HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA S211 of 2020
SYDNEY REGISTRY

BETWEEN: **DEPUTY COMMISSIONER OF TAXATION**
Appellant

and

10 **ZU NENG SHI**
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for Publication

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

Part II: Statement of the Issues

20 2. The appeal relates to the determination of a claim for privilege against self-incrimination under s 128A of the *Evidence Act 1995* (Cth) (***Evidence Act***) in respect of an affidavit sworn in response to an order made by the Federal Court requiring the Respondent to disclose information about his worldwide assets in connection with a freezing order (**disclosure affidavit**).

3. The issue raised by the appeal is the circumstances in which a court, having been satisfied that a claim for privilege against self-incrimination is properly made, may be satisfied that the interests of justice require the information contained in a disclosure affidavit to be disclosed. Specifically, the following two issues arise in the appeal:

   (a) In respect of an affidavit disclosing a deponent's assets, is the availability of a
30 mechanism to examine the deponent as a judgment debtor a relevant consideration in determining whether the interests of justice require disclosure of the information and the granting of a certificate under s 128A(7) of the *Evidence Act* ?

(b) Is the risk of derivative use of the information in respect of which privilege is claimed a relevant consideration in determining whether the interests of justice require disclosure of the information and the granting of a certificate under s 128A(7) of the *Evidence Act*?

4. The Notice of Contention raises the question of the party on whom the onus of proof lies under s 128A(6)(b) of the *Evidence Act* and whether the Full Court erred in failing to find that it was not open to the primary judge to have been satisfied that the disclosure affidavit in this case did not reveal the commission of an offence or exposure to civil penalty arising under foreign law.

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Part III: Section 78B certification

5. It is certified that there are no constitutional issues in this case.

Part IV: Case citations

6. The decision at first instance is *Deputy Commissioner of Taxation v Shi (No 3)* [2019] FCA 945 (**PJ**).

7. The decision of the Full Court of the Federal Court of Australia is *Deputy Commissioner of Taxation v Shi* [2020] FCAFC 100; 380 ALR 226 (**FCJ**).

20 **Part V: Statement of facts**

Freezing order application

8. On 27 November 2018, the Appellant commenced proceedings against the Respondent and two other individuals seeking judgment for taxation liabilities, interest and penalties arising under the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and *Taxation Administration Act 1953* (Cth) (**TAA**). The Appellant also sought interlocutory relief against the Respondent and the two other individuals in the form of freezing orders pursuant to r 7.32 of the *Federal Court Rules 2011* (**FCR**) and ancillary orders.

9. On 27 November 2018, *ex parte* freezing orders were made in respect of the worldwide assets of the Respondent. The orders were framed as follows:[1]

> *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$41,092,548.03 ('**the Relevant Amount'**).*
>
> *(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.*
>
> 10 *(c) If the unencumbered value of your Australian assets is less than the Relevant Amount:*
>
> > *(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.*

10. Orders were also made requiring the Respondent to file and serve an affidavit disclosing his worldwide assets (**Disclosure Orders**). The Disclosure Orders were in the following
20 terms:[2]

> *8. Subject to paragraph 9, you must:*
>
> *(a) at or before the further hearing on the Return Date (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing of all your assets world wide, 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) within 14 working days after being served with this order, swear and serve on the applicant an affidavit setting out the above information.*

11. Also on 27 November 2018, the Local Court of New South Wales issued a search warrant
30 relating to premises associated with the Respondent. The search warrant was issued on the basis that there were reasonable grounds for suspecting that there was material at the

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[1] *Deputy Commissioner of Taxation v Shi* [2018] FCA 1915 (**Freezing Order Judgment**), order 6 to Annexure A.

[2] Freezing Order Judgment, order 8 to Annexure A.

premises that would afford evidence as to the commission of a series of taxation fraud, money laundering, secret commission and migration offences.[3]

12. The search warrants were executed on 28 November 2018. No charges were subsequently laid against the Respondent.

The Privileged Affidavit

13. In response to the Disclosure Orders, the Respondent filed two affidavits. The first, affirmed on 13 December 2018, was served on the Appellant. This affidavit disclosed assets with an estimated aggregate value of $360,100.00.[4]

14. The second, affirmed 16 March 2019 (**Privileged Affidavit**), was not served on the
10 Appellant but was delivered to the Court in a sealed envelope. The Privileged Affidavit set out various other assets not disclosed in the affidavit of 13 December 2018.[5] Throughout the proceedings at first instance and on appeal, the Appellant has not had access to the Privileged Affidavit.

15. On 24 April 2019, judgment was entered by consent for the Appellant against the Respondent in the amount of $42,297,437.65.[6] The judgment debt has not been discharged by the Appellant and the freezing orders remain in place.

16. In the week prior to judgment being entered against him, the Respondent brought an interlocutory application (**the privilege claim**) seeking the following orders:

    (a) The Privileged Affidavit be returned to the Respondent or his legal representatives
20 under s 128A(5) of the *Evidence Act*.

    (b) In the alternative, in the event that the Court makes an order under s 128A(6) of the *Evidence Act*, that the Respondent file and serve the whole or part of the Privileged Affidavit upon the parties and the Respondent be given a certificate of the kind described in s 128A(7)-(8) in respect of the information referred to in s 128A(6)(a).

The application before the primary judge

17. The hearing of the privilege claim was held on 15 May 2019.

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[3] Affidavit of Vivian Evans dated 18 March 2019 (**Evans Affidavit**), [4] and Annexure A.
[4] FCJ [2].
[5] FCJ [2].
[6] FCJ [3].

18. The primary judge read the Privileged Affidavit for the purpose of determining the application and was satisfied:

    (a) The affidavit disclosed reasonable grounds for the making of the claims for privilege against self-incrimination;[7]

    (b) The information disclosed in the privilege affidavit may tend to prove that the Respondent committed an offence against or arising under an Australian law for the purposes of s 128A(6)(a);[8] and

    (c) The information did not tend to prove that the Respondent had committed an offence in China for the purposes of s 128A(6)(b).[9]

10 19. Having accepted that there were reasonable grounds for the claim of privilege against self-incrimination, the primary judge then turned to a consideration of whether it was in the interests of justice that a certificate be granted pursuant to s 128A(7) of the *Evidence Act* with the consequence that the Privileged Affidavit be disclosed to the Appellant.

20. The primary judge accepted that but for one consideration, he would have been of the clear view that the interests of justice favoured disclosure. The primary judge considered there was a public interest in ensuring that taxpayers pay the correct amount of tax based upon all of the relevant facts. In circumstances where the Privileged Affidavit contained information that may bear upon that issue, the primary judge found that the granting of a certificate under s 128A would, *inter alia*, prevent the use of the information contained
20 in the Privileged Affidavit in Australian proceedings, including any future criminal proceeding, or tax appeal pursued by the Respondent pursuant to Part IVC of the TAA.[10] As the Appellant was able to obtain the same information via its compulsory information gathering powers in s 353-10 of Sch 1 of the TAA, the primary judge found that it was preferable the Appellant obtain the information contained in the Privileged Affidavit via those means.[11] Accordingly, because the primary judge was not satisfied that the interests of justice required the information to be disclosed, his Honour ordered the return of the Privileged Affidavit to the Respondent pursuant to s 128A(5) of the *Evidence Act.*

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[7] PJ [18].
[8] PJ [22].
[9] PJ [25].
[10] PJ [30].
[11] PJ [31], [35], [45].

The appeal to the Full Federal Court

21. The Appellant sought leave to appeal the primary judge's orders, challenging the primary judge's consideration of the Appellant's information gathering powers under the TAA in determining the interests of justice. By Notice of Contention, the Respondent relevantly contended the Appellant bore the onus of establishing the matter set out in sub-s 128A(6)(b) and had not met that onus (Ground 1). A further ground of contention (Ground 2) was abandoned, namely that that in the alternative to ground 1, the primary judge should have concluded that the information in the Privileged Affidavit did tend to prove that the Respondent had committed an offence against or arising under, or is liable
10 to a civil penalty under, a law of a foreign country.

22. The Full Court granted leave to appeal the primary judgment but the majority dismissed the appeal. The majority considered that the Appellant bore an onus of establishing all matters within sub-s 128A(6), including that the Privileged Affidavit (that the Appellant had not seen) did not reveal an offence against foreign law (sub-s 128A(6)(b)) and that the interests of justice required disclosure (128A(6)(c)). As to sub-s 128A(6)(b), the Full Court accepted that, the primary judge having been affirmatively satisfied that the information in the Privileged Affidavit did not tend to prove that the Respondent committed an offence in China, the Appellant had discharged his onus.[12]

23. As to sub-s 128A(6)(c), all judges of the Full Court accepted that the primary judge erred
20 in taking into account the Appellant's compulsory examination powers under s 353-10 of the TAA in determining what the interests of justice, in the circumstances of the present case, required.[13]

24. However, the majority upheld Ground 3 of the Notice of Contention that the interests of justice nonetheless did not require disclosure of the Privileged Affidavit. Justice Lee (with whom Stewart J agreed) reasoned that as this was a case in which judgment had already been entered for the Appellant, disclosure of the Privileged Affidavit was solely for the purpose of assisting methods of execution. That being the case, it was relevant to consider whether there were other available ways that execution could be assisted,

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[12] FCJ [93] (Lee J, Stewart J agreeing at [114]-[115]).
[13] FCJ [31]-[33] (Davies J), [101] (Lee J, Stewart J agreeing at [114]-[115]).

including the Appellant's ability to apply to examine the Respondent as a judgment debtor.[14]

25. Further, Lee J had regard to the risk that the information contained in the Privileged Affidavit could be used in or in relation to future criminal proceedings. His Honour considered that derivative use immunity in respect of compulsorily acquired information, such as that which is provided for in s 128A(8), is very difficult to enforce, and a certificate issued pursuant to s 128A(7) is not a complete answer to this difficulty.[15]

26. Having regard to these considerations, Lee J concluded that this was not a case where the interests of justice required disclosure of the Privileged Affidavit and consequently
10 dismissed the appeal.[16]

Part VI: Appellant's arguments

27. The Appellant contends that the majority of the Full Court made two errors in its determination of whether the interests of justice require disclosure of the Privileged Affidavit, both of which are errors of the kind referred to in *House v R*.[17] Each provides an alternative basis for overturning the Full Court's decision.

Ground 1(a): Relevance of examination of the Respondent as a judgment debtor

28. The majority of the Full Court erroneously had regard to the availability of powers to order the examination of the Respondent as a judgment debtor.

20 29. By application of FCR r 41.10(1), a judgment creditor may make an application relying upon s 108 of the *Civil Procedure Act 2005* (NSW) (**CPA**) for a judgment debtor to attend court to be orally examined. Section 108 of the CPA empowers the Court to make an order requiring a person bound by a judgment or order to attend the court to be orally examined as to any material question. An examination order will only be made under s 108 if the judgment debtor first fails to comply with an examination notice requiring the person to provide answers to specified material questions: *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**), rr 38.1-38.3.

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[14] FCJ [103]-[106].
[15] FCJ [109]-[110].
[16] FCJ [111].
[17] (1936) 55 CLR 499.

30. Justice Lee, writing for the majority, reasoned that once it was understood that the interests of justice required disclosure in order to facilitate the enforcement of the judgment, it was appropriate to have regard to other ways that execution of the judgment could be assisted. By seeking to utilise the procedure under s 108 of the CPA, the Appellant could obtain the same information in the Privileged Affidavit by other means that would not give rise to the same concerns as to self-incrimination.[18]

31. The reasons of the majority overlooked the purpose of the asset disclosure orders which were ancillary to extant freezing orders. As Davies J in dissent recognised,[19] the purpose of an asset disclosure order is to prevent frustration or abuse of the Court's processes in relation to matters coming within its jurisdiction. This fundamental purpose was recognised by this Court in *Witham v Holloway*, where Brennan, Deane, Toohey and Gaudron JJ explained:[20]

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> *The purpose of a Mareva injunction is "to prevent the abuse or frustration of [a court's] process in relation to matters coming within its jurisdiction". And the same is necessarily true of an order that is ancillary to a Mareva injunction, as was the discovery order made in this case.*

32. An asset disclosure order serves the purpose of identifying the respondent's assets. The utility of a disclosure affidavit lies in enabling the Court to ensure that the integrity of its orders are maintained and that its processes are not frustrated by assets being dissipated between the time of commencement of proceedings and any eventual enforcement.[21] Freezing orders may continue to operate after final judgment to preserve assets and protect the integrity of the Court's processes.[22]

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33. For asset disclosure orders to have their intended purpose, the applicant for a freezing order is entitled to timely disclosure of assets. In granting the freezing order and the Disclosure Orders in the present case, Yates J was satisfied on the evidence that there was a real danger that a judgment obtained against the Respondent might remain wholly or partly unsatisfied because assets might be removed from Australia or otherwise

[18] FCJ [99], [104]-[106].
[19] FCJ [29].
[20] (1995) 183 CLR 525 at 535 (Brennan, Deane, Toohey and Gaudron JJ), citing *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (Deane J).
[21] *Pathways Employment Services Pty Ltd v West* (2004) 186 FLR 330 at 346 [41] (Campbell J)
[22] *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (Deane J); *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 401 [43] (Gaudron, McHugh, Gummow and Callinan JJ)

disposed of or dealt with to the disadvantage or detriment of the Commonwealth.[23] At the time of the hearing of the application under s 128A and the appeal, the freezing orders had not been discharged and remained in force, and the purpose of the making of them remained extant.[24]

34. In circumstances where there remained an ongoing risk of dissipation of assets, and the Court had considered the appropriate mechanism to address that risk was the making of freezing orders and ancillary asset disclosure orders, the availability to a judgment creditor of examination powers was an irrelevant consideration. The Full Court's approach would require the Appellant to invoke other powers of the Court to achieve a purpose identical to the asset disclosure orders. In circumstances where the Court has identified a real and not fanciful risk of asset dissipation, the time associated with the conduct of such an examination process, as opposed to the provision of the information already supplied under the ancillary order, is another factor against the Full Court's construction.

35. Further, the same issues regarding a claim for privilege would arise in the context of an examination as were in issue in this proceeding in respect of the Privileged Affidavit. In *Deputy Commissioner of Taxation v Gould*, Davies J concluded that the privilege against self-incrimination may be claimed in the course of a judgment debtor's examination pursuant to s 128 of the *Evidence Act*, the examination being a "*proceeding in a federal court*" for the purpose of the *Evidence Act*.[25]

36. Here, the majority of the Full Court reasoned that questions during an oral examination could be framed to obtain information as to assets in a direct way, thus avoiding to the extent possible questions which called for answers trespassing on potentially privileged information.[26] However at first instance and in his appeal to the Full Court, the Appellant submitted (without having seen the affidavit) that the Privileged Affidavit should have been redacted to remove the incriminatory aspects. Both the primary judge and all judges of the Full Court agreed that the affidavit could not sensibly be redacted and did not go beyond the requirements of the Disclosure Orders by revealing more information than

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[23] Freezing Order Judgment at [20].
[24] FCJ [30] per Davies J.
[25] [2020] FCA 337 at [9] (Davies J).
[26] FCJ [106] per Lee J.

was strictly required to comply with the orders.[27] Accordingly, if the purpose of an examination of the Respondent was to obtain information about his worldwide assets in the same terms as required to be disclosed by the Disclosure Orders, the examination would give rise to the same claim of privilege against self-incrimination and the descent into privileged information could not be avoided.

37. In *Deputy Commissioner of Taxation v Gould*, Davies J referred to the Full Court's decision of *Griffin v Pantzer* in which Allsop J, as his Honour then was, concluded that s 128 of the *Evidence Act* does not apply to an examination under s 81 of the *Bankruptcy Act 1966* (Cth).[28] Although the Appellant does not contend that *Deputy Commissioner* 10 *of Taxation v Gould* was wrongly decided, in the alternative to the above argument, if there is in fact no scope for claiming privilege against self-incrimination in the course of a judgment debtor's examination, recourse to that mechanism by the Appellant to obtain the information contained in the Privileged Affidavit may invoke the same concerns as the use of the Appellant's powers under s 353-10 of Sch 1 of the TAA, namely, that to use a mechanism that circumvents the privilege against self-incrimination may constitute an abuse of power.[29]

38. If it is the case that an applicant for freezing orders may be prevented from gaining access to a disclosure affidavit in respect of which privilege is claimed in circumstances where judgment is entered because of the availability of other enforcement mechanisms, there 20 is a disincentive for the applicant to have judgment entered prior to the determination of the claim for privilege. An applicant for freezing orders should not be put in a different position in seeking to enforce the scope of extant freezing orders because of the timing of the hearing of a claim of privilege and should not be required to elect between obtaining judgment and obtaining access to an affidavit sworn in accordance with disclosure orders.

39. For these reasons, the availability of a mechanism to examine the Respondent as a judgment creditor was an irrelevant consideration and gave rise to error of the kind referred to in *House v R*.[30] Although the scope of the discretion under s 128A(6) is a

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[27] FCJ [38] (Davies J), [52] (Lee J), [114] (Stewart J); PJ [20].

[28] [2020] FCA 337 at [7]-[8], citing *Griffin v Pantzer* (2004) 137 FCR 209 at [198]-[206] (Allsop J, as his Honour then was; Ryan and Heerey JJ agreeing).

[29] FCJ [32]-[33] per Davies J.

[30] (1936) 55 CLR 499.

broad one, there is nothing in the terms of s 128A or the principles underlying the provision that support the approach taken by the majority of the Full Court. The consequence of the majority's reasoning is that the Appellant is only able to ensure compliance with the freezing orders in relation to assets to the value of $360,000, an amount far below that required to satisfy the judgment debt, until such time that further mechanisms of the Court are invoked.

Ground 1(b): Risk of derivative use

40. Like s 128 of the *Evidence Act*, sub-ss 128A(7) and (8) provides a mechanism whereby the Court may issue a certificate which prevents information contained in a privilege
10 affidavit being used in an Australian court against the deponent of the affidavit.

41. The protection which the privilege against self-incrimination confers extends not only to the risk of incrimination by direct evidence but also to incrimination by indirect or "derivative" evidence.[31] Accordingly, sub-s 128A(8) prevents derivative use of the information contained in a privilege affidavit by preventing the use of "*evidence of any information, document or thing obtained as a direct result or indirect consequence*" of the disclosure of the affidavit.

42. In the present case, the Privileged Affidavit disclosed information which may tend to prove that the Respondent had committed an offence against or arising under an Australian law. However, the Respondent had not been charged with any such offence.[32]
20 The evidence only went so far as to establish that, on 28 November 2018, search warrants were executed at premises associated with the Respondent. The risk that the information contained in the Privileged Affidavit might be used against the Respondent in Australian proceedings was therefore hypothetical.

43. In finding that the interests of justice did not require disclosure of the Privileged Affidavit, the majority of the Full Court accepted that derivative use immunity in respect of compulsorily acquired information, such as that which is provided for in s 128A(8), is very difficult to enforce, in part because investigators and prosecutors may not even

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[31] *Reid v Howard* (1995) 184 CLR 1 at 6 (Deane J).
[32] FCJ [47] (Davies J), [109] (Lee J).

be aware that they are in possession of derivative information.[33] In contrast, Davies J considered this risk to be purely speculative.[34]

44. The risk posed by derivative use of privileged information was recognised by Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre*, where his Lordship explained that "*quite apart from [direct use of privileged information], its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.*[35] This risk was also accepted by Gibbs CJ in *Sorby v Commonwealth*, prior to the introduction of the Uniform Evidence Law and the mechanisms in ss 128 and 128A.[36]

10 45. The certificate procedure was considered by the Australian Law Reform Commission in its 1985 Report into Evidence. The Commission considered that "*the appropriate balance between the rights of the individual and the state could be struck by a procedure whereby a witness could be encouraged to testify but the state would be prevented from using that evidence against him or her in later proceedings*".[37] This approach was later endorsed by the Commission in its report into the Uniform Evidence Law.[38] The certificate procedure was enshrined into the Uniform Evidence Laws in s 128, and subsequently, s 128A came to be incorporated as part of the 2008 amendments to the *Evidence Act*.[39]

46. In circumstances where the legislature has determined that the appropriate mechanism
20 to guard against the risk of derivative use of privileged information is the issuing of a certificate pursuant to sub-s 128A(8), the majority of the Full Court erred in taking into account the risk that derivative use could nonetheless occur after a certificate was issued. Derivative use of the privileged information would be contrary to the express terms of a certificate.

47. In *Gedeon v The Queen*, the NSW Court of Criminal Appeal accepted that it was not an error for the primary judge to take into account the risk of derivative use when

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[33] FCJ [110] per Lee J.
[34] FCJ [47].
[35] [1982] AC 380 at 443.
[36] (1983) 152 CLR 281 at 294 (Gibbs CJ).
[37] Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [860].
[38] Australian Law Reform Commission, *Uniform Evidence Law,* ALRC 102 (2005), [15.103].
[39] *Evidence Amendment Act 2008* (Cth).

determining the interests of justice in an application under s 128 of the *Evidence Act*.[40] However, in that case the witness had been charged with offences and the proposed questioning was directed to those offences.[41] There was therefore a risk of interfering with the accusatorial process by requiring the witness to answer questions about the offence,[42] the very danger that the High Court cautioned of in *X7 v Australian Crime Commission*.[43] In contrast in the present case, the Disclosure Orders did not address the substance of any potential charge against the Respondent;[44] nor was the Respondent required to disclose any potential defence by those orders.

48. In cases involving Anton Pillar and Mareva orders, fraud and deception are not uncommon.[45] It follows that the application of s 128A will be considered as part of a sizeable proportion of cases where freezing orders have been granted. The approach of the Full Court therefore risks undermining the certificate mechanism in sub-ss 128A(7) and (8), which replicates the mechanism in sub-ss 128(5) and (7), by endorsing an approach whereby an entirely speculative risk of derivative use may be taken into account in determining a claim of privilege. The Appellant submits that the Full Court thus erred in taking into account the risk of derivative use.

The Respondent's Notice of Contention

49. By Notice of Contention, the Respondent contends that having found for the purposes of s 128A that the onus is on the party seeking disclosure to satisfy the court of the matters in s 128A(6), the Full Court should have found that it was not open for the primary judge to have been satisfied of the negative proposition set out s 128A(6)(b), namely that "*the information [in the Privileged Affidavit]does not tend to prove that the [respondent] has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country*".

50. The majority determined the primary judge should have found the party seeking the privilege affidavit (in this case the Appellant) bears the onus of establishing the matter

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[40] (2013) 280 FLR 275 at [292].
[41] Ibid at [293].
[42] Ibid at [292]-[293] (Bathurst CJ, Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreeing).
[43] (2013) 183 CLR 92.
[44] Not only had no charges been brought against the Respondent, there was no evidence that the investigation against the Respondent was continuing such that there was any risk of interference with the accusatorial process.
[45] See *BPA Industries Ltd v Black* (1987) 11 NSWLR 609 at 613 (Waddell CJ in Eq).

set out in s 128A(6)(b).[46] That is, the majority determined the Appellant (who did not have access to the Privileged Affidavit) was required to prove a negative – that the affidavit did not disclose an offence against foreign law. It is inherent in the Respondent's Notice of Contention that the majority of the Full Court was correct on its construction of the onus, however the Appellant disputes the correctness of the Full Court's interpretation in this regard.

51. The majority's construction imposes an impossible burden on a party in the position of the Appellant who does not have access to a disclosure affidavit by requiring that party to prove that a document which it cannot access does not reveal an offence
10 against the law of any foreign jurisdiction. How a party in the Appellant's position is able to discharge this onus in a practical sense was not explained by the majority of the Full Court.

52. Section 128A allows for the claiming of privilege in two scenarios, both of which have distinct consequences pursuant to sub-ss 128A(5) and (6): first, the information contained in the Privileged Affidavit might disclose the commission of an offence against Australian law, and second, the information might disclose the commission of an offence against the law of a foreign country. In the former category, if there are reasonable grounds for an objection on the basis that the information might disclose an Australian offence, but not an offence against a foreign law, the Court
20 must determine whether it is appropriate to issue a certificate. However if the Court finds that there are reasonable grounds for an objection on the basis that the information might disclose an offence against a foreign law, the consequence is that affidavit must be returned. There is a clear distinction in the wording of s 128A between the consequences of an affidavit revealing an offence against Australia law versus an offence against foreign law.

53. In light of the above, the Appellant submits that the logical approach to s 128A gave rise to four avenues open to the Court:

(a) If the Court determined that there were not reasonable grounds for the objection, the Disclosure Orders stood and the affidavit was required to be
30 disclosed to the Appellant. The threshold for determining that there were

[46] FCJ [91]; see also [83] per Lee J.

reasonable grounds for the objection required the Respondent to establish that there was a "*real and appreciable risk of a criminal prosecution*".[47]

(b) If the Court was satisfied that:

i. there were reasonable grounds for the objection on the basis that information disclosed in the Privileged Affidavit may tend to prove that the Respondent has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law only, and

ii. the interests of justice required the information to be disclosed

the Court was required to make an order requiring the whole or a part of the Privileged Affidavit to be filed and served on the Appellant and cause a certificate to be given in respect of the information that may tend to prove that the Respondent has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law: s 128A(5), (6) and (7). In this scenario, the Respondent bore the onus of establishing the reasonable grounds for the objection under s 128A(4), which then informed whether sub-s 128A(6)(a) was engaged.

(c) If the Court was satisfied that:

i. there were reasonable grounds for the objection on the basis that any information disclosed in the Privileged Affidavit may tend to prove that the Respondent has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law only, and

ii. the interests of justice did *not* require the information to be disclosed

the Court was obliged not to require the information contained in the Privileged Affidavit to be disclosed and was required to return the affidavit to the Respondent: s 128A(5). Again, in this scenario, the Respondent bore the onus of establishing the threshold, namely reasonable grounds for the objection under s 128A(4).

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[47] *ASIC v Mining Projects Group Ltd* (2007) 164 FCR 32 at [9] (Finkelstein J); see also *Sorby v Commonwealth* (1983) 152 CLR 281 at 290.

(d) If the Court was satisfied that there were reasonable grounds for the objection on the basis that the information tends to prove that the Respondent has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, the Court was obliged not to require the information contained in the Privileged Affidavit to be disclosed and was required to return it to the Respondent: s 128(5) and (6). Again, the Appellant submits, the Respondent bore the onus of establishing the reasonable grounds for the objection, which onus, if discharged, would inform whether sub-s 128A(6)(b) was engaged.

10 54. This was the approach favoured by Davies J in dissent. Her Honour accepted that the question of whether the preconditions of sub-ss 128A(6)(a) and (b) are met is resolved by what the affidavit discloses, which is not a matter within the knowledge of the party seeking disclosure. There is no shift in onus from the determination of the sub-s 128A(4) criteria to the sub-ss 128A(6)(a) and (b) criteria.[48]

55. The majority of the Full Court did not accept that the forensic disadvantage of the party seeking to access the affidavit was an impediment to that party bearing the onus under sub-ss 128A(6)(a) and (b), likening the situation to those where common law privileges including legal advice and litigation privilege are invoked. However the analogy to a party seeking access to a document over which a common law 20 privilege is claimed is inapposite. In that scenario, the party claiming the privilege has access to the documents over which privilege is asserted and also bears the onus of establishing the existence of the privilege. The party seeking access to the purportedly privileged document (who often will not have access to that document) bears no such onus.

56. Even where the party seeking access to a document invokes an exception to privilege, such as the fraud exception under s 125 of the *Evidence Act*, that party would not be in a position whereby it was required to make submissions blindly, with no understanding at all as to the content of the documents sought. The party would have the benefit of the privilege holder's justification for the existence of the 30 privilege, as well as an understanding of the context of the communication from its

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[48] FCJ [40].

knowledge about the broader legal dispute. Here, in contrast, the Appellant has nothing to assist it in understanding the nature of the offence that may be revealed by the Privileged Affidavit.

57. Further, the majority placed emphasis upon the fact that the party in the position of the Appellant is the party "*advocating that a disclosure order should be made*".[49] However it was not the Appellant who sought access to the Privileged Affidavit; such access was already mandated by the Disclosure Orders made on 27 November 2018. The raising of an objection pursuant to s 128A did not alter the continuing application of the Disclosure Orders. There was thus no requirement in s 128A for the Appellant to apply for disclosure of the Privileged Affidavit. To the contrary, it was the Respondent who applied for an exception to those orders by availing himself of the protection offered in certain circumstances by s 128A. Accordingly, it was the Respondent who bore the onus of proof to satisfy the Court of the reasonable grounds for the objection, following on from which, the Court could determine whether sub-ss 128A(6)(a) or (b) were engaged.

58. At first instance, the primary judge found that the information contained in the Privileged Affidavit concerned matters which had taken place in Australia which tended to incriminate the Respondent. There was nothing to indicate that those Australian matters could give rise to any offence in China.[50] That being the case, the primary judge was satisfied that the information contained in the Privileged Affidavit did not tend to prove that the Respondent had committed an offence in China.[51]

59. There was no error in the primary judge's approach. Even if the Appellant's arguments on onus are not accepted, the primary judge clearly found that there was no evidence to satisfy the Court of the matters in sub-s 128A(6)(b).

The interests of justice require disclosure of the Privileged Affidavit

60. The Appellant submits that the interests of justice require disclosure of the Privileged Affidavit. The proceedings have resulted in a substantial judgment debt of $42,297,437.65 owing to the Commonwealth by the Respondent in respect of unpaid

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[49] FCJ [83] per Lee J.
[50] PJ [24].
[51] PJ [25].

taxation liabilities. The evidence before the Federal Court at the time of the freezing order application established that the Respondent has been involved in high value overseas funds transfers.[52] The very danger that the freezing orders were intended to guard against, namely the risk that the judgment debt may be wholly or partly unsatisfied, has occurred and yet the Appellant is unable to ensure compliance with the freezing orders by procuring a proper understanding of the Respondent's asset position and the potential breadth of the freezing orders by reference to the entirety of the Respondent's worldwide assets.

61. If the Appellant's arguments on the ground of appeal are accepted, the Appellant submits that there is no countervailing consideration that would weigh against disclosure of the Privileged Affidavit. Accordingly, the Privileged Affidavit should be served on the Appellant and a certificate issued pursuant to s 128A(7) of the *Evidence Act.*

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[52] Freezing Order Judgment at [13].

Part VII: Orders sought

62. The Appellant seeks the following orders:

(1) The appeal be allowed.

(2) Set aside order 2 of the orders made by the primary judge.

(3) Order that the Privileged Affidavit be served on the Appellant.

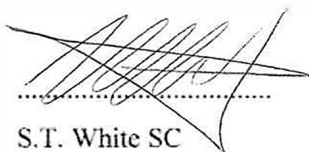
(4) The Court grant a certificate pursuant to s 128A(7) of the *Evidence Act* in respect of the Privileged Affidavit.

(5) In the alternative to orders (3) and (4), remit the matter to the Federal Court for further hearing in accordance with the reasons of this Court.

10 (6) The Respondent pay the costs of this appeal.

Part VIII: Time estimate

63. The Appellant estimates approximately 1 hour for the presentation of his oral argument in chief plus 0.5 hour in reply and on the Notice of Contention.



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Dated: 8 January 2020

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S211/2020

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **DEPUTY COMMISSIONER OF TAXATION**
Appellant

and

10 **ZU NENG SHI**
Respondent

ANNEXURE

LIST OF RELEVANT STATUTORY PROVISIONS

1. *Evidence Act 1995* (Cth), ss 128, 128A
2. *Federal Court Rules 2011*, rr 7.32, 41.10
3. *Civil Procedure Act 2005* (NSW), s 108 (20)
4. *Uniform Civil Procedure Rules 2005* (NSW), rr 38.1-38.3