HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S211 of 2020

BETWEEN

DEPUTY COMMISSIONER OF TAXATION
Appellant
and
ZU NENG SHI
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions

2. The asset disclosure order was made in the context of an extensive, co-ordinated criminal investigation into the respondent and an associated group of companies. There was overlap:
   (a) Allegations of significant monetary transfers to China were prominent in both the criminal investigation and application for freezing orders: **CAB18 [27]; CAB99 [44]**.
   (b) The AFP executed the warrants at nine premises connected to the respondent the day after the *ex parte* freezing orders issued: **RS[9]-[19]; CAB99 [44]; AFM5, 31**.
3. Post judgment the evidentiary landscape had changed. The availability of alternate, less exposed, mechanisms to obtain information; and the extent to which the certificate offered real protection, were significant to whether the interests of justice required disclosure. The appellant asserts *House* error in the FFC's reasoning, contending these two matters were not relevant considerations, and hence were prohibited: **AS[27], [39].**

Construing s.128A(6)

4. The appellant frames s.128A as a facilitative scheme, abrogating privilege for freezing and related orders but retaining some mechanism of protection of deponents: **AS[45]-[46]**. The legislative history shows otherwise. The provision was designed to provide a narrow exception only to privilege, and was drafted cautiously, mindful that risks to the respondent may have been overlooked in the urgent *ex parte* freezing order process. The inclusion of "the interests of justice require" language was significant: **RS[22]-[27]**.
5. In preferring the VLRC model (**JBA692**), the legislature largely mirrored the terms of s.128 in s.128A. The drafting evinces an intention to allow disclosure, *first*, only if certain risks are excluded to the court's satisfaction and, *secondly*, only to the minimum extent required. Structural and textual features of the provision support this construction:

(a) The deponent does not "apply" but "objects" in order to engage privilege. The default position established by sub-s (5) is that the affidavit "must" be returned. The respondent has no interest in engaging with the terms of sub-s (6). S211/2020

(b) The words "subject to" in s.128A(5) do the same work as "unless" in s.128(4); this proviso is activated only if the "interests of justice require" disclosure. The phrase imports the broadest level of judicial inquiry and a high barrier to satisfaction: see *Gedeon* [286] (re 128) (**JBA524**); **RS[33]-[37], [41]** Subsection (6) carries no implication that disclosure will be required in the interests of justice.

(c) In both s.128 and s.128A, the words "determine" and "satisfaction" are words of onus and invoke s.142(1)(b) of the *Evidence Act*: see *Gedeon* [285] (**JBA524**), **RS[75]**.

(d) The appellant has an interest in every stage of sub-ss (6)(a)-(c) as each must be established to overcome the default position against disclosure. Sub-s (5) provides that any exposure to domestic or foreign liability attracts privilege and presumptive return. In sub-s (6) the court must be satisfied that any exposure is *only* to domestic liability and disclosure *only* ordered where "the interests of justice require".

(e) The closing use of "may" in sub-s (6), and option for partial disclosure, serve to emphasise the breadth of the enquiry and disclosure to the minimum extent required.

(f) The language of sub-s (8) is limited, prohibiting direct and derivative use of "evidence" in proceedings, whilst scope remains for broader investigative forensic advantage. A certificate under s.128A(7) affords less protection than s.128 due to the irrevocability of physical disclosure compared to the judicially supervised s128 questioning process.

6. If considerations of alternate mechanisms and residual exposure are prohibited it is difficult to see what work is performed by the "interests of justice require" inquiry. Both are well-established considerations in the s.128 context: see e.g. *Gedeon* [290], [292] (**JBA525**).

Ground One: The availability of an alternative statutory mechanism is relevant

7. No *House* error has been identified. The availability of s.108 will not necessarily be determinative but given (a) the existing judgment order; (b) the law enforcement status of the appellant; (c) the ongoing, overlapping parallel criminal investigation; and (d) the risk of exposure even with a certificate; it was appropriately considered: **RS[50].**

8. There was no erroneous failure to appreciate the purposes of asset disclosure orders: **cf AS[31]**. The comment by Lee J at [104] must be understood in the context of his earlier statements at [99] and [103] and how the appellant framed its case: **AS[31]-[32]; RFM21**. Any asset disclosure order is ancillary, access to the PA is not, and should not be permitted to be, an end in itself. The FFC was alive to the risk of use for other purposes: **RS[56].**

9. The s.108 procedure can be contrasted with the blunt, irrevocable step of disclosing the PA to a party with law enforcement responsibilities in a related criminal investigation: **CAB118; RS[49]**. Consideration of s108 is consistent with the underlying legislative principle of requiring disclosure to the minimum extent necessary: **RS[44]-[49]**.

10. Section 108 provides a controlled procedure under the auspices of the Supreme Court. Risk of derivative use is reduced by (a) being confined to relevant "material questions" (b) supervision is exercised judicially taking into account possible prejudice and risk to parallel processes; (c) procedures exist to limit broader dissemination: **RS[49].**

Ground Two: The risk of derivative use is relevant

11. The appellant's contention that derivative use is irrelevant because of the certificate is contradicted by the text and legislative history. The preferred VLRC model was drafted to ensure consideration would be given to the extent of residual exposure: **RS[26]-[27]**.

12. The risks in the present case were acute given the value of the PA as an investigative tool and the appellant's direct engagement in the criminal investigation: **RS[9]-[11]; AFM 5 31**.

13. The FFC correctly observed at [109]-[110] that there can be interference with the accusatorial process before charge and the well-recognised difficulty of identifying and proving that evidence is a direct or indirect use of the disclosed information: **RS[63]**.

Notice of Contention: Onus is on the party seeking disclosure.

14. The FFC at [83] and [91] correctly decided that the party seeking disclosure bears the burden of satisfying the court of s.128A(6)(b). This construction is consistent with the analysis above at [5], as the onus moves to the appellant at sub-s(6) to obtain disclosure.

15. The asserted practical difficulties provide no basis to strain a natural reading of the statute and, in any event, effectively fall away in practice:
    (a) it is not unusual for a party seeking disclosure of confidential material to bear an onus without viewing the relevant material: **RS[77]-[78]**;
    (b) s 128A is structured around the satisfaction of the judge, who can direct questions to parties, or invoke numerous other practical expedients: **RR[13]**.

16. The effect of the respondent's concession was misunderstood. The respondent abandoned Ground 2 (**CAB70**) which effectively claimed it had satisfied the onus if it rested on the deponent. The passage extracted by Lee J at [92] related to the alleged failure of the respondent to discharge his onus. It was not open for the primary judge to be satisfied of sub-s (6)(b) if it was an independent curial exercise: **RFM41**. The appellant alleged activity in a foreign jurisdiction that would be illegal if it occurred in Australia.

Dated: 14 April 2021

T A Game