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

APPELLANT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: ISSUE

2. The issue in this appeal is whether the power of the Federal Court to grant a freezing order is subject to a mandatory jurisdictional precondition that there be proof of a realistic possibility of enforcement of a judgment debt against assets of the respondent in each foreign jurisdiction to which the proposed freezing order relates.

3. The appellant (**Deputy Commissioner**) submits that the Full Court was wrong to construe r 7.32 of the *Federal Court Rules 2011* (Cth) (**FCR**) as being subject to an unexpressed jurisdictional precondition to this effect.

PART III: NOTICE OF A CONSTITUTIONAL MATTER

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

PART IV: REPORTS OF DECISIONS BELOW

5. The decision of the primary judge (Jagot J) is *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728 (Jagot J) (**PJ**) **[CAB 4]**. The decision of the Full Court (Besanko,

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Thawley and Stewart JJ) is *Huang v Deputy Commissioner of Taxation* [2020] FCAFC 141 (**FC**) **[CAB 49]**.

PART V: MATERIAL FACTS

6. 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 (**PRC**) and, on 11 September 2019, Mrs Huang also left Australia for the PRC. At the time Mr Huang left Australia, there was an ongoing audit into his income tax affairs by the Commissioner of Taxation (**Commissioner**). As a result of the audit, on 11 September 2019, the Commissioner issued to Mr Huang notices of amended assessment and a notice of assessment of shortfall penalty for a total of $140,925,953.98: FC [3] **[CAB 53]**.[1]

7. On 16 September 2019, the Deputy Commissioner filed an originating application in the Federal Court seeking judgment against Mr Huang in the amount of $140,925,953.98 plus interest. On the same day, Katzmann J made an *ex parte* freezing order against Mr Huang's Australian and foreign assets. Her Honour also made an *ex parte* freezing order against Mrs Huang in respect of a parcel of real property in Australia in which the Deputy Commissioner contended Mr Huang had a beneficial interest.[2] Both the appeal to the Full Court (FC [6] **[CAB 54]**), and the appeal in this Court, concern only the freezing order made against Mr Huang.

8. The *ex parte* freezing order made by Katzmann J required Mr Huang to refrain from disposing of, dealing with or diminishing the value of his Australian assets up to the unencumbered value of $140,925,953.98 (**Relevant Amount**), and his assets outside of Australia to the extent that the value of his unencumbered Australian assets was less than the Relevant Amount.[3] The freezing order was expressed so as to cease to have effect if

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1 *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at [1] (Katzmann J) **[ABFM 67]**.

2 *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at [58], [66] **[ABFM 77, 78]**.

3 *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at Penal Notice (Annexure A to Order 2), Order 6(c) **[ABFM 57]**.

Mr Huang were to pay the Relevant Amount into Court or into a bank account in the joint names of the parties' solicitors or if he were to provide security in that sum.[4]

9. In her reasons for granting the *ex parte* relief, published on 18 September 2019, Katzmann J concluded that there was a danger that a prospective judgment would be wholly or partly unsatisfied because Mr Huang's assets might be removed from Australia or disposed of, dealt with or diminished in value.[5] Her Honour identified seven reasons which supported that conclusion, as follows:[6]

   a. At over $140 million, the size of Mr Huang's tax liability was considerable.[7]

   b. Although there was no direct evidence that Mr Huang intended to divest himself of his Australian assets or to diminish them in value, the results of the audit conducted by the Commissioner indicated an intention to avoid paying tax by grossly understating income.[8]

   c. Mr Huang was a Chinese national, located overseas, without an Australian visa and who, since November 2018, had taken a number of steps towards severing his ties to Australia.[9]

   d. Mr Huang's Australian assets appeared to be insufficient to satisfy the tax liability.[10]

   e. Mr Huang was likely to be a person of substantial wealth having regard to his transfers of monies into and out of Australia between January 2016 and August 2019 and the number of foreign companies that he apparently controlled. He had significant business interests in the PRC, including in Hong Kong, and the structures and operations to allow him to move assets between jurisdictions easily.[11]

   f. Mr Huang had already taken steps to divest himself of his interests in Australian companies and trusts. Although he had transferred money overseas before he was

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4 *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at Penal Notice (Annexure A to Order 2), Order 10(a) **[ABFM 58]**.

5 *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at [49] **[ABFM 76]**.

6 *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at [50]-[57] **[ABFM 76 – 77]**.

7 See the affidavit of Yi Deng sworn 16 September 2019 at [22]-[34] **[ABFM 13 – 17]**.

8 See the affidavit of Yi Deng sworn 16 September 2019 at [17](a) and [70] **[ABFM 10, 26]**.

9 See the affidavit of Yi Deng sworn 16 September 2019 at [74]-[81] **[ABFM 27 – 29]**.

10 See the affidavit of Yi Deng sworn 16 September 2019 at [82]-[95] **[ABFM 29 – 36]**.

11 See the affidavit of Yi Deng sworn 16 September 2019 at [60]-[69] **[ABFM 23 – 26]**.

aware that he was under investigation by the Commissioner, since the audit began, the amount of money transferred offshore had increased dramatically.[12]

g. The issue of the tax assessment notices increased the likelihood of dissipation.[13]

There has been no challenge to these findings in the Full Court or in this Court.

10. Justice Katzmann referred to affidavit evidence of an officer of the Australian Taxation Office to the effect that, because the PRC and Hong Kong had entered a reservation with respect to the *Convention on Mutual Administrative Assistance in Tax Matters* (**Convention**),[14] the deponent believed "*that a prospective judgment obtained against the First Respondent is not likely to be enforceable in either the People's Republic of China or Hong Kong*".[15] The relevant reservation is to the effect that the PRC and Hong Kong "*shall not provide assistance in the recovery of tax claims, or in conservancy measures, for all taxes.*"[16]

11. On 17 September 2019, Mr Huang appeared in the proceedings by filing a Notice of Acting stating the address for service of his lawyers[17] and thereby submitted to the Court's jurisdiction. Service of the originating application upon Mr Huang occurred in accordance with an order made by Katzmann J pursuant to FCR r 10.43 granting leave for service outside Australia.[18] There is no dispute that, having been so served, Mr Huang was amenable to the Court's jurisdiction and was required to comply with its processes and orders.[19]

12. On 21 October 2019, following an *inter partes* hearing, the primary judge (Jagot J) held that the worldwide freezing order against Mr Huang should be continued: PJ [30], [41] **[CAB 12, 14]**. Her Honour made orders in substantially the same terms as the *ex parte*

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[12] See the affidavit of Yi Deng sworn 16 September 2019 at [36]-[37], [64], [77] **[ABFM 17, 24, 29]**.

[13] See the affidavit of Yi Deng sworn 16 September 2019 at [22]-[27] **[ABFM 13 - 15]**.

[14] [2012] ATS 38.

[15] *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at [2], [34]-[35] **[ABFM 67, 72 – 73]**, referring to the affidavit of Yi Deng sworn 16 September 2019 at [112]-[113] **[ABFM 41 – 42]**.

[16] *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at [34]-[35] **[ABFM 72 – 73]**.

[17] Notice of Acting – Appointment of Lawyer filed on behalf of Mr Huang by Unsworth Legal pursuant to FCR r 4.03 on 17 September 2019 **[ABFM 84]**.

[18] *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at Order 4 **[ABFM 54]**.

[19] See, eg, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [16] (Black CJ and Finkelstein J).

freezing order, together with an ancillary order requiring Mr Huang to file an affidavit disclosing his worldwide assets: PJ [3], [30], [41] **[CAB 7, 12, 14]**. Before the primary judge, Mr Huang did not contest the continuation of the freezing order in respect of his Australian assets: PJ [3] **[CAB 7]**. However, Mr Huang submitted that no process was available for the enforcement of any judgment in the Deputy Commissioner's favour in Hong Kong or the PRC and that, in those circumstances, the worldwide freezing order should not be continued as his foreign assets are not liable to execution: PJ [8] **[CAB 8]**. In responding to Mr Huang's submission that such enforcement was "*unlikely, if not impossible*",[20] the primary judge acknowledged that it was not likely that a judgment debt would be enforceable in Hong Kong or in the PRC but, on the evidence, inferred (PJ [28] **[CAB 11]**) that it was "*not impossible*" that the Deputy Commissioner may be able to take enforcement action against Mr Huang through various steps described by her Honour: PJ [19]-[28], [30] **[CAB 10 – 11, 12]**.

13. On 19 December 2019, Jagot J entered judgment in favour of the Deputy Commissioner against Mr Huang in the sum of $140,607,780.88.[21] Mr Huang acknowledged that he had no defence, and that such sum was a tax debt that was due and payable.[22] Her Honour refused Mr Huang's application for a stay of execution of the judgment.[23] There was no appeal by Mr Huang from those orders.

14. Earlier, on 29 October 2019, Mr Huang had sought leave to appeal from the primary judge's decision to continue the worldwide freezing order: **[CAB 33]**, FC [7], [9] **[CAB 54 – 55]**. The primary ground on which Mr Huang asserted that the primary judge had erred was that, on the evidence, there was no realistic possibility that he held (or would hold) assets in foreign jurisdictions where his Australian tax debt could be enforced and, in such circumstances, the worldwide freezing order would not serve the purpose of preventing or inhibiting the frustration of the Court's process, within the meaning of FCR r 7.32. On that footing, Mr Huang contended that the worldwide freezing order was "*beyond power*": FC [9] **[CAB 55]**.

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[20] Mr Huang's Outline of Submissions dated 7 October 2019 at [5] **[ABFM 88]**.
[21] *Deputy Commissioner of Taxation v Huang* [2019] FCA 2122, Order 1.
[22] *Deputy Commissioner of Taxation v Huang* [2019] FCA 2122 at [3].
[23] *Deputy Commissioner of Taxation v Huang* [2019] FCA 2122 at [27]-[28] and Order 3.

15. The Full Court (Besanko, Thawley and Stewart JJ) granted leave to appeal and allowed the appeal **[CAB 73]**. The Full Court held that, in order for the Court to make a freezing order in respect of assets located outside Australia, "*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*": FC [43] **[CAB 65]**. The Full Court concluded that the primary judge had applied an incorrect test in inferring that it was *"not impossible"* that the Deputy Commissioner could take enforcement action and further concluded that, in any event, the evidence did not meet the test that there was a *"realistic possibility of enforcement"*: FC [32]-[34] **[CAB 63]**. The Full Court held that a freezing order could not be used for a purpose beyond that identified in FCR r 7.32 (namely, to prevent the frustration or inhibition of the Court's processes) and that, where assets were *"beyond the reach"* of enforcement, then a freezing order in respect of those assets would not be for such a purpose: FC [41]-[42] **[CAB 65]**. The Full Court was satisfied that the evidence then before it did not provide a basis for concluding that enforcement in the PRC or Hong Kong was a realistic possibility and accordingly held that the freezing order against Mr Huang (so far as it concerned assets outside Australia) ought to be set aside: FC [50], [62], [67] **[CAB 67, 71, 73]**.[24]

16. On 28 September 2020, the Full Court made orders varying the freezing order to exclude Mr Huang's non-Australian assets (together with certain other consequential orders): **[CAB 74 – 75]**.[25] Those orders were subsequently stayed by Besanko J pending the Deputy Commissioner's application for special leave to appeal and any consequent appeal to this Court.[26]

PART VI: ARGUMENT

17. The effect of the Full Court's decision is to impose a jurisdictional precondition to the making of worldwide freezing orders separate from and additional to the requirements of FCR rr 7.32 and 7.35. This is reflected in the reasons for decision at FC [42]-[43], [47]-[48] **[CAB 65 – 66, 67]**. At FC [42]-[43] **[CAB 65 – 66]**, the Full Court required, as a

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[24] In addition, the Full Court set aside the asset disclosure order made under FCR r 7.33 (which had been complied with): FC [64]-[66] **[CAB 71 – 72]**; order 6 made on 28 September 2020 **[CAB 75]**.

[25] See *Huang v Deputy Commissioner of Taxation (No 2)* [2020] FCAFC 160, which dealt with the form of orders and costs.

[26] *Huang v Deputy Commissioner of Taxation* [2020] FCA 1518, Order 1 in the reasons for decision **[ABFM 121]**.

mandatory precondition to the making of all worldwide freezing orders, that there be proof of a realistic possibility that any judgment obtained by the applicant can be enforced against the respondent in the place to which the proposed order relates (**the precondition**). At FC [47] **[CAB 67]**, the Full Court confirmed that the precondition was "*necessary*" and referred to the "*test*" that must be satisfied before freezing orders may be made in respect of foreign assets. The Full Court treated proof of a realistic possibility of enforcement as being not merely a permissible consideration that might inform a discretion, but rather a matter that must be established before the discretionary power is enlivened: FC [48] **[CAB 67]**.

18. In imposing the precondition, the Full Court was addressing Mr Huang's first ground of appeal, which itself was framed in jurisdictional terms: FC [9] **[CAB 55]**. As outlined above (at [14]), that ground asserted a lack of evidence about a realistic possibility that an Australian tax judgment debt could be enforced against assets held outside Australia. The ground then continued that, because of the alleged evidentiary deficiency, the freezing order, in its operation upon Mr Huang's assets outside Australia, was "*beyond power*". The argument before the Full Court was, thus, that evidence of a particular description was a precondition to the power to make a freezing order. That being so, the test imposed by the Full Curt was necessarily a jurisdictional precondition, the satisfaction of which requires any applicant for freezing orders to adduce evidence of enforceability in each relevant foreign jurisdiction. For the reasons developed at [19] to [31] below, that test impermissibly travelled beyond, and was not supported by, the language used in FCR rr 7.32 and 7.35.

The precondition is not supported by the terms of FCR r 7.32

19. The Full Court considered (at FC [42] **[CAB 65]**) that r 7.32 provides a purposive limitation on the Court's power to make freezing orders in respect of foreign assets, such that:

> [i]f 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.

20. In this passage, the Full Court inserted the word "*enforcement*" into the phrase "*the Court's processes*" and approached r 7.32 as though "*the Court's processes*" were limited

to the Court's enforcement processes. No such limitation is found in the terms of r 7.32 or elsewhere in the FCR. Rule 7.32(1) provides for the making of freezing orders, 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*". Rule 7.32 does not, in terms, confine the Court's power to make such orders to circumstances in which there is a proven possibility of enforcement of a judgment in the relevant foreign jurisdiction(s). Indeed, such a limitation is inconsistent with other provisions within the immediate context of the FCR. In particular, rule 7.35(4)(b)(ii) recognises that the "*danger*" warranting the making of a freezing order may exist where a person who may be called on to satisfy a judgment is permitted to dispose of, deal with, or diminish in value his or her assets.

21. The Full Court reasoned that its "*realistic possibility*" test was "*closely allied*" to the concept of "*danger*" in the balance of r 7.32: FC [43] **[CAB 65 – 66]**. The Deputy Commissioner accepts that, under r 7.32, it was necessary to point to evidence of "*a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied*". There was evidence of such a danger in this case, as accepted in the findings made by Katzmann J summarised at [9] above,[27] which findings were not challenged before, and hence were adopted or assumed by, Jagot J: PJ [3]-[4] **[CAB 7]**. Nothing in the text of r 7.32 supports the imposition of the further requirement, identified at FC [42]-[43] **[CAB 65 – 66]**, that an applicant for a freezing order must adduce evidence to establish a realistic possibility of enforcement in each relevant foreign jurisdiction.

22. Nor can a limitation to this effect be implied from the terms contained in r 7.32 or elsewhere in the FCR. This Court has consistently,[28] and recently,[29] emphasised that it

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[27] *Deputy Commissioner of Taxation v Huang* (2019) 110 ATR 673, [2019] FCA 1537 at [49]-[57] **[ABFM 76 – 77]**.

[28] *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185 (Mason CJ and Deane J), 202-3 (Dawson J), 205 (Gaudron J); *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 260-261 [11] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *Shergold v Tanner* (2002) 209 CLR 126 at 136 [34] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51, 374 ALR 627 at [56] (Kiefel CJ, Bell and Keane JJ), [116] (Gageler J), [146] (Gordon J), [181] (Edelman J).

[29] *Minister for Home Affairs v DMA18 as litigation guardian for DLZ18* (2020) 95 ALJR 14, 385 ALR 16 at [27]-[28] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ); *Wigmans v AMP Limited* [2021] HCA 7 at [111] (Gageler, Gordon and Edelman JJ).

is inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations that are not found in the express words. The Court's jurisdiction to grant freezing orders arises from its inherent ability to prevent frustration of its processes.[30] It is well-established that *Mareva* orders operate *in personam* and do not attach to the property the subject of the orders.[31] Whilst r 7.32 sets out the criteria for the exercise of the power, it does not limit its existence.[32] Further, r 7.36 provides that nothing in Div 7.4 diminishes the inherent, implied or statutory jurisdiction of the Court to make a freezing order.

23. The Full Court's interpretation significantly circumscribes the Court's jurisdiction to make worldwide freezing orders. That circumscribed operation creates adverse practical consequences that tell against the correctness of the Full Court's construction of r 7.32.

24. *First*, freezing orders are urgent in nature. An applicant for freezing orders *ex parte*, or even *inter partes*, will usually not have a full, or perhaps any, understanding of the location of the respondent's assets outside Australia. While an applicant must point to a danger that a judgment or prospective judgment will be wholly or partly unsatisfied, which might include the removal of assets from Australia, an applicant will not necessarily be able to follow the flow of funds, or the transfer of assets, to their final destination. It is for this reason that, as occurred in the present case, ancillary orders are commonly sought (and granted) under r 7.33 compelling the person the subject of a freezing order to depose to the location, value and details of all assets outside of Australia: FC [6], [64] **[CAB 54, 71 – 72]**. One of the express purposes of r 7.33 is to enable an applicant to *"elicit information relating to assets relevant to the freezing order"*. This purpose is undermined if, as the Full Court concluded, an applicant is required to have sufficient evidence to prove a realistic possibility of enforcement against such assets before any freezing order may be granted.

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30 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 (***Jackson v Sterling)*** at 617-619 (Wilson and Dawson JJ); 621 (Brennan J); 623 (Deane J); P*atrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 1 at 32 [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ); *Cardile v LED Builders Pty Ltd* (1991) 198 CLR 380 (***Cardile)*** at 393 [26] (Gaudron, McHugh, Gummow and Callinan JJ).

31 *Cardile* at 403 [50], 405 [55] (Gaudron, McHugh, Gummow & Callinan JJ), 427 [122] (Kirby J); *Derby & Co Limited v Weldon (No 6)* [1990] 1 WLR 1139 (***Derby No 6***) at 1149-1150; *Mercedes Benz AG v Leiduck* [1996] AC 284 at 300 (***Mercedes Benz***).

32 *PT Bayan Resources v BCBC Singapore* (2015) 258 CLR 1 (***PT Bayan***) at 21 [50] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

25. *Secondly*, the imminent threat of dissipation of assets – or other danger that the judgment or prospective judgment will be unsatisfied – typically produces the consequence that, even with respect to places where assets are known to be located, applications for such orders must be made before an applicant has had a reasonable opportunity to investigate the possible enforcement options that might be available in those places, and to put evidence of the same before the Court. The Full Court's construction would require an applicant to prove the content of foreign law – and the enforceability of an Australian judgment, having applied that foreign law – in order to enliven the Court's jurisdiction to consider an urgent, interlocutory application. Particularly where assets are held in one or more non-common law jurisdiction(s), this places a significant evidentiary burden on an applicant.

26. Where an applicant has proof that the respondent's assets have already been removed from Australia, the additional evidentiary burden imposed by the Full Court may have the practical effect of preventing an applicant from seeking urgent relief at all. Consequently, if a debtor is successful in removing assets from the jurisdiction, the debtor may succeed in frustrating the Court's process. The Court would have no power to seek to arrest that frustration absent proof of a realistic possibility of enforcement of the judgment in the relevant foreign jurisdiction(s). It is readily conceivable in this regard that the ability to prove a "*realistic possibility*" of a particular form of enforcement may vary when new material comes to hand following, for example, further investigations or the obtaining of further information pursuant to r 7.33. An inability to grant a freezing order until such investigations are complete would subvert, rather than advance, the purpose of r 7.32.

27. *Thirdly*, even if an applicant has evidence of the whereabouts of some foreign assets, and is able to obtain proof of a realistic possibility of enforcement in the relevant foreign jurisdiction(s), the Full Court's reasoning would prevent the making of a *worldwide* freezing order and, instead, require that the order be limited to those specific jurisdiction(s) where existing assets have already been identified. This causes difficulty where – as is commonly the case – an applicant has incomplete knowledge of the nature and location of foreign assets. By its terms, a worldwide freezing order restrains a person from dealing with their worldwide assets. It is an order directed to a person within the Court's jurisdiction. It is not an order that is concerned with, or depends for its efficacy

on, recognition or enforcement by a foreign state.[33] Nor is such an order a jurisdiction-by-jurisdiction restraint whereby assets located in one jurisdiction are carved out from its operation absent proof of a realistic possibility of an enforcement process. Nothing in the text of r 7.32 requires such an approach.

28. These considerations point to the improbability that r 7.32, by implication or by interpretative gloss, was intended to exclude the power of the Court to grant a freezing order against a respondent with foreign assets where the prospective judgment may not be enforceable in the jurisdiction(s) in which the assets are held. The Full Court's construction places limitations on the Court's ability to safeguard the administration of justice, enabling it to be defeated by "*the ease and speed with which money and other assets can now be moved from country to country*".[34] Contrary to the reasoning of the Full Court, all that is required in order to satisfy r 7.32 is that, relevantly, there is a danger that a judgment will be unsatisfied to some extent. Such a danger is sufficiently demonstrated where a prospective judgment debtor seeks to dissipate assets so that the judgment will be unsatisfied in whole or in part.

The precondition is not supported by the terms of FCR r 7.35

29. Similarly, no support for the imposition of the jurisdictional precondition may be found in r 7.35. Rule 7.35(4) relevantly provides for the making of freezing orders in two circumstances: *first*, where assets of the judgment debtor might be removed from Australia or from a place inside or outside Australia; or *secondly*, where the judgment debtor's assets might be disposed of, dealt with or diminished in value. The frustration of the Court's processes spoken of in r 7.32(1) occurs when *either* of these requirements is satisfied. There is nothing in the terms of r 7.35(4) that necessitates proof of enforceability of the judgment debt against ex-Australian assets.

30. Rule 7.35(4) recognises that, by disposing of, dealing with or diminishing assets, the judgment debtor or prospective judgment debtor will cease to have assets available to him or her that could otherwise be used to satisfy a judgment debt. An applicant for a freezing order is not required to show what enforcement mechanisms might be utilised

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[33] There is no conflict between equity acting *in personam* and the land laws of the foreign state, which operate *in rem*, for the reasons explained in *Griggs Group v Evans* [2005] Ch 153 at [65]-[69].

[34] See *Mercedes Benz AG v Leiduck* [1996] AC 284 at 313-314 (Lord Nicholls), cited with approval in *PT Bayan* at [49].

at a future time to access those assets; it suffices that the respondent's apprehended conduct in disposing of, dealing with or diminishing the assets, if not restrained, would leave the judgment debt unsatisfied.[35]

31. The notion that a judgment is frustrated only if the assets that are disposed of, or dealt with, are amenable to the Court's enforcement processes fails to appreciate that the Court's processes include methods of equitable execution: see [49] below. For example, a judgment debtor may be made subject to an order *in personam* to deal with his or her assets, including foreign assets, to satisfy a judgment debt.[36] In the circumstances, the Deputy Commissioner was not required to demonstrate the possible recognition by a foreign court of any specific enforcement process.

The Full Court's construction is unsupported by authority

32. There is no previous Australian authority that has imposed a precondition upon the making of worldwide freezing orders of the kind held to exist by the Full Court.

33. On the contrary, in *Jackson v Sterling*, Deane J acknowledged that the general power to make *Mareva* orders had been recognised to encompass an order restraining a local company from disposing of or dealing with assets that were outside the jurisdiction, at least where they had been within the jurisdiction when the action commenced.[37] In *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (***Ballabil***),[38] the New South Wales Court of Appeal considered the principles that govern the making of a freezing order in respect of assets outside the jurisdiction, and accepted that it had jurisdiction to make an order that prevented the appellant company from dealing with foreign assets. In that regard, Priestley JA said:[39]

> It follows to my mind that when exercising that jurisdiction against a company incorporated within the jurisdiction, *the location of the company's assets can have no bearing on the extent of the court's jurisdiction*, although it may, as already indicated, affect the court's discretionary exercise of those powers. [Emphasis added]

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35 See, eg, *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65 (***Derby Nos 3 & 4***) at 76 (Donaldson LJ).

36 See, eg, *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 (***Masri***) at [50]-[58] (Lawrence Collins LJ, with whom Lord Neuberger of Abbotsbury and Ward LJ agreed).

37 (1987) 162 CLR 612 at 622-623.

38 (1985) 1 NSWLR 155.

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

34. Significantly, in neither *Jackson* nor *Ballabil*, did the Court suggest that the enforceability of the judgment in the foreign jurisdiction was a precondition to the making of the orders. Nor did either Court suggest any other limitation of the type discerned by the Full Court. Indeed, the observation by Priestley JA as to the lack of relevance of the location of assets to the Court's jurisdiction is at odds with the Full Court's conclusion that a realistic possibility of enforcement in each foreign jurisdiction where assets are located is a precondition to the existence of the power.

35. The Full Court's analysis also cannot be reconciled with statements of principle in the English authorities. In *Derby Nos 3 & 4*,[40] the Court of Appeal for England and Wales considered whether *Mareva* relief could be granted in respect of a judgment debt that may prove unenforceable against the foreign assets of the defendant company. The Court of Appeal proceeded, expressly, upon the understanding that Milco Corporation (**Milco**), one of the defendant companies which was incorporated in Panama, had no assets anywhere.[41] The primary judge had declined to make an order against Milco on the basis that there was no evidence that either a *Mareva* order or any eventual judgment could be enforced against Milco in Panama, even if it had any assets.[42]

36. On appeal, Donaldson LJ (with whom Neill LJ agreed) acknowledged that there were problems of enforceability of any order of the English court in Panama, but did not consider that the inability to prove enforceability in Panama was a bar to the making of a freezing order.[43] The relevance of enforceability in the foreign jurisdiction was addressed further in the concurring reasons of Butler-Sloss LJ. Her Ladyship considered that, insofar as the Court was to have regard to the location of Milco's assets and the question of enforceability in the foreign jurisdiction, this was a matter of discretion, not of jurisdiction.[44] The circumstance that the freezing order could not be enforced in the foreign jurisdiction was not decisive, as "*Courts assume, rightly, that those who are subject to its jurisdiction will obey its orders*".[45] The Court of Appeal emphasised that there was no reason to reject the existence of the jurisdiction to grant a *Mareva* order in

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[40] [1990] Ch 65.
[41] [1990] Ch 65 at 97F (Butler-Sloss LJ).
[42] [1990] Ch 65 at 97G, quoting the reasons of the primary judge.
[43] [1990] Ch 65 at 81G-82A, 86E; Neill LJ agreeing at 95E-F.
[44] [1990] Ch 65 at 96G, 98A-B.
[45] [1990] Ch 65 at 81B (Donaldson LJ); see also at 97G-98B (Butler-Sloss LJ).

respect of a defendant with foreign assets or to fetter the exercise of the wide discretion given to enable the Court to protect the effectiveness of its own procedures.[46]

37. The Court of Appeal's reasoning was subsequently confirmed in *Derby No 6*.[47] A differently constituted Court of Appeal there accepted that the jurisdiction to grant *Mareva* relief depends, not on the territorial jurisdiction of the English court over assets, but on the unlimited jurisdiction of the Court *in personam* against any person who is a party to proceedings before it. Thus, as with the Court's jurisdiction to appoint a receiver over foreign assets, the location of the assets was not determinative of the Court's *Mareva* jurisdiction.[48]

38. Subsequently, in *Masri*,[49] the Court of Appeal upheld a freezing order that had been made against the appellants – which had submitted to the jurisdiction of the English court – in respect of assets held by the appellants in Yemen, notwithstanding that the judgment creditor had no apparent intention or ability to enforce the judgment against those particular assets. The appellants argued, unsuccessfully, that freezing orders could not be used collaterally to facilitate other mechanisms of recovery. In rejecting that argument, the Court of Appeal accepted that it was sufficient for the grant of *Mareva* relief that there be a real risk that the judgment will remain unsatisfied if the order is not made.[50] This approach is consistent with the language employed in FCR r 7.35(4)(b)(ii) which, as noted above, contemplates the making of a freezing order where it can be shown that the disposal of, dealing with or diminishing in value of assets may result in a judgment being wholly or partly unsatisfied.

39. The Federal Court's power to grant a freezing order against a respondent with foreign assets is not dependent on enforcement processes being available in the foreign jurisdiction(s), and is not limited to cases in which it can be shown that there is a realistic possibility of enforcement in the relevant foreign jurisdiction(s). By imposing an

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46 [1990] Ch 65 at 93H-94B (Neill LJ) and at 96A-G, 98 (Butler-Sloss LJ).

47 [1990] 1 WLR 1139.

48 [1990] 1 WLR 1139 at 1149-1150 (Dillon LJ, with whom Taylor LJ agreed at 1152 and Staughton LJ agreed at 1153D-E). *Derby No 6* was referred to, with apparent approval, in *Supabarn Supermarkets Pty Ltd v Cotrell Pty Ltd* [2016] ACTSC 49 at [86] (Refshauge J); *Pier (WA) Pty Ltd as Trustee for Isandi Trust v Jean Maurice Pty Ltd* [2018] WASC 22 at [13], [21] (Kenneth Martin J); and *In the matter of Statewide Office Furniture Pty Ltd* [2018] NSWSC 1393 at [28] (Brereton JA).

49 [2009] QB 450.

50 [2009] QB 450 at [132], [134]-[135] (Lawrence Collins LJ, with whom Neuberger and Ward LJJ agreed).

inflexible jurisdictional limitation to that effect, the Full Court's reasoning was contrary to, and unsupported by, authority and misapprehended the personal jurisdiction that the Court exercises when making freezing orders. Indeed, the decision of the Full Court appears to be the first case in the common law world in which such a limitation has been imposed.

Worldwide freezing orders may have real utility

40. Even in the absence of enforcement mechanisms in the foreign jurisdiction(s) in which a respondent's assets are located, worldwide freezing orders have utility and therefore aid in preventing the frustration or inhibition of the Court's process.

41. The Full Court interpreted the concept of "*the frustration or inhibition of the Court's process*", in r 7.32, by reference solely to the enforcement mechanisms available to a judgment creditor, as proved at the time of the application for the freezing order. The Full Court reasoned that, if a prospective judgment creditor is unable to point to enforcement mechanisms in respect of the assets held in the foreign jurisdiction(s), no frustration or inhibition of the Court's process can occur: FC [42] **[CAB 65]**.

42. This reasoning reflected an unduly narrow conception of the Court's "*process*", and thus of the "*danger*", spoken of in r 7.32. In *Jackson v Sterling*, Deane J described the rationale for freezing orders thus: the plaintiff, "*if he gets judgment, will not be able to get it satisfied*".[51] Further, Deane J accepted that the purpose of a freezing order is "*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*".[52] Consistently with that understanding, the grant of *Mareva* relief enables the Court to frame an order that deprives the respondent of possession of an asset for the purpose of precluding its disposal so as to defeat a judgment.[53] In *Masri,* the Court of Appeal reached the same conclusion.[54] Again, this understanding is reflected in, and implemented by, the language in r 7.35(4)(b)(ii).

43. The Full Court erred in interpreting the Court's "*process*" as limited to identifying a specific enforcement mechanism, or mechanisms, which is or are established, by

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[51] (1987) 162 CLR 612 at 623 (Brennan J agreeing: at 621), and see Gaudron J at 640.
[52] (1987) 162 CLR 612 at 625.
[53] (1987) 162 CLR 612 at 626.
[54] [2009] QB 450 at 487 [135] (Lawrence Collins LJ, with whom Neuberger and Ward LJJ agreed).

evidence, to be available as a matter of realistic possibility. A Court's "*process*" is broader, and includes the entry of judgment itself and all that is necessary to aid in giving effect to the judgment, once entered. The Court is entitled to assume that, once judgment is entered, the judgment debtor (being subject to the Court's *in personam* jurisdiction) *will* accept the judgment as binding and *will* apply what assets he or she has (wherever located) to discharge the liability created by the judgment, even if no specific enforcement mechanism is shown to be available against assets located in a particular foreign jurisdiction.[55] If it were otherwise, the entry of judgment would be treated as little more than an interim step towards engaging the available enforcement procedures. Once the ambit of the concept of "*process*" in r 7.32 is appreciated, it is evident that worldwide freezing orders have significant utility even if no specific enforcement mechanism is identifiable in any relevant foreign jurisdiction. In any event, even if "*process*" has the narrower meaning assumed by the Full Court, the Full Court was nonetheless wrong to treat proof of a realistic possibility of enforcement as a mandatory precondition to the Court's jurisdiction.

44. In *National Australia Bank Ltd v Dessau*,[56] Brooking J explained that a court of equity, acting *in personam*, may order a defendant amenable to its jurisdiction to do, or to refrain from doing, an act abroad. The equitable jurisdiction is grounded, not on any pretension to the exercise of judicial power abroad, but on the circumstance that the defendant, being amenable to the Court's jurisdiction, can be directed personally to act or not to act.[57] The Court's *in personam* jurisdiction does not relevantly differ depending upon the subject matter of the proceeding, and accordingly is not to be unduly constrained in revenue cases where the application of the "*revenue rule*"[58] may operate to prevent specific methods of enforcement of a judgment debt in a particular foreign jurisdiction.

45. The Full Court erred by approaching the making of worldwide freezing orders by reference to the Court's power over foreign assets and the circumstances in which the

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[55] See, in the context of an injunction, the observations in *South Bucks District Council v Porter* [2003] 2 AC 558 at [32] (Lord Bingham of Cornhill, with whom Lord Steyn, Lord Hutton and Lord Scott of Foscote agreed).

[56] [1988] VR 521 at 522.

[57] See also *Griggs Group v Evans* [2005] Ch 153 at [65]; and *Singh v Singh* (2009) 253 ALR 575, [2009] WASCA 53 at [25] (Pullin JA, with whom Martin CJ and Newnes AJA agreed).

[58] See *Peter Buchanan Ltd v McVey* [1955] AC 516; *Government of India v Taylor* [1955] AC 491; *Re Ayres; Ex parte Evans* [1981] FCA 45; (1981) 51 FLR 39.

Court's orders will be recognised in foreign jurisdictions, rather than by reference to the Court's *in personam* authority over persons subject to its jurisdiction. In this respect, the Full Court's analysis was inconsistent with the nature of freezing order relief. It failed to recognise that the utility of a worldwide freezing order is to prevent a person, who is subject to the Court's jurisdiction, from dealing with his or her foreign assets in such a manner that the judgment, or prospective judgment, will be unsatisfied. Indeed, contrary to an implicit suggestion in Mr Huang's submissions before the Full Court, the Court's jurisdiction is not to be frustrated by persons placing assets in a "*safe haven*" so as to avoid the Court's judgments.[59] This Court should be slow to accept the practical effect of the Full Court's decision, namely that the Federal Court's process may be inhibited by the design of persons within its jurisdiction as to where his or her assets are located.

46. Further, the reasoning of the Full Court erroneously assumed that the enforcement mechanisms available to a judgment creditor will be known at the time of an application for a freezing order. That is inconsistent with this Court's acceptance in *PT Bayan* that a freezing order may be made where some future, contingent legal process may be available.[60] The availability of domestic enforcement mechanisms (which may in turn render the judgment enforceable against foreign assets) may only become known to a judgment creditor after judgment, upon a full examination of the judgment debtor's affairs.

47. This is illustrated by the Full Court's analysis of the prospective enforcement mechanisms identified by the primary judge. While the Full Court considered (FC [58] **[CAB 70 – 71]**) that there was no likely prospect of sequestration of Mr Huang's estate in Australia in light of the jurisdictional requirements in s 43 of the *Bankruptcy Act 1966* (Cth), whether or not this is so will only be known once the Deputy Commissioner has had a reasonable opportunity to investigate the existence or otherwise of any continuing connection between Mr Huang and any business carried on in Australia (s 43(1)(b)(iii)). The prospects for action under the *Bankruptcy Act* may well vary after further factual investigation. For example, were a sequestration order to be made against Mr Huang in the future, there would be at least the possibility of creditors other than the Deputy

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[59] Transcript NSD1759/2019, P-24 at Line 40.

[60] (2015) 258 CLR 1 at 19-20 [46]-[47] (French CJ, Kiefel, Bell, Gageler and Gordon JJ); 24 [64] and 26 [72] (Keane and Nettle JJ); see also *Cardile* at 405-406 [57] (Gaudron, McHugh, Gummow and Callinan JJ).

Commissioner. If, with time, other creditors were to come forward and lodged proofs of debt in the bankruptcy, then the Hong Kong courts would be asked to give effect to Australian *bankruptcy* law, not Australian revenue law. Further, if a trustee in bankruptcy were appointed, then the Deputy Commissioner could fund the trustee to conduct examinations of Mr Huang, or other examinable persons, under s 81 of the *Bankruptcy Act*. Those investigations, in turn, may well identify other assets or means of pursuing recovery against Mr Huang. There may also be scope to pursue the appointment of a receiver in respect of the assets of Mr Huang. This was ultimately the method by which assets were sought to be recovered in *Masri*: the freezing order there prevented the disposal of a Yemeni asset; the English court appointed a receiver to income received in Greece from that asset; and the Court of Appeal upheld that *in personam* equitable relief as a permissible means to assist in the ultimate collection of the judgment debt in circumstances where enforcement against foreign assets was not directly available.[61]

48. More generally, the availability of enforcement mechanisms may become apparent only after judgment, including upon examination of the judgment debtor. For example, if an examination were to reveal assets moved offshore with an intent to defraud creditors, it would be open to the judgment creditor to apply for an order declaring void the offshore transfers pursuant to s 37A of the *Conveyancing Act 1919* (NSW) or equivalent provisions. Orders of this nature are available in respect of offshore assets because the Court has power to make *in personam* orders against a person within the jurisdiction of the Court in order to reverse the fraud.[62]

49. As a further example, superior courts of record have jurisdiction to grant equitable execution of a judgment, such as the appointment of a receiver, where forms of legal execution are unavailable.[63] In *Masri*, Lawrence Collins LJ observed that the Court's power to appoint a receiver extends, at least in some circumstances, to foreign assets in

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61 [2009] QB 450 at [1]-[2], [12], [132], [134]-[135] (Lawrence Collins LJ, with whom Neuberger and Ward LJJ agreed).

62 *Singh v Singh* (2009) 253 ALR 575, [2009] WASCA 53 at [31].

63 See, eg, *Corporate Affairs Commission v Smithson* [1984] 3 NSWLR 547 at 552D-E (Waddell J); *ACC Loan Management v Rickard* [2019] IESC 29; *Caird Seven Pty Ltd v Mina Attia and Shopsmart Pharmacy Franchising Pty Ltd (No 3)* (2016) 92 NSWLR 457 at [16] (Emmett AJA).

jurisdictions where legal execution was unavailable.[64] Such an order acts *in personam* against the judgment debtor, but does not have proprietary effect.[65] The potential availability, or appropriateness, of such a remedy will frequently be unknown, or difficult to assess, at the time of an application for a freezing order.

50. In the present case, the appropriateness of such remedies is unknown until the Deputy Commissioner has had the opportunity to make proper inquiries as to the extent, nature and location of Mr Huang's assets. Yet the reasoning of the Full Court, if upheld in this Court, would require proof, in advance and in all cases, as to the realistic availability of such mechanisms, including at the hearing of an application for a worldwide freezing order made *ex parte* in urgent circumstances. If that be correct then, in the time required for such proper inquiries to be made, a prospective judgment debtor will have the opportunity to dissipate his or her assets and to increase the danger that a judgment debt will be unsatisfied, and the Court's processes frustrated. Such an outcome is antithetical to the purpose of r 7.32.

Conclusion

51. There is nothing in the terms of r 7.32 or elsewhere in the FCR that requires, as a precondition to the existence or exercise of the Court's jurisdiction to make a worldwide freezing order, proof of a realistic possibility of enforcement of the judgment debt in the relevant foreign jurisdiction(s). There is no basis for the imposition of an unexpressed limitation upon the Court's inherent power to prevent frustration of its processes. The Full Court's reasoning inappropriately confined the breadth and flexibility of the jurisdiction to make freezing orders.[66]

52. A worldwide freezing order serves a purpose even in the absence of the established availability of a specific enforcement mechanism in each relevant foreign jurisdiction: the order prevents a judgment debtor from diminishing assets that could (and should) otherwise be used to satisfy the judgment. The absence of an established enforcement mechanism is to be viewed against the background of the debtor's ability to bring the

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64 [2009] QB 450 at [50]-[51].

65 [2009] QB 450 at 470G (Lawrence Collins LJ).

66 See *Cardile* at [41], [50] (Gaudron, McHugh, Gummow and Callinan JJ), citing *Jackson v Sterling* at 621 (Brennan J); see also *Jackson v Sterling* at 632-633 (Toohey J).

freezing order to an end by providing security to the Court's satisfaction or discharging the judgment debt.

53. It may well be in some cases – such as those where the opportunities to pursue all investigative matters have been exhausted – that difficulties of enforcement may be a permissible discretionary consideration in an application to discharge a freezing order previously made. However, in that circumstance, this would be a matter to be weighed and assessed with other relevant discretionary considerations at the time the discretion is exercised. That is different, in principle, from the imposition of a mandatory evidentiary requirement operating as a precondition to the power to grant or to continue any freezing order. The Full Court erred by requiring, in all cases, evidence of a realistic possibility of enforcement in every relevant foreign jurisdiction as a mandatory precondition to the making of a worldwide freezing order.

PART VII: ORDERS SOUGHT

54. The Deputy Commissioner seeks the following orders:

(1) The appeal be allowed.

(2) Set aside orders 4 to 8 made by the Full Court of the Federal Court of Australia on 28 September 2020 and, in their place, order that leave to appeal to that Court be granted but the appeal be dismissed with costs.

(3) The respondent is to pay the appellant's costs of this appeal.

PART VIII: ESTIMATE

55. The Deputy Commissioner estimates that up to 2.5 hours will be required for oral argument (including reply).

Dated: 15 April 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **DEPUTY COMMISSIONER OF TAXATION**
Appellant
and
CHANGRAN HUANG
Respondent

10 **ANNEXURE**

LIST OF STATUTORY PROVISIONS REFERRED TO IN SUBMISSIONS

Legislation / Statutory Instrument	***Version as at relevant date***
Bankruptcy Act 1966 (Cth) – s43	Current (Compilation 86 – 10 February 2021)
Conveyancing Act 1919 (NSW) – s37A	Current (Compilation 6 – 1 December 2019)
Federal Court Rules 2011 (Cth) – Division 7.4, rr. 7.32, 7.33, 7.35, 7.36	Current (Compilation 7 – 21 May 2019)