SUPREME COURT OF QUEENSLAND

CITATION:	*PJM & Ors v AML & Anor* [2018] QSC 187
PARTIES:	**PJM** (first applicant) **PKM** (second applicant) **PJM AS LITIGATION GUARDIAN FOR PLM** (third applicant) **v** **AML** (first respondent) **ACL** (second respondent)
FILE NO:	6551 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	17 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4 July 2018
JUDGE:	Davis J
ORDER:	**1. Application dismissed.** **2. The respondents file and serve any material and written submissions on costs by 4 pm on 24 August 2018.** **3. The applicants file and serve any material and written submissions on costs by 4 pm on 31 August 2018.** **4. The respondents file and serve any material and written submissions in reply by 4 pm on 4 September 2018.** **5. The issue of costs be decided without oral argument.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DETENTION, INSPECTION AND PRESERVATION – FREEZING ORDERS – where the applicants seek freezing orders to prevent the first respondent from dealing with his interest in real property – where the second respondent also holds an interest in the property – where the applicants have not yet commenced personal injury proceedings – whether freezing orders should be made *Evidence Act 1977* (Qld) s 93A

Uniform Civil Procedure Rules 1999 (Qld) r 8, r 11, r 260A, r 260D, r 430

Deputy Commissioner of Taxation v Ahern (No 2) [1988] 2 Qd R 158, cited
Ex parte Britt [1987] 1 Qd R 221, cited
Harrison Partners Construction Pty Ltd v Jevena Pty Ltd [2006] NSWSC 317, cited
Parbery & Ors v QNI Metals Pty Ltd & Ors [2018] QSC 107, followed
PT Bayan Resources TBK v BCBC Singapore Pte Ltd (2015) 258 CLR 1, considered
R v G [1998] 1 Qd R 659, considered
Virgtel v Zabusky [2008] QSC 316, cited
Zhen v Mo & Ors [2008] VSC 300, considered

COUNSEL: M Eliadis for the applicants
M Horvath with B Buckley for the first respondent
C J Kanther (solicitor) for the second respondent

SOLICITORS: Shine Lawyers for the applicants
Corney & Lind Lawyers for the first respondent
BTLawyers for the second respondent

[1] The applicants, who all assert that they have claims for damages against the first respondent, seek freezing orders to preserve the first respondent's interest in a house in the Moreton Bay region which he presently holds with the second respondent. The respondents are likely to sell the house. The applicants do not object to the sale, provided that the first respondent's share of the sale proceeds is frozen.

[2] No claim has been made by the applicants against the second respondent, but she has been made a party to the application because she has an interest in the house. The first respondent opposes the application. The second respondent does not oppose the making of an order freezing the first respondent's interest in any proceeds of sale, but is in dispute with the applicants as to the terms of an appropriate order.

Background

[3] The respondents are married and have been for some 45 years. The first respondent is almost 68 years of age and the second respondent is 67. Their house is very close to that occupied by the applicants.

[4] The first and second applicants are the parents of the third applicant who brings proceedings through her litigation guardian, the first applicant. The third applicant is 11 years old.

[5] Police have charged the first respondent with offences of a sexual nature against three complainants, including the third applicant.

[6] Upon the first respondent being charged, the respondents separated. At present the second respondent still resides in the house and the first respondent lives with the couple's adult daughter.

[7] While the respondents originally held the house as joint tenants, the second respondent has recently severed the joint tenancy with the result that the house is held by the respondents as tenants in common in equal shares. The house has been valued at $750,000. It has been listed for sale inviting offers over $800,000. A debt of $73,500.00 (rounded) is secured on the property. That debt includes $31,000 which was drawn on the mortgage and paid to solicitors acting for the first respondent in the civil case which is anticipated against him, and to other solicitors acting in relation to the criminal charges which have been laid.

[8] Apart from his interest in the house, the first respondent's assets consist of:

1. a motor vehicle worth about $7,000;

2. a coin collection worth about $800;

3. about $500, being his share of money held in a credit account at a bank.

[9] Legal fees likely to be incurred by the first respondent in defending both the civil proceedings and criminal charges are about $75,000 in addition to the amount already paid to the various solicitors.

[10] The applicants have not yet issued proceedings but have given notices of claim pursuant to the provisions of the *Personal Injuries Proceedings Act* 2002 ("*PIPA*"). The third applicant claims damages for personal injury as a result of the alleged sexual assault. The other applicants claim damages for psychiatric injury, although the exact basis of their claims is far from clear.

[11] Simone Hoeft-Marwick, a solicitor employed by the firm of solicitors representing the applicants, has expressed in her affidavit an opinion that the applicants' damages, if they are successful in their claims, would exceed $250,000.

[12] The freezing order is sought by originating application in support of the civil claim, which cannot be commenced because the procedures prescribed by *PIPA* have not yet been completed. The application came before Mullins J on 27 June 2018 who, by consent, made orders preserving the house and adjourned the application to 4 July 2018. On that day the matter came before me. I heard the application and reserved judgment. Upon my indication, certain undertakings were given by the first respondent pending delivery of judgment on the present application. Both the consent to the orders made by Mullins J, and the giving of the undertakings were for the purpose of maintaining the status quo while the present application could be determined and did not constitute any admission by the first respondent. The assertion by Ms Hoeft-Marwick in her first affidavit that by an exchange of emails in late June 2018 the first respondent had agreed to the freezing orders now sought is obviously wrong.

[13] The applicants submit that the entirety of the net proceeds of sale of the first respondent's interest in the house, but for an allowance for legal fees, should be secured by a freezing order. They say:

1. It is reasonable to anticipate that the house will be sold for a net sum of approximately $730,000. This represents the current valuation ($750,000) less $20,000 estimated sale costs.

2. The mortgage of $73,500 (rounded) would be paid, leaving a balance of $656,500;

3. The second respondent would be paid $328,250, being one-half of the net sum realised from the sale;

4. Of the first respondent's share ($328,250), the sum of $75,000 would be released for legal fees, leaving a balance of $253,500, which would be restrained.

[14] The first respondent submits that the applicants have not proved a basis for a freezing order against him and the application should be dismissed.

[15] As already observed, the second respondent does not oppose a freezing order over the first respondent's share of the proceeds of sale of the house. However, she says that $31,000 of the mortgage balance represents legal costs already paid on behalf of the first respondent. That leaves a balance on the mortgage of about $42,500. The second respondent submits that any freezing order should be fashioned as follows:

1. These calculations assume that the house is sold for a net sum of $730,000.

2. The second respondent would receive half of the sale price after the mortgage debt is paid but on the basis that she is only jointly responsible for that part of the mortgage debt which does not represent the $31,000 paid to the first respondent's solicitors for legal expenses concerning the civil claim and the criminal charges. On her calculations, if the mortgage debt is $73,500, then she is notionally jointly liable for $42,500, being $73,500 less the $31,000 representing the first respondent's legal expenses.

3. On the second respondent's submission, she would receive $343,750, being $730,000 (the net sale price) less $42,500 (notional mortgage figure) giving $687,500, which, divided equally, realises $343,750.

4. The first respondent's share of $343,750 would then be distributed as to $31,000, being payment of that part of the mortgage debt which represents the first respondent's legal expenses, leaving a balance of $312,750. Given the applicants' concession that the future legal expenses of the first respondent must be provided for ($75,000), the sum for restraint would be $237,750.

What the applicants must prove

[16] Both r 260A and r 260D of the *Uniform Civil Procedure Rules* 1999 (Qld) ('*UCPR*') are relied upon. They provide:

> "**260A Freezing order**
>
> (1) The court may make an order (a freezing order) 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."

> "**260D Order against judgment debtor or prospective judgment debtor or third party**
>
> (1) This rule applies if judgment has been given in favour of an applicant by the court or another court and there is sufficient prospect that the judgment of the other court will be registered in or enforced by the court.
>
> (2) This rule also applies if an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in—
>
> (a) the court; or
>
> (b) another court and—
>
> (i) there is a sufficient prospect that the other court will give judgment in favour of the applicant; and
>
> (ii) there is a sufficient prospect that the judgment of the other court will be registered in or enforced by the court.
>
> (3) 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—
>
> (a) the judgment debtor, prospective judgment debtor or another person might abscond; or
>
> (b) the assets of the judgment debtor, prospective judgment debtor or another person might be—
>
> (i) removed from Australia or from a place inside or outside Australia; or
>
> (ii) disposed of, dealt with or diminished in value.

(4) The court may make a freezing order or an ancillary order or both against a person other than a judgment debtor or prospective judgment debtor (a ***third party***) if the court is satisfied, having regard to all the circumstances, that—

(a) there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because –

(i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or

(ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or

(b) a process in the court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment.

(5) This rule does not affect the power of the court to make a freezing order or ancillary order if the court considers it is in the interests of justice to do so."

[17] In *Parbery & Ors v QNI Metals Pty Ltd & Ors*,[1] Bond J reviewed the operation of rr 260A and 260D and the inherent jurisdiction of the Court to make injunctions in reliance on the principles articulated in the *Mareva* line of authority.

[18] Of r 260A, his Honour said this:

"[62] The result is that I think that there is one overall question governing the exercise of power under r 260A, namely is a freezing order necessary for the purpose of preventing 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. In seeking to answer that question the Court should address the three considerations which have been identified as relevant to the grant of freezing orders in the exercise of the inherent jurisdiction. I should also remark that r 260A is not worded in a way which would suggest any departure from the inherent jurisdiction's focus on the **effect** rather than the **purpose** of the defendant's conduct, occurring or apprehended."

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1 [2018] QSC 107.

[19] Of r 260D, his Honour said this:

> "[63] What then of r 260D? I make the following observations:
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> (a) Rule 260D confers on the Court a power to make freezing orders and ancillary orders which is specifically constrained.
>
> (b) Putting to one side orders sought in aid of judgments from other courts, or against third parties, the constraints are (1) the applicant has the good arguable case referred to in r 260D(2), and (2) the court is satisfied, having regard to all the circumstances, of the matters referred to in r 260D(3). Those matters cover the same ground as the first two considerations which are relevant in the exercise of the inherent jurisdiction. No mention is made of the third (interests of justice) consideration, but it could hardly be thought that the discretion conferred by the rule was intended to be exercised without having regard to that subject matter.
>
> (c) It is notable that r 260D(3)(b) is also not worded in a way which would suggest any departure from the inherent jurisdiction's focus on the **effect** rather than the **purpose** of the defendant's conduct, occurring or apprehended."

[20] His Honour's analysis of both rules draws upon the remedies which may be given in the inherent jurisdiction. Of those remedies his Honour referred firstly to the general statement of principle of Keane and Nettle JJ in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*,[2] namely:

> "When it is demonstrated to a superior court that there is a likelihood that its processes will be abused or frustrated, it is within the court's power to make orders considered to be appropriate to prevent that from occurring."[3]

[21] Bond J observed that, against that general principle, the authorities demonstrate that an application is assessed by reference to three issues, being the issues referred to in paragraphs [62] and [63] of his Honour's judgment, which I have set out earlier. They are:

1. The strength of the underlying cause of action;

2. The risk that the process of the Court will be frustrated; and

3. The interests of justice.

The strength of the underlying cause of action

[22] As already observed, the third applicant's claim is for damages for personal injuries flowing from the alleged sexual assault. The first and second applicants' claims are for

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2 (2015) 258 CLR 1.

3 At [64]; *Parbery* at [16].

psychiatric injury flowing from news of the assault upon their daughter. Consequently, all claims, one way or another, are dependent upon proof of the assault.

[23] The totality of the evidence relied upon to prove the assault is provided by the first affidavit of Ms Hoeft-Marwick. At paragraphs 39 to 42 she says this:

> "39. I am informed by the Applicant [PKM] and verily believe that on 15 December 2017 he[4] made a formal statement to Queensland Police Service about the alleged sexual abuse by Respondent [AML]. Exhibited hereto and marked 'S20' is a true copy of that statement.
>
> 40. I am informed by the Applicant [PJM] and verily believe that on 15 December 2017 that[5] a male friend of Respondent [AML], [HSG] made a formal statement to Queensland Police Service about the alleged sexual abuse by Respondent [AML] on Respondent[6] [PLM] and his own daughter [HTG]. Exhibited hereto and marked 'S21' is a true copy of that statement.
>
> 41. I am informed by the Applicant [PJM] and verily believe that on 23 January 2018 that[7] a male friend of Respondent [AML], [SAJ] made a formal statement to Queensland Police Service about the alleged sexual abuse by Respondent [AML] on Respondent[8] [PLM]. Exhibited hereto and marked 'S22' is a true copy of that statement.
>
> 42. I am informed by the Applicant [PJM] and verily believe that on 22 December 2017 he made a formal statement to Queensland Police Service about the alleged sexual abuse by Respondent [AML]. Exhibited hereto and marked 'S23' is a true copy of that statement."

[24] The various exhibits which are "S20", "S21", "S22" and "S23" are said to be the police statements of the various witnesses, although exhibit "S23", the statement of PJM, does not even appear to be signed.

[25] The second respondent, in what is said to be her police statement, details various contact between the third applicant, another child and the first respondent. The closest she comes to providing evidence of the assault by the first respondent upon her daughter is:

> "70. [PLM] said something like '[AML] put his hand down my pants onto my privates'."

[26] HSG, in his police statement, speaks of conversations that he had with the first respondent where the first respondent made certain admissions of sexual misconduct. The third applicant though is not specifically mentioned. There was some conversation which could suggest some misconduct against the third applicant and another girl, but the conduct seems to be that of the first respondent exposing himself to the children. Otherwise the conversation was about an incident some years prior involving HSG's daughter.

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4 This is a clear error in the affidavit; it should be a reference to "she".
5 Another grammatical error.
6 Another error in the affidavit. PLM is an applicant; indeed, one of Ms Hoeft-Marwick's clients.
7 Another grammatical error.
8 Yet another error in the affidavit.

[27] SAJ also had conversations with the first respondent where he allegedly made some admissions. However, the third applicant is not mentioned.

[28] The first applicant, in the unsigned document said to be his police statement, records various conversations he had with the first respondent. One of those conversations concerned one of the other children. This is referred to in paragraph 13 of the first applicant's statement. Relevantly, this is said:

> "13. I said 'Please tell me that's what happened because this little girl, her father's a policeman. She's told him that she's seen your dick twice today. And she said something about a flower. Did you take your clothes off to go to the pool?" [AML] started mumbling and then said 'It's all going to come out now.' He then walked out. That's the last time I spoke to him.
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> 14. I rang [PKM] again. *(She said that she and [FRJ] are going up to the police station).* I came down to Petrie Police Station at about 8:00pm. [PLM] had just come out from an interview with police. Tim the policeman came and spoke to [FRJ] and his ex-wife, me and my wife. That's when I found out that [PLM] had been involved as well.
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> 15. On Monday night, the 20th of December, [PMM], [PNM] and [PLM] were in the lounge room. [PKM] was in the kitchen. I was in the lounge with the kids. I looked at [PLM] and said '[PLM], I just want to know the truth, whatever you tell me we won't speak to it again, but I have to know. That day that [AML] did what he did, was that the only time?' [PLM] looked at me, she was very calm. I said 'What used to happen when you'd go down to his house?'
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> 16. [PLM] said 'When I used to go into the office, he used to put a porno movie on. He'd put his hands down my pants and he'd make me put my hand on him.' I said 'What, his willy?' [PLM] said 'Yes'. I said 'How many times do you think this happened". Was it once, a hundred, five times, ten times?' [PLM] said 'It wasn't a hundred times. Between five and ten.' I said 'Did he ever put his willy in your mouth? Did he ever put it between your legs?' She said 'No, no.'"

[29] Surprisingly, the first applicant has not sworn an affidavit in the application. He could have and, given that the present application is probably one for interlocutory relief,[9] had he sworn to the conversations he had with the third applicant and sworn his belief in the truth of what she told him, there would then be evidence that the first respondent had sexually assaulted the third applicant.[10]

[30] Ms Hoeft-Marwick purports to swear her affidavit on information and belief. However, what she swears is that she was informed and verily believes that the first applicant "made a formal statement to Queensland Police Service about the alleged sexual abuse by respondent [AML]". She does not swear to her belief as to the truth of what is contained

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9 *Ex parte Britt* [1987] 1 Qd R 221 at 226, and despite the fact that the application is an application rather than a claim: *UCPR* rr 8, 11.

10 *UCPR* r 430.

in the statement. Even if she had done so the evidence would not prove the fact of the assault. She would be swearing to belief on double hearsay. She would be swearing to her belief as to the truth of what the first applicant told her about what the third applicant told him. Evidence such as that is generally not admissible, even on an interlocutory application.[11]

[31] However, the statement of the first applicant has been proved in the sense that the document which is exhibit "S23" to Ms Hoeft-Marwick's first affidavit has been proven (through information and belief) to be PJM's statement. Given that the first applicant's statement refers to a statement made by a child witness (the third applicant), s 93A of the *Evidence Act* 1977 (Qld) must be considered. Section 93A provides:

> "**93A Statement made before proceeding by child or person with an impairment of the mind**
>
> (1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if—
>
> (a) the maker of the statement was a child or a person with an impairment of the mind at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
>
> (b) the maker of the statement is available to give evidence in the proceeding.
>
> (2) If a statement mentioned in subsection (1) (the ***main statement***) is admissible, a related statement is also admissible as evidence if the maker of the related statement is available to give evidence in the proceeding.
>
> (2A) A ***related statement*** is a statement—
>
> (a) made by someone to the maker of the main statement, in response to which the main statement was made; and
>
> (b) contained in the document containing the main statement.
>
> (2B) Subsection (2) is subject to this part.
>
> (3) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) or (2), the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement.
>
> (3A) For a committal proceeding for a relevant offence, subsections (1)(b) and (3) do not apply to the person who made the statement if the person is an affected child.

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11 *Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2 Qd R 158 at 163.

Note—

For the taking of an affected child's evidence for a committal proceeding for a relevant offence, see part 2, division 4A, subdivision 2.

(4) In the application of subsection (3) to a criminal proceeding—

party means the prosecution or the person charged in the proceeding.

(5) In this section—

affected child see section 21AC.

child, in relation to a person who made a statement under subsection (1), means—

(a) a person who was under 16 years when the statement was made, whether or not the person is under 16 years at the time of the proceeding; or

(b) a person who was 16 or 17 years when the statement was made and who, at the time of the proceeding, is a special witness.

relevant offence see section 21AC."

[32] In *R v G*,[12] a police officer interviewed a child witness. The officer made a contemporaneous handwritten note of his conversation with the child and the Crown tendered the note as a statement of the child, relying on s 93A. On appeal, the admissibility of the note was confirmed.

[33] Section 93A is contained in Part 6 of the *Evidence Act*, entitled "Admissibility of statements and representations". Part 6 begins with s 92. Section 92(4) provides:

"(4) For the purposes of this part, a statement contained in a document is made by a person if—

(a) it was written, made, dictated or otherwise produced by the person; or

(b) it was recorded with the person's knowledge; or

(c) it was recorded in the course of and ancillary to a proceeding; or

(d) it was recognised by the person as the person's statement by signing, initialling or otherwise in writing."

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12 [1998] 1 Qd R 659.

[34] The statement contained in the note produced in *R v G* was "dictated or otherwise produced" by the child, or "recorded with the [child's] knowledge". The manner of recording did not matter.[13] Byrne J (as his Honour then was) said:

> "…the section[14] contains distinct indications of an intention that it comprehends another person's contemporaneously written record of things said by a child."[15]

[35] The first applicant's statement is self-evidently a document prepared well after the first applicant's conversation with his daughter; it was prepared by police in the course of the investigation. It is not a record of the conversation as envisaged by ss 92(4) and 93A of the *Evidence Act*.

[36] Therefore, the applicants have proved that the first applicant made a written statement to police. They have probably therefore also proved the fact that the third applicant said the things set out at paragraph [28] of these reasons. That is evidence of preliminary complaint[16] (at least for the purposes of a criminal trial), but there is no evidence of the truth of what was stated by the third applicant to the first. The same applies to the statement of the second applicant.

[37] Mr Horvarth, who led Mr Buckley for the first respondent, takes the evidentiary point. He has made out his objection with the result that there is no admissible evidence to prove the sexual assault. It follows then that there is no evidence to support the case raised by any of the applicants.

The risk

[38] In *Parbery*, Bond J observed that the relevant risk is the risk posed to the process of execution and enforcement of any judgment.[17] That risk eventuates to an actual frustration of the Court's processes if assets of a defendant are dissipated so that a judgment remains unfulfilled. A plaintiff need not prove that the risk will actually come to pass,[18] and it is not necessary for a plaintiff to prove any particular purpose or motivation of a defendant.[19] Helpfully, Bond J said this:

> "[35] It is appropriate to make some (non-exhaustive) observations as to the way in which a plaintiff may go about demonstrating the existence of the relevant risk.
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> [36] **First**, although it is not essential to prove that a defendant's purpose or intention is to frustrate any potential judgment against the defendant, that is not to say that the question of purpose or intention is irrelevant. If a plaintiff adduced evidence which shed light on the likely actual intentions of a defendant, that evidence might well

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13 At 665.
14 A reference to s 93A.
15 At 664–5.
16 *Criminal Law (Sexual Offences) Act* 1978 (Qld) s 4A.
17 At [28].
18 *Parbery* at [31], citing *Paterson v BRT Engineering* (1989) 18 NSWLR 309.
19 *Parbery* at [34].

prove to be extremely relevant. In his text *Freezing and Search Orders*,[20] Biscoe observes (at [6.19]):

> However, if there is evidence of a positive intention to frustrate a judgment, that should almost certainly lead the court to exercise its discretion to grant a freezing order. Thus the respondent's own boasts were held sufficient evidence of the necessary danger in *A/S D/S Svendborg v Wansa* [1997] 2 Lloyd's Rep 183 at 188-9; and in *Ausbro Forex Pty Ltd v Mare* (1986) 4 NSWLR 419 evidence of a threat by the defendant to close up his companies and take his money and himself overseas led Young J to grant a *Mareva* order.

[37] **Second**, mere assertion of the existence of the risk is not sufficient: *Frigo v Culhaci* [1998] NSWCA 88 per Mason P, Sheller JA and Sheppard AJA at 8 and *Severstal Export GmbH v Bhushan Steel Ltd* [2013] NSWCA 102 per Bathurst CJ (with whom Beazley P and Barrett JA agreed) at [57]. There must be solid evidence which justifies the conclusion: see *Ninemia* per Mustill J at 406, and *LPH Developments Pty Ltd v Jameson Moore Pty Ltd* [No 3] [2017] WASC 284 per Banks-Smith J at [30].

[38] **Third**, the evidence which establishes the underlying strength of the plaintiff's case may have a bearing on the assessment of the risk which exists to the integrity of the Court processes. Where the underlying case involves allegations of serious dishonesty, they may be relied on in considering the second element: cf *Patterson v BRT Engineering* per Gleeson CJ at 325. However there is no reason in principle to confine this proposition to cases of serious dishonesty: see *RHG Mortgage Corporation Ltd v Morgan Kelly* [2016] WASC 169 per Pritchard J at [38].

[39] **Finally**, the conclusion that there is a real risk of steps being taken which would have the effect of frustrating the prospective Court processes of execution and enforcement in respect of any judgment in the plaintiff's favour is often, perhaps even usually,[21] a matter of inference rather than direct proof. If so, there must be facts from which a prudent, sensible commercial person could properly infer the existence of the relevant risk of frustration: see *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 per Lawton LJ at 671, referred to with approval in *Hua Wang Bank Berhad v Deputy Commissioner of Taxation* [2010] FCAFC 140 per Lander, Middleton and Nicholas JJ at [21]-[23] and in *Severstal Export GmbH v Bhushan Steel Ltd* [2013] NSWCA 102 per Bathurst CJ (with whom Beazley P and Barrett JA agreed) at [59]."

[39] During argument, I pressed Mr Eliadis, who appeared for the applicants, to identify the risk. He continually submitted that the relevant risk was that the real property was being sold. It therefore followed, so he submitted, that the first respondent would be in possession of cash. There was a risk, he submitted, that the cash would then be disbursed.

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20 Peter Biscoe, *Freezing and Search Orders* (LexisNexis Butterworths, 2nd Ed, 2008).

21 *Supabarn Supermarkets Pty Ltd v Cotrell Pty Ltd* per Refshauge J at [58]. (footnote in original)

[40] It simply cannot be the case that a relevant risk is demonstrated simply because the asset is cash. Here, the first respondent is only selling the house because his marriage has failed. The first respondent's interest in the house will be converted to cash. That cash is the first respondent's money. There is no suggestion that he will waste it and no basis upon which any inference could be drawn that it (or assets that he might purchase) will be placed beyond the reach of the applicants.

[41] When further pressed to identify the risk, Mr Eliadis said this:

> "MR ELIADIS: - - - based on what we've seen, is possibly a paedophile and lacks – should not be given the trust of the court, with the greatest of respect. There's evidence, albeit hearsay, of three children being involved, two in respect of which he's been charged, and raping and committing incest with another person, so if these matters are made out, he's of a distasteful person not worthy of trust by the court, with the greatest of respect, and that – that should, in all of the circumstances, be sufficient to draw the inference that there's a – a danger, with the greatest of respect. The ease with which he can deal with the cash as distinct from, as your Honour pointed out, dealing with the property, which we don't seek to restrain him from – from disposing of because of his wife's joint interest in it."[22]

[42] The submission seems to be that:

1. The first respondent is "possibly a paedophile";
2. He is therefore a "distasteful person";
3. As a "distasteful person" he is not "worthy of trust by the Court"; and therefore
4. An inference can be drawn that there is a "danger"; in context, a danger of dispersal of the proceeds of sale of the house.

[43] I reject that submission. Firstly, for the reasons I have already explained, the applicants have failed to adduce admissible evidence that the first respondent has assaulted the third applicant. There may be some admissions of sexual misconduct towards HSG's daughter and perhaps one of the third applicant's friends. However, even taking all that at face value, the evidence is very vague. It hardly establishes the first respondent as suffering from the psychiatric disorder of paedophilia. Secondly, even if it was appropriate for me to determine that the first respondent was a person who was "distasteful", no inference could be drawn from such a finding relevant to risk of disposal of assets.

[44] The applicants have failed to prove any relevant risk.

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22 Transcript at 1-45 ll 23–34.

Interests of justice

[45] This element brings into play various discretionary considerations. Discretionary considerations here favour dismissal of the application.

[46] There is very little, if any, real evidence of the quantum of the applicants' claims. The highest the evidence gets in this respect is the global assertion by the applicants' solicitor that the damages will exceed $250,000.

[47] In her first affidavit, Ms Hoeft-Marwick deposes to the fact that each of the applicants have "suffered psychological injuries" and asserts that they are under treatment from a psychologist. A lawyer cannot give admissible opinion evidence that a person is suffering from a psychological injury. Ms Hoeft-Marwick does not rely in her first affidavit, for instance, on information and belief based on matters she may have been told by the psychologists treating the applicants. In her second affidavit, Ms Hoeft-Marwick says this:

> "3. I am informed and verily believe by[23] that the First Applicant has suffered the following injuries and symptomatology as a result as a result[24] of the disclosure of [PLM]'s sexual abuse suffered at the hands of the First Respondent:
>
> (a) Depression and anxiety requiring psychological therapy continuing on a fortnightly basis;
>
> (b) Symptoms of Post-traumatic Stress Disorder;
>
> (c) Periods of intense anger when recounting what has happened to his daughter;
>
> (d) Marital breakdown resulting in moving away from the family home and his wife and children due to his injuries and the impact on him;
>
> (e) Feelings of isolation and loss;
>
> (f) Broken sleep, loss of appetite.
>
> 4. I am informed and verily believe by[25] that the Second Applicant has suffered the following injuries and symptomatology as a result as a result[26] of the disclosure of [PLM]'s sexual abuse suffered at the hands of the First Respondent:
>
> (a) An exacerbation of her Anxiety and Depression and Obsessive Compulsive Disorder which has required an increase in medication and psychological therapy continuing on a fortnightly basis;
>
> (b) Shock and disbelief with recurrent feelings of nausea when having to recount the disclosure of the abuse;

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23 Words apparently missing.
24 Another error.
25 Words apparently missing.
26 Another error.

(c) Negative feelings of guilty and depression;

(d) Broken sleep, episodes of crying, loss of appetite;

(e) Marital breakdown due to the trauma and stress of the disclosure of the abuse and the effect it has had on her child;"

[48] In both of the paragraphs of Ms Hoeft-Marwick's second affidavit set out above, there are obvious errors. It was clearly intended to place a name of some person between the words "I am informed and verily believe by" and the words "that the" in the first line of each paragraph. The repetition of "as a result" in the second line of each paragraph is a further error. It is concerning that such errors were made. There are also numerous errors in her first affidavit. I can only wonder how carefully Ms Hoeft-Marwick actually read the affidavits she was prepared to swear. In the end, though, the paragraphs of the second affidavit are inadmissible, as the source of information is not disclosed.[27]

[49] Ms Hoeft-Marwick further says in her second affidavit:

"5. I am informed and verily believe by her mother and father that the Third Applicant has suffered the following injuries and symptomology as a result of the alleged abuse by the First Respondent:

(a) Severe anxiety and depression requiring psychological therapy continuing on a fortnightly basis;

(b) Suicidal ideation;

(c) Negative behaviour which has impacted her relationships with her family and friends;

(d) Withdrawn and teary;

(e) Isolation from her friends and normal recreational activities;

(f) Negative impact on her school studies."

[50] The first and second applicants can no doubt inform Ms Hoeft-Marwick as to their child's behaviour and apparent mood. It is doubtful that they can express an admissible opinion to Ms Hoeft-Marwick as to the cause of her behaviour and apparent mood.

[51] In the first applicant's *PIPA* notice of claim, he states:

"The Claimant suffered a psychiatric injury as a consequence of him learning of the extent of the psychiatric harm caused by the sexual abuse on his daughter [PLM] over a period of time and perpetrated upon her by his neighbour [AML].

The Claimant learnt of the sexual abuse of his daughter [PLM] via a telephone conversation with his wife [PKM] on or about 12 December 2017.

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27 *UCPR* r 430; *Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2 Qd R 158.

> The Claimant and [AML] met on the same day after the telephone conversation with [PKM] at the Claimant's farm … The Claimant asked [AML] about the abuse at that time.
>
> The Claimant further learnt of the details of the sexual abuse via a face to face conversation with Police at Petrie Police Station later that day.
>
> The Claimant was in complete shock when he learnt of the abuse inflicted on his daughter and suffered a psychological injury."

[52] The second applicant says in her *PIPA* notice of claim:

> "The Claimant suffered a psychiatric injury as a consequence of her learning of the extent of the psychiatric harm caused by the sexual abuse on her daughter [PLM] over a period of time and perpetrated upon her by their neighbour [AML].
>
> The Claimant was in complete shock when she learnt of the abuse inflicted on her daughter and suffered a psychological injury."

[53] There is no evidence of any "psychiatric injury". The closest is the assertion, through Ms Hoeft-Marwick, of a psychological injury, proof of which is insufficient to give the first and second applicants a cause of action.[28]

[54] In *Zhen v Mo & Ors*,[29] Forrest J observed:

> "22 First, that a freezing order, by its very nature, is a drastic remedy and a court must exercise a high degree of caution before taking a step which will interfere with a party's capacity to deal with his or her assets.
>
> 23 Second, the order is not designed to provide security for the applicant's claim. It is solely directed to preserving assets from being dissipated, thereby frustrating the court process.
>
> 24 Third, the applicant bears the onus both in satisfying the Court that the order should be continued and in satisfying the Court as to the amount which is to be the subject of the order.
>
> 25 Fourth, that an order can only be made on the basis of admissible evidence which supports the contentions made by the party seeking the order. Speculation and guesswork is no substitute for either the facts or inferences properly drawn from proved facts.
>
> 26 Fifth, that before such an order can be made it is necessary that the applicant establish –
>
> (a) an arguable case against the defendant; and
>
> (b) that there is a danger that the prospective judgment will be wholly or partly unsatisfied as a result of the defendant's actions in either removing the assets or disposing or dealing with them so as to diminish their value.

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28 *Jaensch v Coffey* (1984) 155 CLR 549 at 587.

29 [2008] VSC 300.

> 27 Sixth, the balance of convenience must favour the granting of the freezing order.
>
> 28 Seventh, that there is no set process determining the exact nature of an order. The order will be framed according to the circumstances of the case.
>
> 29 Eighth, the applicant must establish with some precision the value of prospective judgment. The order should not unnecessarily tie up a party's assets and property."[30]

[55] The applicants have failed to tender admissible evidence to substantiate a cause of action even in a preliminary way. The evidence of damage is scant at best, and there was a failure to identify relevant risk of disposal of assets. Mr Eliadis submitted that it was significant that the first respondent had not made any offers of any type to give the applicants confidence that his assets will not be diminished in some way. The application though is so defective and lacking in substance that nothing can be taken from the attitude of the first respondent. He chose to stand his ground and defend the application. He was entitled to do so

[56] The application should be dismissed.

The position of the second respondent

[57] As the application will be dismissed against the first respondent, no orders will be made which can affect the second respondent. However, I should comment on the position adopted by the applicants towards the second respondent as that may be relevant to costs issues.

[58] The respective positions of the applicants and the second respondent is set out at paragraphs [13] and [14] of these reasons.

[59] There was no challenge by the applicants to the evidence of the second respondent that the mortgage debt reflected, in part, an expenditure of $31,000 for the first respondent's costs of the civil proceedings and criminal charges arising from the allegations made by the applicants.

[60] The applicants' written submissions, as against the second respondent, contain the following:

> "23. First, if, as the second respondent alleges, a portion of the mortgage debt currently owing has been used to pay the first respondent's legal fees, then presumably this must have occurred with the consent and acquiescence of the second respondent. The second respondent has not sworn to the contrary. Many spouses and family members provide financial assistance in similar circumstances. Yet, the second respondent seeks to further diminish the effect of the freezing order and diminish the sum available to satisfy a prospective judgment of the Court in the applicants' favour, by not only

[30] At [22]–[29]. Footnotes omitted.

extinguishing the mortgage but having legal costs already incurred deducted from the amount available to satisfy the applicants' claims.

24. Secondly, the second respondent seeks to sever the joint tenancy to enable her immediate access to funds, yet at the same time, seeks to elevate her position to a secured creditor with respect to the balance sale proceeds of the first respondent's interest as tenant in common in the property. The second respondent has made no application to the Family Court for injunctive relief, has not indicated an intention to do so, and has shown no basis upon which such relief would be granted. And she does this in circumstances in which she wants the applicants to pay her costs, while at the same time taking advantage of the applicants' application for a freezing order for her own purposes.

25. Indeed, if the second respondent simply agreed to abide by orders permitting the property to be sold with her retaining 50% of the net sale proceeds, there would be no necessity for her to take part or continue taking part in this application. She does so to achieve her own purposes."

[61] The stance taken by the applicants against the second respondent is totally unreasonable. It is well settled that freezing orders, as opposed to injunctions restraining dealing with property in which a claimant asserts a proprietary interest, should allow a respondent to use their assets for the purposes of paying legal costs of the proceeding,[31] and, as here, the costs of defending a criminal case. The applicants' submission has the effect of requiring the second respondent to contribute to the first respondent's costs. This is completely unreasonable, especially in view of the obvious fact that the applicants have no claim against the second respondent, who is only involved because she happens to jointly hold property with her husband of 45 years.

Costs

[62] On 10 August 2018, I had my Associate email the parties indicating that I would hear argument on costs on the day I delivered judgment on the principal application.

[63] Communication was received from the solicitors for the applicants that, for various reasons that I needn't go into, the applicants could not make submissions on that day. All parties agreed, then, that costs would be dealt with by way of written submissions without oral argument.

[64] THE ORDER OF THE COURT IS AS FOLLOWS:

1. Application dismissed.

2. The respondents file and serve any material and written submissions on costs by 4 pm on 24 August 2018.

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[31] *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* [2006] NSWSC 317 at [11]–[14], followed in *Virgtel v Zabusky* [2008] QSC 316 at [35].

3. The applicants file and serve any material and written submissions on costs by 4 pm on 31 August 2018.

4. The respondents file and serve any material and written submissions in reply by 4 pm on 4 September 2018.

5. The issue of costs be decided without oral argument.