



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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

**NO S211 OF 2020**

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

**AND:** **ZU NENG SHI**  
 Respondent

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**APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

**PART I**

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

20 **PART II**

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Ground 1(a): Availability of power to examine Respondent as a judgment debtor

2. The purpose of freezing orders is to prevent frustration of the Court's process by seeking to meet a danger that a judgment will be unsatisfied: *Jackson v Sterling Industries Pty Ltd* (1987) 162 CLR 612 at 622-623 (Deane J) (**JBA(9) 189-190**); *Federal Court Rules 2011 (FCR)*, r 7.32 (**JBA(4) 19**). The abuse or frustration of the Court's processes may occur when there is a risk that a judgment or prospective judgment will be wholly or partially unsatisfied: FCR r 7.35(4).
3. Ancillary orders such as disclosure orders have the same purpose as freezing orders: *Witham v Holloway* (1995) 183 CLR 525 at 535 (Brennan, Deane, Toohey and Gaudron JJ) (**JBA(12) 395**). A disclosure affidavit enables the applicant and the Court to monitor compliance with freezing orders and enables the applicant to notify third parties of the existence of the orders. These considerations do not cease upon entry of judgment for the applicant (Appellant's Written Submission (**AWS**) [32]). The purpose of freezing orders and disclosure orders provide important context for construing s 128A of the *Evidence Act 1995* (Cth) (**Act**) (Appellant's Reply Submissions (**Reply**) [8]).
4. The availability of the power to examine the Respondent as a judgment debtor pursuant to s 108 of the *Civil Procedure Act 2005* (NSW) (**CPA**) (**JBA(5) 22**) and rules 38.1 and

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38.2 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) (**JAB(6) 25-26**) was an irrelevant consideration because:

- a. The majority erroneously reasoned that the only continued relevance of the Disclosure Orders was to facilitate enforcement of the judgment debt: Lee J [104] **CAB 118**. In contrast, asset disclosure orders serve a number of purposes including ensuring the integrity of the Court's orders are maintained and its processes are not frustrated by the dissipation of assets: see *Pathways Employment Services Pty Ltd v West* (2004) 186 FLR 330 at 346 [41] (**JBA (17) 551**). These purposes continue after entry of judgment (AWS [32]).
- b. In the present case, the freezing orders remained extant and the risk of dissipation of assets remained (AWS [33]).
- c. A s 108 examination is conducted for different purposes and in different circumstances to orders ancillary to freezing orders. The time associated with the conduct of such an examination tells against its relevance, given that freezing orders and ancillary orders are made in circumstances of urgency (AWS [34]).
- d. As the privilege against self-incrimination can be asserted in the course of a judgment debtor's examination (*Deputy Commissioner of Taxation v Gould* [2020] FCA 337 at [9] **JBA(14) 436**), the rationale behind embarking on such an examination would be defeated as the same factors would arise in determining whether to grant a certificate under s 128 of the Act (AWS [35]-[36]).

30 Ground 1(b): Relevance of the risk of derivative use of the information in the Privileged Affidavit

5. There were no current charges or criminal proceedings on foot at the time of the hearing before the Full Court: Davies J [47] **CAB 101**; AWS [42]; Reply [2]-[5]. In those circumstance, the risk of derivative use of the information in the Privileged Information was purely speculative and an irrelevant consideration because:

- a. There will always be a real and appreciable risk of prosecution whenever there are reasonable grounds for the claim for privilege: see Lee J [109] **CAB 119** (Reply [13]).
- b. Section 128A(8) of the Act prohibits derivative use where a certificate has been issued. The protection offered by a certificate has been determined by the legislature as the appropriate mechanism to guard against the risk of derivative use

(AWS [46]). The protection offered is not expressed in qualified terms in s 128A(8) (Reply [12]).

- c. Limited circumstances may arise in which the risk of derivative use is a relevant consideration in determining where the interests of justice lie, such as those considered in *Gedeon v The Queen* (2013) 280 FLR 275 at 315-316[230]-[232], 324-325[292]-[294] (**JBA(16) 516-517; 525-526**) (AWS [47]). However in the absence of any evidence of criminal charges, such a consideration is irrelevant.

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#### Notice of contention

6. The onus imposed under sub-ss 128A(6)(a) and (b) mirrors the onus in sub-s 128(A)(4). At both stages, it is for the respondent to satisfy the Court of the matters contained in the sub-section. There is no shift in onus between the two stages.

7. The following reasons support this construction:

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a. An applicant will be unaware of the content of the Privileged Affidavit and accordingly cannot meaningfully assist the Court. There is no practical way for a party in the Appellant's position to discharge its onus (AWS [51]).

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b. The position of an applicant is not analogous to the other scenarios referred to at the Respondent's Written Submissions [77]-[79]. In contrast to those examples, sub-s 128A(6)(b) does not involve a consideration of any of the matters within the knowledge of the party seeking access to the Privileged Affidavit (AWS [55]-[56]; Reply [15]-[17]).

c. It is not in an applicant's interest to satisfy the Court of the matters in sub-s 128A(6)(a), which is indicative that the applicant does not bear that onus.

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d. It was not the Applicant who sought access to the Privileged Affidavit (cf Lee J [83] **CAB 112**); such access was already mandated by the Disclosure Orders. There was no requirement for the Appellant to apply for disclosure of the Privileged Affidavit (AWS [57]).

Dated: 13 April 2021



Simon White SC  
Counsel for the Appellant