Deputy Commissioner of Taxation v Huang (No 4) [2022] FCA 618

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| File number: |  |
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| Judgment of: | **JAGOT J** |
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| Date of judgment: | 20 May 2022 |
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| Date of publication of reasons:  | 25 May 2022  |
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| Catchwords: | **PRACTICE AND PROCEDURE** — application to vary freezing order to prevent use of Australian assets to pay legal expenses — where substantial judgment debt for income tax and penalties unpaid by respondent — where enforcement of debt will be far easier against remaining Australian assets than overseas assets — where substantial overseas assets sufficient to pay for ongoing legal proceedings — variation of freezing order necessary to allow efficacious execution of order for judgment debt — application granted  |
|  |  |
| Legislation: | *Taxation Administration Act 1953* (Cth), pt IVC  |
|  |  |
| Cases cited: | *Break Fast Investments Pty Ltd v Gravity Ventures Pty Ltd* [2013] VSC 89*Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44*Deputy Commissioner of Taxation v Bollands* [2012] FCA 1050; (2012) 90 ATR 679*Deputy Commissioner of Taxation v Huang* [2019] FCA 1537*Deputy Commissioner of Taxation v Huang* [2019] FCA 1728*Deputy Commissioner of Taxation v Huang* [2019] FCA 2122*Deputy Commissioner of Taxation v Huang* [2021] HCA 43; (2021) 96 ALJR 43*Deputy Commissioner of Taxation v Shi* [2021] HCA 22; (2021) 95 ALJR 634*Goumas v McIntosh* [2002] NSWSC 713*Huang v Deputy Commissioner of Taxation* [2020] FCAFC 141; (2020) 280 FCR 260*Iraqi Ministry of Defence v Arcepey Shipping Co SA (No 2) (The Angel Bell)* [1981] QB 65*Linke v TT Builders Pty Ltd (No 2)* [2015] FCA 704*Masri v Consolidated Contractors International (UK) Ltd* [2008] EWHC 2492 (Comm)*Michael Wilson & “Partners” Ltd v Emmott* [2019] EWCA 219 (Civ); [2019] 4 WLR 53*National Australia Bank Limited v Human Group Pty Ltd (No 2)* [2020] NSWSC 1900 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 41 |
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| Date of hearing: | 20 May 2022  |
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| Counsel for the Applicant: | Mr L Livingston SC and Ms T Epstein  |
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| Solicitor for the Applicant:  | Craddock Murray Neumann  |
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| Counsel for the First Respondent:  | Mr G Ng and Mr N Li  |
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| Solicitor for the First Respondent:  | Unsworth Legal  |
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| **Table of Corrections** |  |
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| 30 May 2022  | Judgment debt figure in [38(1)] corrected to $140,607,780.88. |
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ORDERS

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| --- | --- |
|  | NSD 1490 of 2019 |
|   |
| BETWEEN: | DEPUTY COMMISSIONER OF TAXATIONApplicant |
| AND: | CHANGRAN HUANG First RespondentJIEFANG HUANG Second Respondent |

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| order made by: | JAGOT J |
| DATE OF ORDER: | 20 MAY 2022  |

THE COURT ORDERS THAT:

1. Order [10] in the Penal Notice directed to the first respondent made by Justice Jagot on 21 October 2019 be varied by inserting the words “*using your ex-Australian assets for the purposes of”* after the words “*This order does not prohibit you from*”. The penal notice to the first respondent as varied is annexed to these orders and marked “**A**”.
2. The first respondent pay the applicant’s costs of and in connection with the interlocutory application filed on 30 March 2022 as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**ANNEXURE A**

**(CHANGRAN HUANG)**

**PENAL NOTICE**

**TO: CHANGRAN HUANG**

**IF YOU:**

**(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR**

**(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU TO ABSTAIN FROM DOING,**

**YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.**

**ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.**

**TO: CHANGRAN HUANG**

This is a ‘*freezing order*’ made against you on 21 October 2019 by Justice Jagot at a hearing after the Court was given the undertakings set out in Schedule A to this order.

**THE COURT ORDERS**:

1. Subject to the next paragraph, this order has effect until further order.
2. Anyone served with or notified of this order, including you, may apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified.
3. In this order:

(a) ‘applicant’, if there is more than one applicant, includes all the applicants;

(b) ‘you’, where there is more than one of you, includes all of you and includes you if you are a corporation;

(c) ‘third party’ means a person other than you and the applicant;

(d) ‘unencumbered value’ means value free of mortgages, charges, liens or other encumbrances.

5. (a) If you are ordered to do something, you must do it by yourself or through directors, officers, partners, employees, agents or others acting on your behalf

or on your instructions.

(b) If you are ordered not to do something, you must not do it yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions or with your encouragement or in any other way.

**FREEZING OF ASSETS**

6.

(a) You must not remove from Australia or in any way dispose of, deal with or diminish the value of any of your assets in Australia (‘**Australian assets**’) up to the unencumbered value of AUD$140,823,109.76 (‘**the Relevant Amount’**) other than to make payment to the Commissioner of Taxation.

(b) If the unencumbered value of your Australian assets exceeds the Relevant Amount, you may remove any of those assets from Australia or dispose of or deal with them or diminish their value, so long as the total unencumbered value of your Australian assets still exceeds the Relevant Amount.

(c) If the unencumbered value of your Australian assets is less than the Relevant Amount, and you have assets outside Australia (‘**ex-Australian assets**’):

(i) You must not dispose of, deal with or diminish the value of any of your Australian assets and ex-Australian assets up to the unencumbered value of your Australian and ex-Australian assets of the Relevant Amount; and

(ii) You may dispose of, deal with or diminish the value of any of your ex-Australian assets, so long as the unencumbered value of your Australian assets and ex-Australian assets still exceeds the Relevant Amount.

7. For the purposes of this order,

(a) your assets include:

(i) all your assets, whether or not they are in your name and whether they are solely or co-owned;

(ii) any asset which you have the power, directly or indirectly, to dispose of or deal with as if it were your own (you are to be regarded as having such power if a third party holds or controls the asset in accordance with your direct or indirect instructions); and

(iii) the following asset in particular, the real property at:

1. 31 Douglas Ave, Chatswood NSW 2067;
2. Unit 5205, 438 Victoria Ave, Chatswood NSW 2067; and
3. Flat B,36/F, Tower 5, Bel-Air on the Peak Island South (Phase 4), 68 Belair Peak Avenue

(b) the value of your assets is the value of the interest you have individually in your assets.

**PROVISION OF INFORMATION**

1. (a) Subject to paragraph 9, you must at or before 11 November 2019 (or within such further time as the Court may allow) swear and serve on the applicant an affidavit setting out all of your assets within Australia, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets.

(b) Subject to paragraph 9, you must at or before 11 November 2019 (or within such further time as the Court may allow) swear and serve on the applicant an affidavit setting out all of your assets outside Australia, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets.

1. (a) This paragraph (9) applies if you are not a corporation and you wish to object to complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that you:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(b) This paragraph (9) also applies if you are a corporation and all of the persons who are able to comply with paragraph 8 on your behalf and with whom you have been able to communicate, wish to object to your complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that they respectively:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(c) You must:

(i) disclose so much of the information required to be disclosed to which no objection is taken; and

(ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and

(iii) file and serve on each other party a separate affidavit setting out the basis of the objection.

**EXCEPTIONS TO THIS ORDER**

10. This order does not prohibit you from using your ex-Australian assets for the purposes of:

(a) paying up to $10,000 a week on your ordinary living expenses;

(b) paying your reasonable legal expenses provided that the solicitor for the First Respondent is to file and serve a certificate in the form of Schedule C setting out the amount of their legal expenses and disbursements reasonably incurred by the respondents in connection with these proceedings and any other proceedings in which the first respondent is involved by 25 October 2019, and each month thereafter;

(c) dealing with or disposing of any of your assets in the ordinary and proper course of your business, including paying business expenses bona fide and properly incurred; and

(d) in relation to matters not falling within (a), (b) or (c), dealing with or disposing of any of your assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that before doing so you give the applicant, if possible, at least two working days written notice of the particulars of the obligation.

11. You and the applicant may agree in writing that the exceptions in the preceding paragraph are to be varied. In that case the applicant or you must as soon as practicable file with the Court and serve on the other a minute of a proposed consent order recording the variation signed by or on behalf of the applicant and you, and the Court may order that the exceptions are varied accordingly.

12. (a) This order will cease to have effect if you:

(i) pay the sum of AUD$140,823,109.76 into Court; or

(ii) pay that sum into a joint bank account in the name of your solicitor and the solicitor for the applicant as agreed in writing between them; or

(iii) provide security in that sum by a method agreed in writing with the applicant to be held subject to the order of the Court.

(b) Any such payment and any such security will not provide the applicant with any priority over your other creditors in the event of your insolvency.

(c) If this order ceases to have effect pursuant (a), you must as soon as practicable file with the Court and serve on the applicant notice of that fact.

**COSTS**

13. The costs of this application are reserved to the judge hearing the application on the Return Date.

**PERSONS OTHER THAN THE APPLICANT AND RESPONDENT**

14. **Set off by banks**

This order does not prevent any bank from exercising any right of set off it has in respect of any facility which it gave you before it was notified of this order.

15. **Bank withdrawals by the respondent**

No bank need inquire as to the application or proposed application of any money withdrawn by you if the withdrawal appears to be permitted by this order.

16. **Persons outside Australia**

(a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.

(b) The terms of this order will affect the following persons outside Australia:

(i) you and your directors, officers, employees and agents (except banks and financial institutions);

(ii) any person (including a bank or financial institution) who:

(A) is subject to the jurisdiction of this Court; and

(B) has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and

(C) is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience of the terms of this order; and

(iii) any other person (including a bank of financial institution), only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has jurisdiction over that person or over any of that person’s assets.

17. **Assets located outside Australia**

Nothing in this order shall, in respect of assets located outside Australia, prevent any third party from complying or acting in conformity with what it reasonably believes to be its bona fide and properly incurred legal obligations, whether contractual or pursuant to a court order or otherwise, under the law of the country or state in which those assets are situated or under the proper law of any contract between a third party and you, provided that in the case of any future order of a court of that country or state made on your or the third party’s application, reasonable written notice of the making of the application is given to the applicant.

**SCHEDULE C**

**CERTIFICATE**

No. NSD 1490 of 2019

Federal Court of Australia

District Registry: New South Wales

Division: General

**DEPUTY COMMISSIONER OF TAXATION**

Applicant

**CHANGRAN HUANG**

First Respondent

**JIEFANG HUANG**

Second Respondent

1. I, [insert name] , Solicitor for the First Respondent, certify that the amount of the legal expenses and disbursements incurred by the First Respondent in connection with this proceeding and any other proceedings in which the First Respondent is involved (**the Proceedings**) during the period between **[*insert relevant time period*]** is as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| *Name of Solicitor* | *Hourly rate* | *Number of hours spent* | *Cost* |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Total cost: $[ ]** |

1. I further certify that the amount of the disbursements incurred by the First Respondent in connection with the Proceedings during the period between **[*insert relevant time period*]** is as follows:

|  |  |  |
| --- | --- | --- |
| *Date* | *Disbursement* | *Cost* |
|  | *[E.g. counsel’s fees]* |  |
|  |  |  |
|  |  |  |
|  |  |  |
| **Total cost: $[ ]** |

1. Having regard to the complexity of the issues in dispute and the nature of the work which has been undertaken, I consider these amounts to be reasonable.

Date: [*insert date*]

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| [sIGNED] |

REASONS FOR JUDGMENT

JAGOT J:

1. These reasons for judgment explain why I made an order on 20 May 2022 in these terms:

Order [10] in the Penal Notice directed to the first respondent made by Justice Jagot on 21 October 2019 be varied by inserting the words “*using your ex-Australian assets for the purposes of”* after the words “*This order does not prohibit you from*”. The penal notice to the first respondent as varied is annexed to these orders and marked “**A**”.

1. In summary, I am satisfied that it is in the interest of justice that the first respondent, Changran Huang, not be permitted to use his assets in Australia to pay his contemplated legal expenses in connection with proceedings he has commenced in the Administrative Appeals Tribunal (**AAT**) to review the **Commissioner** of Taxation’s decision to disallow Mr Huang’s objections to the assessments of income tax and penalties the subject of the judgment I entered against Mr Huang in these proceedings on 19 December 2019: *Deputy Commissioner of Taxation v Huang* [2019] FCA 2122.
2. If necessary, I am also satisfied that there has been a material change in circumstances justifying the variation of the freezing orders I made on 21 October 2019: *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728.
3. On both accounts, this is primarily because: (a) there is now a judgment debt owed by Mr Huang to the **Deputy Commissioner** of Taxation for the unpaid income tax and penalties, (b) the entirety of the judgment debt remains unpaid by Mr Huang, (c) Mr Huang has now commenced the proceedings in the AAT, (d) the evidence persuades me that unless the freezing orders are varied as proposed by the Deputy Commissioner, the purpose of the continuation of the freezing order, to protect the efficacy of execution of the judgment debt against Mr Huang, will be or involves a real risk of being undermined, (e) the evidence persuades me that Mr Huang will have no difficulty in funding his proceedings in the AAT using his assets outside of Australia, and (f) there is no evidence that the variation of the freezing order will cause any prejudice to Mr Huang or any other person.

## Background

1. On 16 September 2019, Katzmann J made an ex parte freezing order against Mr Huang: *Deputy Commissioner of Taxation v Huang* [2019] FCA 1537.
2. On 15 October 2019, Mr Huang made an objection to his assessed income tax under Pt IVC of the *Taxation Administration Act 1953* (Cth) (the **TAA**).
3. On 21 October 2019 I made an inter partes **freezing order** against Mr Huang: *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728. This freezing order has continued and is the subject of the order for variation described above.
4. On 23 October 2019, Mr Huang applied for leave to appeal to appeal against the freezing order I made to the extent the order concerned his assets outside of Australia.
5. On 4 November 2019, Mr Huang made another objection to his assessed income tax under Pt IVC of the TAA.
6. On 19 December 2019, I made an order that judgment be entered in favour of the Deputy Commissioner against Mr Huang in the sum of $140,607,780.88 together with general interest charges to the date of judgment: *Deputy Commissioner of Taxation v Huang* [2019] FCA 2122. This is the judgment debt referred to above. No stay of execution was granted. The judgment debt remains unpaid.
7. On 28 September 2020, the Full Court of the Federal Court allowed Mr Huang’s appeal and made orders varying the freezing order but stayed those orders until further order: *Huang v Deputy Commissioner of Taxation* [2020] FCAFC 141; (2020) 280 FCR 260.
8. On 11 February 2021, the High Court granted the Deputy Commissioner special leave to appeal against the Full Court’s orders.
9. On 15 November 2021, the Commissioner disallowed all of Mr Huang’s objections to the assessments of his income tax and administrative penalties the subject of the judgment debt.
10. On 8 December 2021, the High Court allowed the Deputy Commissioner’s appeal and set aside the orders of the Full Court of the Federal Court: *Deputy Commissioner of Taxation v Huang* [2021] HCA 43; (2021) 96 ALJR 43.
11. On 23 December 2021, Mr Huang both filed an application for review of the Commissioner’s objection decisions in the AAT under Pt IVC of the TAA and requested that the Deputy Commissioner, in the context of this proceeding, facilitate the use of his Australian assets to fund his legal fees and expenses in the AAT proceedings. Discussions ensued but the parties did not reach an agreed position about Mr Huang’s proposal.
12. The Deputy Commissioner filed the interlocutory application seeking to vary order 10 of the freezing orders (relevantly, a provision of the annexed penal notice allowing for exceptions on the use of Mr Huang’s assets) on 31 March 2022.

## Principles

1. In *Deputy Commissioner of Taxation v* ***Shi*** [2021] HCA 22; (2021) 95 ALJR 634 at [21]–[22] Gordon J (with whom Kiefel CJ, Gageler and Gleeson JJ agreed) identified that (citations excluded):

The Federal Court may make a freezing order or an ancillary order, or both, against a judgment debtor or a prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or a prospective judgment will be wholly or partly unsatisfied because the judgment debtor or the prospective judgment debtor might abscond, or because the assets of the judgment debtor or the prospective judgment debtor might be removed from Australia or from a place inside or outside Australia, or disposed of, dealt with or diminished in value.

A freezing order, and an asset disclosure order, have the same fundamental purpose: “to prevent the abuse or frustration of [a court’s] process in relation to matters coming within its jurisdiction”. Freezing orders may be made, and may continue to operate, after final judgment to protect the efficacy of the execution. And for freezing orders to be effective there needs to be timely disclosure of assets. The utility in both orders lies in ensuring that the court’s processes for enforcement of a judgment are not frustrated by assets being spirited away between the time of commencement of the proceedings and eventual enforcement.

1. In the present case, the freezing order was made because of the real risk of Mr Huang dissipating his assets in Australia: *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728 and *Deputy Commissioner of Taxation v Huang* [2019] FCA 1537. The freezing order has continued in circumstances where the judgment debt remains unpaid and Mr Huang, no doubt for that reason, has not applied to vary or vacate the freezing order.
2. I agree with the submissions for the Deputy Commissioner that it is not necessary that a material change in circumstances be proved to permit a variation of the freezing order. Rather, the question in the circumstances of the present case, where the judgment debt exists and remains unpaid, is whether it is in the interests of justice for the freezing order to be varied. I do not accept the submissions for Mr Huang to the contrary.
3. As McLelland J explained in *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 at 46:

The overriding principle governing the approach of the court to interlocutory applications is that the court should do whatever the interests of justice require in the particular circumstances of the case. In giving effect to that general principle, and in recognition of the public and private interests earlier referred to, rules of practice have been developed in accordance with which the discretionary power of the court to set aside, vary or discharge interlocutory orders will ordinarily be exercised …

In the present case I am dealing with an interlocutory order of a substantive nature made after a contested hearing in contemplation that it would operate until the final disposition of the proceedings. In such a case the ordinary rule of practice is that an application to set aside, vary or discharge the order must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application….

1. The freezing order ceased to be an order of that kind on entry of the judgment debt. On entry of the judgment debt, the freezing order was no longer contemplated to operate until the final disposition of the proceeding. Its purpose became to protect the efficacy of the future execution of the judgment debt. If the interests of justice require the freezing order to be varied to fulfil that purpose, the Court has a discretion to vary the freezing order.
2. This is reflected in *Break Fast Investments Pty Ltd v Gravity Ventures Pty Ltd* [2013] VSC 89 at [43] where Vickery J said:

As to variations, a freezing order may be varied, on the application of the defendant, or indeed any other person who is affected by the making of the order. However, any such variation that is made must not, in the ordinary course, conflict with the purpose for which the order was made in the first place. Secondly, a variation must also accord with the interests of justice. In this respect, reference is made to *MG Corrosion Consultants v Gilmour* [[2012] FCA 568 at [14] where Barker J made the following observations:

So far as the court’s power to vary a freezing order is concerned, there can be little doubt about it. Similarly, it is also clear that having made a freezing order a court should not be quick to reverse it save for good reason and the dictates of justice.

…

Ultimately, the grant or discharge or variation of an interlocutory injunction, including a freezing order will be dictated by what justice demands in the particular circumstances of the case.

1. Similarly, in *Linke v TT Builders Pty Ltd (No 2)* [2015] FCA 704 White J said at [11]:

It is in the public interest that the Court’s orders are respected and obeyed. Accordingly, it is appropriate for the Court to assist judgment creditors to enforce their entitlements. Respect for the law will be undermined if judgment debtors can readily frustrate enforcements of judgments against them. Spender J referred to these considerations in *Guthrie v Robertson* (1987) 13 FCR 336 at 337–8 when he said:

It is obviously crucial to the efficiency of the Court’s process that its orders be obeyed, and the Court should be astute to lend whatever assistance it can to enable its orders to be enforced.

Section 53 of the Federal Court Act, s 8 of the Enforcement of Judgments Act and r 41.10 reflect this public interest.

1. In *Michael Wilson & “Partners” Ltd v* ***Emmott*** [2019] EWCA 219 (Civ); [2019] 4 WLR 53 Gross LJ (with whom Peter Jackson and Rose LJJ agreed) discussed the so-called *Angel Bell* exception (*Iraqi Ministry of Defence v Arcepey Shipping Co SA (No 2) (The Angel Bell)* [1981] QB 65) to a freezing order permitting the defendant to spend money on living expenses, in the ordinary course of business and on legal costs associated with defending the action. At [55]–[57] Gross LJ said:

Thirdly, in the light of Tomlinson LJ’s further reflections in *Nomihold* [*Nomihold Securities Inc v Mobile Telesystems Finance SA* [2011] EWCA Civ 1040; [2012] Bus LR 1166], it cannot be said that, *without more*, the (*Angel Bell*) exception *would* be inappropriate in a post-judgment *Mareva*. In this regard, the observations of Colman J in *Soinco* [*Soinco SACI v Novokuznetsk Aluminium Plant* [1998] QB 406] and Tomlinson J in *Masri* [*Masri v Consolidated Contractors International (UK) Ltd* [2008] EWHC 2492 (Comm)], went too far.

Fourthly, it *can* be said, however, on the basis of *Nomihold*, at [33], that “it will sometimes and perhaps usually be inappropriate” to include the exception in a post-judgment *Mareva* injunction. Given the policy of the law strongly in favour of the enforcement of judgments, as already remarked, it would indeed be curious were the position otherwise – leaving the judgment debtor free to carry on business and ignore the outstanding judgment. The context is that a risk of dissipation must already have been demonstrated, as otherwise no *Mareva* injunction (with or without the exception) would have been granted at all. Accordingly, over the period between judgment and execution taking effect, a *Mareva*, without the exception, serves to hold the ring: Sir Jeremy Cooke, judgment, at [27].

Fifthly, I would prefer not to characterise refusal of the exception in a post-judgment *Mareva* as either a “starting point” or a presumption. For that matter, I would be equally reluctant to pigeon-hole refusal of the exception as a remedy of last resort; there is no warrant for so confining such a decision, save that the more draconian the relief, the greater the need for its justification. Instead and while it strikes me as an obvious matter to consider when granting a post-judgment *Mareva*, the appropriateness or otherwise of the exception in such a *Mareva* should be treated as a question turning on all the facts in the individual case. In addressing this question, Tomlinson LJ’s test in *Nomihold*, at [33] (“it will sometimes and perhaps usually be inappropriate” to include the exception in a post-judgment *Mareva*), furnishes helpful and appropriately nuanced general guidance. Thus analysed, the decision by a Judge to permit or refuse its inclusion is a discretionary decision reached on a fact specific basis, with which this Court will be slow to interfere. Furthermore, while a Judge, when considering refusal of the exception, would no doubt have regard to the ambit of the *Mareva* sought, the assets thus frozen and the impact on the judgment debtor’s business …

1. I agree that, once a judgment debt is entered, the continuation or inclusion of any exception from the freezing order for the payment of living expenses, the ordinary costs of business, and/or legal costs for any matter involves a discretionary decision to be exercised in all of the circumstances of the case having regard to the overall interests of justice. It should not be presumed that the exception will continue (if a freezing order is continuing) or will be included (if a freezing order is to be made) once a judgment debt has been entered. This is different from a freezing order to protect the potential fruits of a cause of action in which it is ordinarily presumed that the exception should be included if the cause of action involves an *in personam* and not a proprietary claim over the assets in question. This is because, in those circumstances, the cause of action has not yet been proved and may well fail. Once a judgment debt has been entered, however, the cause of action has been proved and the Court should facilitate enforcement of the Court’s orders.
2. The observations in *Emmott* are also relevant because they make the obvious point that the freezing order, if already made, was made because a risk of dissipation of the assets was proved. The public interest in ensuring that the orders of a court can be enforced, once judgment has been entered, is not confined to preventing the illegitimate dissipation of assets. The very reason that there should be no presumption in favour of the continuation or inclusion of the exception in a freezing order after judgment had been entered is that it is in the public interest for orders of a court to be able to be effectively enforced; as such, the relevant issue is the risk of dissipation of the assets undermining the efficacy of enforcement of the orders, and is not confined to the illegitimacy of that risk. Obviously, if the risk of dissipation is illegitimate (ie, to avoid future enforcement) then that would be a significant discretionary factor weighing against continuation or exclusion of the exception. But the fact that the risk of dissipation is not illegitimate, does not mean that the exception must be continued or included.
3. ***Goumas*** *v McIntosh* [2002] NSWSC 713 at [27] is not authority to the contrary, as contended by the first respondent. Justice Barrett there said:

It has been said repeatedly by the courts that a Mareva order must not operate as a form of de facto security for the applicants’ claims and that the sole purpose is to prevent illegitimate dissipation of assets that will otherwise be available to meet any judgment. I say “illegitimate” dissipation to emphasise that to deny access to funds needed for ordinary living purposes or to fund the conduct of the very litigation the integrity of which the order is designed to protect goes beyond the proper protective province of the jurisdiction and causes the order sought to be a means of exerting pressure foreign to the underlying purpose.

1. This is all orthodox. It applies to the making of a freezing order to preserve the potential fruits of a cause of action. As explained, once a judgment has been entered on the cause of action, the purpose of the freezing order is different.
2. Similarly, *National Australia Bank Limited v Human Group Pty Ltd (No 2)* [2020] NSWSC 1900 concerned an application made to vary a freezing order before judgment in the context of a proprietary claim over the assets. In those circumstances Henry J said at [104]–[105]:

To engage the Court’s discretion to vary the Freezing Orders, NAB must establish that there has been a material change of circumstances since the original application for the orders was heard or the discovery of new material that was not reasonably available at the time they were made: *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 at 46; *Short v Crawley (No 42)* [2009] NSWSC 1110 at [75].

As NAB seeks to vary the Freezing Orders so as to prevent Ms Rosamond and Human Group from having recourse to ACN’s assets for the purposes of paying their living, legal and business expenses, it must also establish that it has an [sic] prima facie or arguable case for a proprietary claim to ACN’s assets…

1. The observation of McKerracher J in *Deputy Commissioner of Taxation v* ***Bollands*** [2012] FCA 1050; (2012) 90 ATR 679 at [23] that it “is difficult to discern any point of principle which would require that a person be placed in a more prejudicial position, concerning access to resources to meet legal fees simply by reason of the need to attempt to call on a loan, rather than to access frozen funds” was made in the context of an application to vary a freezing order where consent orders had been entered but the underlying factual issues and operation of those orders were still to be determined. Consistently with the discussion above, at [22] McKerracher J said:

I would regard the general default position as being that a freezing order should expressly make provision for the paying of reasonable legal expenses. Clearly the rationale behind this is that any person the subject of a freezing order should not be deprived of reasonable legal advice to contest the merits of the substantive claim against which the order is based. The same logic follows in respect of a Mareva order, as noted by Barrett J in *Goumas v McIntosh* [2002] NSWSC 713 (at [27])…

1. The focus of McKerracher J in *Bollands* was the need for a person to be able to obtain legal advice to “contest the merits of the substantive claim against which the order is based”. In the present case, by distinction, the claim has been established by entry of the judgment debt. The fact that the review proceedings in the AAT remain on foot does not change that fact.
2. I also consider that the submissions for Mr Huang mischaracterise the nature of the discretion to be exercised in another respect. It may be accepted that the purpose of a freezing order continuing, or being made after judgment is entered, is to protect the efficacy of the execution of the order. It may also be accepted that the concept of the “efficacy” of execution of the order is different from the “convenience” of the execution. But this does not mean that considerations such as the likely capacity to be able to execute the order, and the cost and time of doing so, are matters of mere convenience. They are matters relevant to the efficacy of future execution of the order.
3. Further, the party seeking to exclude the exception from a freezing order for the purpose of protecting the efficacy of future execution of the order does not need to prove that the variation is necessary or essential to enable any possibility of future execution. It is sufficient if, in all of the circumstances, the interests of justice facilitating the future efficacious execution of the order are served or supported by the variation and no countervailing consideration outweighs that purpose. For this reason it is not material that it might be possible that the Deputy Commissioner might be able to execute judgment against Mr Huang’s overseas assets by one or more methods.
4. Contrary to the submissions for Mr Huang, it is clear that the evidence enables an inference that execution against the Australian assets, if they are available for that purpose, will be more efficacious than any potential to execute against the overseas assets. There is also no basis for the submission for Mr Huang that variation of the order would have the effect of being a punitive sanction against Mr Huang for not paying the amount owed under the judgment debt.
5. I also do not accept that the effect of the variation of the freezing order would be to provide the Deputy Commissioner with security of the kind referred to in *Goumas*at [27]. Justice Barrett was there referring to *de facto* security for a claim. That is not the present case in which the Deputy Commissioner’s claim has been proved. In any event, preventing Mr Huang from using the Chatswood properties (perhaps worth $7,000,000) does not provide any form of effective security for the judgment debt of $140,607,780.88.

## The interests of justice in the circumstances of this case

1. The Deputy Commissioner has not moved for execution of the judgment debt. Contrary to the submissions for Mr Huang, it is not possible to infer that the Deputy Commissioner has or might have not moved to execution for some improper purpose of sterilising Mr Huang’s assets for an indefinite period. This inference cannot be drawn because: (a) there is no evidence at all to support it, and (b) it is perfectly proper for the Deputy Commissioner not to move to execute the judgment debt in circumstances where Mr Huang had made objections to the underlying tax debts and (as he did) subsequently applied to the AAT for review of the Commissioner’s objection decisions.
2. In this latter regard, the Deputy Commissioner referred to the provisions of the Commissioner’s published Practice Statement Law Administration PS LA 2011/4 and PS LA 2011/6, which identify the considerations relevant to the recovery of disputed and other debts. It is not necessary to refer to the provisions of these practice statements given that the propriety of the position taken by the Deputy Commissioner about debt recovery in the present case is clear. The circumstances do not involve a freezing order being left in place “until the crack of doom”, which, if it were so, might give rise to a possible inference of an illegitimate purpose in maintaining the order: *Masri v Consolidated Contractors International (UK) Ltd* [2008] EWHC 2492 (Comm) at [34].
3. I am satisfied that the interests of justice weigh heavily in favour of making the variation to the freezing order. The unchallenged circumstances are that:
4. the judgment debt for the sum of $140,607,780.88 entered on 19 December 2019 remains unsatisfied;
5. it is common ground and not confidential that the asset disclosure affidavit of Mr Huang affirmed 16 April 2019 (otherwise subject to a suppression order) discloses that his only remaining assets in Australia are two properties in Chatswood estimated to be worth about $7,000,000;
6. it is common ground and not confidential that the asset disclosure affidavit of Mr Huang (otherwise subject to a suppression order) discloses that Mr Huang has very substantial assets overseas;
7. the evidence is that before the freezing order was made, Mr Huang managed to transfer substantial assets outside of Australia: *Deputy Commissioner of Taxation v Huang* [2019] FCA 1537 at [24];
8. Mr Huang is not resident in Australia;
9. Mr Huang has very substantial assets outside of Australia, more than sufficient to pay his legal costs in the AAT proceedings;
10. the AAT proceedings raise potentially complex and time consuming issues, enabling it to be inferred that the legal fees for which Mr Huang will become liable will be substantial;
11. Mr Huang has already paid substantial legal fees after 1 November 2019 without recourse to the Chatswood properties;
12. while execution of the judgment debt against Mr Huang’s overseas assets may not be impossible, it is far more likely that the Deputy Commissioner will be able to satisfy at least some part of the judgment debt against the Chatswood properties;
13. it is clear that if Mr Huang uses the Chatswood properties to fund his legal expenses in the AAT proceedings, the only assets in Australia available for execution of the judgment debt will be substantially eroded; and
14. there is no evidence of any prejudice to Mr Huang or any other party by reason of the variation of the freezing order to exclude his Australian assets from the exception in paragraph 10 of that order for legal expenses.
15. As noted, I am also satisfied that there has been a material change of circumstances since the making of the freezing order. The primary material change of circumstances is the entry of the judgment debt. That would be sufficient to enliven a power to vary the freezing order dependent on a material change of circumstances. As discussed, however, I do not accept that that criterion is applicable. There are also other changed circumstances which would support the exercise of the power including that: (a) the Commissioner rejected Mr Huang’s objections against his tax assessments, (b) Mr Huang sought review of the objection decisions in the AAT and has now indicated he wishes to use his Australian assets to fund his legal costs of the AAT proceedings which, if permitted, will erode the assets likely to be available for execution of the judgment debt, and (c) Mr Huang has never paid any part of the tax debt owing, and the Deputy Commissioner’s attempts by 39 garnishee orders to recover part of that debt have proved fruitless.
16. In conclusion, it is apparent that the purpose of the continuation of the freezing order to protect the efficacy of execution of the order for the judgment debt will be substantially undermined if the order is not varied. It will be undermined because by far the most likely available source of assets for execution, the presently unencumbered value of the Chatswood properties, will be substantially diminished by Mr Huang on paying legal costs he incurs in the AAT proceedings.
17. The variation of the freezing order was made for these reasons.

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| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jagot. |

Associate:

Dated: 25 May 2022