Federal Court's power to issue worldwide freezing orders

Jeremy Harrison reports on *Deputy Commissioner of Taxation v Huang* (2021) 395 ALR 616 [2021] HCA 43

The High Court, by majority, has confirmed the power of the Federal Court of Australia to order, pursuant to r 7.32(1) of the *Federal Court Rules 2011* (Rules), a worldwide freezing order whenever there is a danger that a prospective judgment will be wholly or partly unsatisfied. In so doing, the court rejected the suggestion that the power to make such an order could only be exercised where there was a 'realistic possibility' that a judgment debt against a person's assets could be enforced in each foreign jurisdiction to which the proposed freezing order related.

Background

Mr Huang and his wife were tax residents of Australia. They left Australia for China when the commissioner of taxation issued Mr Huang with assessments for tax liabilities and a shortfall penalty totalling almost $141 million.

Proceedings below

The appellant, the deputy commissioner of taxation, filed an originating process in the Federal Court of Australia seeking judgment against Mr Huang. On the day that the originating process was filed, Katzmann J

made an *ex-parte* interim worldwide freezing order against Mr Huang pursuant to r 7.32(1). This required Mr Huang to refrain from disposing of, dealing with or diminishing the value of his Australian and overseas assets.

Subsequently, on 21 October 2019, Jagot J made a worldwide freezing order until further order, in substantially the same terms as the original order. Notably, Jagot J found that enforcement of the prospective judgment against Mr Huang was 'not impossible'. Three months later, Jagot J gave judgment in favour of the appellant against Mr Huang. Mr Huang did not appeal the amount of the tax debt, with Mr Huang acknowledging that he had no defence.

Mr Huang however appealed to the Full Federal Court against the worldwide freezing order, particularly as it pertained to his overseas assets. The Full Court allowed the appeal.

The Full Court concluded that the primary judge's order was beyond the power conferred by r 7.32(1). The Full Court considered that a test of 'not impossible' set the bar too low and instead it was appropriate to apply a test which addressed whether there was a 'realistic possibility' that any judgment obtained by the appellant could be enforced against the assets of Mr Huang in the place to which the proposed order related. The Full Court held that Jagot J could not have been satisfied that there was a 'realistic possibility' that Mr Huang had assets in (or would move assets to) jurisdictions in which an Australian judgment could be enforced. Accordingly, the Full Court varied the freezing order so as to exclude Mr Huang's non-Australian assets.

The appeal to the High Court of Australia

The appellant appealed to the High Court which, by majority (Gageler, Keane, Gordon and Gleeson JJ, Edelman J in dissent) allowed the appeal. In the High Court, the appellant did not dispute that there was no 'realistic possibility' that the judgment against Mr Huang would be enforceable in China or Hong Kong.

The issue in the High Court was whether the Federal Court's power to make a worldwide freezing order pursuant to r 7.32(1) could only be exercised if there was proof of a 'realistic possibility' of enforcement of a judgment debt against the person's assets in each foreign jurisdiction to which the proposed worldwide freezing order related.

The majority

In a joint judgment Gageler, Keane, Gordon and Gleeson JJ analysed r 7.32(1) and noted that the rule supplemented s 23 of the *Federal Court of Australia Act 1976* (Cth) (FCA) as well as the Federal Court's implied power as a superior court, each of which conferred power upon the Federal Court to make such orders as are appropriate for the proper exercise of the Federal Court's statutorily conferred jurisdiction and powers (at [16]).

Their Honours highlighted that, according to its terms, the power to make a freezing order under r 7.32(1) is expressly subject to two limitations (at [17]–[18]). The first is that the purpose of the worldwide freezing order must be: 'the purpose of preventing the frustration or inhibition of the court's process'.

The second is that the order must address such purpose: 'by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied'.

The majority rejected the contention that a worldwide freezing order made pursuant to r 7.32 could not be properly made with the requisite purpose of preventing the frustration or inhibition of the Federal Court's process unless there was a 'realistic possibility' of the freezing order's efficacy (at [20]–[29]).

In particular, this was because the provisions granting powers to a court are not to be read down by making implications or imposing limitations which are not found in the express words. There was no reason to imply an unexpressed limitation on the scope of the power in r 7.32 in circumstances where the rule represented a restatement of the powers conferred by s 23 of the FCA and the Federal Court's implied power which contain no such limitations (at [23]–[24]).

The majority, furthermore, considered that the 'efficacy requirement' imposed by the Full Court was inconsistent with the nature of a freezing order which is against a particular person, inconsistent with the purpose of r 7.32 to protect the Federal Court's process and inconsistent with the power to make a worldwide freezing order (at [25]).

Their Honours concluded (at [31]) by stating that the Full Court asked itself the 'wrong question' in that the Full Court enquired as to whether there was a 'realistic possibility' that the prospective judgment could be enforced against the defendant's assets in any relevant foreign jurisdiction. Instead, the correct question was 'whether the [worldwide freezing] order would seek to meet a danger that the prospective judgment will be wholly or partly unsatisfied'.

Edelman J

Edelman J expressed 'some regret' in dissenting from the reasons of the majority because those reasons lead to beneficial commercial consequences and deter fraud (at [34]). Nevertheless, his Honour agreed with the Full Court in that the worldwide freezing order in question could not properly be made. His Honour, in reaching that view, considered that the purpose of 'preventing the frustration or inhibition of the court's process' requires an applicant to identify the process of the court that would be frustrated or inhibited.

His Honour reasoned that, if there was no 'realistic possibility' that any process of the court would be frustrated or inhibited without the freezing order, then the court cannot be acting for the purpose of preventing the frustration or inhibition of the court process. His Honour considered that the courts 'cannot be taken to act in vain' (at [40]).

Since, in the present case, as there was no 'realistic possibility' of any enforcement of the prospective judgment against Mr Huang in either China or Hong Kong, a freezing order over his assets in those jurisdictions could not have the purpose of preventing or frustrating the enforcement processes of the Federal Court (at [44]). BN