HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA No. S211 of 2020

SYDNEY REGISTRY

BETWEEN: **DEPUTY COMMISSIONER OF TAXATION**

Appellant

and

ZU NENG SHI

10 Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification for publication

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

Part II: Statement of the issues

2. This case concerns challenges, by way of appeal, and, if necessary, by notice of contention, to the application by the majority of Full Court of the Federal Court of Australia (**Full Court**) of the statutory criteria in sub-ss.128A(6)(b) and (c) of the *Evidence Act 1995* (Cth) (***Evidence Act***). The appeal concerns the considerations that a court is permitted to take into account in determining whether it is satisfied that "the interests of justice require" the compelled disclosure of a "privilege affidavit".[1]

3. The privilege affidavit in this case (**Privileged Affidavit**) outlined the respondent's worldwide assets pursuant to an *ex parte* asset "disclosure order".[2] Shortly after that order was made, search warrants were executed which nominated the respondent as a suspect in an ATO investigation into serious criminal offences, including money laundering offences involving allegations of high value monetary transfers to China. Subsequently, the appellant obtained a judgment in respect the respondent's tax debts by consent. The respondent sought return of the Privileged Affidavit pursuant to s.128A(5). At first instance, and on appeal, it was held that the respondent had reasonable grounds for his objection on grounds of privilege against self-incrimination. By majority, the Full Court (Lee and Stewart JJ) held that they were not satisfied that the interests of justice required disclosure of the Privileged Affidavit to the appellant.

4. The appellant contends the majority of the Full Court erred, in the manner described in *House v R*[3], by erroneously taking into account one or both of two discrete considerations in determining it was not satisfied that the interests of justice require disclosure of the Privileged Affidavit pursuant to s.128A(6)(c).

5. The specific questions raised by the grounds of appeal are:

   (a) Where the appellant obtained judgment against the respondent in advance of the hearing before the primary judge on the s.128A issues, was the Full Court entitled

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[1] As that term is defined in s.128A(2)(d).

[2] As that term is defined in s.128A(1).

[3] (1936) 55 CLR 499; Appellant's Submissions (**AS**) at [27]; *Deputy Commissioner of Taxation v Shi* (2020) 380 ALR 226 (**FCJ**) at [89] per Lee J, with whom Stewart J agreed at [115].

to consider, as one factor, the availability of an alternative statutory mechanism for examination of a judgment debtor?[4]

(b) Where the respondent is under criminal investigation by the ATO and it was found there exists a realistic possibility that he could be charged with criminal offences, was the Full Court entitled to consider, as one factor, the risk of derivative use of information in the Privileged Affidavit?

Notice of contention

6. If it is decided that the majority of the Full Court erroneously had regard to either consideration, the notice of contention raises for determination the following question:

10 Having correctly found that the onus is on the party seeking disclosure of a privilege affidavit to satisfy the court of the matters in s.128A(6)[5], did the majority of the Full Court err in finding that it was open to the primary judge to have been satisfied of the proposition set out s.128A(6)(b), namely that "the information [in the Privileged Affidavit] does not tend to prove that the [respondent] has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country"?[6]

Part III: Section 78B certification

7. It is certified that no constitutional issues arise in this case.

Part IV: Statement of facts

Appellant's statement of facts

20 8. The respondent largely agrees[7] with the appellant's statement of facts (at AS[8]-[26]) but sets out additional relevant facts below.

Covert audit

9. From July 2015 to 26 November 2018, a taskforce led by the ATO conducted an intense covert audit into the tax affairs of a labour hire group of companies (**Group**) and persons

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[4] I.e., *Federal Court Rules 2011* (Cth) (**FCR**) r. 41.10(1) as applied in respect of s.108 of the *Civil Procedure Act 2005* (NSW) (**CPA**) which, along with , *Pt 38* Part 38, provides a procedure for examination of a judgment debtor in the Supreme Court.

[5] FCJ[83], [91].

[6] Cf. FCJ[92]-[93].

[7] Noting at AS[21] the appellant misstates the respondent's second ground of contention in the Full Court (which is correctly stated at CAB tab 5, 71) and re AS[26], the six matters to which the majority of the Full Court had regard are best understood by reference to Lee J's reasons at FCJ[102]-[111]. Importantly, the judgment took into account the purpose of asset disclosure orders which were ancillary to extant freezing orders (FCJ[103], [111], cf. AS[31]).

associated with it, including the respondent.[8] The taskforce learned that companies believed to be in the Group had previously been wound up in insolvency or deregistered with significant unpaid tax liabilities.[9] The view was formed that other Group companies which were still trading had incurred significant unreported liabilities for 'pay as you go' withholding tax, goods and services tax and superannuation guarantee charges.[10]

10. The audit team determined that during the period from 30 June 2010 to 30 June 2016, more than $43 million was transferred by Group companies to accounts in China held by the respondent, his relatives, and companies suspected to be under his control in China, through direct transfers and through a Chinese foreign exchange business.[11] The appellant suspects the respondent is the controlling mind of both the Group and other companies in China.[12]

ATO criminal investigation

11. Sometime during the period from July 2015 to 26 November 2018, the ATO commenced a covert criminal investigation into the Group and the respondent.[13] The respondent remained under criminal investigation as at 15 May 2019[14] and the primary judge found that there existed a realistic possibility of criminal charges.[15] The appellant does not contend that the criminal investigation has been abandoned, but the respondent has not yet been charged with any offence.[16]

Commencement of proceedings and *ex parte* hearing before Yates J

12. On 27 November 2018, the appellant commenced the *Shi* proceedings in the Federal Court of Australia seeking:[17]

    (a) urgent *ex parte* asset preservation (freezing) orders against the respondent and two others in respect of their worldwide assets, and ancillary orders for affidavits disclosing their worldwide assets; and

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[8] *Deputy Commissioner of Taxation v Shi* [2018] FCA 1915 (***Shi***) at [3]: Appellant's Book of Further Materials (**AFM**) at tab 7 page 75; *Deputy Commissioner of Taxation v Ausmart Services Pty Ltd* [2018] FCA 1912 (***Ausmart***) at [3].

[9] *Ausmart* at [9], [19].

[10] *Ausmart* at [4], [7].

[11] *Ausmart* at [17]; *Shi* at [13], [20]: AFM tab 7, pages 77, 79.

[12] *Ausmart* at [3], [17].

[13] Affidavit of Timothy Kelly sworn 27 November 2018 (**Kelly**): AFM tab 16 at [3]-[4], [8].

[14] *Deputy Commissioner of Taxation v Shi (No 3)* [2019] FCA 945 (**PJ**) at [4].

[15] PJ[45].

[16] It is noteworthy that if the Respondent were charged in respect of the matters the subject of the *Shi* and *Ausmart* proceedings, that fact would be relevant to the s 128A(6)(c) analysis in this case.

[17] *Shi*, e.g. at [1].

(b) judgment against the respondent in respect of taxation related liabilities in the amount of $41,092,548.03 plus interest.

13. Concurrently with the *Shi* proceedings, the appellant commenced the *Ausmart* proceedings against eight of the Group companies seeking interlocutory orders for appointment of provisional liquidators along with final relief for the winding up of those companies on just and equitable grounds.[18]

14. In support of the interlocutory applications, the appellant relied upon the evidence of senior tax officer, Mr Zafiriou, comprising two affidavits and an exhibit of thousands of pages of material acquired or generated by the ATO during the covert audit.[19]

15. On 27 November 2018, the applications for freezing and disclosure orders in *Shi* and for appointment of provisional liquidators in *Ausmart* were heard *ex parte* before Yates J. His Honour granted the relief sought by the appellant on both applications.[20]

16. Paragraph 7 of the freezing orders in respect of the respondent provides a broad definition of "assets"[21] which includes not only assets held in the name of the respondent, but also any assets in respect of which he has direct or indirect power to deal with or dispose of, including those of all of the respondent's businesses.

17. Orders under s.37AF were made[22] to prevent potential frustration of the planned execution of a series of search warrants expected to be issued the same day and executed by the Australian Federal Police, on the following day, 28 November 2018.[23]

Search warrants

18. On 27 November 2018, the New South Wales Local Court issued a series of search warrants under s.3E of the *Crimes Act 1914* (Cth) which listed eleven suspected serious offences concerning the respondent including various taxation fraud, money laundering, secret commission and *Migration Act* offences.[24]

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[18] *Ausmart*, e.g. at [21].

[19] *Ausmart* at [2]; Index to Part B of the Appeal Book in the Full Court of the Federal Court of Australia: Core Appeal Book (**CAB**), pages 133-173.

[20] *Shi* Orders: AFM tab 7, 42-43.

[21] AFM tab 21, 47-48.

[22] *Shi* Orders: AFM tab 7, 43 (Orders 7 and 8).

[23] Affidavit of Timothy Kelly sworn 27 November 2018 (**Kelly**) at [8], AFM at tab 16.

[24] Affidavit of Vivian Evans affirmed 18 March 2019 (**Evans**): AFM tab 14 at pages 20-23 (blue page numbers as added by the Registry); PJ[2]. The money laundering offence carries a maximum penalty of 25 years imprisonment.

19. On 28 November 2018, search warrants were executed by the Australian Federal Police at nine premises associated with the respondent.[25]

Part V: Argument in answer to the argument of the appellant

20. The appellant's grounds of appeal invoke the language of "relevant considerations" to submit that the Full Court was prohibited from considering, *first*, the availability of alternative mechanisms to obtain information and *secondly*, the residual risk of exposure to criminal liability or prejudice if privilege material were to be disclosed.

21. The respondent submits that an analysis of the statutory text, supported by reference to the legislative history, subject matter, scope and purpose of the relevant legislation,[26] does not support the court being constrained in the manner contended for by the appellant. In the circumstances of this case, it is submitted the considerations were not only relevant, but significant, in the evaluative exercise mandated by s.128A(6)(c).

Legislative history of s.128A

22. The task of ascertaining the scope of the enquiry mandated by s.128A(6)(c) is informed by ordinary principles of construction, including the legislative text, history and context.[27] We commence with the history due to the significance of the "perceived difficulty"[28] the development and enactment of s.128A sought to address.

23. The "somewhat tortuous"[29] legislative history to s.128A is summarised by the Full Court.[30] This history confirms the conclusion of the textual analysis (below) that the provision is intended to give full breadth to the mandated interests of justice enquiry.

24. Section 128A was inserted into the *Evidence Act* after judicial criticism of the *ad hoc* "*Bax* practice", and a predecessor procedure, which invoked the inherent power of the court to facilitate disclosure of privilege information to effect orders of the court while providing some measure of protection from liability for deponents. The judicial criticism was principally directed to the residual risk posed to people being compelled to disclose

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[25] Kelly at [4]: AFM tab 16; PJ[2].

[26] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) CLR 355 at [91]-[92] per McHugh, Gummow, Kirby and Hayne JJ.

[27] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39].

[28] FCJ[57].

[29] FCJ[68].

[30] FCJ[19]-[23] (Davies J); FCJ[60]-[61] (Lee J).

incriminatory information and the undesirability of modification or abrogation of the privilege against self-incrimination without statutory basis.[31]

25. Prior to enactment, s128A was subject to detailed and repeated consideration by a series of Law Reform Commissions.[32] A joint report of the ALRC, NSWLRC and VLRC proposed a model in which self-incrimination was abrogated in respect of orders in civil proceedings requiring assets disclosure, but provided that any evidence obtained in compliance of those orders that had a tendency to incriminate the person could not be used against the person in criminal or civil penalty proceedings (**the ALRC model**). The legislature ultimately rejected that model and adopted a model provision of the Victorian Law Reform Commission (**VLRC**). The VLRC model was limited to orders ancillary to Anton Pillar and Mareva orders. It prohibited disclosure of information unless the court was satisfied that the information would not tend to incriminate a person of a foreign offence or civil penalty (s.128A(6)(b)) and inserted a requirement that the Court be satisfied that the "interests of justice require disclosure" before considering whether to exercise its discretion to make an order for disclosure.[33]

26. The VLRC's model was designed to (underlining added):

> limit the court's ability to require disclosure to instances <u>where the certificate procedure is able to provide either an absolute or reasonable degree of protection</u>" … "by excluding the power to require disclosure where the self-incrimination relates to an offence in a foreign jurisdiction and by making the power discretionary and subject to an 'interests of justice' test <u>so that consideration can be given to the extent of the protection afforded by the certificate</u>.[34]

27. The VLRC's statement that consideration should be given to the "extent of the protection afforded by the certificate" recognises that the derivative use protection afforded by the certificate may not be complete.[35] Further, the addition of an "interests of justice" test confirms that s.128A was specifically designed to ensure that courts consider any residual exposure that may exist, even with the protection of a certificate.[36]

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[31] *Reid v Howard* (1995) 184 CLR 1 at [14] (Toohey, Gaudron, McHugh and Gummow JJ), *Pathways Employment Services Pty Ltd v West* (2004) 212 ALR 140 (Campbell J); FCJ[57]-[59].

[32] FCJ[63]-[68].

[33] *Implementing the Uniform Evidence Act:* February 2006 (**VLRC Report**); Explanatory Memorandum, *Evidence Amendment Bill 2008* (Cth) *at* [190] (**EM**).

[34] VLRC Report at [2.66] and footnote 81.

[35] A certificate under s.128A(7), like its s.128 counterpart, provides for derivative use immunity but does not provide complete protection: see *Gedeon v R* (2013) 280 FLR 275 (***Gedeon***) at [292] (Bathurst CJ, with whom Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreed), and decisions there cited.

[36] A certificate under s.128A(7) may afford less protection than one under s.128 due to the physical nature of the sworn affidavit and the irrevocability of its disclosure when compared to the judicially supervised 'question by question' process of witness examination.

28. Unlike the ALRC model, the VLRC model deliberately adopted much of the language and structure of s.128 of the *Evidence Act*.[37] The practical operation of those provisions is relevant to the construction of s.128A.

29. The VLRC further explained (at [2.67]) (underlining added):

> The commission takes an admittedly cautious approach to the abrogation of the privilege in these circumstances. We consider this to be warranted given the fundamental nature of the privilege, and the likelihood that initial orders for disclosure will be made at short notice in the absence of the person who should have an opportunity to claim the privilege.

30. The rejection of the ALRC proposal and adoption of the VLRC model signified a legislative intent to provide greater, and more certain, legal protection to deponents. The inclusion of the broad "interests of justice" test and discretion ensured that the court:

(a) was able to consider a broad range of considerations;

(b) gave careful consideration to any interest of the deponent that may have been neglected during the expedited process for initial disclosure orders;

(c) was able to take into account any residual exposure, both nationally and internationally, so that exposure was limited to where protection was absolute or reasonable in all the circumstances; and

(d) retained a residual discretion such that an order for disclosure would not axiomatically follow, even where the criteria in s.128A(6) were satisfied.[38]

31. These steps would not have been necessary if the legislature considered, as argued by the appellant at AS[45]-[46], [48], that the protections and immunities afforded by the certificate were sufficient in all cases.

32. The extrinsic materials do not indicate an intention that the discretion of the court be in any way confined. There is nothing in the purpose or object of the enactment as revealed by its language, statutory context or other legislative materials, which confines the court's evaluative judgment or discretion in the manner suggested.

Textual analysis

33. The operative language in s.128A(6)(c), i.e. that the court be satisfied that "the interests of justice require the information to be disclosed", should be construed broadly.[39] In *Rich v*

[37] Also seen in cognate provisions such as s.61 *Coroners Act 2009* (NSW) and s.87 *Civil Procedure Act (NSW)*.
[38] Cf AS[53(b)]; FCJ[108].
[39] PJ[26]; FCJ[77]; *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 at [37] (Sheller JA with whom Meagher and Beazley JJA agreed).

Attorney General (NSW) Leeming JA observed, in the context of the use of the same form of words in sub-s.61(4)(b) of the *Coroners Act 2009* (NSW), that the phrase is "broadly worded" and of a class of "undefined discretionary powers described by Dixon CJ in *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473".[40] His Honour noted the phrase has been described as of the "widest possible reference" such that "there could scarcely be a wider judicial remit": *Herron v Attorney-General for NSW*.[41]

34. Ascertaining whether the interests of justice require a particular outcome (or whether a particular outcome is in the interest of justice) in any statutory context requires an evaluative judgment which depends upon the circumstances of the case.[42] The state of satisfaction under s.128A(6)(c) necessarily imports a degree of subjectivity.[43]

35. The interests of justice are not limited to the interests of one party and there may be interests wider than those of either party to be considered.[44] It has been observed in other contexts that the interests of justice must include justice to all parties and it would be incompatible with notions of justice to apply s.128A in a way that favoured the rights of one party over the rights of another.[45]

36. Accordingly, as the primary judge and the majority of the Full Court concluded, the "interests of justice" enquiry is broad.[46] It is only by reference to the specific statutory terms and context that the discretion may be confined.

37. Three textual features of s.128A militate against the confined construction urged by the appellant.

38. ***Prima facie requirement for return of the affidavit if reasonable grounds for objection.*** The provision is constructed as a two-stage process. First, the court must determine if there are reasonable grounds for the objection (after the relevant person fulfils the procedural requirements in sub-ss.(2) and (3)). It is common ground that the onus rests upon the claimant of privilege at this stage. If a court finds there are reasonable grounds for the objection, a default position is created by s.128A(5) whereby the privilege affidavit "must" be returned to the "relevant person".[47] At this point the relevant person has met his or her

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[40] [2013] NSWCA 419 at [19]-[20] (Leeming JA, with Bathurst CJ and Beazley JA agreeing).
[41] (1987) 8 NSWLR 601 at 613.
[42] *Onley v Commissioner of the Australian Federal Police* (2019) 367 ALR 291 at [408] (Basten J).
[43] FCJ[89].
[44] *BHP Billiton Ltd v Shultz* (2004) 221 CLR 400 at [15] (Gleeson CJ, McHugh and Heydon JJ).
[45] *BHP Billiton* at [169] (Kirby J).
[46] PJ[26]; FCJ[77] (Lee J).
[47] "***relevant person*** means a person to whom a disclosure order is directed": s.128A(1).

onus, the default position has been engaged and he or she has no further burden of satisfying the court as to the criteria in the provision.

39. At the second stage, the party seeking disclosure attempts to satisfy the court of the matters in s.128A(6). The majority of the Full Court correctly held[48] that the onus at the second stage shifts from the relevant person to the party seeking disclosure.[49]

40. ***Barriers to disclosure in s.128A(6).*** Consistent with the VLRC's cautious approach to the abrogation of privilege, s.128A(6) is drafted to place two potential barriers to disclosure. If the party seeking disclosure is unable to satisfy the court that the information does not tend to prove a foreign offence or civil penalty, then s.128A(6)(b) operates to prohibit any disclosure. Only if that risk can be excluded will the court proceed to consider if the "the interests of justice require" an order for disclosure.

41. Section 128A(6)(c) does not constrain the considerations relevant to the analysis. Typical indicia of legislative intent to restrict a court's consideration of interests of justice, such as specified mandatory or prohibited considerations, are absent.[50] Further, the provision calls for a determination of whether the interests of justice *require* disclosure of a privilege affidavit (as opposed to merely whether disclosure is *in* the interests of justice). As observed by the majority at FCJ[95], "*Require* is a strong word and although "interests of justice" is a broad concept, it is not enough, for example, in the s.128 context, that the evidence in question be relevant – a 'relatively high standard of satisfaction' is required given that the legislation abrogates a basic common law right significantly."[51] This reasoning is similarly apposite to s.128A, which involves the possible abrogation of a basic common law right.

42. ***Residual discretion.*** The inclusion of a residual discretion to not order disclosure, or to only order partial disclosure, even where the court is satisfied of each of the s.128A(6) criteria further confirms that Parliament did not intend that a court be confined in the manner urged by the appellant.[52] Provision for partial disclosure indicates that the legislature intended that any compelled disclosure be to the minimum extent necessary.

Conclusion on construction

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[48] FCJ[83], [91].

[49] *Evidence Act* s.142.

[50] Cf. *Proceeds of Crime Act 2002* (Cth) (**POC Act**), s.319; *Onley v Commissioner of the Australian Federal Police* (2019) 367 ALR 291 at [224] (Bathurst CJ) and at [334], [359] (Basten J).

[51] *Gedeon* at [286].

[52] Cf. FCJ[86].

43. A construction of s.128A which gives full meaning to the operative language in s.128A(6)(c) of "the interests of justice require", is reflective of the legislative intent to give the full measure of protection to the fundamental rights engaged by the provision.

Ground 1(a) – The statutory mechanism under s.108 CPA was a relevant consideration

44. The majority's reasons for considering the available alternative statutory mechanism in s.108 of the CPA are summarised at FCJ[101], [104]-[107]. The majority's reasoning may be summarised as follows:

    (a) The purpose of ancillary orders for disclosure of assets is to prevent frustration of a court's process by operating to preserve assts and assist and protect the use of methods of execution and are not a substitute for them: FCJ[103] (cf. AS[31]).

    (b) The appellant submitted that disclosure was required in the interest of justice to assist methods of execution, which requires consideration of other available ways that execution could be assisted: FCJ[104].

    (c) The examination procedure under s.108 of the CPA was available and questions could be framed to obtain information in a direct way to avoid trespassing on potentially privileged information: FCJ[105]-[106].

45. In *Bax Global* (at [23]), Austin J observed, by reference to this Court's decision in *Cardile v LED Builders*[53] and the Queen's Bench decision of *A v C* [54], that in deciding whether to make an asset disclosure order, a court should consider alternative statutory procedures such as discovery and interrogatories before compelling disclosure. It stands to reason that in a post-judgment curial context, particularly given the important common law rights and immunities involved, the Full Court was correct to consider the statutory alternative to disclosure under s.108 of the CPA. The ability to obtain information from other sources without compelling a person to incriminate themselves is a well-established consideration under s.128 and similar provisions.[55]

46. When the matter came before the primary judge in May 2019, the evidentiary landscape had changed significantly from the position when Yates J made the *ex parte* orders in November 2018. Search warrants had been executed and judgment had been obtained. Accordingly, the purpose of the disclosure order had narrowed to the need for information

[53] (1999) 198 CLR 380.

[54] [1981] QB 956.

[55] *Lifetime Investments Pty Ltd v Commercial (Worldwide) Financial Services Pty Ltd* [2006] FCA 639 at [29], [33], [40] (Spender J); *AWU v ROC* [2019] FCA 195 at [26] (Bromberg J); *Darlaston v Parker* [2010] FCA 771 at [28] (Flick J)

to satisfy the judgment debt. The prospect of criminal charges loomed large. In these circumstances, the availability of alternative mechanisms to obtain asset information which posed less risk to the deponent was critical to the determination of where the interests of justice would lie.

47. The relevance of alternative statutory mechanisms was the subject of a good deal of discussion in the argument before Full Court.[56] There the appellant did not contest that alternative statutory mechanisms might be taken into account as part of the evaluative exercise.[57]

48. It is common ground that s.128 would apply to a s.108 examination.[58] Neither party takes issue with the correctness of the decision of Davies J in *Gould.*[59] It does not follow however, as the appellant submits (at AS[36]), that the procedure could not be conducted to elicit information in the targeted manner described by the majority.[60]

49. The advantage of the s.108 procedure is that it is controlled and conducted under the auspices of the Supreme Court. As observed in *Lee v New South Wales Crime Commission,*[61] the Registrar has the power conferred on the court to prevent injustice and unfair prejudice to the examinee and to prevent abuse of its own processes. The power is to be exercised judicially and in accordance with legal principle to diminish the possibility of injustice or oppression.[62] Further, it can be expected there will be sensitivity to the impact of questioning on pending (or potential) criminal proceedings.[63] This may include orders to close the court, restriction on use of the transcript, refusing to allow questions that may cause prejudice and other orders to safeguard a future trial.

50. The majority did not find that the availability of the s.108 procedure is determinative; only that statutory alternatives are relevant to the interests of justice enquiry in s.128A(6)(c). In the present case, where freezing orders were in place, and where there was a realistic possibility of criminal charges, this was a matter of real significance.

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[56] Transcript of hearing before the Full Court (**T**): Respondent's Book of Further Materials (**RFM**) tab 21, at T9.27-11.19; 14.15-15.24; 18.16-.43; 21.16-21.41; 22.11-.19.
[57] T14.31-.42.; 19.19-20.4.
[58] AS[35], [37].
[59] *Deputy Commissioner of Taxation v Gould* [2020] FCA 337.
[60] FCJ[106]; See also T15.1-.14.
[61] (2013) 251 CLR 196 (***Lee***).
[62] *Lee* at [141] (Crennan J), at [164] (Kiefel J) and at [340] (Gageler and Keane JJ).
[63] *Lee* at [49] (French CJ) and at [81] (Hayne J).

51. The appellant relies upon Davies J's dissent[64] as the basis upon which he contends that the considerations the subject of grounds 1(a) and 1(b) are irrelevant. However, at AS[23], he mischaracterises the primary judge's error in respect of s.353-10. The error unanimously identified by the Full Court was not that the s.353-10 power was an irrelevant consideration to the s.128A(6)(c) analysis, but rather that his Honour failed to take into account other relevant considerations in respect of that power.[65]

52. Justice Davies accepted that alternative means by which the appellant may obtain the relevant information is a relevant consideration[66] but not the only (determinative) consideration. It follows that if the s.353-10 power is not an irrelevant consideration, then neither are other statutory mechanisms to obtain the information.

53. At AS[38], the appellant submits that if the availability of other statutory remedies to obtain information from a judgment debtor is a relevant consideration under s.128A(6)(c), then "there is a disincentive for the [freezing order] applicant to have judgment entered prior to the determination of the claim for privilege." The submission does not take account of important features of the provision, the overarching purpose of the rules of procedure, the nature of freezing and ancillary orders generally, and the unique status of appellant as a party.

54. *First*, as submitted above, the legislative history of s.128A and an analysis of its text, are strongly indicative that courts are not confined in the manner suggested by the appellant in considering whether the interests of justice require disclosure and whether the residual discretion to not make an order for disclosure should be exercised.

55. *Secondly*, any effort to delay a judgment otherwise available merely to increase the prospects of obtaining disclosure of a privilege affidavit, particularly under circumstances where it appears there exist reasonable grounds for an objection under s.128A(4),[67] would be inconsistent with the overarching purpose of the rules of court in all courts with

[64] AS[31].

[65] FCJ[[31] (Davies J); FCJ[101] (Lee J); FCJ[114]-[115] (Stewart J).

[66] FCJ[31] (Davies J); FCJ[52], [101] (Lee J with whom Stewart J agreed at FCJ[114]-[115]).

[67] I.e., where "provision of information [in the Privileged Affidavit] 'would give rise to a real and appreciable risk of prosecution…": FCJ[109], citing *Deloitte Touche Tohmatsu (A Firm) v Sadie Ville Pty Ltd (atf Sadie Ville Superannuation Fund)* [2020] FCAFC 23 at [6] (Wigney J).

jurisdiction to grant freezing orders.[68] Further, such an effort may amount to an abuse of process.

56. *Thirdly*, as recognised by the majority,[69] freezing orders and ancillary disclosure orders operate to preserve assets and assist and protect the use of methods of execution and are not a substitute for them.[70] They are not an end unto themselves.

57. *Fourthly*, the appellant obtained judgment against the respondent on 24 April 2019[71] in an amount calculated by reference to notices of income tax and penalty assessment issued by him. By operation of the "conclusive evidence provisions",[72] the notices of assessment are conclusive proof of the tax debt.[73] Aside from any allegation of conscious maladministration on the part of the appellant,[74] there are no grounds upon which the respondent could have resisted judgment. No such grounds were advanced, leading to an expeditious resolution of the substantive proceedings. Most freezing order applicants are not similarly situated.

58. The present case has specific circumstances which arise, in large measure, due to the identity of the appellant. The appellant's statutory ability to obtain judgment expeditiously by raising and tendering a notice of assessment[75] may occasionally have implications on the broad enquiry mandated by s.128A(6)(c). In the present case, those features do not render the s.108 procedure an irrelevant consideration.

Conclusion on ground 1(a)

59. For all the above reasons, ground 1(a) should be dismissed.

Ground 1(b) – Risk of derivative use is not a prohibited consideration

60. The appellant's argument on ground 1(b) is twofold. *First*, it is contended that the legislature determined that the appropriate mechanism to guard against the risk of derivative use was the issuing of a certificate, and therefore the majority erred in taking into account that derivative use could nonetheless occur after a certificate was issued.[76]

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[68] E.g. *Federal Court of Australia Act 1976 (Cth)* s.37M; CPA s.56;

[69] FCJ[103].

[70] *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 401 [43] (Gaudron, McHugh, Gummow and Callinan JJ); *Witham v Holloway* (1995) 183 CLR 525 at 535 (Brennan, Deane, Toohey and Gaudron JJ).

[71] PJ[1]; FCJ[3].

[72] Div 353 and s 350-10(1) of Sch 1 of the TAA; s 175 of the *Income Tax Assessment Act 1936* (Cth)

[73] *Anglo American Investments v DCT* (2017) 347 ALR 134 at [54]; *FCT v Futuris Corp* (2008) 237 CLR 146

[74] See for example *Anglo American Investments* at [78].

[75] The appellant may obtain judgment on the assessment and seek to enforce that judgment even where it has been objected to under Part IVC of the *Taxation Administration Act 1953* (Cth).

[76] AS[46].

Secondly, the appellant submits that the risk of derivative use in the present case is purely speculative since the respondent has not yet been charged with an offence and that taking into account the speculative possibility of derivative use risks undermining the certificate mechanism.[77]

61. For the reasons outlined above, each of these contentions should be rejected. The legislature adopted a VLRC model provision that was expressly drafted to limit compelled disclosure to where courts considered a certificate would provide an "absolute or reasonable" level of protection. It was never contemplated that the derivative immunity provisions would provide a complete answer to the risks faced by the deponent. In other words, the inclusion of the certificate regime does not create a presumption that the interests of justice require disclosure with a certificate.[78]

62. The type of derivative use taken into account by the majority went beyond the derivative use expressly proscribed by the certificate. First, the majority properly took into account the difficulty of detecting and enforcing the derivative immunity protections. The majority accepted that derivative use immunity in respect of compulsorily acquired information in s.128A(8), is very difficult to detect and enforce.[79] The nature of derivative information is such that investigators and prosecutors may not even be aware they have it.[80] As the appellant acknowledges, this was a matter that was taken into account by Bathurst CJ in *Gedeon*.[81] Contrary to the appellant's submissions, *Gedeon* cannot be wholly sidelined on the basis that Gedeon had been charged with offences. The presence or absence of charges may affect the weight given to this factor. It does not render the factor irrelevant in the face of a criminal investigation.

63. In this respect, the majority properly took into account the risk of interference to the accusatorial process of criminal justice.[82] The accusatorial process of criminal justice begins pre-charge.[83] As Lee J noted, a plurality of this Court in *Strickland* held that "a requirement to give answers in respect of an offence of which a person is suspected, or in

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[77] AS[48].

[78] FCJ[108]; *Workcover Authority (NSW) v Tsougranis* (2002) 117 IR 203 at [27] (Haylen J).

[79] FCJ[110]; *Sorby v Commonwealth* (1983) 152 CLR 281 at 312.3 (Murphy J); *Hamilton v Oades* (1989) 166 CLR 486 at 496 (Mason CJ); *Strickland* at [61] and *R v Seller* (No 3) (2014) 249 A Crim R at 445 at [47].

[80] *Seller v R (No 3)* (2014) 301 FLR 318 at [47] (Button J).

[81] At [292].

[82] *Strickland v Cth* (2018) 361 ALR 233 (***Strickland***) at [75]-[78], [101]; *Lee v R* (2014) 253 CLR 455 (***Lee (No 2)***) at [31]-[38], [42]; *X7 v ACC* (2013) 248 CLR 92 (***X7***) at [124]; *Onley v Commissioner of the Australian Federal Police* (2019) 367 ALR 291 at [230] (Bathurst CJ).

[83] FCJ[109]; *X7* at [106]-[109], [118] and [160], confirmed in *Strickland* at [76]-[79], [101] (Kiefel CJ, Bell and Nettle JJ); *R v Leach* [2019] 1 Qd R 459 at [102] (Sofronoff P).

relation to which he or she is a person of interest, fundamentally alters the accusatorial process including for the investigation [of that offence]."[84]

64. An inquiry into whether an act creates a real risk to the proper administration of justice requires consideration of all of the circumstances, and of necessity will always be a forward-looking assessment, and, to some extent, a hypothetical exercise. However, in circumstances where the primary judge accepted[85] that there is a realistic possibility that the respondent will be charged, and where the legislature recognised that derivative use protections will not inevitably suffice, this risk should not be summarily ignored merely because it is to some degree "speculative".

10 65. It should also be noted that the Full Court was unanimous that the risk of derivative use was not an irrelevant consideration. Whilst Davies J gave the consideration less weight than the majority, her Honour nonetheless considered this factor to be relevant.[86]

Risk of derivative use exists here

66. The certificate does not prohibit use of the Privileged Affidavit in proceedings to which the respondent is not a party. The majority identified risks of derivative use that would not be prohibited by the provision, including its tender on an application for the appointment of a receiver or another enforcement measure taken against a third party.[87]

67. On this point, the primary judge reasoned that the information in the hands of the appellant would be protected by the implied undertaking[88] and that the protection of a certificate
20 would prevent the information being used by prosecutors against the respondent in any subsequent criminal proceedings.[89]

68. However, the implied undertaking only operates so long as the material is not tendered in open court. A certificate does not operate to prevent the Privileged Affidavit (or information derived from it) being used against third parties and a party can be released from an undertaking. If the appellant were to obtain the Privileged Affidavit to assist enforcement of the judgment, subject to a certificate, then, as noted by the primary judge, the appellant may wish to "issue writs of execution of property, charging orders, a court ordered garnishee and may wish to perform court examinations".[90] The appellant may need

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[84] *Strickland* at [77] (Kiefel CJ, Bell and Nettle JJ): FCJ[109]; also *X7* at [110] (Hayne and Bell JJ);
[85] PF[45]
[86] FCJ[46]-[47].
[87] FCJ[110].
[88] *Harman v Home Office* [1983] 1 AC 2080; *Hearne v Street* (2008) 235 CLR 125.
[89] PJ[29].
[90] PJ[27].

to rely on the Privileged Affidavit to enforce his judgment against third parties which would tend towards the need to disclose the Privileged Affidavit to those third parties as a matter of procedural fairness. These circumstances could give rise to the appellant being released from the implied undertaking, if leave is required.[91]

69. Once the information is in the public arena, the derivative use problem remains, which has potential to cause significant disruptions to any future criminal proceedings. If the Privileged Affidavit were to be disclosed to prosecutors, the respondent would be inclined to explore whether any evidence discovered later was directly or indirectly attributable to information in the Privileged Affidavit.[92]

10 *Conclusion as to ground 1(b)*

70. The risk that the disclosed privileged information could be used or held against the respondent in or in relation to future criminal proceedings exists notwithstanding the grant of a certificate under s.128A(7).[93] Considering and weighing up that risk is intrinsic to the interests of justice analysis in s.128A(6)(c).

71. It does not overstate the position to submit that risk of derivative use would be a relevant consideration in every case where reasonable grounds for the objection have been found under s.128A(4). Whilst such risk may, of course, not be determinative, and weight may vary, the court must be entitled to take this consideration into account.[94] In the present case, the risk is substantial and was given appropriate weight by the Full Court.

20 **Part VI: Respondent's argument on the notice of contention**

72. The majority found that "*unless* the primary judge was affirmatively satisfied of all the s.128A(6) matters (including that the evidence did not tend to prove the deponent committed an offence against or arising under a law of a foreign country), any power to make a disclosure order under s.128A(6) was not engaged".[95] There was no material upon which a finding could be made that the appellant had satisfied his onus under s.128A(6)(b). The Full Court had the benefit of all material before the primary judge, which included the Privileged Affidavit, a Confidential Annotation and an Open Annotation to the Privileged Affidavit, as well as the parties' submissions. The Full Court was in a position to determine

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[91] See *Pathways Employment Services Pty Ltd v West* (2004) 186 FLR 330 at 346 [42] (Campbell J).

[92] *Strickland*; *Lee (No 2)*; *X7; JRD Ghalloub v Eltobbagi* (2013) NSWSC 56 at [11].

[93] *Gedeon* at [292].

[94] See *R v Simmons (No 6)* (2015) 250 A Crim R 65. (re s.128 context); *Borland v NSW Deputy State Coroner* [2006] NSWSC 982 and *Rich v Attorney General (NSW)* [2013] NSWCA 419 (re s61).

[95] FCJ[91], emphasis in the original.

ground 1(b) of the respondent's notice of contention. It was not open on the material to be satisfied of the s.128A(6)(b) matter.

Textual indications of the onus being on the party seeking disclosure

73. The Full Court correctly held that the onus rests on the party seeking access to satisfy the court of each of the statutory pre-conditions in s.128A(6), applying s.142 of the *Evidence Act* and the principle that "[a]s a general proposition, if a court is required to be satisfied of the existence of a fact or state of affairs, it is for the party seeking to establish that level of satisfaction to bear the burden of doing so."[96]

74. A construction which requires the party seeking access to satisfy the court of the matter in s.128A(6)(b) is consistent with the overall structure of the provision. As outlined above, the provision is separated into two stages, which first impose an onus in the first instance on the "relevant [objecting] person" (s.128A(2), (3) and (4)), which if met, the court "must not require" disclosure and "must return" the privilege affidavit: s.128A(5). The directives in this section are "subject to" subsection (6). If a party seeks disclosure, as the appellant does here, then, and only then, does the court need to consider whether it is "satisfied" of the matters in s.128A(6). There is no evident statutory intention that such a step would automatically impose a further onus upon the party claiming the privilege, who had already established reasonable grounds.

75. "Satisfied" is the language of onus and where a statute requires the court to be satisfied before enlivening a particular outcome, the party seeking that outcome bears an onus on the balance of probabilities. It is common ground that the appellant bears the onus with respect to sub-s.128A(6)(c). It requires a strained reading of the section to conclude that, after having established reasonable grounds for objection, the party claiming the privilege would be required to take additional evidentiary steps in respect of the same subject for a second time.

Practical difficulty

76. The assessment of any practical difficulty to the moving party in meeting the onus should be assessed through the lens of what the appellant already knows and what any party seeking disclosure under s.128A(6) would be likely to know. The appellant was already aware of sufficient information such that he was not materially disadvantaged by not being able to see the Privileged Affidavit.

[96] FCJ[81]-[83].

77. It is not unusual for statutory provisions to place an onus upon a party seeking disclosure of privileged or confidential material without allowing the party to view or access the material.[97] Typically, the court may inspect the material and the provisions tend to be structured, like s.128A(6), so that the court must be satisfied of certain enumerated criteria before making orders. This tends to occur where there is a strong public interest in limiting the disclosure of confidential or sensitive information. The regime for sexual assault communication privilege requires a party seeking access to a 'protected confidence' to satisfy the Court that the document "will" have substantial probative value without having access to the document.[98] Similarly, under the doctrine of public interest immunity, it is accepted that the party resisting production bears the onus of establishing that production would be contrary to the public interest but, once satisfied, the onus shifts to the party to seeking access,[99] who, without access, must satisfy the court of a series of matters including the importance of the evidence in the proceedings and the likely effect of allowing production.[100]

78. Resistance of an application to set aside a subpoena is another example requiring a party who seeks disclosure of documents to demonstrate that the requested documents, to which the party does not have access, meet certain criteria.[101] A party contesting a claim of legal professional privilege (the claim itself or loss of privilege through misconduct) must also meet their statutory burden without access to the claimed document.[102]

79. In the context of the statutory regimes described above, the court is able to adopt pragmatic expedients so that the moving party does not, in reality, face an "impossible burden".[103] The surrounding context of litigation will mean that it would be a rare case for a moving party to be making submissions "blindly".[104] The court may inspect the material and direct questions to parties. For example, the judge may require the moving party to establish that the gravamen of any potential offences alleged during the freezing order process (e.g. high

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[97] FCJ[85].

[98] Part 5, Division 2 of the *Criminal Procedure Act 1986* (NSW). In *R v Chute* [2019] ACTSC 52 Mossop J considered an application for leave to issue subpoenas for "protected confidences" and remarked upon, without resolving, the 'tension' that exists when requiring a party to show that the requested material would materially assist its case without that party being able to access the material (at [7]).

[99] In *Murphy v Victoria* [2014] VSC 624 at [36] the Supreme Court of Victoria stated the "scales must tip decisively in favour of disclosure before production and inspection will be ordered."

[100] Through the combined operation of ss130, 131A, and 133 of the *Evidence Act*.

[101] The issuing party of a subpoena must identify a "legitimate forensic purpose" and show it is "on the cards" that the documents will materially assist the case *Alister v The Queen* (1984) 154 CLR 404 at 414; *Attorney General (NSW) v Chidgey* (2008) 182 A Crim R 536 at 551; *R v Saleam* [1999] NSWCCA 86 [11].

[102] Sections 118, 119, 125 of the *Evidence Act*.

[103] FCJ[85], Cf. AS[51].

[104] Cf. AS[56].

value money transfers to China) do not tend to incriminate the deponent of foreign offences.

80. In the present case, the Confidential and Open Annotations were prepared as a guide to the contents of the Privileged Affidavit. In other cases, deponents or their solicitors may lead evidence about specific risks of exposure. The presiding judge may also adopt the rebuttable presumption that foreign law is the same as Australian law.[105]

81. Section 128(5)(b) has been operational, in almost identical terms, since 1995. The initial model of s.128 in DP 69 did not allow for compelled examination at the discretion of the court. Once it was determined that the section as enacted would allow compulsion, it was considered inappropriate to allow courts the discretion to overrule a legitimate claim of privilege for foreign exposure (because an Australian court could not guarantee that a foreign jurisdiction would respect a certificate of immunity). Section 128(5)(b) was reviewed in 2005, with the ALRC 102 noting concern from the Family Court about the potentially broad scope of the section and New Zealand law reform commentary about the difficulty of assessing the legitimacy of claims of potential liability overseas. The Commissions recommended retaining the provision despite the concerns because "[t]he underlying policy of s.128 is that the privilege against self-incrimination should be overridden only when an immunity is available in relation to other proceedings."[106]

82. Considering the potentially grave consequences of compelling a person to expose themselves to foreign prosecutions, there are clear policy reasons why the onus would be placed on the party seeking access to exclude any risk of foreign exposure. In this regard, the appellant's submissions properly draw attention to the textual distinction in s.128A between Australian and foreign law and the stricter requirements surrounding exclusion of the risk of foreign liability.[107]

The evidence in the present case

83. The appellant was in a position to lead evidence to establish that the activities and transactions which grounded his *prima facie* case for fraud did not run contrary to the relevant law of China. The appellant was aware of:

(a) the outcome of its audit and investigatory activities;

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[105] *Gedeon* and cases cited therein at [303]-[304] (Bathurst CJ with Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreeing); also *R v Rigney-Hopkins* (2005) 154 A Crim R 433 at [43] for application of the presumption in a criminal matter.

[106] Australian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [15.104-105].

[107] AS[52].

(b) the terms of the search warrants and the evidentiary basis upon which the listed offences were suspected, namely evidence of money transfers overseas to China and money transfers from China back into Australia, i.e. *prima facie* money laundering offences;[108] and

(c) the evidence which it relied upon to *prima facie* establish that the respondent and others "were engaging in systematic and deliberate non-compliance with their taxation obligations to the tune of many millions of dollars" resulting in substantial risk to the revenue "given the flow of the defendants' liquid assets to [the respondent], his relatives and/or associates, including by transfer offshore [to China] to entities either controlled by or associated with [the respondent]."[109]

Part VII: Time estimate

84. The respondent estimates 1 hour for the presentation of the argument in response and 30 minutes for the argument on the notice of contention.

Dated: 8 February 2021

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[108] Open annotation: AFM tab 20, 35-38; *Ausmart* at [14], [15], [17], [27]; *Shi* at [13], [20].
[109] *Ausmart* at [24], [27], [29]; *Shi* at [7].

IN THE HIGH COURT OF AUSTRALIA No. S211 of 2020

SYDNEY REGISTRY

BETWEEN: **DEPUTY COMMISSIONER OF TAXATION**

Appellant

and

ZU NENG SHI

Respondent

ANNEXURE

LIST OF RELEVANT STATUTORY PROVISIONS

1. *Evidence Act 1995* No. 2 (Cth), Compilation No. 33: ss 118, 119, 125, 128, 128A, 130, 131A, 133, 142
2. *Federal Court Rules 2011* No. 134 (Cth), Compilation No. 7: r 41.10
3. *Civil Procedure Act 2005 No. 28* (NSW), current version for 11 December 2020 to date: ss 56, 87, 108
4. *Uniform Civil Procedure Rules* 2005 No. 418 (NSW) current version for 11 December 2020 to date: Pt 38
5. *Coroners Act 2009 No. 41* (NSW), current version for 1 March 2020 to date: s 61
6. *Proceeds of Crime Act 2002* No. 85 (Cth), Compilation No. 49: s 319
7. *Criminal Procedure Act 1986 No. 209* (NSW), current version for 25 November 2020 to date: Part 5, Division 2