning of Deane J in *Jackson*[3] must be read in context. The High Court was there considering a freezing order that required the appellant to "provide security".[4] It was in that context that Deane J made the statement quoted at RS [7](a). However, his Honour went on to describe the purpose of a freezing order, in wide terms, as "to prevent a defendant from disposing of his actual assets … so as to frustrate the process of the court by depriving the plaintiff of the fruits of any judgment obtained in the action"; and observed that the Court has power to order a defendant to deliver assets, to appoint a receiver or to deprive a defendant of possession of an asset for the purpose of precluding its disposal, so as to defeat a judgment.[5]

10. ***Re RS [14]-[24]:*** Mr Huang has not pointed to any authority, anywhere in the common law world, to the effect that the enforceability of a judgment in a foreign jurisdiction is a precondition to the existence of the power to make an extraterritorial freezing order. Contrary to RS [15], the authorities at AS [33]-[38] do rise higher than to confirm the jurisdiction to make *in personam* freezing orders in respect of assets in foreign jurisdictions: they confirm that, to the extent relevant, considerations of enforceability go to the exercise of discretion, not to the existence of power;[6] and that unenforceability – whether legal or practical – should not be regarded as a bar to

---

[3] (1987) 162 CLR 612 at 625.
[4] (1987) 162 CLR 612 at 614, 624.
[5] (1987) 162 CLR 612 at 625-626.
[6] *Ballabil* (1985) 1 NSWLR 155 at 165F (Priestley JA); *Derby Nos 3 & 4* [1990] Ch 65 at 96G, 98A-B (Butler-Sloss LJ); *Masri* [2009] QB 450 at [132], [134]-[135] (Lawrence Collins LJ, with whom Neuberger and Ward LJJ agreed).

relief.[7]

11. ***Re RS [3](b), [25]-[28]:*** If the reference to "inability" in RS [3](b) is intended to convey an impossibility of enforcement, that overstates the evidence: the Deputy Commissioner's evidence did not establish that there was an "inability" to enforce a judgment in the PRC (including Hong Kong). The evidence was merely that, by reason of the matters summarised in AS [10], the deponent believed that a prospective judgment was "not likely" to be enforceable in the PRC (including Hong Kong).[8]

12. Contrary to the tenor of RS [26], compliance with a judgment is not optional. An assumption that a defendant, who is amenable to the Court's jurisdiction, will (or must) comply with a monetary judgment (see AS [43]) is not a prediction about a future factual state of affairs pertaining to any specific defendant. It is a systemic expectation that the Court is entitled to have, as a premise for analysis: it is commonly expressed in this and other contexts.[9] As such, it is not inconsistent with the premise of freezing orders. On the contrary, it conforms with the nature of judicial power as a final and binding determination of rights and liabilities. There is nothing oppressive about a Court taking such steps as it can to ensure that a judgment debtor uses his or her assets to satisfy a judgment debt: cf RS [13].

13. ***Re RS [29]-[33]:*** Relief by way of equitable execution is not confined to, although it undoubtedly includes, the appointment of a receiver.[10] It is a flexible set of remedies.[11] Consistently with ss 23 and 57(1) of the *Federal Court of Australia Act 1976* (Cth), "the guiding principle in the appointment of receivers in aid of enforcement" is "what is just and convenient in all the circumstances of the case".[12] The balancing of the

---

[7] *Derby Nos 3 & 4* [1990] Ch 65 at 81G-82A, 86E (Donaldson LJ, Neill LJ agreeing at 95E-F).

[8] Affidavit of Yi Deng sworn 16 September 2019 at [112]-[113] **[ABFM 41-42]**.

[9] See, eg, *Singh v Singh* (2009) 253 ALR 575; [2009] WASCA 53 at [35] (Pullin JA, with whom Martin CJ and Newnes AJA agreed); *In re Liddell's Settlement Trusts* [1936] Ch 365 at 374 (Romer LJ, with whom Greene LJ agreed); *Masri* [2009] QB 450 at [28]; *Derby Nos 3 & 4* [1990] Ch 65 at 81B (Donaldson LJ); see also at 97G-98B (Butler-Sloss LJ).

[10] See, eg, *Hall v Foster* [2012] NSWSC 974 at [16]-[17] (Ball J); *Aquaqueen Int'l Pty Ltd* [2016] NSWSC 508 at [40]-[41] (Kunc J). Contrary to RS [29], the Deputy Commissioner should not be prevented from relying on this new point. It is within the grant of special leave (see *FCT v Travelex Ltd* (2021) 95 ALJR 334 at [19]); it is not suggested that the point might have been met by calling evidence below (see *Talacko v Talacko* [2021] HCA 15 at [62]); and no prejudice flows from this Court now dealing with the point, which concerns an important question of principle not dependent on the resolution of any factual controversy, such that it is in the interests of justice that this Court address it.

[11] Heydon, Leeming & Turner, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (5th ed, 2015) at [29-065]-[29-070]; Finnane, Wood & Newton, *Equity Practice & Precedents* (2nd ed, 2019) at [9.90].

[12] *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468 at [75] (Allsop CJ, Besanko and Middleton JJ).

interests of the judgment debtor and the protection of a judgment creditor's "legitimate entitlement to practical enforcement of its monetary judgment" may be achieved, where appropriate, by staying the appointment of a receiver for a period, so as to give the judgment debtor an opportunity to pay the judgment debt.[13] Equitable relief in aid of enforcement is not confined to the particular form of order made in *Masri*.[14] The receivership remedy may extend to any asset, undertaking, right or income. The subject-matter, terms of appointment and powers conferred upon the receiver may be moulded so as to maximise the prospect of satisfaction of the particular judgment: depending upon the assets available and the terms of the order, the receiver may succeed in recovering funds without invoking any specific curial procedure in the foreign state.[15] The efficacy of such an order does not depend on recognition of the receivership by a foreign state, but rather on the acts that the judgment debtor (or others) may be compelled to do, or restrained from doing, so as to assist the receiver.

14. Both the identification, in principle, of the mandatory jurisdictional precondition at FC [42]-[43] [**CAB 65-66**], and its application by the Full Court to the particular circumstances here, cut across the availability and flexibility of equitable relief in aid of enforcement. The "danger" spoken of in both r 7.32(1) and r 7.35(4) is not restricted to assets against which legal forms of execution may issue. A Court is entitled to consider the danger that a prospective equitable order in aid of enforcement may be rendered less effective without a freezing order.

15. ***Re RS [34]-[41]:*** The "test" imposed at FC [42]-[43], [47] [**CAB 65-67**] does not turn on the *ex parte* duty of candour: it insists on proof, in all cases, of a realistic possibility of enforcement before the power to make a freezing order exists. The adverse practical consequences are accurately described at AS [24]-[28].

Dated: 3 June 2021

Stephen Donaghue
Solicitor-General of the Commonwealth
T: (02) 6141 4139
stephen.donaghue@ag.gov.au

Stephen Lloyd
Sixth Floor

T: (02) 9235 3753
stephen.lloyd@sixthfloor.com.au

Luke Livingston
New Chambers

T: (02) 9151 2065
livingston@newchambers.com.au

[13] *Gujarat NRE Coke* (2013) 304 ALR 468 at [76]-[78].
[14] [2009] QB 450 at [20]-[24], [28].
[15] See, eg, *Derby No 6* [1990] 1 WLR 1139 at 1150C-D (Dillon LJ; Taylor LJ and Staughton LJ agreeing).