

# HIGH COURT OF AUSTRALIA

GAGELER, KEANE, GORDON, EDELMAN AND GLEESON JJ

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DEPUTY COMMISSIONER OF TAXATION

APPELLANT

AND

CHANGGRAN HUANG

RESPONDENT

*Deputy Commissioner of Taxation v Huang*

[2021] HCA 43

*Date of Hearing: 13 October 2021*

*Date of Judgment: 8 December 2021*

S26/2021

## ORDER

1. *Appeal allowed with costs.*
2. *Set aside orders 4 to 9 of the orders of the Full Court of the Federal Court of Australia made on 28 September 2020 and, in their place, order that:*
  - (a) *the applicant be granted leave to appeal; and*
  - (b) *the appeal be dismissed with costs.*

On appeal from the Federal Court of Australia

## Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, and  
S B Lloyd SC with L T Livingston SC for the appellant (instructed by  
Craddock Murray Neumann Lawyers)



B W Walker SC with G E S Ng and Y H Li for the respondent (instructed by Unsworth Legal)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Deputy Commissioner of Taxation v Huang**

Practice and procedure – Freezing orders – Power of Federal Court of Australia to make worldwide freezing order conferred by r 7.32 of *Federal Court Rules 2011* (Cth) – Where appellant commenced proceedings against respondent in Federal Court – Where appellant applied to Federal Court for worldwide freezing order – Where assets located in People's Republic of China and Hong Kong – Where presently no realistic possibility of enforcement of appellant's judgment debt in each foreign jurisdiction where assets located – Where freezing order made – Whether worldwide freezing order within power of Federal Court where presently no realistic possibility of enforcement in each foreign jurisdiction.

Words and phrases – "assets outside Australia", "danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied", "freezing order", "frustration or inhibition of the Court's process", "realistic possibility of enforcement", "worldwide freezing order".

*Federal Court Rules 2011* (Cth), rr 7.32, 7.35.

*Federal Court of Australia Act 1976* (Cth), s 23.



1 GAGELER, KEANE, GORDON AND GLEESON JJ. This appeal concerns whether the power of the Federal Court of Australia to make an order restraining a person from disposing of, dealing with or diminishing the value of assets, including assets located in or outside Australia (a "Worldwide Freezing Order"), conferred by r 7.32 of the *Federal Court Rules 2011* (Cth) ("the Rules"), may only be exercised if there is proof of a realistic possibility of enforcement of a judgment debt against the person's assets in each foreign jurisdiction to which the proposed order relates. Rule 7.32 states:

"(1) The Court may make an order (a *freezing order*), with or without notice to a respondent, for the purpose of preventing 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.

(2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets."

2 For the following reasons, the Full Court of the Federal Court of Australia erred in holding that the power in r 7.32 is constrained by such a precondition. Accordingly, the appeal must be allowed.

### Background to appeal

3 The respondent, Mr Huang, and his wife, Mrs Huang, were tax residents of Australia from 1 February 2013. On 4 December 2018, Mr Huang left Australia for the People's Republic of China ("the PRC"). At the time of his departure, the Australian Taxation Office was conducting an audit into Mr Huang's income tax affairs. Mrs Huang left Australia, also for the PRC, on 11 September 2019.

4 On 11 September 2019, the Commissioner of Taxation issued to Mr Huang assessments for tax liabilities and a shortfall penalty totalling almost \$141 million. On 16 September 2019, the appellant ("the Deputy Commissioner") filed an originating application in the Federal Court seeking judgment against Mr Huang based on the assessments. On the same day, a single judge of the Federal Court, Katzmann J, made an *ex parte* interim order against Mr Huang ("the interim order")<sup>1</sup>. The interim order was a Worldwide Freezing Order, effective up to and including 20 September 2019, and substantially in the terms set out in Annexure A to the Federal Court's *Freezing Orders Practice Note* (GPN-FRZG) published on

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1 *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673.

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25 October 2016 ("the Practice Note"). Most relevantly, the interim order required Mr Huang to refrain from disposing of, dealing with or diminishing the value of his Australian assets up to the amount claimed in the originating application and his assets outside Australia to the extent that the value of Mr Huang's unencumbered Australian assets was less than the amount claimed in the originating application. On 20 September 2019, the interim order against Mr Huang was continued.

5 In her reasons for making the interim order, Katzmann J referred to rr 7.32 and 7.35 of the Rules. Rule 7.35 states relevantly:

- "(1) This rule applies if:
- (a) judgment has been given in favour of an applicant by:
    - (i) the Court; or
    - (ii) for a judgment to which subrule (2) applies – another court; or
  - (b) an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in:
    - (i) the Court; or
    - (ii) for a cause of action to which subrule (3) applies – another court.
- (2) This subrule applies to a judgment if there is a sufficient prospect that the judgment will be registered in or enforced by the Court.
- (3) This subrule applies to a cause of action if:
- (a) there is a sufficient prospect that the other court will give judgment in favour of the applicant; and
  - (b) there is a sufficient prospect that the judgment will be registered in or enforced by the Court.
- (4) The Court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur:



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- (a) the judgment debtor, prospective judgment debtor or another person absconds;
- (b) the assets of the judgment debtor, prospective judgment debtor or another person are:
  - (i) removed from Australia or from a place inside or outside Australia; or
  - (ii) disposed of, dealt with or diminished in value.

...

- (6) Nothing in this rule affects the power of the Court to make a freezing order or ancillary order if the Court considers it is in the interests of justice to do so."

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Katzmann J found that r 7.35 applied because the Deputy Commissioner had a good arguable case against Mr Huang within r 7.35(1)(b)(i)<sup>2</sup>. Her Honour also found, in accordance with r 7.35(4)(b)(i) and (ii), that there was a danger that the Deputy Commissioner's prospective judgment against Mr Huang would be wholly or partly unsatisfied because his assets might be removed from Australia or disposed of, dealt with or diminished in value<sup>3</sup>. Her Honour gave the following seven reasons for finding this danger<sup>4</sup>:

- (1) Mr Huang's tax liability of over \$140 million was "considerable".
- (2) The results of the tax audit indicated an intention to avoid paying tax by grossly understating income.
- (3) Mr Huang was a Chinese national, currently overseas, without an Australian visa who, since November 2018, had taken a number of steps towards severing his ties to Australia.
- (4) Mr Huang's Australian assets did not seem to be enough to satisfy the tax liability.

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<sup>2</sup> *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673 at 681 [45].

<sup>3</sup> *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673 at 681-682 [49].

<sup>4</sup> *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673 at 682 [50]-[57].

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- (5) Mr Huang was likely to be a person of substantial wealth and has significant business interests in the PRC, including Hong Kong, that allowed him to easily move assets between jurisdictions. These circumstances demonstrated that Mr Huang had both a motive and the means to dissipate his Australian assets.
- (6) Mr Huang had already taken steps to divest himself of his interest in Australian companies and trusts. Although he transferred money overseas before becoming aware that he was under investigation by the Australian Taxation Office, the amount of money transferred increased dramatically after the audit began.
- (7) The recent issue of the tax assessment notices increased the likelihood of dissipation.

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On 11 October 2019, the Deputy Commissioner applied for summary judgment against Mr Huang and a Worldwide Freezing Order against Mr Huang until further order. The applications were heard by another judge of the Federal Court, Jagot J ("the primary judge"). Before the primary judge, Mr Huang did not oppose the freezing order to the extent that it related to his assets in Australia, and subject to the Deputy Commissioner giving certain undertakings. Nor did Mr Huang object to filing an affidavit disclosing his assets in Australia. Further, Mr Huang did not seek to revisit the findings which led Katzmann J to make the interim order, instead confining his submissions to the single issue of whether the order should operate in respect of his assets outside Australia and, in particular, assets located in Hong Kong and the PRC.

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On 21 October 2019, the primary judge made a Worldwide Freezing Order against Mr Huang until further order, in substantially the same terms as the interim order. Her Honour rejected Mr Huang's contention that the order affecting his significant assets in the PRC and Hong Kong did not serve the purpose of protecting or preventing the frustration of the Federal Court's process because there was no process available for enforcement of any judgment in the Deputy Commissioner's favour in those jurisdictions. She concluded that the issue was "the preservation of the integrity or efficacy of any process *ultimately* enforceable by the Court"<sup>5</sup>. Her Honour considered that there were sufficient possibilities of

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<sup>5</sup> *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728 at [28] (emphasis in original).

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enforcement to enable the conclusion that the purpose specified in r 7.32(1) was satisfied<sup>6</sup>. Those possibilities included<sup>7</sup>:

"... the potential use of bankruptcy procedures, the potential willingness of the courts of Hong Kong and China to enforce Australian insolvency laws, the possibility of [Mr Huang] moving assets to other jurisdictions where enforcement is readily available, as well as the potential willingness of the courts of Hong Kong and China to enforce Australian laws relating to the payments of penalties and interest."

Her Honour found that "it is not impossible that the [Deputy Commissioner] may be able to take enforcement action against [Mr Huang] as a result of one or more of the possibilities" identified by the Deputy Commissioner<sup>8</sup>.

9 On 19 December 2019, the primary judge gave judgment in favour of the Deputy Commissioner against Mr Huang in an amount of just over \$140.6 million plus general interest charges to the date of judgment. Mr Huang acknowledged that he had no defence, and that the tax debt claimed by the Deputy Commissioner was due and payable<sup>9</sup>. Her Honour refused Mr Huang's application for a stay of execution of the judgment<sup>10</sup>. There was no appeal by Mr Huang from these orders.

### Full Court's reasons

10 The Full Court granted Mr Huang leave to appeal from the Worldwide Freezing Order made by the primary judge and allowed the appeal.

11 In the Full Court, Mr Huang's contention was that the primary judge's order was beyond the Federal Court's power in r 7.32(1) because the primary judge could not satisfy herself that the order had the purpose required by r 7.32(1) in the absence of a realistic possibility that Mr Huang either had assets in, or would move

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6 *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728 at [30].

7 *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728 at [30].

8 *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728 at [28].

9 *Deputy Commissioner of Taxation v Huang* [2019] FCA 2122 at [3].

10 *Deputy Commissioner of Taxation v Huang* [2019] FCA 2122 at [27].

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assets to, jurisdictions in which an Australian judgment based on a tax debt owed to the Commonwealth could be enforced, either directly or indirectly.

12 The Full Court concluded that, in deciding whether the Federal Court had power to make the order, the primary judge stated and applied a test that enforcement of the prospective judgment was "not impossible"<sup>11</sup>. After referring to r 7.35(4), and noting that the power in r 7.32 to make a freezing order must not be exercised for a purpose other than that stated in r 7.32, the Full Court reasoned as follows<sup>12</sup>:

"If assets are beyond the reach of the Court's enforcement processes, then a freezing order with respect to those assets is not for the purpose identified in r 7.32 because there is no longer a realistic possibility that the removal or disposition of the assets will frustrate or inhibit the Court's process such that a judgment or prospective judgment will be wholly or partly unsatisfied.

In our opinion, there must be a realistic possibility that any judgment obtained by the plaintiff can be enforced against assets of the defendant in the place to which the proposed order relates. A test of 'not impossible' is somewhat indefinite in meaning and, in our view, sets the bar too low. A test of a realistic possibility is consistent with the approach taken by the courts in determining what must be shown in terms of the risk of the removal of assets or the disposal of assets, matters to which a freezing order is directed. This last matter is either part of the same composite concept as the matter of enforcement or, at least, it is a closely allied concept. Although the word 'danger' in the rule does not mean that the risk of removal or dissipation must be more probable than not (*Deputy Commissioner of Taxation v Chemical Trustee Ltd (No 4)* (2012) 90 ATR 711 at [23] per Perram J), it does mean that there must be a realistic possibility (as we have put it) or a danger sufficiently substantial to warrant the grant of an injunction (*Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 (*Patterson*) at 325 per Gleeson CJ), or a sufficient likelihood of risk of dissipation which, in the particular circumstances, justifies an asset

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11 *Huang v Deputy Commissioner of Taxation* (2020) 280 FCR 160 at 169-170 [34].

12 *Huang v Deputy Commissioner of Taxation* (2020) 280 FCR 160 at 171 [42]-[43].

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preservation order (*Victoria University of Technology v Wilson* [2003] VSC 299 at [36] per Redlich J)."

13 The Full Court concluded that the matters relied upon by the primary judge did not provide a basis for concluding that enforcement of the Deputy Commissioner's prospective judgment debt against Mr Huang in the PRC or Hong Kong was a realistic possibility<sup>13</sup>. Accordingly, the Full Court made orders varying the primary judge's order to exclude Mr Huang's non-Australian assets. The Full Court's orders were subsequently stayed pending the determination of the appeal to this Court.

14 The Deputy Commissioner does not dispute the Full Court's finding that there is presently no realistic possibility that the Deputy Commissioner's judgment would be enforceable in the PRC or Hong Kong. Among other reasons, the PRC and Hong Kong have each entered a reservation to the Convention on Mutual Administrative Assistance in Tax Matters, to the effect that they "shall not provide assistance in the recovery of tax claims, or in conservancy measures, for all taxes".

15 It is also not in dispute that Mr Huang, having submitted to the Federal Court's jurisdiction, is required to comply with its process and orders.

### Freezing orders under r 7.32 of the Rules

16 Rule 7.32, in Div 7.4 of the Rules, supplements s 23 of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act") and the Federal Court's implied power as a superior court, each of which confers power upon the Court to make such orders as are appropriate for the proper exercise of its statutorily conferred jurisdiction and powers<sup>14</sup>. That relationship is emphasised by r 7.36, which provides that nothing in Div 7.4 diminishes the inherent, implied or statutory jurisdiction of the Court to make a freezing order or ancillary order.

17 The power conferred by r 7.32(1) is expressly subject to two limitations: first, the purpose of the order must be "the purpose of preventing the frustration or inhibition of the Court's process"; and secondly, the order must address that

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13 *Huang v Deputy Commissioner of Taxation* (2020) 280 FCR 160 at 173 [50], 176 [62].

14 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32-33 [35]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393-394 [25]-[26].

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purpose "by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied". The first limitation corresponds with the established scope of the Federal Court's general powers to grant a freezing order, being the power to make such orders as the Court may determine to be appropriate to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction<sup>15</sup>. Rule 7.32 states explicitly the requirement, stated by this Court in relation to the Federal Court's general powers to grant a freezing order, that the power must be exercised for the purpose for which it is conferred<sup>16</sup>. Where the order is made in proceedings in which substantive relief is sought against the defendant, that purpose is "to prevent a defendant from disposing of his actual assets (including claims and expectancies) so as to frustrate the process of the court by depriving the plaintiff of the fruits of any judgment obtained in the action"<sup>17</sup>. More broadly, a freezing order is directed to dispositions "which are intended to frustrate, or have the necessary effect of frustrating, the plaintiff in his attempt to seek through the court a remedy for the obligation to which he claims the defendant is subject"<sup>18</sup>.

18        The second limitation, that an order made under r 7.32 must serve the specified purpose "by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied", also corresponds with the scope of the Federal Court's general powers to make a freezing order. Since *Jackson v Sterling Industries Ltd*, it has been accepted in Australia, as a general proposition, that a freezing order could be granted if the circumstances are such that there is a danger of the defendant absconding, or a danger of the assets being removed from the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if successful in obtaining a

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15    *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32-33 [35]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 399-401 [41]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 243 [94]; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 18 [43].

16    *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32-33 [35]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 399-401 [41].

17    *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

18    *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 276.

judgment, will not be able to get it satisfied<sup>19</sup>. The danger must be sufficiently substantial to warrant the freezing order<sup>20</sup>. The need to identify a relevant danger was first articulated in *Mareva Compania Naviera SA v International Bulkcarriers SA*<sup>21</sup>, where Lord Denning MR stated:

"If it appears that the debt is due and owing – and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment – the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."

19 Rule 7.32(2) explicitly contemplates that a freezing order within r 7.32 may apply to assets located outside Australia, reflecting the power of a superior court to make a freezing order in respect of foreign assets, first identified in *Ballabil Holdings Pty Ltd v Hospital Products Ltd*<sup>22</sup>. The Practice Note assumes that the Federal Court's power to make a freezing order extends to assets "anywhere in the world"<sup>23</sup>, and the example form of freezing order in Annexure A to the Practice Note contains provisions which may be included if the Court makes a Worldwide Freezing Order<sup>24</sup>.

20 Mr Huang sought to defend the Full Court's conclusion that an order under r 7.32 could not be for the requisite purpose of preventing the frustration or inhibition of the Federal Court's process unless there was a realistic possibility of the freezing order's efficacy. That defence was based principally on the asserted

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19 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623. See, eg, *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 321-322.

20 *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325.

21 [1975] 2 Lloyd's Rep 509 at 510.

22 (1985) 1 NSWLR 155, cited in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623.

23 Federal Court of Australia, *Freezing Orders Practice Note (GPN-FRZG)*, 25 October 2016 at 2 [2.8].

24 Federal Court of Australia, *Freezing Orders Practice Note (GPN-FRZG)*, 25 October 2016, Annexure A, para 6(c).

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effect of r 7.35 of the Rules upon r 7.32 or, alternatively, on the purposive requirement in r 7.32.

21 The argument based upon r 7.35 can be readily dismissed. Rule 7.35 is not expressed to affect the operation of r 7.32 and, contrary to Mr Huang's submission, there is no reason to read r 7.32 as subject to r 7.35. Both r 7.35(6) and r 7.36 are expressly to the contrary<sup>25</sup>. Rather, r 7.35 extends the scope of r 7.32, including by confirming the rule's application to cases that may have otherwise been in doubt, namely where there is a "prospective" cause of action and in relation to processes of a foreign court. Where r 7.35 applies, r 7.35(4) supplements the power in r 7.32 by identifying reasons why the Court may be satisfied, having regard to all the circumstances, that a danger of the kind specified in both r 7.32 and r 7.35(4) exists.

22 Mr Huang also contended that r 7.35(4) covers the field of events that might give rise to a danger of the kind necessary to enliven the power in r 7.32. In this case, the interim order was made on the basis of Katzmann J's satisfaction as to the danger on the basis that the circumstances stated in r 7.35(4)(b)(i) and (ii) might occur. That finding was not disputed before the primary judge. As a practical matter, in most cases the danger required by r 7.32 will be proved because of one or more of the circumstances set out in r 7.35(4). However, r 7.35(4) does not cover the field. As already noted, both r 7.35(6) and r 7.36 explicitly contemplate that a freezing order may be made even though the applicant is unable to satisfy r 7.35(4). By way of example, r 7.32 may apply where a defendant deliberately and openly moves from Australia, leaving insufficient assets to satisfy a prospective judgment debt and stating an intention not to comply with the prospective judgment.

23 Mr Huang's alternative argument, that the purposive requirement in r 7.32 entails a further requirement of possible efficacy of the freezing order, must also be rejected for several reasons. First, r 7.32 does not say so and provisions granting powers to a court are not to be read down by making implications or imposing limitations which are not found in the express words<sup>26</sup>.

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25 cf *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

26 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *Weinstock v Beck* (2013) 251 CLR 396 at 419-420 [55]; *Minister for Home Affairs v DMA18* (2020) 95 ALJR 14 at 23 [27]; 385 ALR 16 at 26.



24 Secondly, there is no reason to imply an unexpressed limitation on the scope of the power in r 7.32, where r 7.32 is, in substance, a restatement of the powers under s 23 of the Federal Court Act and the Federal Court's implied power and there is no similar limitation upon those powers.

25 Thirdly, the Full Court's efficacy requirement is inconsistent with the *in personam* nature of a freezing order<sup>27</sup>. It is the court's authority to make orders against a person who is subject to the court's jurisdiction that is relevant to the court's power to make a freezing order and not the location of the person's assets. In *Ballabil Holdings Pty Ltd v Hospital Products Ltd*<sup>28</sup>, neither Street CJ nor Glass JA found it necessary to consider the precise location of the assets in question. Priestley JA saw no reason why the order should be limited to assets within the court's jurisdiction, concluding that when exercising the jurisdiction to make a *Mareva* injunction (as a freezing order was then termed) "the location of the company's assets can have no bearing on the extent of the court's jurisdiction, although it may ... affect the court's discretionary exercise of those powers"<sup>29</sup>.

26 Fourthly, the Full Court's requirement is inconsistent with the evident purpose of r 7.32, restricting the power in a manner that would significantly impair its capacity to protect the Federal Court's process, including by granting urgent relief. Such a requirement would render the power largely impotent to protect the Court's process from frustration by defendants who are able to secrete their assets or move them almost instantaneously across international borders. Unaffected by a Worldwide Freezing Order, a defendant would be free to move assets surreptitiously to a jurisdiction not covered by the order. The requirement would also substantially defeat the utility of the power in r 7.33 to make an order ancillary to a freezing order for the purpose of eliciting information relating to assets relevant to the freezing order because such information could only concern assets that have been identified.

27 The Full Court's focus upon the possible availability of enforcement processes in foreign jurisdictions ignored other ways that a judgment may eventually be satisfied, such as following the appointment of a receiver pursuant

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27 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403 [50]. See also *Derby & Co Ltd v Weldon [No 6]* [1990] 1 WLR 1139 at 1149-1150; [1990] 3 All ER 263 at 272.

28 (1985) 1 NSWLR 155.

29 *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155 at 165.

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to s 57(1) of the Federal Court Act<sup>30</sup>. And, although Mr Huang sought to deprecate it, there is no reason to ignore the possibility that a defendant, who is demonstrated to have created the relevant danger, may be induced by the inconvenience of a freezing order, falling short of oppression, to comply with the Court's process.

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Finally, the Full Court's requirement is effectively inconsistent with the power to make a Worldwide Freezing Order, similar to a power recognised in numerous foreign jurisdictions<sup>31</sup>, because it necessitates identification of the defendant's foreign assets as well as a potential means of enforcement in a relevant foreign jurisdiction. In *Broad Idea International Ltd v Convoy Collateral Ltd*, the Privy Council recently observed that the granting of worldwide freezing orders has "long since ceased to be exceptional"<sup>32</sup>. Notably it is now more than 30 years since the English Court of Appeal in *Derby & Co Ltd v Weldon [Nos 3 & 4]*<sup>33</sup> rejected an argument that s 37 of the *Supreme Court Act 1981* (UK) did not confer jurisdiction to make a *Mareva* injunction against a Panamanian company in the absence of evidence that the order could be enforced against the company in Panama or elsewhere. Lord Donaldson of Lynton MR (Neill LJ and Butler-Sloss LJ agreeing<sup>34</sup>) considered it a "mistake to spend time considering whether English orders and judgments can be enforced against Panamanian companies in

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30 *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468 at 487 [75]-[76]. See also *Caird Seven Pty Ltd v Attia and Shopsmart Pharmacy Franchising Pty Ltd [No 3]* (2016) 92 NSWLR 457 at 462 [16]; *Masri v Consolidated Contractors International (UK) Ltd [No 2]* [2009] QB 450 at 470 [50]; Aitken, "No Alsatis: 'Equitable execution', and recent developments in the asset preservation order" (2015) 40 *Australian Bar Review* 52.

31 See, eg, *Babanaft International Co SA v Bassatne* [1990] Ch 13; *Republic of Haiti v Duvalier* [1990] 1 QB 202; *Derby & Co Ltd v Weldon* [1990] Ch 48 (United Kingdom); *Natural Gas Corporation Holdings Ltd v Grant* [1994] 2 NZLR 252 (New Zealand); *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676 (Bahamas); *Akai Holdings Ltd (in compulsory liquidation) v Ho Wing On* [2009] HKCU 172 (Hong Kong); *Equustek Solutions Inc v Jack* (2015) 386 DLR (4th) 224 (Canada); *Bouvier v Accent Delight International Ltd* [2015] 5 SLR 558 (Singapore).

32 [2021] UKPC 24 at [20].

33 [1990] Ch 65.

34 *Derby & Co Ltd v Weldon [Nos 3 & 4]* [1990] Ch 65 at 95, 96.

Panama" at the time of making the injunction<sup>35</sup>. Butler-Sloss LJ observed that factors such as the impossibility of compliance with, or enforcement of, a worldwide *Mareva* injunction are relevant considerations in exercise of discretion<sup>36</sup>, and noted that there was presently no evidence that the injunction would be unenforceable.

29 A freezing order operates to preserve the *status quo* and not to change it in favour of the party who seeks the order<sup>37</sup>. Mr Huang submitted that the *status quo* in this case is the existence of assets not liable to execution by any process available to the Deputy Commissioner. That characterisation ignores that "[c]ourts assume, rightly, that those who are subject to its jurisdiction will obey its orders"<sup>38</sup>, including, relevantly, a final judgment to pay a tax debt. The *status quo* to be preserved by the freezing order is the existence of assets which could be realised to pay the prospective judgment debt.

30 None of the above should be taken to suggest that courts should not be astute to ensuring that a worldwide freezing order does not become an instrument of oppression. As with any freezing order, it is a remedy which should not be granted lightly<sup>39</sup>. The likely utility of a freezing order is undoubtedly relevant to the exercise of the court's discretion to grant the order<sup>40</sup>. A court may decline to make a freezing order because the defendant is outside the jurisdiction and is likely

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35 *Derby & Co Ltd v Weldon [Nos 3 & 4]* [1990] Ch 65 at 81-82.

36 *Derby & Co Ltd v Weldon [Nos 3 & 4]* [1990] Ch 65 at 96, 98.

37 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403-404 [51].

38 *Derby & Co Ltd v Weldon [Nos 3 & 4]* [1990] Ch 65 at 81, citing *In re Liddell's Settlement Trusts* [1936] Ch 365 at 374.

39 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403-404 [51]; *Derby & Co Ltd v Weldon* [1990] Ch 48 at 55, 62; *Derby & Co Ltd v Weldon [Nos 3 & 4]* [1990] Ch 65 at 96; *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 at 2501 [24]; [2006] 3 All ER 48 at 54.

40 *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155 at 165; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622-623; *Derby & Co Ltd v Weldon [Nos 3 & 4]* [1990] Ch 65 at 81-82.

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to ignore the order<sup>41</sup>, but it should not be deterred by a defendant's contumelious behaviour from making an order that is otherwise appropriate<sup>42</sup>. The discretionary nature of the power provides a further reason why the Federal Court would not strive to read into the purposive requirement in r 7.32 an additional requirement about the prospects of enforcement.

31 It follows that the Full Court asked itself the wrong question in considering, as a matter going to the existence of the broad and flexible power conferred by r 7.32, whether there was a realistic possibility that the prospective judgment could be enforced against the defendant's assets in any relevant foreign jurisdiction. In determining whether the Federal Court had power to make the Worldwide Freezing Order, the question was whether the order would seek to meet a danger that the prospective judgment will be wholly or partly unsatisfied.

## Conclusion

32 The appeal must be allowed. Costs should follow the event. Orders 4 to 9 of the orders of the Full Court made on 28 September 2020 must be set aside and, in their place, order that leave to appeal to the Full Court be granted and the appeal be dismissed with costs.

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41 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 431 [16]; *BAS Capital Funding Corp v Medfinco Ltd* [2004] 1 Lloyd's Rep 652 at 680 [202]; *Motorola Credit Corp v Uzan [No 2]* [2004] 1 WLR 113 at 147 [114]-[115], 149 [125].

42 *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309 at 321 [43]; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 431 [16]. See also *In re Liddell's Settlement Trusts* [1936] Ch 365 at 374; *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 at 574; *Derby & Co Ltd v Weldon [Nos 3 & 4]* [1990] Ch 65 at 81; *South Bucks District Council v Porter* [2003] 2 AC 558 at 580-581 [32].

33 EDELMAN J. The decision of the majority in this case has salutary commercial consequences. It will deter fraud. It will lessen the extent of evidence that an applicant might be required to lead, especially on an urgent application involving money that could be transferred overseas by the click of a button. It will enhance the efficacy of the "worldwide freezing order" that has proved so valuable in "prevent[ing] the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country"<sup>43</sup>. It is an approach that has been taken in numerous cases, including by the primary judge in this case.

34 Those commercial consequences are a reason why I have some regret in dissenting from the reasons of the majority on this appeal. But it must not be forgotten that the power to make a freezing order is a drastic power, the effect of which has been described as draconian<sup>44</sup>. A freezing order deprives a person of access to their own assets. Its commands are made under the threat of contempt proceedings, and the sanction of imprisonment<sup>45</sup>. Unless and until a rule of court is made, with sufficient authority, to relax the very limited number of conditions upon the jurisdiction to make freezing orders, those conditions must be strictly followed by courts.

35 The central issue on this appeal concerns the authority of the Federal Court of Australia to make a freezing order in circumstances where there is no reasonable prospect that the freezing order could be enforced. In my view, the Full Court of the Federal Court of Australia was correct to conclude that such a freezing order could not be made. In any event, and however desirable it might be thought to be for the law to weaponise the freezing order, it should be an extremely rare circumstance where a court would exercise a discretion to make a freezing order for a purpose that has no realistic prospect of being fulfilled.

36 I gratefully adopt the background in the reasons of the majority of this Court. My reasons are concerned with a short point of the interpretation of r 7.32 of the *Federal Court Rules 2011* (Cth), relating to a restriction upon the power to make a freezing order that requires the court to do so with a particular purpose.

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43 See *Mercedes Benz AG v Leiduck* [1996] AC 284 at 313; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 20 [49].

44 *Jaken Properties Australia Pty Ltd v Naaman* [2020] NSWSC 1554 at [44].

45 *Federal Court Rules 2011* (Cth), Pt 42. See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403 [50]; *JSC BTA Bank v Ablyazov [No 14]* [2020] AC 727.

The same restriction exists in the implied and inherent powers of courts to make freezing orders<sup>46</sup>, expressly preserved by the *Federal Court Rules*<sup>47</sup>.

37 Rule 7.32 requires the court to make a freezing order for a particular purpose which is to be advanced by particular means. Rule 7.32 requires that the court have the particular "purpose of preventing the frustration or inhibition of the Court's process" and that the court advance that purpose by the particular means which involve "seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied".

38 The difference between the two requirements of r 7.32 can be illustrated by an example. Suppose a person had a judgment debt in Australia of \$20 million and assets of \$25 million in each of Australia and the United Kingdom. If there were a danger that the person might dispose of their assets to defeat enforcement of the judgment, then a worldwide freezing order in the amount of \$50 million would be a means to meet a danger that the judgment would be wholly or partly unsatisfied. But a worldwide freezing order in the amount of \$50 million would not be solely for the purpose of preventing the frustration or inhibition of the process of the court. An order limited to the freezing of \$20 million of assets in Australia could satisfy that requirement. The worldwide freezing order in the amount of \$50 million would "go beyond a mere order for the preservation of assets pending judgment or execution"<sup>48</sup>. In other words, by making an order that extends beyond the minimum necessary to protect the integrity of the process of the court, the worldwide freezing order in the amount of \$50 million could not be said to have only the purpose of preventing the frustration or inhibition of the process of the court.

39 The purpose of preventing the frustration or inhibition of the process of the court is not a purpose of "creat[ing] security for the plaintiff"<sup>49</sup>. It is not a purpose of providing leverage by creating "in effect, a new vulnerability to imprisonment for debt ... to guarantee to a plaintiff that any judgment obtained will be satisfied"<sup>50</sup>.

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46 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32 [35]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 400 [41].

47 *Federal Court Rules*, r 7.36.

48 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

49 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 24 [65].

50 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

It is a purpose which is the "counterpart" to a purpose of protecting "the integrity of those processes once set in motion"<sup>51</sup>. With a purpose that aims only to protect the integrity of the court's processes, freezing orders belong to the family of remedies that protect the integrity of the court from abuse<sup>52</sup>. Since the jurisdiction of the court is confined to protecting its processes, the jurisdiction extends only to the minimum necessary orders to protect the court's processes from abuse<sup>53</sup>.

40 The purpose of "preventing the frustration or inhibition of the Court's process" therefore requires an applicant to identify the process of the court that would be frustrated or inhibited. If there is no realistic possibility that any process of the court would be frustrated or inhibited without the freezing order, then the court cannot be acting for the purpose of preventing the frustration or inhibition of the court's process. Courts cannot be taken to act in vain<sup>54</sup>.

41 It was not submitted in this case that there was any new or separate foundation for the jurisdiction to grant a freezing order which permitted this Court to free itself from the jurisdictional limit confining the freezing order to its purpose of protecting the process of the court from being frustrated or inhibited. In that respect, it may be that Australian law and English law have diverged. In *Cardile v LED Builders Pty Ltd*<sup>55</sup>, four members of this Court said that "the English authorities appear to have developed to a stage where what is identified as the *Mareva* injunction or order lacks any firm doctrinal foundation and is best regarded as some special exception to the general law". In turn, it has recently been observed in the Privy Council that the English approach differs from the Australian

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51 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393 [25]; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 25 [68].

52 See *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 409 [248], 415-417 [265]-[269].

53 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 410-411 [254], 415 [264]-[265]; *Victoria International Container Terminal Ltd v Lunt* (2021) 95 ALJR 363 at 369 [21]-[22], 373 [43]-[44]; 388 ALR 376 at 382, 387-388.

54 *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1595; [1971] 2 All ER 1278 at 1294; *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657 at 664-665; [1986] 1 All ER 901 at 907.

55 (1999) 198 CLR 380 at 393 [25].

approach, the latter of which had once been preferred by Lord Nicholls of Birkenhead in dissent<sup>56</sup>.

42 The mere prospective event of giving a judgment by the Federal Court is not a process that was, or could have been, frustrated or inhibited by Mr Huang's removal of his assets from Australia. Summary judgment in favour of the Deputy Commissioner of Taxation was granted<sup>57</sup>. The presence of Mr Huang's assets in the People's Republic of China ("the PRC") and Hong Kong had no bearing on the giving of judgment.

43 The purpose of preventing the frustration or inhibition of the process of the court includes a purpose of "preserving the efficacy of the execution which would lie against the actual or prospective judgment debtor"<sup>58</sup>. In this case, there is no doubt that there was jurisdiction to make a freezing order in relation to Mr Huang's assets in Australia in order to prevent the enforcement process being frustrated or inhibited. It is thus unsurprising that Mr Huang did not seek to oppose the making of such a freezing order.

44 In many other cases it might be a very simple exercise for an applicant to point to evidence of the ability to obtain enforcement or reciprocal enforcement of judgments to justify a concern that the enforcement process of the court, including that reciprocity, could be frustrated or inhibited<sup>59</sup>. Further, where there is evidence that a defendant might have assets in other, perhaps even unknown, jurisdictions, a worldwide freezing order might be appropriate to preserve any realistic prospect of enforcement in foreign jurisdictions. But, in this case, since there was no realistic possibility of any enforcement of the prospective judgment against Mr Huang in either the PRC or Hong Kong, a freezing order over his assets in those jurisdictions could not have the purpose of preventing or frustrating the

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56 *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24 at [1]-[2] read with [36], [212]-[213], citing the reasons of Lord Nicholls in *Mercedes Benz AG v Leiduck* [1996] AC 284.

57 *Deputy Commissioner of Taxation v Huang* [2019] FCA 2122.

58 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393 [25].

59 See, eg, Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters [1994] ATS 27; *Trans-Tasman Proceedings Act 2010* (Cth) and *Trans-Tasman Proceedings Act 2010* (NZ); *Foreign Judgments Act 1991* (Cth), s 5 read with *Foreign Judgments Regulations 1992* (Cth), Schedule, recognising reciprocal arrangements with superior courts of, eg, France (French Republic), Gibraltar, the Republic of Korea, Tonga, Tuvalu, and Western Samoa.



enforcement processes of the Federal Court. Indeed, it could have the opposite effect. By complying with the order, Mr Huang might maintain those assets in the PRC or Hong Kong rather than moving them to any jurisdiction where there was a realistic prospect of enforcement against them.

45 In some cases, an enforcement process of the court that might be frustrated or inhibited is the process of appointing an equitable receiver. If an applicant alleges this to be the case, the applicant must show that there is a realistic possibility that an equitable receiver might be appointed before a freezing order could be made for the purpose of preventing the frustration or inhibition of the equitable receivership. Before the primary judge in this case, there was no evidence or submission to support the possibility of the appointment of an equitable receiver, nor any evidence or submission that any equitable receiver would have any realistic possibility of recovery from assets in the PRC or Hong Kong.

46 The Deputy Commissioner of Taxation submitted that the in personam nature of a freezing order meant that it should be capable of application anywhere in the world. This submission is based upon an erroneous conflation of all the different dimensions of jurisdiction<sup>60</sup>. Merely because a court has personal jurisdiction, in other words jurisdiction over a person, does not mean that it has unlimited jurisdiction to make any orders against that person. As Hoffmann J said in *Bayer AG v Winter [No 2]*<sup>61</sup>, "[t]here are territorial limits to the effectiveness" of the orders of the court and, in foreign jurisdictions, the effectiveness of such orders depends on the willingness of the foreign court, or at least a realistic possibility that the foreign court might be willing, to enforce the court's orders.

47 I would dismiss the appeal with costs.

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60 *Plaintiff S164/2018 v Minister for Home Affairs* (2018) 92 ALJR 1039 at 1041 [6]; 361 ALR 8 at 10.

61 [1986] FSR 357 at 362.