



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**BETWEEN:**

**Deputy Commissioner of Taxation**

**Appellant**

**and**

**Changran Huang**

**Respondent**

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**RESPONDENT'S SUBMISSIONS**

**Part I: Form of submissions**

1. These submissions are in a form suitable for publication on the internet.

**Part II: Statement of issues**

2. The issues in this appeal are as follows:

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- (a) Did the Full Court of the Federal Court of Australia in *Huang v Deputy Commissioner of Taxation* [2020] FCAFC 141 (**FCJ**) require, as a jurisdictional pre-condition for the making of a freezing order, separate from and additional to the requirements of the *Federal Court Rules 2011* (Cth) (**FCR**), that an applicant for such an order prove that there is a realistic possibility that a judgment might be enforced against the assets the subject of the order? and

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- (b) In deciding whether to make a freezing order pursuant to r 7.32 of the FCR, can the Court be satisfied of the matters in r 7.35, particularly r 7.35(4), with respect to assets that are not realistically liable to execution or any other form of enforcement process?

3. In the respondent's submission, the Full Court:
- (a) did not hold that it is necessary, as a jurisdictional requirement, additional to the requirements of the FCR, that an applicant for a freezing order establish a realistic possibility of enforcement in respect of the assets the subject of the freezing order; but
  - (b) correctly held that the failure by the Deputy Commissioner to overcome evidence led by her of her inability to enforce any judgment in the People's Republic of China (**PRC**) (including Hong Kong) meant that she failed to satisfy the requirements in r 7.35(4). That is, she failed to show, in relation to the respondent's assets outside Australia, that there was a danger that a prospective judgment would be wholly or partly unsatisfied *because* the respondent's assets might be disposed of, dealt with or diminished in value.

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**Part III: Notice of a constitutional matter**

4. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

**Part IV: Appellant's narrative of facts or chronology**

5. The respondent does not contest the statement of material facts in Part V of the Deputy Commissioner's submissions dated 15 April 2021 (**AS**).

**Part V: Statement of the argument in answer to the appellant**

*No additional jurisdictional requirement*

- 20 6. The issue before the Full Court was whether the primary judge applied an incorrect test when she ordered a freezing order against the respondent's assets outside Australia on the basis only that it was "not impossible" that the Deputy Commissioner might, upon obtaining judgment, be able to enforce against those assets: FCJ [32].
7. The Full Court answered this question in the affirmative. Its reasoning in so doing involved the following steps:
- (a) The purpose of a freezing order made pursuant to r 7.32 is to prevent the frustration or inhibition of the Court's process by seeking to meet a danger

that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied: FCJ [41]. It is not “to introduce, in effect, a new vulnerability to imprisonment ... for alleged indebtedness, by requiring a defendant, under the duress of the threat of imprisonment for contempt of court, to find money ... to guarantee to a plaintiff that any judgment obtained will be satisfied”: *Jackson v Stirling Industries Ltd* (1987) 162 CLR 612 at 625 per Deane J. This recognises a purpose requirement for the making of a freezing order.

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- (b) If assets are already beyond the reach of the Court’s enforcement processes, there is no danger, in the sense of a realistic possibility, that the removal or disposition of the assets will frustrate or inhibit the Court’s processes: FCJ [42]. There is thus a causation requirement for the making of a freezing order.
- (c) In so far as assets outside Australia are concerned, proof of a realistic possibility of enforcement in the foreign State in which the assets are located is therefore necessary to satisfy both the purpose and causation requirements: FCJ [47].
8. Thus, without recognising any additional jurisdictional requirement, the Full Court rejected a “not impossible” standard of satisfaction for the causation requirement in r 7.35(4): FCJ [43].
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9. Moreover, the construction of r 7.32 and r 7.35(4) favoured by the Full Court does not qualify or limit the Federal Court’s power to dispense with the rules in r 1.34, make orders pursuant to r 7.35(6), or exercise the power conferred on it by s 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) (as preserved by r 7.36) to make such orders as the Court thinks appropriate. Nonetheless, the Deputy Commissioner does not now suggest that her application for a freezing order was brought otherwise than pursuant to r 7.32 in Division 7.4 of the FCR such that she was not required to establish the matters identified in r 7.35(4). As will be developed below, the requirement for the Deputy Commissioner to satisfy the Court of the matters prescribed in r 7.35(4) is fatal to her case.

*The Full Court's construction of r 7.35(4) is correct*

10. If a respondent's assets are beyond the reach of the Court's enforcement processes, their disposal, or any diminution in their value, will not affect the risk that a judgment against the defendant will be wholly or partly unsatisfied. The judgment will not be satisfied by recourse to those assets in any event. The causation requirement suggested by use of the word "because" in r 7.35(4) cannot, therefore, be satisfied. That a respondent, at the time of commencement of the relevant proceedings, holds assets which are not amenable to execution or some other enforcement process and which are thus not available to satisfy a judgment of the Court neither embarrasses the Court nor frustrates its processes.
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11. This would be so, even if one were to refrain from speaking, as the Full Court did, of "the Court's enforcement processes" and read the expression "the Court's process" as extending to non-curial processes for procuring the satisfaction of a judgment. Even on that premise, the Full Court correctly recognised that the Deputy Commissioner simply did not satisfy the causation requirement imported by the word "because" in r 7.35(4). Nothing in their Honours' reasons suggest that they allowed the respondent's appeal on the basis that the potential enforcement processes said by the Deputy Commissioner to be available were non-curial or non-judicial. It was immaterial, for example, whether or not bankruptcy or insolvency constituted a curial process: FCJ [38]. This is because, even if they did, the Deputy Commissioner led no evidence to establish that there was a realistic possibility that any non-curial enforcement procedure was available to her in respect of the respondent's overseas assets.
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12. Nor, in the circumstances posited above, could the purpose requirement in r 7.32 be satisfied. The only purpose that can be served by a freezing order in respect of assets that are beyond the reach of the Court's process is to expose the respondent to the possibility of contempt proceedings if he or she ever sought to deal with the assets, which threat will only dissipate if the respondent makes those assets available for the satisfaction of any judgment. The freezing order would thus operate as an instrument of coercion, directed to improving an applicant's or plaintiff's position relative to the
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status quo ante the making of the order. And this would be beyond the purpose identified in r 7.32.

13. A similar concern appears to underpin r 7.35(5)(b), which requires that before a freezing order can be made against a third party, the applicant must show that there is some process by which the third party may be obliged to disgorge assets or contribute towards satisfying the judgment or prospective judgment. In other words, the freezing order is predicated upon the existence of a process for compelling disgorgement by the third party; it is not, of itself, an instrument for compelling that disgorgement. In drafting the uniform rules eventually adopted in r 7.35, the Council of Chief Justices' Rules Harmonisation Committee was evidently concerned with ensuring that a freezing order is not made merely to oppress a person into making available assets in satisfaction of a judgment debt in the absence of any legitimate process by which those assets might be made available.

*The position in the authorities*

14. It is uncontroversial that the Federal Court has the power to make freezing orders in relation to matters in which it has jurisdiction. This is granted by s 23 of the FCA Act. The jurisdiction exercised by the primary judge was conferred by s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) as a matter arising under any laws made by the Parliament and the relevant federal cause of action was created by s 255-5 of Schedule 1 of the *Taxation Administration Act 1953* (Cth). Nothing in the Full Court's reasons curtails the fullness of that jurisdiction.
15. The authorities relied upon by the Deputy Commissioner at AS [33]-[38] do not rise any higher than to confirm that the Federal Court has jurisdiction to make in personam freezing orders in respect of assets outside Australia. They do not, however, supply an answer to:
- (a) whether or not r 7.35(4) imports a causation requirement of the sort identified in the reasons of the Full Court and further outlined above; and
  - (b) whether or not that causation requirement is satisfied merely by showing that it is "not impossible" that there may be some process by which the Deputy

Commissioner could directly or indirectly satisfy her judgment debts from assets otherwise apparently immune from execution.

16. Thus, in answer to AS [33], *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155 rises no higher than to support the uncontroverted proposition that the Federal Court has jurisdiction to make an in personam freezing order.
17. In so far as AS [35] is concerned, *Derby & Co v Weldon (Nos 3 and 4)* [1990] Ch 65 does not stand for the proposition that the existence of impediments to enforcement of a judgment is irrelevant to deciding whether to make a freezing order. Lord Donaldson, in that case, rejected the submission that a freezing order should not be made unless there were some mechanism to enforce compliance with that order (at 10 80G to 81G). But nothing that his Lordship said in the relevant passages addresses what is required in establishing that that there is a danger of non-satisfaction of a judgment “because” the defendant’s assets, especially those located outside the jurisdiction, might be disposed of, dealt with or diminished in value.
18. It is true that in allowing an appeal against the refusal of the primary judge to make a freezing order against the third defendant, his Lordship was untroubled (at 81G to 82B) by whether or not a judgment of an English court could be enforced in Panama, where the third defendant had no assets and in which an English judgment might not be enforceable (see 81F). But this was because his Lordship was satisfied that there were other jurisdictions in which the assets of the third respondent could be executed against (at 82A-82B). Far from being irrelevant, then, his Lordship expressly adverted to the prospects of enforcement. Similarly, Butler-Sloss LJ was satisfied that there may have been assets outside Panama and that there was no basis for finding that an English judgment would be unenforceable where those assets were located (at 97H-98A). It is accordingly incorrect to read *Derby (Nos 3 and 4)* as authority for dispensing with the causation requirement.
- 20 19. The same may be said of *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139.
20. At AS [38] the Deputy Commissioner relies on *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 in which Lawrence Collins LJ is said to have rejected a submission that it is not legitimate to use a freezing injunction
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merely as a collateral means of putting pressure on a judgment debtor to pay a judgment debt and that if the asset which is the subject of the injunction is unavailable for execution, then a freezing order cannot be granted in respect of it: *Masri* at 486 [132], 487 [134]-[135].

21. The appeal in *Masri* arose in circumstances where the primary judge had made orders appointing a receiver to receive the proceeds of sale from the judgment debtor's oil concessions in satisfaction of a judgment debt owing to the judgment creditor: at 462-463 [20]. Freezing orders were made to prevent the judgment debtor from assigning or disposing of its rights in the oil concessions: at 463 [25]. Crucially, the judgment debtor appealed against both the appointment of the receiver and the freezing order.
22. The judgment debtor's submission, recorded at 486-487 [132], was that the primary purpose of the freezing order was to preserve income for the receiver to receive, such that if the receivership order was set aside, the freezing order had no purpose and was thus also amenable to being dissolved. That is quite different from the submission advanced on the respondent's behalf before the Full Court. In response to the judgment debtor's submission, Lawrence Collins LJ found that the receivership and the freezing orders were both granted for a legitimate purpose, namely, to assist in the ultimate collection of the judgment debt, although whether they would have that effect remained to be seen: at 487 [135]. His Lordship thus rejected the appeal against both orders.
23. That being so, the question whether a freezing order could be made even if the judgment creditor failed to show a realistic prospect that the freezing order could aid in the process of enforcement against the assets the subject of the order did not squarely arise in *Masri*. *Masri* therefore does not stand for the proposition that a judgment creditor required to satisfy a causation requirement of the sort embodied in r 7.35(4) need not show a realistic prospect of enforcement against the assets which the judgment creditor seeks to freeze.
24. There is therefore no authority that should have prevented the Full Court from applying the causation requirement in r 7.35(4) as their Honours did.



*The gaps in the Deputy Commissioner's evidence*

25. Contrary to AS [41], the Full Court did not consider the making of a freezing order only by reference to whether there was an enforcement mechanism against the respondent's overseas assets as at the date of the application for the order. As their Honours observed in FCJ [47], each case is likely to turn on all its circumstances, but the Deputy Commissioner did not lead sufficient evidence to show the realistic possibility of future enforcement in light of the presumption that the PRC will not lend aid in the enforcement of a revenue law (FCJ [52]) and in light of evidence that a Hong Kong court would not enforce, directly or indirectly, the revenue laws of a foreign state (FCJ [58]). Their Honours thus did not adopt any unduly narrow approach to the assessment of the Deputy Commissioner's evidentiary case.
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26. The Deputy Commissioner in AS [43] urges upon this Court the adoption of an assumption that once judgment is entered the judgment debtor will accept the judgment as binding and will apply what assets they have (whether or not they are amenable to some enforcement process) to discharge the liability created by the judgment. This is said in aid of a submission that it is not necessary to establish the existence of an enforcement mechanism capable of reaching those assets. However, that assumption is inconsistent with the basic premise underpinning the making a freezing order. If the Court were to act on the assumption that a judgment debtor will voluntarily apply their assets in satisfaction of any judgment debt, the Court could never be satisfied that there is any danger that a judgment or prospective judgment of the Court would be wholly or partly unsatisfied by reason of the matters stated in r 7.35(4).
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27. It follows then that the Full Court did not err in finding that the Deputy Commissioner failed to discharge her evidentiary onus of showing that there was a danger that assets available for satisfaction of the Deputy Commissioner's judgment might be disposed of, dealt with or diminished in value. The Deputy Commissioner led evidence about the respondent's economic activities within Australia<sup>1</sup>; and evidence about the

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<sup>1</sup> Affidavit of Yi Deng sworn 16 September 2019 [35]-[59] [ABFM 17-23], [66]-[81] [ABFM 25-29].

respondent's property within and outside Australia<sup>2</sup>; evidence about steps that the respondent had taken to alienate any property<sup>3</sup>. This evidence was said by the Deputy Commissioner to be sufficient to permit the primary judge or the Full Court to draw an inference that there was a realistic possibility that some hypothesised enforcement mechanism could overcome the refusal of a PRC or Hong Kong court to lend aid to the enforcement of Australian revenue law. Nonetheless, despite the 10 lever arch folders of evidence relied upon by the Deputy Commissioner,<sup>4</sup> the Full Court remained unsatisfied that there was any realistic prospect of any enforcement mechanism available to her. And the availability of the forms of enforcement process identified at AS [47]-[48] is entirely a matter of speculation; it is, as the Deputy Commissioner herself concedes, dependent on further investigation. That alone suggests that the Deputy Commissioner could not before the Full Court, and cannot now, make good the assertion that the respondent's overseas assets might, even in the future, be subject to those forms of enforcement process. To say that a freezing order can be made on the basis of such speculation is to reverse the onus of proof and to abandon wholly the notion that a freezing order is an exceptional order, not lightly to be made.

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28. There was accordingly no error by the Full Court in proceeding to make findings of fact based on the evidence before it (with the benefit of any inferences that could be drawn from that evidence, weighed according to the proof which it was uniquely in the power of the Deputy Commissioner to supply)<sup>5</sup> and then declining to proceed on the basis of hypothetical evidence that might or might not exist after further unparticularized enquiries were made.

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*“Equitable execution”*

29. The Deputy Commissioner at AS [49] invokes, as a possible enforcement mechanism, the power of a superior court of record to grant equitable execution. This

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<sup>2</sup> Affidavit of Yi Deng sworn 16 September 2019 [82]-[95] [ABFM 29-36].

<sup>3</sup> Affidavit of Yi Deng sworn 16 September 2019 [60]-[65] [ABFM 23-25].

<sup>4</sup> Deputy Commissioner of Taxation v Huang [2019] FCA 1537 at [2] [ABFM 67].

<sup>5</sup> *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 454 [36] per Gleeson CJ and Gummow and Callinan JJ.

was not the subject of any argument or evidence before either the primary judge or the Full Court. It should not now be entertained by the Court.

30. In any event, the possibility of equitable execution does not supply an answer to the Deputy Commissioner's admission that a prospective judgment obtained against the respondent is not likely to be enforceable in either the PRC or Hong Kong.<sup>6</sup>
- 10 31. The equitable execution referred to in *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 took the form of the appointment of a receiver, whose powers to execute in a foreign court were subject to either (a) any defendant in the foreign proceedings accepting the receiver's title to sue or (b) the receiver's title to sue being recognised by the foreign court: *Masri* at 463 [22], 463-464 [28]. The appointment of the receiver does not have proprietary effect but only has effect as an injunction restraining the judgment debtor from receiving any part of the property which it covers: *Masri* at 471 [53]. In that way the expression "equitable execution" is liable to confuse because it does not effect an execution against any assets: *Masri* at 471-472 [56]-[57].
- 20 32. The Deputy Commissioner would likely be met, then, with the same difficulty in attempting to enforce indirectly through a receiver what she could not enforce directly: FCJ [53]-[55], [58]-[59]. Without more, there is no basis for finding that there is a realistic possibility that a receiver could bring proceedings in the PRC or Hong Kong to enforce the Deputy Commissioner's judgment against assets in the PRC or Hong Kong.
33. Moreover, if equitable execution were functionally equivalent to an injunction restraining the judgment debtor from receiving any part of the property which it covers, then in seeking a freezing order to assist in giving effect to that injunction (if granted), the Deputy Commissioner would be applying for an extraordinary remedy to preserve her ability to do no more than to obtain a future injunction that, ultimately, would not have the effect of satisfying any judgment debt. At the very least, that

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<sup>6</sup> Affidavit of Yi Deng sworn 16 September 2019 [112]-[113] [ABFM 41-42].

casts into some doubt whether, by relying on “equitable execution”, the Deputy Commissioner can satisfy the purpose requirement in r 7.32.

*The mischief contended for by the Deputy Commissioner does not arise*

- 10 34. The adverse practical consequences of the Full Court’s conclusions advanced by the Deputy Commissioner at AS [24]-[28] are overstated. The appeal to the Full Court and the appeal to this Court arose only because the Deputy Commissioner failed to lead evidence to qualify the admission she made that a prospective judgment obtained against the respondent is not likely to be enforceable in either the PRC or Hong Kong.<sup>7</sup> The admission made by the Deputy Commissioner was presumably given in compliance with [2.19] of the Federal Court’s Practice Note GPN-FRZG which puts an applicant for a freezing order made without notice under a duty to make full and frank disclosure of all material facts to the Court.
35. It was therefore incumbent on the Deputy Commissioner to disclose whether or not the content of any foreign law, of which she was aware, could prevent the enforcement of any Australian judgment in a foreign jurisdiction in which she was aware that the respondent held property.
- 20 36. Having made the disclosure as required by GPN-FRZG [2.19], the Deputy Commissioner cannot be heard to complain that she had been denied the relief she seeks if she fails to address those matters disclosed by her which were adverse to her case.
37. If in compliance with GPN-FRZG [2.19] an ordinary litigant has no basis to disclose that they would be prevented from enforcing their judgment in a foreign jurisdiction in which they know the respondent has property, then consistently with FCJ [47], very little (if any) evidence may be required to satisfy the causation requirement in r 7.35(4).
38. There is no oppression in requiring an ex parte applicant who knows of a matter adversely affecting the possibility of enforcement – and thus of a fact which might

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<sup>7</sup> Affidavit of Yi Deng sworn 16 September 2019 at [112]-[113] [ABFM 41-42].

sever the causal nexus between the disposition of property and the frustration of judgment – to show why, despite that fact, they should nonetheless be granted the ex parte relief they seek.

39. In specific answer to AS [24], the purpose and utility of r 7.33 is not subverted merely by requiring an applicant, in seeking an ex parte freezing order, to make full and frank disclosure of all material facts, including material facts adverse to them, and to answer, if possible, those adverse matters.

10 40. Despite the Deputy Commissioner's histrionic protestations at AS [25] as to the onerous task that would be borne by applicants seeking freezing orders if the Full Court's reasoning were undisturbed, their Honours made pellucidly clear that they were not laying down any general principle as to the nature of the evidence necessary to establish that there is a realistic possibility of enforcement against the assets covered by a freezing order: FCJ [47]. The evidentiary burden described by the Deputy Commissioner must naturally be proportionate to the materiality of the apparent unavailability of enforcement against the relevant assets and the stage of proceedings in which the application for a freezing order is being brought.

20 41. As for the suggestion at AS [27] that the Full Court's reasoning would result in a prohibition on worldwide freezing orders, as distinct from orders limited to specific jurisdictions where assets have already been identified, this difficulty does not arise at all. Though the Full Court was inclined to discharge the freezing order to the extent that it applied to assets outside Australia (and not just to the extent that it applied to assets within the PRC and Hong Kong) (FCJ [63]), that is explicable in circumstances where the Deputy Commissioner did not attempt to articulate what advantage she may obtain by having a freezing order over assets outside Australia but not in the PRC and Hong Kong. In other words, the Deputy Commissioner's failure to obtain any sort of freezing order affecting overseas assets was the result, not of any principle that the Full Court erroneously recognised, but of forensic decisions that she and her legal representatives made. She should not now be rescued from the consequences of those decisions.

**Part VI: Statement of the respondent's argument on any notice of contention**

42. The respondent does not move on any notice of contention.

**Part VII: Estimate as to number of hours required for respondent's oral argument**

43. The respondent estimates that up to 2 hours will be required for oral argument.



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Dated: 13 May 2021



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**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**BETWEEN:**

**Deputy Commissioner of Taxation**

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**ANNEXURE TO RESPONDENT'S SUBMISSIONS**

**Legislation**

1. *Federal Court Rules 2011* (Cth) (Compilation No 7), rr 1.34, 7.32, 7.33 7.35, 7.36
2. *Federal Court of Australia Act 1976* (Cth) (Compilation No 54), s 23
3. *Judiciary Act 1903* (Cth) (Compilation No 47), s 39B(1A)(c)
- 20 4. *Taxation Administration Act 1953* (Cth) (Compilation No 172), Schedule 1 s 255-5

**Practice notes**

5. Federal Court of Australia Freezing Orders Practice Note GPN-FRZG (25 October 2016)