HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY NO S 211 OF 2020

BETWEEN: **DEPUTY COMMISSIONER OF TAXATION**
Appellant

and

ZU NENG SHI
Respondent

APPELLANT'S REPLY

Part I: Certification for publication

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

Part II: Argument in reply

Evidence of a criminal investigation into the Respondent

2. The Respondent's submissions (**RS**) place significant emphasis on the allegedly ongoing nature of a criminal investigation pertaining to his conduct. However, while it is the case that a taskforce within the Australian Taxation Office (**ATO**) conducted a covert audit into the tax affairs of a labour hire group of companies associated with the Respondent between July 2015 and November 2018 (RS [9]-[10]), there was no evidence before the primary judge or the Full Court of a likelihood of criminal charges being laid.

3. The Respondent cites *Deputy Commissioner of Taxation v Shi (No 3)* [2019] FCA 945
20 (**PJ**) at [45] in support of the submission that "*the primary judge found that there existed a realistic possibility of criminal charges*" (RS [11], [64]). However, that passage does no more than state what is always the case following an investigation that uncovers any suggestion of criminal activity: there was a possibility of criminal charges against the Respondent. The evidence before and the conclusions of the primary judge went no further. The primary judge found at [45] that there was no evidence to suggest that it was probable that criminal charges would eventuate and indeed, none have.

4. The totality of the evidence available to the primary judge and the Full Court on this issue was as follows:

   a. An affidavit of Timothy Kelly, an ATO Investigations Manager and the officer in
30 charge of a criminal investigation into the Respondent and his associated companies, deposing that it was proposed that a search warrant would be executed

by the Australian Federal Police (**AFP**) in relation to this investigation at nine premises;

b. A copy of the search warrant executed at the Respondent's premises on 28 November 2018, pertaining to taxation fraud offences, money laundering offences, secret commission offences and migration offences;[1]

c. An affidavit of Vivian Evans, the solicitor for the Respondent, affirmed 18 March 2019 attesting to her belief that the evidence relied upon by the Appellant in his freezing order application concerned the same subject matter as the search warrant;[2] and

d. A letter from the Australian Government Solicitors, the solicitors for the Appellant, dated 13 May 2019 in response to a request by the Respondent for an unexecuted copy of the affidavit lodged in support of the application for the search warrant, accepting that it was open to the Court to conclude that the Respondent was under criminal investigation in relation to the offences specified in the search warrants.[3]

5. Notably, there was no evidence of referral of a brief of evidence to the AFP or that charges against the Respondent were under consideration or imminent. The evidence showed no more than that the Respondent was suspected to have committed certain offences.

Construction of s 128A - General

6. The Appellant accepts that the "interests of justice" must be broadly construed. However, this is not to say that the exercise of the discretion is without limitation. Plainly, as with all discretionary and evaluative determinations, there are matters that limit the court's discretion both generally and in the circumstances of the particular case under consideration; the discretionary power must be exercised in a principled way.[4] A discretionary power is "*confined by the matters which may be taken into account and by the matters, if any, which must be taken into account in its exercise*".[5]

7. A consideration of the interests of justice will involve the balancing of various interests

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[1] Appellant's Book of Further Materials (**ABFM**) Tab 3.

[2] ABFM Tab 2.

[3] ABFM Tab 4.

[4] See eg *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31 (Mason CJ), 76 (Gaudron J).

[5] Ibid at 76 (Gaudron J).

that are in play in the particular context in which the phrase is used. Although the "interests of justice" will include the interests of the parties, the concept will invariably be wider than that and include larger questions of legal principle, the public interest and policy considerations.[6] This appeal pertains to each of those matters which are permissible considerations.

Ground 1(a)

8. The Respondent's submissions on the construction of s 128A omit reference to an important textual and contextual consideration, namely, the fact that asset disclosure orders are made ancillary to freezing or search orders. Unlike s 128 of the *Evidence Act*, s 128A is not a provision of general application. Instead, it relates to an affidavit made in response to a particular type of order of the court. Accordingly, it is insufficient to merely have regard to the text and history of s 128A itself; the broader context of the purpose of and mechanisms for making and enforcing freezing orders must be considered.

9. The observations of Austin J in *Bax Global v Evans* [1999] NSWSC 815 (see RS [45]) were made in the absence of a statutory mechanism for the making of asset disclosure orders. At [23], Austin J was referring to the power of the court to make such orders and considered that other statutory procedures may also provide such power. His Honour's statements do not bear upon whether the Full Court erred in the present case. However, his Honour relevantly noted the importance of asset disclosure in the context of freezing orders, including to ensure that the *Mareva* relief is effective and not oppressive and to enable the plaintiff to be able to make the risk assessment necessary in order to give the undertaking as to damages (at [23]). These considerations do not cease upon entry of judgment for the plaintiff and support the Appellant's submission that it was entitled to timely disclosure of the Respondent's assets, without recourse to other mechanisms of the court.

10. That the legislature has now enshrined in statute a mechanism for making a claim for privilege against self-incrimination in the context of asset disclosure orders is also an important aspect of the construction of s 128A. The inclusion in the *Evidence Act* of an express power to consider a claim for self-incrimination is indicative that the legislature did not intend that applicants for freezing orders should require recourse to alternative

[6] *Landsman v R* (2014) 88 NSWLR 534 at [69] (Beazley P, Hidden and Fullerton JJ agreeing), citing *BHP Billiton v Schultz* 221 CLR 400.

mechanisms in order to obtain the information produced in response to disclosure orders.

11. The Full Court did not determine the Appellant's s 353-10 power was a relevant (but not determinative) consideration (cf RS [51]-[52]). Justice Lee (Steward J agreeing) found the s 353-10 power was a way of circumventing the privilege and was therefore an erroneous consideration (FCJ [101]). Justice Davies concluded the fact the Appellant had *not* sought to utilise his s 353-10 powers was relevant, and therefore the primary judge had erred in having regard to this power (FCJ [[31]-[33]). By analogy, it is also relevant that the Appellant has not here sought to utilise other statutory schemes to obtain the same information as that contained in the Privileged Affidavit.

Ground 1(b)

12. The inclusion of an "interests of justice" test in s 128A(6) does not necessitate a conclusion that the protections and immunities afforded by a certificate may be insufficient in all cases (cf RS [31]). The certificate process represents the mechanism by which the privilege against self-incrimination may be abrogated. The "interests of justice" test dictates the circumstances in which such abrogation will occur; there is nothing in the text or purpose of the provision that suggests that a "residual exposure" to direct or derivative use is relevant where there is no evidence that the individual is to be charged with an offence (cf AS [27]).

13. It may be that circumstances arise in which the prospect of derivative use is a relevant consideration in determining where the interests of justice lie. However, if the court reaches the stage of evaluating s 128A(6)(c), it will necessarily be the case that there is evidence of the deponent having committed an offence. To take into account the risk of "residual exposure" in the absence of any evidence that it is any more than a hypothetical possibility risks undermining the certificate process by introducing into the factual mix a consideration that will almost always be present. This approach finds no support in the text of s 128A.

14. Justice Davies did not accept the risk of derivative use was a relevant consideration (cf RS [65]). To the contrary, her Honour found there was "*no force*" in the submission this was a relevant consideration as the risk was purely hypothetical, and that matter had no bearing on the interests of justice: FCJ [47].

Notice of contention

15. The examples relied upon by the Respondent to rebut the practical difficulty encountered

by the Full Court's construction of the onus under s 128A(6)(b) are inapposite (RS [77]-[78]). In each of the examples cited, the onus on the party who does not have access to the relevant document is to satisfy the court of the likely relevance of the document or the effect of the document on the party's case. This party, who has sought production of the document, is in a position to make submissions to the court about the nature of its case and the anticipated relevance of the document.

16. In contrast, 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. At RS [79], the Respondent suggests that the judge may require a party in the Appellant's position to establish that the gravamen of any potential offences alleged during the freezing order process do not tend to incriminate the deponent of foreign offences. However, this submission presupposes that offences against foreign law are alleged during the freezing order process, or that the conduct revealed in the disclosure affidavit coincides with any evidence presented by the applicant in the application for freezing orders. This will not necessarily be the case; freezing orders will be made 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 (*Federal Court Rules* r 7.32). Satisfaction of this test will not in all cases involve evidence of offshore money transfers and even if such evidence does exist, an affidavit disclosing all of a deponent's worldwide assets may well go beyond the scope of the offshore transfers known to the applicant.

17. If the onus is truly on the party seeking disclosure there would also be no obligation on the deponent to provide open annotations of the type provided in respect of the Privileged Affidavit in this case, nor to lead evidence about specific risks of exposure as suggested at RS [80]. That being the case, the party seeking disclosure is unable to meaningfully make submissions about the matters described in s 128A(6)(b). The construction contended for by the Respondent goes beyond the intended purpose of the sub-section and is not supported by the structure of s 128A as a whole.

Dated: 26 February 2021

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