FEDERAL COURT OF AUSTRALIA

Huang v Deputy Commissioner of Taxation [2020] FCAFC 141

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| Appeal from: | Application for leave to appeal: *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728 |
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| File number: | NSD 1759 of 2019 |
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| Judges: | **BESANKO, THAWLEY AND STEWART JJ** |
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| Date of judgment: | 17 August 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** — application for leave to appeal from certain orders in a freezing order — where freezing order made in relation to assets in Australia and overseas — where applicant has substantial assets in Hong Kong and China — whether judgments of courts in Australia enforceable in Hong Kong and China — test to be applied to determine whether judgments of courts in Australia enforceable in Hong Kong and China — realistic possibility of enforcement — where judge applied incorrect test— consideration of relevant factors in this case — leave to appeal granted — appeal allowed.  |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 29, 40, 41, 43*Evidence Act 1995* (Cth) s 174*Federal Court of Australia Act 1976* (Cth) ss 24, 37M*Taxation Administration Act 1953* (Cth) Pt IVC*Federal Court Rules 2011* (Cth) rr 7.32, 7.33, 7.35  |
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| Cases cited: | *Ayres v Evans* (1981) 56 FLR 235*BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496*Cardile v LED Builders Pty Limited* [1999] HCA 18; (1999) 198 CLR 380*Chen Li Hung v Ting Lei Miao* (2000) 3 HKCFAR 9*Cido Car Carrier Service Ltd v Woori Bank (Hong Kong branch)* [2011] HKEC 817*Damberg v Damberg* [2001] NSWCA 87; (2001) 52 NSWLR 492*Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397*Deputy Commissioner of Taxation v Chemical Trustee Limited (No 4)* [2012] FCA 1064*Deputy Commissioner of Taxation v Huang* [2019] FCA 1537*Deputy Commissioner of Taxation v Huang* [2019] FCA 2122*Government of India v Taylor* [1955] AC 491*Holman v Johnson* (1775) 1 Cowp 341, 343*House v The King* [1936] HCA 40;(1936) 55 CLR 499*In the Matter of Rennie Produce (Aust) Pty Ltd (In Liquidation in Australia)* HCMP1640/2016*Jackson v Stirling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612*Lever v Fletcher* (unreported, Court of Common Pleas of England and Wales, Park J, 1780)*Mercedes Benz AG v Leiduck* [1996] AC 184*Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2019) 264 CLR 541*Moore v Mitchell* (1929) 30 F, (2d) 600, 604*Nanus Asia Co Inc v Standard Chartered Bank* [1990] 1 HKLR 396*Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319*Peter Buchanan Ltd v McVey* [1955] AC 516*Planché v Fletcher* (1779) 1 Doug 251, 253*PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36; (2015) 258 CLR 1*Re Ayres; Ex parte Evans* (1981) 51 FLR 395*Ting Lei Miao v Chen Li Hung* [1999] 1 HKLRD 123*Victoria University of Technology v Wilson* [2003] VSC 299  |
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| Date of hearing: | 22 May 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Taxation |
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| Category: | Catchwords |
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| Number of paragraphs: | 67 |
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ORDERS

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|  | NSD 1759 of 2019 |
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| BETWEEN: | CHANGRAN HUANGApplicant |
| AND: | DEPUTY COMMISSIONER OF TAXATIONRespondent |

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| JUDGES: | BESANKO, THAWLEY AND STEWART JJ |
| DATE OF ORDER: | 17 August 2020 |

THE COURT ORDERS THAT:

1. The applicant file within seven days consent minutes of order reflecting the conclusions in the Court’s reasons. In the event the parties are unable to agree, the applicant file and serve within seven days draft minutes setting out the orders he seeks and a short note setting out the areas of dispute between the parties.

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

REASONS FOR JUDGMENT

THE COURT:

# Introduction:

1. This is an application for leave to appeal pursuant to s 24(1A) of the *Federal Court of Australia Act 1976* (Cth) (the Act) from certain orders in a freezing order made by a judge of the Court. The application has been listed for hearing immediately prior to, or concurrently with, any appeal. The orders which are the subject of the application were made on the application of the Deputy Commissioner of Taxation (Deputy Commissioner) on 21 October 2019 against Mr Changran Huang and his wife, Mrs Jiefang Huang. Mrs Huang has not sought leave to appeal. Mr Huang’s application for leave to appeal is against the freezing order and an ancillary order in relation to the disclosure of information (asset disclosure order) only insofar as it applies to assets outside Australia. Mr Huang has substantial assets in the People’s Republic of China (PRC) and in Hong Kong.
2. For the reasons which follow, leave to appeal should be granted and the appeal should be allowed.

# Background

1. The background to the application for leave to appeal is as follows. Mr and Mrs Huang lived in Australia for several years and, since 1 February 2013, they were tax residents of Australia. On 4 December 2018, Mr Huang left Australia bound for the PRC. Mrs Huang left Australia on 11 September 2019, also bound for the PRC. At the time of Mr Huang’s departure, an audit into his income tax affairs by the Australian Taxation Office (ATO) was in progress. On 11 September 2019, and as a result of that audit, the Deputy Commissioner issued notices of Amended Assessment for the years ended 30 June 2013, 30 June 2014 and 30 June 2015 to Mr Huang, and a notice of assessment of shortfall penalty assessing Mr Huang as liable for penalties in relation to those years (the tax assessment notices) for a total amount of $140,925,953.98. A second Amended Assessment for the income year ended 30 June 2015 was issued on 13 March 2020 and the details of that assessment, and Mr Huang’s objections to the assessments, are the subject of an agreement as to facts. The precise details of those matters are not relevant for present purposes.
2. On 16 September 2019, the Deputy Commissioner filed an originating application in the Court seeking judgment against Mr Huang in the amount of $140,925,953.98 and general interest charges to the date of judgment. The Deputy Commissioner also applied for freezing orders against Mr Huang and his wife, for leave to serve them with the application outside the jurisdiction, and for substituted service. In addition, the Deputy Commissioner sought interim freezing orders in order to preserve the status quo.
3. On 16 September 2019, a judge of this Court made freezing orders against both Mr Huang and Mrs Huang. The freezing orders applied to assets held by Mr Huang in Australia and assets outside Australia. The judge who made the orders delivered reasons on 18 September 2019 (*Deputy Commissioner of Taxation v Huang* [2019] FCA 1537). On 20 September 2019, those orders were continued.
4. On 11 October 2019, the Deputy Commissioner made an application for summary judgment against Mr Huang in the amount of $140,607,780.88 and the Deputy Commissioner also sought freezing orders against both Mr Huang and his wife until further order. The application for the freezing orders came on for hearing before the primary judge on 17 October 2019 and her Honour made orders on 21 October 2019 (*Deputy Commissioner of Taxation v Huang* [2019] FCA 1728). As we have said, only the orders made against Mr Huang are of present relevance and only those that relate to assets outside Australia. The orders challenged by Mr Huang are as follows:

6.

(c) If the unencumbered value of your Australian assets is less than the Relevant Amount [$140,823,106.76], 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. …

8.

(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. On 29 October 2019, Mr Huang issued his application for leave to appeal from the orders made by the primary judge on 21 October 2019. The draft notice of appeal filed by Mr Huang includes a copy of the freezing order which he contends should be made. It excludes paragraphs 6(c) and 8(b). There are some other minor changes to the order made by the primary judge. They include a reduction in the Relevant Amount from $140,823,109.76 to $140,607,780.88 (paras 6(a) and 12(i)) which is appropriate in light of the judgment entered by her Honour (see the next paragraph). The other changes are the removal of an item of real property identified in paragraph 7a(iii)C and the removal of dates from paragraphs 8(a) and 10(b).
2. On 19 December 2019, the primary judge 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. Her Honour dismissed an application by Mr Huang for a stay of execution of that judgment (*Deputy Commissioner of Taxation v Huang* [2019] FCA 2122).

# The Grounds Upon Which the Orders are challenged

1. The grounds in the draft notice of appeal are as follows:

1. The primary judge erred by failing to find that:

a. there was, on the evidence, no realistic possibility that the Appellant either had assets in, or would move assets to, jurisdictions in which an Australian judgment based on a tax debt owed to the Commonwealth would be enforced, either directly or indirectly; and

b. a freezing order in respect of the Applicant’s assets outside Australia would not serve the purpose of preventing or inhibiting the frustration of the Court’s process within the meaning of rule 7.32(1) of the Federal Court Rules 2011, and is therefore beyond power.

2. Having regard to Ground 1, the primary judge erred in ordering the Applicant to swear and serve on the Respondent an affidavit setting out all of his 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 his interest in the assets.

1. The test on an application for leave to appeal is well-known and it is sufficient for us to refer to *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 and the two requirements that the decision be attended with sufficient doubt to warrant it being reconsidered and that substantial injustice will result should leave be refused supposing the decision at first instance is wrong. As we have said, we have reached the conclusion that the primary judge erred and the first requirement does not call for separate consideration.
2. With respect to the second requirement, the Deputy Commissioner raised separate arguments in relation to the freezing order and the asset disclosure order. We deal with the asset disclosure order below (at [64]–[66]).
3. With respect to the freezing order, the Deputy Commissioner submits that Mr Huang will not suffer substantial injustice by reason of the freezing order applying to his overseas assets supposing the order was wrongly made and, in that regard, she relies on the following circumstances:
4. Mr Huang has not put forward any evidence of prejudice or injustice if the orders stand and he has not, for example, identified any proposed transaction which cannot proceed;
5. under the primary judge’s order, he can apply at any time for a variation of the order;
6. the primary judge’s order contains the usual exception of dealing with or disposing of assets in the ordinary and proper course of business (paragraph 10(c)) and meeting any contractual obligations incurred in good faith before the order was made (paragraph 10(d));
7. with respect to Mr Huang’s assets outside Australia, the primary judge’s order contains the following provisions with respect to persons outside Australia and assets outside Australia:

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.

1. Mr Huang is able to overcome the restriction by paying the judgment debt into Court or into a joint bank account controlled by the respective solicitors for the parties or by providing security acceptable to the Deputy Commissioner. Although it is not possible on the evidence to put a precise figure on Mr Huang’s personal wealth, it is clear, we think, that he has substantial financial resources at his disposal.
2. In our opinion, it may be inferred that Mr Huang will suffer substantial injustice in not being able to deal with assets up to the value of approximately $140 million should the orders which are challenged be wrong. The exceptions and exclusions in the order do not alleviate the substantial injustice. We do not consider the possibility of payment to be sufficient to alleviate the substantial injustice because to be deprived of that amount for what we consider would not be a short period of time, having regard to the objection and appeal processes under Part IVC of the *Taxation Administration Act 1953* (Cth), is substantial injustice should the orders have been made in error.

# The Primary Judge’s Reasons

1. The primary judge described the issue before her as being whether the freezing orders made on 16 and 20 September 2019 should be continued against Mr Huang in respect of his assets outside Australia, in particular in the PRC and Hong Kong.
2. The primary judge referred to r 7.32 of the *Federal Court Rules 2011* (Cth) (the Rules). That rule is in the following terms:

(1) The Court may make an order (a ***freezing order***), with or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the Court’s process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.

(2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

1. Her Honour noted that the purpose of a freezing order is to prevent the frustration or inhibition of the Court’s process by seeking to meet a danger that a judgment of the Court may be wholly or partly unsatisfied. Her Honour noted that in *Cardile v LED Builders Pty Limited* [1999] HCA 18; (1999) 198 CLR 380 (*Cardile*) at [25] in the joint reasons of Gaudron, McHugh, Gummow and Callinan JJ, their Honours said that the integrity of the Court’s processes extends to the preservation of “the efficacy of the execution which would lie against the actual or prospective judgment debtor”.
2. The primary judge then turned to summarise the respective submissions of the parties, beginning with those of Mr Huang.
3. The primary judge noted Mr Huang’s submission that there is no process available for the enforcement of any judgment in the Deputy Commissioner’s favour in the PRC or Hong Kong where Mr Huang holds significant assets. Mr Huang’s submission to the primary judge was that to the extent the freezing orders operate upon those assets, the orders do not serve the purpose of protecting or preventing the frustration of this Court’s enforcement processes as those assets are not liable to execution in any event.
4. The primary judge noted that the evidence before her included an affidavit of Mr Yi Deng which had been filed by the Deputy Commissioner. In September 2019, Mr Deng was an Australian public servant employed by the Debt Section of the ATO as a Senior Technical Leader of Significant Debt Management. He was authorised to swear his affidavit on behalf of the Deputy Commissioner. He had been employed in the ATO since 2012 and had acted as Senior Technical Leader of Significant Debt Management since 2017. In that role, he was responsible for the conduct of the more complex tax debt recovery and insolvency matters. Mr Deng gave evidence in his affidavit that because the PRC and Hong Kong had made reservations in relation to the “Convention on Mutual Administrative Assistance in Tax Matters”, he was of the belief “that a prospective judgment obtained against the first respondent [Mr Huang] is not likely to be enforced in either the People’s Republic of China or Hong Kong”. The reservation was to the effect that the party to the Convention should not procure assistance in the recovery of tax claims, or in conservancy measures for all taxes.
5. The primary judge noted that Mr Huang relied on the statement in *Damberg v Damberg* [2001] NSWCA 87; (2001) 52 NSWLR 492 (*Damberg v Damberg*) at [119] that “where foreign law is not proved it will be presumed to be the same as the *lex fori*”. Her Honour noted Mr Huang’s submission that, with respect to the *lex fori*, Australian courts will not, directly or indirectly, enforce the revenue laws of another country. In that connection, her Honour referred to the decision of Lockhart J in *Re Ayres; Ex parte Evans* (1981) 51 FLR 395 (*Re Ayres*).
6. The primary judge noted that Mr Huang had tendered two decisions of the courts of Hong Kong, namely, *Nanus Asia Co Inc v Standard Chartered Bank* [1990] 1 HKLR 396 and *Cido Car Carrier Service Ltd v Woori Bank (Hong Kong branch)* [2011] HKEC 817 and that, in both decisions, the applicable principle which was identified is that the courts of Hong Kong will not enforce, directly or indirectly, a penal, revenue or other public law of a foreign State. Her Honour noted that Mr Huang submitted that there was no evidence that the position was any different in China and, consistently with *Damberg v Damberg*, it should be presumed to be the same. Mr Huang’s submission was that there was no basis in the evidence for concluding that a judgment for a tax debt of his would be enforceable in China or Hong Kong and that as a result, the Deputy Commissioner could not identify any foundation for a serious question to arise in respect of the potential frustration of the Court’s processes for enforcement; such enforcement was an impossibility on the evidence.
7. The primary judge also noted that, in terms of any reliance by the Deputy Commissioner on a capacity to bankrupt Mr Huang, it was the latter’s submission that there was no evidence capable of satisfying s 43(1)(b) of the *Bankruptcy Act 1966* (Cth) and, in fact, all the evidence was to the contrary. Section 43(1) of the Bankruptcy Act is in the following terms:

(1) Subject to this Act, where:

(a) a debtor has committed an act of bankruptcy; and

(b) at the time when the act of bankruptcy was committed, the debtor:

(i) was personally present or ordinarily resident in Australia;

(ii) had a dwelling house or place of business in Australia;

(iii) was carrying on business in Australia, either personally or by means of an agent or manager; or

(iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;

the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.

1. Her Honour noted Mr Huang’s submission that even if the Deputy Commissioner obtained a sequestration order against him, the evidence was to the effect that the Deputy Commissioner is the sole creditor and the relevant principle is that the revenue laws will not be enforced either directly or indirectly. Her Honour noted the submission that given that any judgment debt would not be enforceable against the assets of Mr Huang in China or Hong Kong, the purpose of the freezing orders extending to assets in those jurisdictions was the impermissible exerting of pressure on him through the threat of a contempt charge or some other sanction, to apply assets that are beyond the reach of the Court’s enforcement process for the purpose of satisfying the judgment.
2. Mr Huang submitted that the same principle that foreign revenue laws will not be enforced, directly or indirectly, answered the Deputy Commissioner’s proposition that the penalties and interest components of the judgment debts may be in a different class from the revenue debt. Those aspects of the debt would still involve at least the indirect enforcement of Australia’s revenue laws.
3. Her Honour then turned to the submissions made by the Deputy Commissioner. First, the Deputy Commissioner submitted that the evidence did not establish that enforcement in China or Hong Kong or elsewhere in the world is impossible. Mr Deng’s evidence is only that he believes it is not likely that a judgment debt will be enforceable in China or Hong Kong. Second, the Deputy Commissioner submitted that *Damberg v Damberg* is subject to a wide variety of exceptions so that it should not be presumed that enforcement in the PRC or Hong Kong will be impossible. Third, the Deputy Commissioner submitted that it is not self-evident from the terms of the reservations that they would apply to penalties or interest as opposed to unpaid tax. Fourth, the Deputy Commissioner submitted that the reservations in the Convention on Mutual Administrative Assistance in Tax Matters applying to China and Hong Kong may be withdrawn or varied. Fifth, the Deputy Commissioner submitted that there were Hong Kong cases in which the courts had taken steps to give effect to Australian insolvency administrations and, in that respect, she referred to *In the Matter of Rennie Produce (Aust) Pty Ltd (In Liquidation in Australia)* HCMP1640/2016; *Ting Lei Miao v Chen Li Hung* [1999] 1 HKLRD 123; and *Chen Li Hung v Ting Lei Miao* (2000) 3 HKCFAR 9 (*Chen Li Hung v Ting Lei Miao*). With respect to the latter case, Mr Huang responded by asking the Court to note that the rights involved were private rights and the Court said (at 25) that the position may be different if the Taiwan Government was the sole or main creditor. The Deputy Commissioner submitted that the Court would not find that the current absence of other creditors means that ultimately there will be no such creditors. Such information is within the knowledge of Mr Huang and he had adduced no evidence about the matter. Sixth, the Deputy Commissioner submitted that the assets in Hong Kong and China may be moved to another jurisdiction as permitted by the freezing orders and thereby become amenable to the Court’s jurisdiction as a result. Seventh, the Deputy Commissioner submitted that the recognition by the Hong Kong courts of any subsequent bankruptcy of Mr Huang would constitute recognition of Australian bankruptcy law, not of Australian revenue law. The issue is the protection of the integrity or efficacy of any process ultimately enforceable by the courts at the suit of the judgment creditor, which includes bankruptcy. Finally, the Deputy Commissioner submitted that if her submissions are rejected, then the relevant order should exclude China and Hong Kong (with a similar exclusion applying to the asset disclosure order) as there was currently no evidence that Mr Huang had any assets in any other jurisdiction.
4. The primary judge rejected Mr Huang’s submissions. Her Honour said that the Deputy Commissioner was right that the issue was the preservation of the integrity or efficacy of any process *ultimately* enforceable by the Court (primary judge’s emphasis). Her Honour said that the Deputy Commissioner’s evidence acknowledged that it was not likely that a judgment debt would be enforceable in China or Hong Kong. However, her Honour said that she inferred that “it is not impossible that the applicant may be able to take enforcement action against the first respondent as a result of one or more of the possibilities which the [Deputy Commissioner] has identified” (at [28]). As we would understand it, the possibilities identified by the Deputy Commissioner are those identified in her submissions which are summarised by the primary judge and are set out above.
5. Her Honour then turned to address the extent to which foreign law had been proved by the evidence. Her Honour said that there was evidence that the courts of Hong Kong have enforced foreign insolvency laws and her Honour said that, contrary to Mr Huang’s submission, she did not see the potential enforcement by use of the bankruptcy legislation as necessarily involving a purpose antithetical to that of r 7.32. In this context, her Honour referred to the observations in the joint reasons in *Cardile* at [57] which are as follows:

What then is the principle to guide the courts in determining whether to grant *Mareva* relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word “may”, be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which: (i) the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including “claims and expectancies”, of the judgment debtor or potential judgment debtor; or (ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.

(Citation omitted).

1. The primary judge said that the law of the PRC had not been proved.
2. Her Honour said that it may be accepted that an Australian court would not assist in a bankruptcy if in substance it constituted the enforcement of a foreign revenue law. She referred to *Peter Buchanan Ltd v McVey* [1955] AC 516 (High Court of Eire) (*Buchanan v McVey*) and *Government of India v Taylor* [1955] AC 491 (*India v Taylor*). Her Honour said that while the presumption in *Damberg v Damberg* is relevant, the presumption is subject to exceptions and she referred to various passages in the reasons for judgment of Heydon JA in that case (at [118]–[147] and [162]). Her Honour said that when these matters are taken together, and recognising the interlocutory nature of the proceeding, she considered that the Deputy Commissioner had provided a sufficient basis to conclude that there was a serious question to be tried in respect of the potential enforceability of the orders over Mr Huang’s assets in the PRC and Hong Kong so as to support the making of freezing orders in terms which apply to his assets within and outside of Australia.
3. Importantly, the primary judge then identified possibilities of enforcement sufficient to enable the conclusion to be reached that the purpose of r 7.32(1), namely to prevent the frustration or inhibition of the Court’s process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied, is satisfied. Her Honour said that the possibilities included the following: (1) exceptions to the presumption in *Damberg v Damberg*; (2) the potential use of bankruptcy procedures; (3) the potential willingness of the courts of Hong Kong and China to enforce Australian insolvency laws; (4) the possibility of Mr Huang moving assets to other jurisdictions where enforcement is readily available; and (5) the potential willingness of the courts of Hong Kong and China to enforce Australian laws relating to the payments of penalties and interest (at [30]).
4. Her Honour said that, given these circumstances, she was not satisfied that Mr Huang’s submissions about the impermissible scope of the freezing orders should be accepted.

# Analysis

1. Mr Huang submits that the primary judge has applied an incorrect test when she said that she would infer that it is *not impossible* that the Deputy Commissioner may be able to take enforcement action against Mr Huang as a result of one or more of the possibilities the Deputy Commissioner had identified. The correct test, Mr Huang submits, is one of a realistic possibility of enforcement and that that test had not be satisfied. In other words, there must be a realistic possibility that the judgment can be enforced.
2. The Deputy Commissioner submitted that the primary judge’s use of the expression, “not impossible” was no more than a reflection of the fact that Mr Huang had submitted that enforcement in Hong Kong and China was impossible and her Honour rejected that submission. Leaving aside the Deputy Commissioner’s supplementary note which is referred to below, her written submissions proceed on the basis that the primary judge applied a realistic possibility of enforcement test and was correct to find that that test was satisfied (see Outline of Submissions dated 8 May 2020 at [12] and [15]).
3. In our opinion, in considering this submission it is important to remember the context. The Deputy Commissioner’s own case through Mr Deng was that enforcement of a judgment against Mr Huang in Hong Kong or China “is not likely”. The primary judge’s summary of Mr Huang’s submissions is set out above. There is no doubt that, in addition to submitting that enforcement was unlikely and that there was no real prospect of enforcement, Mr Huang went so far as to submit that enforcement was impossible and would not happen. However, we do not think that in concluding that enforcement was not impossible, all that her Honour was doing was responding to a submission. We have summarised what her Honour said in [28] of her reasons above (at [26]). We consider that her Honour states the test which she applies in that paragraph. Even if we are wrong and her Honour applied a test of a realistic possibility, as we will explain, the matters her Honour relied on fall short of meeting that test.
4. It is convenient to note at this point that shortly before the hearing, the Deputy Commissioner provided what she called a supplementary note in which the submission is made that even if enforcement in the PRC and Hong Kong was shown to be presently impossible, “the judgment may be enforceable at some future time within 12 years from judgment, pursuant to a future legal process which may be contingent, even where necessarily the contingencies are unknown”. In further explanation of her submission, the Deputy Commissioner pointed out that neither r 7.32 nor r 7.35 impose any additional requirement for a worldwide freezing order as distinct from an order applying to assets in Australia and she then submitted that, in the absence of evidence that enforcement worldwide would be impossible within the 12 year period, the requirements of r 7.35(4) were satisfied in the present case.
5. Rule 7.35(4) is in the following terms:

(4) The Court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur:

(a) the judgment debtor, prospective judgment debtor or another person absconds;

(b) the assets of the judgment debtor, prospective judgment debtor or another person are:

(i) removed from Australia or from a place inside or outside Australia; or

(ii) disposed of, dealt with or diminished in value.

1. The upshot of the Deputy Commissioner’s supplementary note is the following submission:

… Until the Deputy Commissioner has had the opportunity to take all reasonable steps to enforce the judgment during its 12-year life, the object of rr 7.32 and 7.35, namely to prevent the frustration or inhibition of the Court’s process, is advanced by restraining all of Mr Huang’s assets worldwide.

1. Leaving aside the fact that these submissions seem to suggest a reversal of the onus of proof, the submissions suggest that little, if any, evidence is required before a worldwide freezing order is made and that it would only be in a clear case where impossibility of enforcement of a judgment throughout the life of the judgment was shown that a freezing order would be refused.
2. This seems to us a less demanding test than that applied by the primary judge. Indeed, counsel for Mr Huang, while sensibly, if we may say, recognising that the Court would probably wish to deal with the merits of the Deputy Commissioner’s submissions, submitted that, not only was the supplementary note late, but it raised a matter which, if it was to be raised, should have been raised by a Notice of Contention.
3. We do not think that the test postulated in the Deputy Commissioner’s supplementary note was the test applied by the primary judge. We can illustrate why we reach that conclusion by reference to one of the matters the Deputy Commissioner relied on before the primary judge and that was the circumstance that the reservations in the Convention on Mutual Administrative Assistance in Tax Matters applying to China and Hong Kong may be withdrawn or varied. True it is that there is a power in the Convention for a party by notification to wholly or partly withdraw the reservation and that any such withdrawal takes effect on the date of receipt of the relevant notification. We do not understand there to be any evidence that that is other than a theoretical possibility. Although at one point in her reasons her Honour referred to one or more of the possibilities the Deputy Commissioner identified (see [26] above), and her Honour’s list of possibilities was said by her to be inclusive (see [30] above), we are disposed to agree with counsel for Mr Huang that her Honour’s list of possibilities is in the dispositive part of her Honour’s reasons and should be taken to be exhaustive. In the end, it does not matter because, in our respectful opinion, neither test is the correct test.
4. The purpose of a freezing order as identified in r 7.32 is the prevention of the frustration or inhibition of the Court’s process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied. A freezing order is no doubt an important weapon in the Court’s arsenal, but it must not be used for a purpose beyond that identified in r 7.32. As Deane J said in *Jackson v Stirling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612 (at 625):

Put in positive form, it appears to me that, when an order for the preservation of assets goes beyond simply restraining the defendant from disposing of specific assets until after judgment, it must be framed so as to come within the limits set by the purpose which it can properly be intended to serve. That purpose is not to create security for the plaintiff or to require a defendant to provide security as a condition of being allowed to defend the action against him. Nor is it to introduce, in effect, a new vulnerability to imprisonment for debt, or rather for alleged indebtedness, by requiring a defendant, under the duress of the threat of imprisonment for contempt of court, to find money, which he may or may not have (whether or not at some point of time it may have been available to him), to guarantee to a plaintiff that any judgment obtained will be satisfied. It is to prevent a defendant from disposing of his actual assets (including claims and expectancies) so as to frustrate the process of the court by depriving the plaintiff of the fruits of any judgment obtained in the action.

1. If assets are beyond the reach of the Court’s enforcement processes, then a freezing order with respect to those assets is not for the purpose identified in r 7.32 because there is no longer a realistic possibility that the removal or disposition of the assets will frustrate or inhibit the Court’s process such that a judgment or prospective judgment will be wholly or partly unsatisfied.
2. In our opinion, there must be a realistic possibility that any judgment obtained by the plaintiff can be enforced against assets of the defendant in the place to which the proposed order relates. A test of “not impossible” is somewhat indefinite in meaning and, in our view, sets the bar too low. A test of a realistic possibility is consistent with the approach taken by the courts in determining what must be shown in terms of the risk of the removal of assets or the disposal of assets, matters to which a freezing order is directed. This last matter is either part of the same composite concept as the matter of enforcement or, at least, it is a closely allied concept. Although the word “danger” in the rule does not mean that the risk of removal or dissipation must be more probable than not (*Deputy Commissioner of Taxation v Chemical Trustee Limited (No 4)* [2012] FCA 1064 at [23] per Perram J), it does mean that there must be a realistic possibility (as we have put it) or a danger sufficiently substantial to warrant the grant of an injunction (*Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 (*Patterson*) at 325 per Gleeson CJ), or a sufficient likelihood of risk of dissipation which, in the particular circumstances, justifies an asset preservation order (*Victoria University of Technology v Wilson* [2003] VSC 299 at [36] per Redlich J).
3. We do not consider that there is anything in the two cases referred to by the Deputy Commissioner (*PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36; (2015) 258 CLR 1 (*PT Bayan*) and *Mercedes Benz AG v Leiduck* [1996] AC 184 at 313–314) which supports the test advanced by the Deputy Commissioner in her supplementary note. The passage in *PT Bayan* which is relied on is as follows:

The actual holding in *Cardile v LED Builders Pty Ltd* illustrates that the prospective enforcement process that a court might protect by making a freezing order can be a process contingent on factors in addition to the outcome of a substantive proceeding in that court. The holding was that a freezing order can be made against a third party against whom no present cause of action exists and against whom no present proceeding has commenced. It is enough that some future legal process (which might be contingent, for example, on the appointment by another court of a liquidator or a trustee in bankruptcy) may be available pursuant to which the third party may be obliged to contribute to the funds of the judgment debtor to help satisfy the judgment against the judgment debtor.

(at [47] per French CJ, Kiefel J (as her Honour then was), Bell, Gageler and Gordon JJ; citation omitted).

1. This passage is not addressing the difference between a test of whether enforcement of a process is a possibility and a test of whether enforcement of a process is impossible within the life of the judgment. The word “may” in this passage means, we consider, that the postulated circumstance does not need to be more probable than not, but does not say anything about whether the circumstance needs to be a realistic possibility.
2. We referred above to the reasons of Gleeson CJ in *Patterson*. One further passage in his Honour’s reasons should be emphasised. It is as follows (at 325):

The appellant submitted that the true test to be applied is whether the plaintiff has established the likelihood in question upon the balance of probabilities. This submission must fail. First, it is open to the theoretical objection concerning the conceptual difficulties involved in applying the standard of balance of probabilities to future, as distinct from past, events referred to by Lord Reid in *Davies v Taylor* [1974] AC 207 at 212. Secondly, it is too inflexible. It is not difficult to imagine situations in which justice and equity would require the granting of an injunction to prevent dissipation of assets pending the hearing of an action even though the risk of such dissipation may be assessed as being somewhat less probable than not. Thirdly, the test has been considered and rejected in England, for reasons which are convincing. It was specifically rejected by Mustill J in *Third Chandris Shipping Corporation v Unimarine SA* (at 652) and, at least by implication, by the Court of Appeal in *Ninemia Maritime Corporation v Trave*.

… In any event, for the reasons given by Giles J, I consider that the case was one in which the evidence fully justified the granting of a Mareva injunction. In particular, I consider that Giles J was correct in taking the view that the evidence as to the nature of the scheme in which the appellant was allegedly involved, which established a prima facie case against him, was such as to justify the conclusion that there was a danger that the appellant would dispose of assets in order to defeat any judgment that might be obtained against him and that such danger was sufficiently substantial to warrant the injunction…

1. We consider that a realistic possibility of enforcement in a foreign State is necessary. At the same time, and at the risk of stating the obvious, we wish to make it clear that we are not laying down any general principle as to the evidence which will be necessary to satisfy that test. Each case is likely to turn on all its circumstances and the cogency of the evidence and the inferences which can be drawn from it.
2. The Deputy Commissioner submitted that the primary judge’s decision was a discretionary one with respect to a matter of practice and procedure and that the principles in *House v The King* [1936] HCA 40;(1936) 55 CLR 499 (*House v The King*) (at 505 per Dixon, Evatt and McTiernan JJ) applied. Mr Huang was required to establish (and had not) an error within those principles. No doubt the primary judge was required to evaluate a number of circumstances in reaching her decision, but her Honour was not exercising a judicial discretion. The correctness standard of appellate review is applicable (see *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2019) 264 CLR 541 at [35]–[50] per Gageler J). We should say that, in any event, the error of the primary judge — the formulation and application of an incorrect legal test — is an error within the principles in *House v The King.*
3. It is now for this Court to determine this matter by reference to the correct test.
4. In our respectful opinion, none of the matters relied on by the primary judge, either individually or collectively, provide a basis for a conclusion that enforcement of a judgment in the PRC or Hong Kong is a realistic possibility.
5. The first matter relied on by her Honour is that there are exceptions to the presumption in *Damberg v Damberg*. This is, if we may say, a rather shorthand way of making the point that there are exceptions to the presumption that foreign law is the same as Australian law where a party with the onus fails to prove the content of foreign law. The presumption is a well‑established one and *Damberg v Damberg* is a relatively modern case in which the presumption is discussed in detail by Heydon JA (with whom Spigelman CJ and Sheller JA agreed). After his Honour had identified the presumption and some of the authorities in support of it, he said (at [120]):

However, there are numerous instances where the courts have refused to assume that foreign law is the same as the lex fori, and some where learned authors have opposed that course. It is not easy to classify the exceptions by reference to principle, and initially it is convenient to do so by jurisdiction and chronologically.

There is then a learned and lengthy discussion of the exceptions by his Honour (at [121]–[147]) culminating in the following observation (at [162]):

To state exhaustively when a court will not assume that the unproved provisions of foreign law are identical with those of the lex fori would be a difficult task. It is not necessary to perform it in this case…

1. The primary judge did not identify any particular exceptions as possibly applicable and nor did the Deputy Commissioner in her submissions on the application for leave to appeal. The Deputy Commissioner went no further than identifying relevant paragraphs and said “especially at [143]”, a paragraph which addresses the “amorphous position” in United States law. It seems to us that in the end, the point went no further than that there is a presumption, but there are exceptions to it.
2. The significance of the presumption in this case lies in the fact that the law applied by the courts in this country will not countenance a claim by a foreign government, directly or indirectly, for the enforcement of a foreign revenue debt. In a leading case of *India v Taylor*, Viscount Simonds described the rule as follows (at 508):

We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries: it is sometimes, not happily perhaps, called a rule of private international law: it is at least a rule which is enforced with the knowledge that in foreign countries the same rule is observed.

1. Lord Keith referred to the rule as being to the effect that in no circumstances will the courts enforce, directly or indirectly, the revenue laws of another country (at 510). His Lordship identifies the uncertainty surrounding the rationale for the rule, referring on the one hand to the explanation provided by Lord Mansfield CJ in *Planché v Fletcher* (1779) 1 Doug 251, 253; *Holman v Johnson* (1775) 1 Cowp 341, 343; and *Lever v Fletcher* (unreported, Court of Common Pleas of England and Wales, Park J, 1780), and that of Judge Learned Hand in *Moore v Mitchell* (1929) 30 F, (2d) 600, 604 on the other. His Lordship refers at some length to the decision of Kingsmill Moore J in *Buchanan v McVey*. An important point to note about that decision is that, although the claim in name was a claim by the liquidator of a company to recover company assets, the rule was applied because “it was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another State” (Lord Keith at 510).
2. In the more recent case cited by her Honour of *Re Ayres*¸ Lockhart J said (at 400):

It is now well established that the English, Australian or New Zealand courts will not, directly or indirectly, enforce the revenue laws of another country: *Peter Buchanan Ltd v McVey*; *Government of India v Taylor*; *Municipal Council of Sydney v Bull*, *supra; Rossano v Manufacturers Life Insurance Co*; *Bath v British and Malayan Trustees Ltd; Connor v Connor, supra.*

(Citations omitted).

1. An appeal against the judgment of Lockhart J was dismissed: *Ayres v Evans* (1981) 56 FLR 235 (*Ayres*) per Fox, Northrop and McGregor JJ. The rule against the enforcement of foreign revenue laws was recognised. Each member of the Court did not apply the rule because the Official Receiver sought to get in property to the benefit of ordinary creditors as well as for revenue. Because of that feature, it could not be said that the bankruptcy proceeding was the enforcement of a foreign revenue law. However, Northrop and McGregor JJ decided the case on the broader basis that s 29 of the Bankruptcy Act abrogates that rule and requires the domestic court to assist the foreign trustee: *Ayres* at 248–249 (Northrop J) and 254 (McGregor J). The Commissioner did not submit that the rule against enforcement of foreign revenue laws should be presumed to have been abrogated in Hong Kong on the basis that Hong Kong should be presumed to have a law equivalent to s 29 of the Bankruptcy Act. There are perhaps three explanations for that position. First, as discussed below, there is no likely prospect of a sequestration of Mr Huang’s estate in Australia because the requirements of s 43 of the Bankruptcy Act could not be established. Secondly, to the extent the law of Hong Kong was proved, it was not consistent with the existence of a law equivalent to s 29 of the Bankruptcy Act. Thirdly, there is a question about whether the presumption as to foreign law is intended to operate in favour of a party whose obligation it is to prove the foreign law: *Damberg v Damberg* at [126], quoting Hunt J in *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 503. It is not necessary in those circumstances to consider the views expressed by Northrop and McGregor JJ.
2. The second matter relied upon by her Honour is the potential use of bankruptcy procedures. As we understood it, the possibility involves the following. First, the Deputy Commissioner, relying on the judgment in her favour, serves a bankruptcy notice on Mr Huang under s 41 of the Bankruptcy Act and then relies on Mr Huang’s non-compliance as an act of bankruptcy under s 40 of the Bankruptcy Act. Second, the Deputy Commissioner then seeks recognition and enforcement of the insolvency administration relying on the fact that the courts in Hong Kong will recognise and assist in the case of foreign insolvencies (see the cases referred to in [25] above). Third, this process is unaffected by the rule that the courts of one State will not enforce the revenue laws of a foreign State.
3. Whether bankruptcy proceedings are part of the “Court’s process” within r 7.32 of the Rules may be debated. We do not need to pause on that because they are undoubtedly an enforcement process that can be taken into account in deciding whether to make a freezing order. The High Court said as much in *Cardile* at [57] (see [27] above) in the context of orders against third parties and we consider that the case for a similar conclusion is as strong, if not stronger, in the case of orders against judgment debtors or prospective judgment debtors. The primary judge did not make a finding about the prospect of Mr Huang being made bankrupt in Australia. Her Honour referred to Mr Huang’s argument in relation to s 43(1)(b) of the Bankruptcy Act, but did not express an opinion as to the merits of the argument. In our view, the section means, as we have said, that there is no likely prospect of a sequestration of Mr Huang’s estate in Australia. At all events, the fact the courts in Hong Kong will provide certain forms of assistance to liquidators of companies and trustees in bankruptcy appointed in a foreign jurisdiction must also accommodate the principle that under Australian law and, insofar as proved, Hong Kong law (see [21] above), the courts will not enforce, directly or indirectly, the revenue laws of a foreign State. The two Hong Kong authorities make it clear that the rule applies in the case of indirect as well as direct enforcement and in one of the Hong Kong assistance cases (*Chen Li Hung v Ting Lei Miao*), Lord Cooke said (at 25):

Here the public interest of the society points to the enforceability in Hong Kong of the Taiwan bankruptcy order. The interests to be protected thereby are those of the creditors in the bankruptcy, not those of the Taiwan Government. If the Taiwan Government were the sole or perhaps the main creditor, the position might be different. As it is, however, the creditors appear to be predominantly residents of Taiwan who have invested in Mr Ting’s companies.

The question is one of substance not form: is the claim really brought to collect the debts of a foreign revenue (*Buchanan v McVey* at 529 per Kingsmill Moore J)? On the evidence, the Deputy Commissioner would be the sole or, at least, the principal creditor in a bankruptcy of Mr Huang.

1. The third matter relied on by her Honour is the potential willingness of the courts of Hong Kong and China to enforce Australian insolvency laws. It is difficult to see what this matter adds to the previous matter. In any event, it must be rejected for the same reasons.
2. The fourth matter relied on by her Honour is the possibility of Mr Huang moving assets to other jurisdictions where enforcement is readily available. There is no evidence in this case of Mr Huang threatening to do this and it is, in fact, a theoretical possibility. We do not think that this could be a basis for an order restraining the disposition or diminution of assets in jurisdictions where enforcement is not a realistic possibility. Were it otherwise, it would justify an order in every case.
3. The final matter relied on by her Honour is the potential willingness of the courts of China and Hong Kong to enforce Australian laws relating to the payments of penalties and interest. We do not think this is a matter that can be relied upon in considering the possibilities of enforcement. The penalties and interest follow from the tax which is owed by reason of Australian revenue laws and arise by reason of those laws. They are part of the same revenue laws that give rise to the tax liability. Mr Huang submitted that it was not open to the Deputy Commissioner to argue that penalties and interest may not fall within the reservations in the Convention in light of her failure to adduce evidence of the Convention in accordance with s 174 of the *Evidence Act 1995* (Cth). Absent the Convention, it is not open to the Deputy Commissioner to suggest something about the meaning of tax claims in the Convention. We do not need to consider this submission because we are of the view that penalties and interest are within the rule against the enforcement of the revenue laws of a foreign State.
4. In our opinion, there was no realistic possibility that the Deputy Commissioner’s judgment debt would be enforceable in the PRC or Hong Kong.
5. The Deputy Commissioner submitted that if we were against her, nevertheless we should do no more than remove Hong Kong and the PRC from the orders which are challenged. We see no basis to proceed in that way which is inconsistent with the reasons we have given.
6. The asset disclosure order is an ancillary order and such an order is defined in r 7.33 as follows:

(1) The Court may make an order (an ***ancillary order***) ancillary to a freezing order or prospective freezing order as the Court considers appropriate.

(2) Without limiting the generality of subrule (1), an ancillary order may be made for either or both of the following purposes:

(a) eliciting information relating to assets relevant to the freezing order or prospective freezing order;

(b) determining whether the freezing order should be made.

In this case, the order was made as part of the freezing order and the relevant paragraph is r 7.33(2)(a). Although before the primary judge the parties accepted that the order requiring disclosure of assets stood or fell with the freezing order, in this Court the Deputy Commissioner submitted that it should not be disturbed even if the relevant parts of the freezing order are set aside because the order has been fully performed and is spent. The Court was told by the Deputy Commissioner that Mr Huang served an asset disclosure affidavit in accordance with the primary judge’s orders on 11 November 2019. The Court was told by the Deputy Commissioner that with the consent of Mr Huang, her Honour made an order requiring him to serve a revised asset disclosure affidavit and that he has since complied with that order. The Deputy Commissioner’s argument is that there is no utility in setting aside the order and, in fact, it would be contrary to the overarching purpose of the civil practice and procedure provisions as identified in s 37M of the Act to grant leave to appeal with respect to the order. Perhaps another way of putting this submission is that substantial injustice will not result should leave be refused, supposing the decision at first instance to be wrong.

1. Mr Huang’s response to this submission is as follows. The primary judge’s orders reserves to each party liberty to apply to vary or discharge the order and, in fact, this power was exercised by the Deputy Commissioner when she was not satisfied with Mr Huang’s first asset disclosure affidavit. Mr Huang submits that it would be intolerable if the freezing order was set aside, but the Deputy Commissioner still had the right to seek directions with respect to his asset disclosure affidavit with respect to his overseas assets. We agree that such a result would not be in accordance with law.
2. The Deputy Commissioner’s submissions suggest that she considers that the asset disclosure order has now been complied with and there is no need to set aside the order. We do not doubt the Deputy Commissioner’s good faith, but we consider that an order made in error which may, absent (possibly) an undertaking, have consequences in the future, should be set aside. We will so order.

# Conclusion

1. Leave to appeal should be granted and the appeal must be allowed. The order made by the primary judge should be varied in the manner we have indicated. As the significance of the other changes between the order made by the primary judge and the order sought by Mr Huang is unclear, we will give the parties the opportunity to agree the appropriate form of order in light of these reasons.

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| I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Besanko, Thawley and Stewart. |

Associate:

Dated: 17 August 2020