



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S26/2021  
File Title: Deputy Commissioner of Taxation v. Huang  
Registry: Sydney  
Document filed: Form 27F - Outline of oral argument  
Filing party: Appellant  
Date filed: 13 Oct 2021

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

**NO S 26 OF 2021**

**BETWEEN:** **DEPUTY COMMISSIONER OF TAXATION**  
Appellant

**AND:** **CHANGRAN HUANG**  
Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT**

## PART I INTERNET PUBLICATION

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1. This outline of oral submissions is in a form suitable for publication on the internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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2. The Full Court erred in holding that the power of the Federal Court to grant a worldwide freezing order is subject to a jurisdictional pre-condition that there be proof of a realistic possibility of enforcement of the judgment debt against assets of the respondent in each foreign jurisdiction to which the proposed freezing order relates (**AS [1]**).

### Factual background – AS [6]-[16]

3. On 11 September 2019, Katzmann J made an *ex parte* freezing order against the respondent in respect of both his Australian and foreign assets (**CAB 54 [5]**). Her Honour was satisfied that there was a danger that the prospective judgment would be wholly or partly unsatisfied for seven reasons (**ABFM 76-77 [49]-[57]**). Those findings were not disputed at a subsequent *inter partes* hearing before Jagot J, who did not revisit them (**CAB 7 [4]**); on appeal; or in this Court. On 19 December 2019, Jagot J entered judgment in favour of the appellant (**DCT**) in the amount of some \$140.6 million (**CAB 55 [8]**).

### Construction of the *Federal Court Rules 2011* (Cth)

4. The Federal Court’s power to make freezing orders – which derives from s 23 of the *Federal Court of Australia Act 1976* (Cth) and the status of the Federal Court as a superior court – is confirmed in r 7.32(1) of the *Federal Court Rules 2011* (Cth) (**JBA Vol 1, Tab 3**). Three points should be noted about r 7.32 (**AS [19]-[20], [43], [51]**):
  - (a) in terms, it does not confine the power of the Court to make freezing orders to circumstances where there is a proven possibility of enforcement in each jurisdiction to which the order extends – any such limit on power must be implied;
  - (b) while r 7.32(1) does impose a purposive requirement – freezing orders may be made “for the purpose of preventing the frustration or inhibition of the Court’s process” – that purpose is to be pursued “by seeking to meet a danger that a judgment ... will be ... unsatisfied” – that is, unpaid (not “unenforced”); and
  - (c) r 7.32(1) refers to the “frustration or inhibition of the Court’s process”, not the Court’s enforcement process (contra **CAB 65 [42]**).
5. Rule 7.35 was not relied on by Jagot J in making the freezing order, and does not limit the Court’s power to make a freezing order (whether pursuant to r 7.32 or otherwise)

(cf **RS [9]-[13], [15(a)], [17], [23]-[24], [37]**). Unlike r 7.32, r 7.35 refers, in limited circumstances, to the sufficiency of the prospect of enforcement (rr 7.35(2), 7.35(3)(b)); and contains a causal requirement (r 7.35(4)). These textual differences are deliberate and support the construction of r 7.32 outlined above (**AS [29]-[31]; AR [2]-[7]**).

6. Contrary to **RS [6]-[9]**, the Full Court, in response to an appeal ground that the freezing order was beyond power (**CAB 55 [9], 65-67 [42]-[47]**): (i) implied a limitation on the power of the Court to make such an order, being a limit not found in the text of r 7.32; and (ii) did so without explaining how the implied test arose “clearly and unmistakably” from r 7.32 (**AS [22]**). That approach was contrary to principle:

- *Owners of “Shin Kobe Maru”* (1994) 181 CLR 404 at 421 (**JBA 3, Tab 8**)

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**Relevant authorities – AS [32]-[39]; AR [10]**

7. The construction of r 7.32 advanced by the DCT draws support from: (i) the way this Court has described the nature of freezing orders and, in particular, how such orders “seek to meet” the danger that a judgment will be wholly or partly unsatisfied; and (ii) several authorities specifically relevant to freezing orders with respect to foreign assets.

- *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623, 625 (Deane J) (**JBA 3, Tab 7**)
- *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [41], [50] (Gaudron, McHugh, Gummow and Callinan JJ) (**JBA 3, Tab 6**)
- *Ballabil Holdings* (1985) 1 NSWLR 155 at 165 (Priestley JA) (**JBA 4, Tab 10**)
- *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 at 81-83 (Lord Donaldson MR), 92-95 (Neill LJ), 97-98 (Butler-Sloss LJ) (**JBA 4, Tab 13**)
- *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139 at 1149-1150 (Dillon LJ) (**JBA 4, Tab 14**)

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8. These authorities emphasise that freezing orders: (i) operate *in personam* –the power derives from the Court’s authority to make orders against a person who is subject to the Court’s jurisdiction and does not depend on jurisdiction over assets amenable to enforcement mechanisms; and (ii) are protective of the Court’s process in a broad sense, such that focussing solely on the availability of enforcement processes in places where assets are located ignores other ways these orders may seek to meet a danger of an unsatisfied judgment.

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**Practical consequences of the Full Court’s construction – AS [23]-[28]**

9. The Full Court’s construction of r 7.32 gives rise to at least three significant (perhaps insuperable) practical difficulties in making freezing orders with respect to foreign assets:
- (a) applicants for freezing orders often do not know where a respondent’s assets are and have limited time to investigate – this problem is exacerbated because the Full Court’s construction will also preclude the making of ancillary orders;
  - (b) the Full Court’s test places a heavy burden on an applicant to identify and prove the content of foreign law and the existence of available mechanisms to enforce an Australian judgment; and
  - (c) the Court would be precluded from making a worldwide freezing order, enabling the surreptitious movement of assets to jurisdictions not covered by the order.
10. These considerations suggest that: (i) it is improbable that r 7.32 should be read as limiting the power to make freezing orders as stated by the Full Court; and (ii) the Full Court’s test undermines the Court’s capacity to protect its processes from frustration.

**Equitable relief in aid of enforcement – AS [44]-[45], [49]-[50]; AR [13]-[14]**

11. The Federal Court has jurisdiction to grant equitable relief in aid of enforcement of a judgment, including a statutory power to appoint a receiver (even, in some circumstances, in respect of foreign assets). The availability and appropriateness of a receivership remedy or another form of equitable relief are unlikely to be ascertainable when a freezing order is sought. The Full Court’s restrictive and inflexible interpretation of r 7.32(1) pays no regard to these prospective equitable remedies and increases the likelihood that such remedies will be wholly or partly defeated or avoided.

- *Federal Court of Australia Act 1976* (Cth), s 57(1) (**JBA 1, Tab 4**)
- *Caird Seven Pty Ltd v Attia and Shopsmart Pharmacy Franchising Pty Ltd (No 3)* (2016) 92 NSWLR 457 at [16] (Emmett A-JA) (**JBA 4, Tab 11**)
- *Gujarat NRE Coke Ltd* (2013) 304 ALR 468 at [75]-[76] (**JBA 4, Tab 15**)
- *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 at [50], [53], [58] (Lawrence Collins LJ) (**JBA 4, Tab 16**)

  
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13 October 2021