Equity Division
Supreme Court
New South Wales

Case Name:	Ip v Chiang
Medium Neutral Citation:	[2019] NSWSC 1549
Hearing Date(s):	6 September; 1 October; 3 October 2019
Date of Orders:	8 November 2019
Date of Decision:	8 November 2019
Jurisdiction:	Equity - Applications List
Before:	Parker J
Decision:	See [136].
Catchwords:	PRACTICE AND PROCEDURE — Application to vary orders to permit sale of property to fund legal representation in proceedings – whether party may be heard on application where prima facie in contempt – whether "rule" discretionary – principles of *Young v Jackman; Hadkinson v Hadkinson – Civil Procedure act 2005* (NSW), ss 55-64.
Legislation Cited:	*Civil Procedure Act 2005* (NSW), ss 56-64
Cases Cited:	*Athens & Anor v Randwick City Council* (2005) 64 NSWLR 58; [2005] NSWCA 317 *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; [1986] HCA 46 *Burnett v Burnett* (1903) 3 SR (NSW) 513; (1903) 20 WN (NSW) 168 *Chamberlain Group Pty Ltd v Kids for Life Academy Pty Ltd* (2015) 18 BPR 35,591; [2015] NSWCA 241 *Chuck v Cremer* (1846) 1 Coopt Cott 205; 41 ER 1028; 47 ER 820; 47 ER 841; 47 ER 1028 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 *Gap Constructions Pty Ltd v Vigar Pty Ltd* [2011] NSWSC 1205 *Gordon v Gordon* [1904] Probate P 163 *Hadkinson v Hadkinson* [1952] P 285; [1952] 2 All ER

	567; [1952] WN 405 *Harrison Partners Constructions Pty Ltd v Jevena Pty Ltd* [2006] NSWSC 317 *Hwang v Lawrie* [2014] 1 QD R 562; [2013] QCA 204 *Leaway v Newcastle City Council (No 2)* [2005] NSWSC 826 *Li v Hanson Property Developments Pty Ltd* [2016] NSWSC 1870 *Permewan Wright Consolidated Pty Ltd v Attorney-General (NSW)* (1978) 35 NSWLR 365 *Stojic v Stojic* [2018] NSWSC 723 *Stokes v McCourt* [2013] NSWSC 1014 *X Ltd v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1 *Wilson v Bates* (1838) 3 Myl & Cr 197; 40 ER 900
Texts Cited:	Charles Purton Cooper, *Reports of cases in Chancery decided by Lord Cottenham, commencing 7th July 1846: with interspersed miscellaneous cases, dicta and notes* (London : V&R Stevens and GS Norton, 1846-1848) at 205-223; 247-249; 338-345 Edmund R Daniell, *Daniell's Practice of the High Court of Chancery: Second Edition* (London : V&R Stevens and GS Norton, 1845) Edmund R Daniell, *Daniell's practice the High Court of Chancery: Seventh edition* (London : Stevens and Sons, 1901)
Category:	Procedural and other rulings
Parties:	Xiao Feng Ip (Plaintiff) Tsui Peng Chiang (First Defendant)
Representation:	Counsel: KJ Young (Plaintiff) E Cohen (First Defendant) Solicitors: Philip Gengos & Co (Plaintiff)
File Number(s):	2018/312250
Publication Restriction:	Nil

JUDGMENT

1 Before the Court is an application by the first defendant, Lisa Tsui Peng Chiang, to vary restraining and asset preservation orders previously made by the Court at the instance of the plaintiff, Xiao Feng Ip. The orders in question were initially made ex parte by Slattery J in October last year. They were continued in amended form by Lindsay J in November.

2 Among other things, the orders have the effect of restraining Ms Chiang from dealing with four properties in Pyrmont. Ms Chiang's application seeks a variation which would permit her to sell one of the properties and use the proceeds to retain lawyers to defend the proceedings on her behalf.

3 Ms Ip opposes Ms Chiang's application. Her first contention is that the Court cannot even entertain the application because Ms Chiang is in breach of the orders in question. If the Court is against this contention, Ms Ip submits that the application should be refused on the merits.

4 Ms Ip brings these proceedings on behalf of the estate of the late Lo Sing Ip, who died in August 2017 at the age of 84. The Court has made an order appointing Ms Ip as administrator of the deceased's estate for the limited purpose of bringing these proceedings. I was informed that there is a pending application by Ms Ip to be appointed administrator of the estate generally.

5 Ms Chiang went through a form of marriage with the deceased in September 2013. This (if valid: its validity is contested by Ms Ip) was the deceased's third marriage. According to Ms Chiang she and the deceased separated in the following year; later they divorced.

6 The deceased owned a house in Redfern where he lived. He had acquired the property as a joint tenant with his second wife and he became the sole owner by survivorship upon her death in 2012. In November 2013, eight weeks after his purported marriage to Ms Chiang, the deceased executed a transfer of a half share in the property to Ms Chiang as joint tenant. The transfer was registered. Later, in June 2015, the deceased signed the necessary papers

for a consent dissolution of his marriage to Ms Chiang and a property settlement under which Ms Chiang was to receive the whole of the Redfern property. The dissolution took effect in November 2015. The property was eventually transferred into Ms Chiang's name in April 2016 by Ms Chiang acting under a power of attorney and enduring guardianship executed by the deceased (he was in a nursing home by this stage).

7 The deceased was born in China in February 1933. He appears to have been an uneducated man. When he met Ms Chiang in 2013 he was an 80 year old widower who was suffering from, it is alleged, initial stages of dementia.

8 The claim made by Ms Ip on behalf of the deceased's estate in these proceedings is that Ms Chiang procured the transfer of the Redfern property to herself by exploiting the deceased's vulnerabilities. It is unnecessary to set out the alleged surrounding circumstances in any detail. Counsel for Ms Chiang conceded that there was a strong prima facie case for equitable relief.

9 In July 2016, three months after the property was transferred into her sole name, Ms Chiang mortgaged it to the Commonwealth Bank of Australia ("CBA") for a loan of $150,000. About five weeks later she sold the property. The sale price was $1,050,000 from which she received approximately $900,000 after discharge of the mortgage.

10 Soon after the sale Ms Chiang bought three of the four Pyrmont properties which are covered by the orders which are the subject of the application. These were:

(1) a residential unit in Pyrmont Street purchased in October 2016 for $495,000;

(2) a car space in a building in Harris Street, Pyrmont, purchased in November 2016 for $34,000;

(3) a car space in the Harris Street building, purchased for $33,000 in December 2016.

11 These purchases totalled $572,000. According to Ms Chiang, she also lent loans totalling $136,000 to two people who were friends or acquaintances. Other monies were spent on living expenses. Ms Chiang said that after paying stamp duty and legal fees for the purchase of the three Pyrmont properties, she was left with approximately $200,000 from the proceeds of the Redfern property.

12 The fourth property was bought somewhat later, in December 2017. The purchase price was $615,000. Ms Chiang borrowed $520,000 of that from the CBA. There was no direct evidence about where the rest came from. According to Ms Chiang, the total cost including stamp duty and legal fees and other outgoings was $640,000, so the net cost to her was $120,000.

13 Ms Chiang claims that in February 2018 she sold the property to Haisheng Xu. He is now married to Ms Chiang. According to a later affidavit from Ms Chiang, the purchaser was actually Mr Xu's son (from an earlier marriage). There is no evidence before the Court of any written contract of sale. Ms Chiang attached to one of her earlier affidavits a copy of a bank statement for an account held by Mr Xu. That records that in February 2018 Mr Xu (Ms Chiang's husband, not his son) paid $522,000 to the CBA to discharge the mortgage and a further $98,000 to Ms Chiang.

14 At the time the orders were made about 8 months later, the property was still in Ms Chiang's name. According to Ms Chiang, Mr Xu's son wished to take advantage of the tax concessions available for first home buyers and this resulted in a delay. As a result of caveats lodged on behalf of Ms Ip and the orders made by the Court, any transfer has been blocked. Neither Mr Xu nor his son has taken any steps to challenge the caveats or to have the orders modified. Neither of them has been joined as a party to these proceedings.

15 In the proceedings Ms Ip seeks orders for Ms Chiang to account to the deceased's estate for the proceeds of the Redfern property (both the $150,000 raised by mortgage from the CBA and the $900,000 net proceeds of the sale). The account sought is to include any monies derived from assets purchased with the proceeds of the Redfern property, such as rent received letting out the Pyrmont properties. Where Ms Chiang still holds assets acquired directly or indirectly from the proceeds of the Redfern property, Ms Ip seeks proprietary relief in the form of a constructive trust. Where the proceeds have been dissipated Ms Ip seeks a monetary judgment.

16 Two of the orders made against Mr Chiang are relevant for present purposes. The first is what I will refer to as the restraining order. It is an injunction which prevents Ms Chiang:

> ...from dealing with, disposing of or encumbering:
>
> a. any proceeds of the sale of the Redfern property that remain in her possession or under her control; and
>
> b. any asset acquired or paid for or partly paid for with the proceeds of sale of the Redfern property or any part thereof.

17 The second relevant order is what I will refer to as the "asset preservation order". It is addressed to Ms Chiang and provides:

> (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$1,300,000.00 ('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.

18 For the purposes of this order, the assets are defined to include the proceeds of the Redfern property and specifically to include the four Pyrmont properties. The order is subject to an exception for ordinary living expenses ($475 per week) and reasonable legal expenses ($40,000).

19 As mentioned, the orders were initially made by Slattery J in October 2018. They were made on an interim basis following an ex parte application on 12 October. Upon being notified of the orders, Ms Chiang retained Ying Zhang, a solicitor with the firm Ren Xhao Lawyers in Sydney. On Ms Chiang's behalf, Ms Zhang retained Ms Cohen of counsel. The orders were extended by consent on 16 October, 26 October and 9 November. On 14 November the proceedings came before Lindsay J. Ms Cohen, instructed by Ms Zhang, appeared for Ms Chiang. His Honour increased the amounts allowed for living expenses and legal expenses to their current levels, already set out, and on this basis continued the restraining order and the asset preservation order until further order of the Court.

20 For some reason, neither party sought to have the proceedings expedited. Pleadings were filed in accordance with an agreed timetable. The timetable also provided for the filing of the parties' affidavit evidence. But this does not appear to have happened. Instead, Ms Ip's lawyers sought to join further defendants to the proceedings.

21 Among the proposed further defendants were Ms Chiang's solicitors, Ren Xhao Lawyers. This was because Ren Xhao allegedly acted in connection with some of the transactions between the deceased and Ms Chiang which are the subject of the proceedings. The foreshadowed claim made Ren Xhao's position as Ms Chiang's solicitors untenable and they withdrew from acting. This left Ms Chiang unrepresented.

22 The additional defendants nominated by Ms Ip's lawyers have now been joined, and the Statement of Claim has been amended so as to include Ms Ip's claims against them. Ms Chiang will need to amend her Defence in the light of the amendments to the Statement of Claim. This has been put on hold pending the outcome of the present application.

23 Ms Chiang's application was made by way of notice of motion filed in mid-July. Initially the motion sought orders that Ms Ip give security for costs or

that she be made personally liable for any costs awarded against her without recourse to the estate. This aspect of the application was later abandoned.

24 Ms Chiang has a gambling problem. She has lost large sums of money at casinos in Sydney and Melbourne. No doubt in recognition of this, the application made on her behalf only seeks orders for the sale of the property and the payment of the proceeds for specific purposes, with the balance to be paid into a controlled monies account. The effect of the orders sought would be that any monies raised could only be used to meet the costs of the sale, to pay past legal costs, and to meet future legal costs.

25 In her affidavit in support of the application, Ms Chiang said that she is an aged pensioner, receiving $900 per fortnight. She said this was her only income. According to the affidavit, she owed $53,000 to Ren Xhao for legal costs (including counsel's fees) and $5,400 to the NSW State Revenue for parking levies on her parking spaces. She said she has regular outgoings for living expenses, including strata fees.

26 In her affidavit, Ms Chiang said that she had "no liquid funds" to pay Ren Xhao or her other debts. She said that another firm, Aberdean Lawyers, would be prepared to represent her but only if monies were paid into trust to cover their costs. Her counsel, Ms Cohen, has negotiated an arrangement under which she would continue to be retained on Ms Chiang's behalf by Aberdean Lawyers but again this is subject to her fees being paid.

27 Three earlier affidavits, sworn by Ms Chiang in October/November 2018, were tendered on the application. Slattery J had made orders for the disclosure of information about Ms Chiang's financial position and about what she had done with the proceeds of the Redfern property. The affidavits appear to have been filed by way of compliance with those orders, and in support of Ms Chiang's contention (successful before Lindsay J) that the amount allowed under the restraining and asset preservation orders for living expenses and legal costs should be increased.

28 The thrust of the affidavits was that Ms Chiang had spent all of the proceeds of the Redfern property and had nothing left. She also complained that the restraining and asset preservation orders were causing hardship to her. In particular, she said that they had left her unable to redeem certain jewellery she had pledged at a pawn shop.

29 In opposition to Ms Chiang's application, the solicitors for Ms Ip obtained records produced by various parties in response to subpoenas, which were tendered. Those records fall into a number of categories.

30 First, records produced by The Star Casino in Sydney and Crown Casino in Melbourne showed that between 15 October 2018 (two days after service of the ex parte orders made by Slattery J) and 18 July 2019 Ms Chiang gambled extensively at both casinos. This gambling resulted in a net loss of $222,000.

31 Other records produced by the CBA were relied upon in answer to Ms Chiang's claim that she lacked money. On a loan application lodged with CBA in 2017 Ms Chiang described herself as an "investor". According to the application she was receiving rental income (presumably from the Pyrmont properties, or some of them) of $4,500 per month. The application also disclosed that she had a Taiwanese bank account containing $300,000; an American bank account containing $80,000; two CBA accounts containing $250,000; and superannuation worth $150,000.

32 A further loan application lodged with CBA in October 2018, just before the proceedings were begun, continued to show Ms Chiang as receiving rental income. The amount disclosed was $51,000 per annum.

33 These documents also raise a question about whether Ms Chiang lives at the Pyrmont Street unit (as her affidavits suggest) or has rented it out. Loan applications and other documents show a residential address for the Harris Street unit or an entirely separate property at St Mary's.

34 The bank records between March 2017 and October 2018 also cast doubt on Ms Chiang's claim that she was merely a pensioner. They showed unexplained receipts and deposits in the tens of thousands of dollars.

35 Further bank records produced at a later point show that on 22 October 2018, ten days after the proceedings were begun, Ms Chiang withdrew an amount of $75,000 from an account in her name with the CBA and closed the account. This happened on the very same day that Ms Chiang swore the affidavit saying that she had no money and had been unable to redeem her jewellery.

36 Ms Chiang swore an affidavit in reply. That affidavit contained further financial background.

37 Ms Chiang was born in May 1953, and is therefore 66 years old. She was 60 years old at the time of her purported marriage to the deceased. Prior to that she had been married to a man in Taiwan. Ms Chiang came to Australia in 1988. She said that her husband had been a wealthy man and had provided her with money. She said that from her own resources she had built up a collection of jewellery, antiques and luxury handbags.

38 Ms Chiang said that she was told about the ex parte orders made on 12 October 2018 on or shortly after 13 October when they were served on her solicitor. She said she had a poor memory of the conversation but could recall being told by Ms Zhang;

> "You have been sued and you can only spend $250 per week";
>
> and
>
> "Your properties and car spaces have been caveated and you can't sell them".

39 According to Ms Chiang, Ms Zhang read the orders to her in Mandarin but did not provide a copy of the orders nor a translation. She did not suggest that she asked either for a copy of the orders or a translation of them.

40 Ms Chiang also said that Ms Zhang read to her the affidavits in support of the application. Ms Chiang said that she was "quite aware of the nature of the claim" against her. She said that she "did not totally understand" what the orders meant but did not think that they applied to monies that she held in bank accounts, or to her collectables. She said that, after the order was made, she started to sell off those collectables to raise money for living expenses. No detail was provided about the extent of her expenses or why her pension receipts were not sufficient to cover them.

41 Ms Chiang also referred to the closure of the bank account. She said that she was told that the case could last for 10 years, she was scared she would have no money, and she wanted the contents of the account for living expenses.

42 The affidavit did not address the question of where Ms Chiang actually lives. Nor did it respond to the references in the CBA loan applications to rental income and other assets.

Whether the Court should entertain the application

43 I will consider first Ms Ip's objection to the Court entertaining the application at all. There is a general "rule" that a party in contempt should, except in certain circumstances, not be heard by the Court. I have referred to this as a "rule", in inverted commas, because there is a question about whether it is a fixed rule, or allows the Court a discretion. This was one of the issues debated before me. The others were whether Ms Chiang is actually in contempt, and if the Court does have a discretion about whether to entertain the application, how the discretion should be exercised.

Is Ms Chiang in contempt?

44 In her submissions in chief, counsel for Ms Ip identified two alleged contempts of the orders. The first was the expenditure of $220,000 on gambling. The second was the withdrawal of the $75,000[1] from Ms Chiang's bank account. A

[1] Subs,2

third potential contempt emerged from Ms Chiang's evidence in reply, namely the sale of the collectables.

45 Counsel for Ms Chiang pointed out that no contempt proceedings have been brought against her and the Court has not made any formal finding that she is in contempt. Counsel also submitted that, on the evidence, any contempt was not deliberate; or, at least, had not been found to be deliberate.

46 Counsel's first point was considered by Young J in *Young v Jackman* (1986) 7 NSWLR 97. His Honour concluded that it is not necessary for an actual finding of contempt to be made for the "rule" to apply. It is sufficient if the Court can see on the evidence before it that there has been a contempt: at 99E-101E. This view has not been questioned in subsequent cases.

47 I therefore reject counsel's first point. If it is sufficiently clear on the evidence that Ms Chiang is in contempt, the "rule" is engaged.

48 As to counsel's second point, the authorities clearly establish that an act or omission which contravenes a court order need not be an intentional violation of that order to be a contempt. It is sufficient if the act or omission itself is wilful, as distinct from "casual, accidental [or] unintentional": *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109.

49 For the act to be wilful in the relevant sense, all that is required is that it be wilfully done. It is not necessary that the act be done with intent to defy the Court or even that the contemnor is aware that the act will contravene the Court order: *Athens v Randwick City Council* (2005) 64 NSWLR 58 at 71.

50 On the evidence before me, the withdrawal of the money from the CBA account and the sale of the collectables do not appear, of themselves, to have been a breach of the restraining order. There is insufficient evidence to establish that these assets derived, directly or indirectly, from the proceeds of

sale of the Redfern property. Indeed those proceeds appear to have been exhausted with the purchase of the Harris Street property.

51 It will be recalled that the asset preservation order obliged Ms Chiang to maintain "unencumbered assets" in Australia of no less than $1.3 million. This included the Pyrmont properties. The purchase price of the Pyrmont Street unit and the two car parking spaces was $572,000. Ms Chiang asserted in her affidavit that the Pyrmont Street unit (which was bought for $495,000) was worth $550,000. If that is right, and the car spaces are still worth what Ms Chiang paid for them, the value of these three properties would be approximately $630,000.

52 Ms Chiang remains the owner of the Harris Street unit (which, will be recalled, was originally purchased for $615,000). There is no mortgage or other encumbrance on the register. But it was purchased with external finance from the CBA, which, on the evidence, was paid out by Mr Xu.

53 Whether Mr Xu has any equitable interest in the property (whether as purchaser or otherwise) is unclear. Even if he has such an interest, it may be postponed to a prior equitable interest of the deceased's estate, to the extent that the proceeds of the Redfern property were used in the acquisition. But on any view, should Mr Xu not be able to complete the purchase in his son's name, he will be entitled to restitution.

54 The object of the asset preservation order was in effect to impose a type of negative pledge on Ms Chiang's Australian assets. Ms Chiang was obliged to maintain an "unencumbered" asset pool of at least $1.3 million which would be available to satisfy any judgment Ms Ip might obtain. In this context, "unencumbered" must mean free of any liability, secured or unsecured. It follows that Mr Xu's right of restitution must be taken into account in determining the "unencumbered" value of Ms Chiang's Australian assets for the purposes of the order.

55 The current value of the properties, less the amount paid by Mr Xu by way of discharging the CBA's mortgage, is between $700,000 and $800,000. This means that for Ms Chiang to have gambled away $220,000 between October 2018 and July 2019 without infringing the asset preservation order, she would need to have retained other Australian assets of at least $500,000 by the end of that period.

56 As we have seen, the evidence produced on subpoena raises some unanswered questions about Ms Chiang's asset and income position in 2017 and 2018. But Ms Chiang has sworn in her July 2019 affidavit that she has no money left and for the purposes of the present issue I think I should take her at her word. I am not making any determination which would enable Ms Chiang to be punished for contempt; all I am doing is making an assessment of the position as it appears on the evidence before the Court. On Ms Chiang's own testimony, as at July 2019 she retained nothing like $500,000 in unencumbered assets (apart from the properties). I am satisfied, on the evidence, that her gambling away of $220,000 was a contravention of the asset preservation order.

57 Ms Chiang has admitted that she knew of the restraining and asset preservation orders within a day or so of their having been made ex parte. In particular, on her own account, she knew that the orders allowed her only a fixed sum for living expenses. The later variation of the asset preservation order by Lindsay J to increase the allowance for living expenses was clearly made on instructions; in fact, as we have seen, it was based on evidence from Ms Chiang herself complaining about its effect on her.

58 Ms Chiang admits that her recollection is not good and concedes that the orders were read to her in Mandarin. The orders clearly extended to all of Ms Chiang's property, not merely some of it. I am not satisfied that she in fact thought, as she claims, that the order did not apply. But even if she did, there was no reasonable basis for such a belief.

59 In any event, Ms Chiang's subjective beliefs are not relevant for present purposes. Her actions in gambling away $220,000 were wilful in the relevant sense. They involved a contravention of the asset preservation order. That is enough for the "rule" to apply in the present case.

Rigid rule or subject to discretion?

60 The debate about how the "rule" operates can be traced back to the decision of the English Court of Appeal in *Hadkinson v Hadkinson* [1952] P 285. In that case the Court of Appeal declined to hear an appeal against an order which required the appellant to return a child to the jurisdiction, when, at the time the appeal came on for hearing, the appellant had not complied with it. All of the Lord Justices were of the view that the appeal should not be heard, but their reasoning differed to some extent.

61 The leading judgment was given by Romer LJ, with whom Somervell LJ agreed. His Lordship said (at 288):

> It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

62 After referring to authority (*Chuck v Cremer*, discussed below at [100] to [104]), his Lordship said that "in general" breach of this obligation had two consequences (at 288-289):

> The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt. It is the second of these consequences which is of immediate relevance to this appeal. The rule, in its general form, cannot be open to question. There are many reported cases in which the rule has been recognized and applied ...

63 In the last sentence of this passage Romer LJ spoke of a "rule", albeit that the "rule" was subject to recognised exceptions. In fact counsel for the appellant in that case did not contest the existence of the "rule"; counsel's contention (which was unsuccessful) was that one of the recognised exceptions applied.

64 The third member of the Court, Denning LJ, approached the question somewhat differently. He concluded that (at 298):

> ... the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

65 In *Young v Jackman* (above at [46]), Young J considered which approach should be followed at first instance in this Court. There was (and remains) no High Court authority on the question. But there were two earlier appellate decisions in this State on the application of the "rule". The first was *Burnett v Burnett* (1903) 3 SR (NSW) 513. The second was *Permewan Wright Consolidated Pty Ltd v Attorney-General (NSW)*, a then unreported 1978 judgment of the Court of Appeal, subsequently reported at 35 NSWLR 365.

66 *Burnett* was an appeal in divorce proceedings. The petitioner made an application for access to her child. The petition was dismissed with costs for technical reasons. The petitioner then filed a further petition and objection was taken that the grounds of the previous petition had not been paid. That objection was overruled by the trial judge and the respondent appealed to the Full Court.

67 The leading judgment in the Full Court was given by Owen J, with whom Walker J and Pring J agreed. Owen J concluded that it was perfectly clear that the petitioner was aware of the previous order and was in contempt of the obligation to pay costs. He said that it followed that the petitioner "cannot take any steps in this suit until the costs are paid". The Full Court ordered that the appeal could be relisted (for dismissal) if, within one month, the petitioner paid the costs of the earlier petition and the costs of the appeal to that point were paid. Otherwise the appeal was to be allowed.

68 *Permewan* concerned an interim development order (IDO) over land owned by a company which operated a chain of supermarkets. The Court of Appeal

concluded that the IDO prevented the land from being used for certain types of retailing operations and granted an injunction against the company accordingly. The Court's order was made on 10 October 1978. Special leave to appeal was refused by the High Court on 14 November and on that day the Minister signed a notification varying the IDO. The effect of the variation was that certain retailing operations forbidden by the Court's order were no longer contrary to the IDO. The variation was notified in the Gazette, and took effect, on Monday 17 November. On 20 November the company applied to have the Court's order of 10 October discharged.

69 When the application came on for hearing, it appeared that the company had started to trade in accordance with the terms of the varied IDO once it had been signed by the Minister. But the Court's injunction had not been made subject to the continuation of the IDO in its original form, and the result was that it continued to apply. The company had therefore been in contempt. A question arose as to whether it should be heard on its discharge application.

70 Reynolds JA said (at 367 [A]-[B]):

> Whilst no doubt a court may properly withhold relief to which a litigant is otherwise entitled in cases where that litigant is in contempt of the court's process, even assuming in this case that breaches of the court's order between the dates mentioned are made out and are continuing, that would not be a matter which should preclude the making of the particular order sought here. The contempt since 17 November is not of a serious order, and the order now sought is designed to avoid an undesirable conflict between the present state of the law and a subsisting order of this Court.

71 Hutley JA took a different view. His Honour considered that the Court had to rule on the objection that the company was in contempt before dealing with any other aspect of the application. He said (at 368-369 [E]-[G]; [A]):

> The power to refuse to hear an applicant is an important weapon in the hands of a court. Such a refusal is a public reprimand to educate a litigant to treat its order seriously. ... Moreover, it has wider public importance. The necessity of complying faithfully and literally with the terms of an order made by a court whatever may be the views of the person bound by it and whatever may be the inconvenience or financial embarrassment which may follow from it must be continually emphasised. Where the person bound by an order is a substantial wealthy corporation which as far as the evidence goes would only

> be embarrassed by compliance by loss of its profits, the failure of a court to extract from such a corporation admissions of contrition as a condition of hearing such a person is, in my opinion, calculated to undermine publicly the standing not only of this Court but of all courts. The sword of justice may be rusted, and the arm which uses it may be feeble but, where the power to use that sword exists and the party concerned is somebody whose position is such that is application will act as a salutary education to the community, then that sword should be used. It is not used if the primary consideration weighing with the court is felt to be the need to bring its orders into line with the present rezoning.

72 His Honour quoted from the majority judgment in *Hadkinson* at 288-289. He also quoted from the judgment of Denning LJ whom he said "may be regarded as having adopted a different rule". He concluded (at 369 [F]-[G]):

> I am of the opinion that the rule as stated by Romer LJ and concurred in by Somervell LJ is the correct one and it should be enforced in this Court as the fundamental rule to be observed in matters of this kind.

73 The third member of the Court, Mahoney JA, said:

> The Court has been referred to authorities which establish the attitude which should be adopted to an application made by a party who is in contempt: see *Hadkinson v Hadkinson* [1952] P 285 at 288-289. The relevant principle is subject to qualifications or exceptions. In the present case, this Court's order, as was properly admitted by the plaintiff, was based upon the understanding that it should operate whilst the former interim development order continued to regulate what the defendant might do on the land. It was conceded, quite properly, that the spirit and intendment of that order was that it should not bind the defendant's conduct after the former order ceased to be operative according to its then terms. In such circumstances, I do not think that the principle should be seen as restricting what the court can or should do to make clear that its order, after the new interim development order came into force, did not continue to restrict what the defendant might do thereafter on the land.

The result was that, over Hutley JA's dissent, the Court discharged the injunction.

74 Hutley JA's judgment trenchantly endorsed the approach of Somervell and Romer LJJ over that of Denning LJ. Although Mahoney JA reached a different conclusion, his Lordship only cited from the judgment of Romer LJ. Reynolds JA did not discuss the different approaches. In *Young v Jackman* Young J said (at 102B) that *Permewan* compelled him to reject Denning LJ's approach

and proceed on the basis that the Court has no discretion to hear a party in contempt in cases where the rule applies.

75 The two appellate authorities in this State were analysed again by JC Campell J in *Leaway v Newcastle City Council (No 2)* [2005] NSWSC 826. His Honour was considering an application in proceedings in this Court by a plaintiff for an injunction. The plaintiff had failed to comply with orders made in separate proceedings in the Land and Environment Court. The point was taken that the plaintiff should not be heard in this Court because of contempt in the Land and Environment Court. His Honour asked whether he was bound, sitting at first instance, to apply the "rule" stated by Romer LJ in *Hadkinson*. He concluded that he was not: see at [26]-[45].

76 In reaching this conclusion, his Honour distinguished the decision in *Burnett* on the ground that it involved a disobedience to orders in the same suit. As to *Permewan*, his Honour referred to Hutley JA's endorsement of Romer LJ's judgment in *Hadkinson* but added (at [43]):

> While Mahoney JA also ... referred to the same passage in *Hadkinson v Hadkinson* [1952] P 285, a binding precedent cannot be created by finding the common element in the views of a judge in the majority and the judge in dissent. I cannot find any reason for judgment which is common to the judgments of Reynolds JA and of Mahoney JA, and which is applicable to the present case.

77 His Honour's ground for distinguishing *Burnett* is not available in the present case. But the point he made about the authority of *Permewan* remains valid.

78 In *Stokes v McCourt* [2013] NSWSC 1014, Lindsay J reviewed the issue in depth. His Honour noted that the House of Lords had adopted the view that the "rule" applies in a discretionary, not a rigid, way: *X Ltd v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1 at 46 [B]-[H], 50 [H] and 55 [E]-[F]. His Honour noted that the same view has been taken in the Family Court at appellate level (see [35] citing *AN v Zhu* [2006] Fam CA 179 at [79] and [120]–[123]).

79 Australian trial courts have an obligation to follow intermediate appellate court decisions in other Australian jurisdictions on issues where the law across

Australia is the same, unless those decisions are "plainly wrong" (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135]). But Lindsay J considered that this obligation applies only to substantive, not procedural, decisions (see at [41]).

80 Lindsay J acknowledged that conceptually, Lord Denning's approach "appears to have all but captured the field" (at [39]). But he continued:

> Even if that be so, the appropriate course for a single judge of this Court is to apply Romer LJ's approach until such time as the Court of Appeal may reconsider *Permewan Wright*.

81 His Honour went on to observe, however, that even if the principle were treated as a rigid "rule" subject to exceptions, it was necessary to take into account the case management provisions in the *Civil Procedure Act 2005* (NSW), ss 56-64, which now govern proceedings in this Court (see at [30], [43], and [50], and [49]). His Honour gave instances of how this might affect the Court's approach (at [47]-[48]):

> 47. Thirdly, in a case of contempt of an interlocutory order or undertaking, the most effective means for dealing with that contempt may be for the court to take whatever steps may be available to advance the proceedings as quickly as possible to a final determination, by conventional means uncomplicated by a complaint of a denial of procedural fairness arising from a refusal to hear the contemnor. An inflexible refusal to hear a contemnor may unnecessarily arm the contemnor with a ground of appeal that might, perversely, serve the contemnor's strategy of obstructing enforcement of a court order or an undertaking given to the court. With a focus on ultimate outcomes, a court might be constrained to hear a contemnor: embracing the counter-intuitive to avoid the counter-productive.
>
> 48. Fourthly, it is a comparatively rare thing (outside a small range of cases that includes child abduction cases such as *Hadkinson v Hadkinson,* or cases such as *X Limited v Morgan-Grampion (Publishers) Limited* [1992] 1 AC 1 at 45 E-F in which disclosure obligations are sought to be enforced against a journalist) for an alleged contemnor to reveal, during the pendency of proceedings in which he, she or it seeks actively to participate as a persuasive force, a settled intention never to comply with an order or undertaking sought to be enforced. Absent an overt challenge to the authority of the court, its ordinary business, which mandates that parties be allowed an opportunity to be heard, generally proceeds, one way or another, in the ordinary course.

82 His Honour's observations about the impact of the *Civil Procedure Act* have been influential. They have been expressly adopted in subsequent authority: *Li v Hanson Property Developments Pty Ltd* [2016] NSWSC 1870 at [87]; *Stojic v Stojic* [2018] NSWSC 723 at [18]-[19].

83 Nevertheless, the decision in *Young v Jackman* was that at first instance this Court was required to follow the approach of Romer LJ, and this was left formally intact by *Stokes v McCourt*. But a different view was taken by the Queensland Court of Appeal in *Hwang v Lawrie* [2013] QCA 204.

84 *Hwang* was an appeal from orders made against a defendant at a final hearing when the defendant had been in breach of freezing orders. The leading judgment was given by Holmes JA (as her Honour then was). She referred to *Young v Jackman*, and the NSW appellate authorities on which Young J relied but said (at [19]):

> With respect, however, I do not think that the appellate authority cited by Young J is quite as certain in its effect as he perceived it to be.

85 Her Honour then set out the facts in *Burnett* and quoted the conclusion (set out at [67] above) that the petitioner "cannot take any steps until the costs are paid" but continued:

> The use of the word "cannot" might suggest the application of a rule, rather than the exercise of a discretion; but it is hardly a clear pronouncement for the existence of an invariable rule

86 Her Honour also noted that Hutley JA was in dissent in *Permewan*. She considered that that decision "is not compelling as authority for an absolute rule". In the result, she accepted that whether an application by a party in contempt was to be entertained was discretionary, and the decision would depend on where the interests of justice lay.

87 The "rule" was invoked again before the Court of Appeal for this State in *Chamberlain Group Pty Ltd v Kids for Life Academy Pty Ltd* [2015] NSWCA 241. The case concerned a dispute about the purported assignment of a

lease and the exercise of a renewal option by the purported assignee. At first instance, the Court found the assignment was valid and ordered the landlord to take all steps required to register the transfer and to renew the lease in the assignee's name pursuant to the exercise of the option. The landlord appealed.

88 When the appeal came on for hearing, the landlord had not complied with the Court's order. This was despite the fact that a stay had been sought and refused. The Court of Appeal (Emmett JA, Leeming JA and Sackville AJA) said (at [17]):

> Failure to comply with orders of the court amounts to contempt of court. There is a general principle that, until any contempt is purged, a party guilty of contempt should not be heard on any application for relief beyond an application to set aside or vary an order (or undertaking to the court) in respect of which he, she or it is in contempt or an appeal designed to set aside or vary that order or undertaking: *Young v Jackman* (1986) 7 NSWLR 97 at 101; for a helpful discussion of the history of this principle, and relevant authorities, see *Stokes (by a tutor) v McCourt* [2013] NSWSC 1014 at [18]-[52].

89 But the Court continued:

> Such a course would have been inappropriate here, given that the matter was relatively urgent and ready to proceed. It would not have served the purposes of the "just, quick and cheap" resolution of the real issues in dispute, as required by s 56 of the *Civil Procedure Act* 2005 (NSW), to delay the appeal until the orders had been complied with. However, it should not be thought that this Court has tacitly condoned the appellants' conduct.

The result was that the Court proceeded to hear the appeal.

90 In *Li v Hanson Property Developments Pty Ltd* [2016] NSWSC 1870, Stevenson J was faced with an application by a party in default of procedural directions. He said (at [88]):

> ... were it open to me to do so, I would adopt the approach favoured by the Queensland Court of Appeal in *Hwang v Lawrie* [2013] QCA 204, that there is no absolute rule that a court will not hear a party in contempt and that, instead, the court should treat the question of whether the party in contempt will be heard as one of discretion, exercised in accordance with where the

> interest of justice lie (per Holmes JA (with whom Fraser JA and Mullins J agreed) at [22] and [24]). Although this case was decided in 2013, it does not appear to have been drawn to the attention of Lindsay J in *Stokes v McCourt* or the Court of Appeal in *Chamberlain*.

91 Stevenson J obviously considered that there was or might be some residual doubt about whether the "rule" was a rigid one, as Young J had decided in *Young v Jackman*. His Honour did not need to decide the question because a recognised exception applied: see at [89].

92 In my opinion there have been two developments since *Stokes v McCourt* which require reconsideration of whether the Court should continue to adhere to the view expressed by Young J in *Young v Jackman*. The first is the decision of the Queensland Court of Appeal in *Hwang*. The second is the decision of this State's Court of Appeal in *Chamberlain*.

93 The appeal in *Hwang* was heard after Lindsay J reserved judgment in *Stokes*. Judgment on the appeal was delivered on 30 July, only one day before his Honour's judgment in *Stokes* was delivered. For practical purposes, the decision was not available to his Honour when he wrote his judgment.

94 I acknowledge that, in accordance with what Lindsay J said in *Stokes v McCourt*, the fact that an intermediate appellate court in another Australian jurisdiction has laid down a rule does not oblige this Court at first instance to follow it, where the rule concerns a matter of practice and procedure. But in *Hwang* the Queensland Court of Appeal did more than that. The Court undertook a considered review of the authorities in this State and concluded that they did not have the binding effect attributed to them in *Young v Jackman*. With respect, the Queensland Court's reasoning is persuasive. Even if strictly speaking I am not required to follow it, it should in my view carry considerable weight.

95 As to the decision in *Chamberlain*, in the first part of [17] quoted above, the Court of Appeal cited both *Young v Jackman* and *Stokes v McCourt* but described them as reflecting a "general principle". The Court did not use the language of a rigid rule.

96 In *Chamberlain* the appellant was undoubtedly in breach of the order. It might have been argued that the appellant was entitled to appeal, under an exception to the "rule", for the purpose of getting rid of the order which had placed it in contempt (see [101] below). But the Court of Appeal did not decide the point on this basis. Instead, in the second part of the quoted passage, the Court seems to have adopted an approach where the decision ultimately depends upon whether refusing to entertain an application by a party in contempt would be consistent with the case management objectives laid down in the *Civil Procedure Act*.

97 In my view the approach apparently adopted in *Chamberlain* means that for practical purposes the old distinction between a rigid rule and a principle subject to discretion has ceased to be meaningful. Discretionary case management is built into the *Civil Procedure Act* and if the controlling principle is to comply with the objectives of the Act there is no rule for an absolute rule which would require the Court not to hear a party irrespective of the other circumstances.

98 If I am wrong in this view then I think that the decisions in *Hwang* and *Chamberlain* at least mean that this Court is no longer required to treat the question as foreclosed by authority. The Court is free to consider for itself whether the "rule" applies today as an absolute one.

99 As Denning LJ described in *Hadkinson* at 295, the "rule" derived from the practice of the Court of Chancery (which was also followed in the Ecclesiastical Courts). The form of the "rule", with its exceptions, was basically settled by 1850. Decisions of Lord Cottenham, who was Lord Chancellor from 1836 to 1841 and again from 1846 to 1850, played an important part in this process. The "rule" was distilled into a series of propositions by contemporary text writers and commentators. These included, in particular, *Daniell's Chancery Practice* (Edmund R Daniell, *Daniell's Practice of the High Court of Chancery:* Second Edition (London : V&R Stevens and GS Norton, 1845 at 460-463) and volume one of Cooper's Reports of Cases in Chancery decided by Lord Cottenham, known as Coop

temp Cott (Charles Purton Cooper, *Reports of cases in Chancery decided by Lord Cottenham, commencing 7th July 1846: with interspersed miscellaneous cases, dicta and notes* (London : V&R Stevens and GS Norton, 1846-1848)).

100 The relevant part of Cooper's Reports (1 Coop temp Cott 205-223, 247-248 and 338-345; 47 ER 820-830, 841, 884-888, 41 ER 1028-1030) consisted of his report of the decision of Lord Cottenham in *Chuck v Cremer* from 1846, to which Cooper appended his reports of other decisions by Lord Cottenham, decisions of other judges reported by other reporters, and some commentary of his own. In *Chuck v Cremer* itself, the plaintiff obtained an injunction ex parte. The defendant moved to dissolve the injunction, but failed before the Vice Chancellor. The defendant then filed a notice of motion appealing the Vice Chancellor's decision. In the meantime, the defendant had failed to put in his answer to the plaintiff's claim to the suit. The plaintiff then obtained an order for attachment for contempt.

101 The appeal from the Vice Chancellor came on for hearing before Lord Cottenham in July 1846. The report begins (1 Coop t Cott at 205; ER 820):

> The Lord Chancellor said, he was of opinion that the appeal motion could not proceed. That a party was entitled to be heard, if his object was to get rid of the order, or other proceeding, which placed him in contempt, and he was also entitled to be heard for the purpose of resisting or setting aside for irregularity, any proceedings subsequent to his contempt; but he was not generally entitled to take a proceeding in the cause for his own benefit. That there were exceptions to the last rule, but they were few in number.

102 The appeal was stayed, but not dismissed. The sequel occurred in November, when the defendant renewed his appeal motion. By then he had filed his answer and tendered payment of the costs of the contempt proceedings. In response, the plaintiff had claimed that the answer was insufficient and had taken proceedings by way of exception before the Master. Counsel for the plaintiff submitted that the defendant could still not be heard because the notice of motion had been filed while the defendant was in contempt and the defendant's answer was insufficient. But (Coop t Cott at 248; ER 841):

> The Lord Chancellor said that there was nothing to prevent a party giving a notice of motion whilst he was in contempt, although, except in certain cases, the motion could not be heard until the contempt was cleared. That it was true that an insufficient answer was no answer; but still in cases of this kind until an answer was actually reported insufficient it must be presumed to be sufficient. That if the contempt was not cleared, then the moving upon the answer was a waiver.

103 The denouement came in December when Lord Cottenham heard the appeal against the attachment order itself. The circumstances in which the attachment was issued were extraordinary, at least to modern eyes. The defendant's answer had been due on 1 June. The defendant moved for further time, the application being returnable on 4 June, and the plaintiff's solicitor on that day consented to a one month adjournment, computed however from 1 June. Consent orders to this effect were delivered to the Master's clerk. The clerk made an error, and recorded the order made by the Master as providing for a further period of one month from 4 June.

104 The plaintiff's solicitor became aware of the mistake and, ignoring the terms of the order, on 30 June lodged a praecipe for attachment, which was then issued. The defendant appealed unsuccessfully to the Vice Chancellor but the appeal to the Lord Chancellor was successful. After referring to the solicitor's knowledge of the order, Lord Cottenham said (1 Coop t Cott at 342; ER 885):

> A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It did not even signify whether the order was drawn up. That there were many cases in which a party had been held to have committed a contempt for disobeying an order, which had not only not been served, but had not even been drawn up. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they would come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged.

105 This passage was quoted by Romer LJ in *Hadkinson* in support of his statement of the "rule" that a person in default of an order made by the Court is not entitled to be heard (see at 288; the quotation actually appears between the two passages quoted at [61] and [62] above). But the context shows that

the passage in question was actually a doubtful foundation for any such absolute rule. The plaintiff's "disobedience" consisted of lodging a praecipe for attachment when the time for filing an answer had not expired. This may have been sharp practice or even a form of misleading the Court, but it is difficult to see it as contempt of a court order. All Lord Cottenham actually decided was that a timetable containing an error was valid until corrected by the Court.

106 Admittedly the existence of the "rule" does not depend on this passage alone. What Lord Cottenham said in his July 1846 judgment (quoted at [109] above) also uses the language of a rule, subject to exceptions. But the exceptions (the scope of which which were to some extent a matter for debate) significantly qualified the practical effect of the "rule".

107 In the first place, the "rule" only applied to prevent a party from taking "a proceeding in the cause for his own benefit". An appeal appears to have been treated as such a proceeding. But the "rule" did not prevent a defendant who was in default from defending the plaintiff's substantive claim. There were also steps which a plaintiff could take which were treated as not being "for his own benefit" for the purposes of the exception to the "rule". A number of these were summarised by Cooper (1 Coop temp Cott at 220-223; ER citation) and they are instructive.

108 In *Ricketts v Mornington* ((1834) 7 Sim 200; 58 ER 813), Shadwell VC held that the "rule" did not prevent a plaintiff in contempt from proceeding with a hearing where the rules of court required the plaintiff to bring the cause to hearing within a specified time. In *Wilson v Bates* ((1838) 3 Myl & Cr 197; 40 ER 900) Lord Cottenham held that a plaintiff who had failed to pay costs was still entitled to take steps to require the defendant to file an answer to his claim, and the proper remedy for the defendant in such a case was to apply for a stay. In *Plumbe v Plumbe*, ((1839) 3 Yo & C 622; 160 ER 850) Lord Abinger held that not only was a plaintiff in default entitled to require the defendant to file an answer, but the plaintiff was also entitled to the production of documents disclosed by the answer.

109 Another exception to the "rule" stated by Lord Cottenham in *Chuck v Cremer* was that the plaintiff was entitled to be heard for the purpose of resisting or setting aside irregularity "any proceedings subsequent to his contempt" (at 205-206). Cooper reported (1 Coop temp Cott at 207; ER 820), that Lord Cottenham said in *Barker v Dawson* in January 1836:

> But he never would extend the rule to a case where the order, sought to be set aside on the ground of irregularity, was made subsequently to the contempt. That such an extension of the rule would place the party in contempt too much at the mercy of his adversary.

110 In *Gordon v Gordon* [1904] P 163, a decision of the English Court of Appeal, the sequence of events was such that the case came within the exception stated by Lord Cottenham. But it is far from clear that the Lord Justices who decided the case treated that as determinative, and they seem to have relied also on the fact that the challenge to the order in question was a challenge to jurisdiction, not merely to the exercise of discretion (see Vaughan Williams LJ at 173, Stirling J at 174, Cozens-Hardy LJ at 174). Indeed Cozens-Hardy LJ said he was unable to discern what the basis for the distinction adopted by Lord Cottenham LC actually was. What this underlines is how much the "rule" in the form adopted in *Hadkinson* represented Lord Cottenham's individual practice.

111 Historical analysis thus shows that the "rule" was part of a complex system for enforcing procedural timetables, and interlocutory costs orders, based on the consequences of writs of attachment which were issued automatically, or virtually automatically. The system operated on laissez-faire notions which generally left it to the parties (and mainly the plaintiff) to decide how rapidly, if at all, cases were to proceed to decision by the court.

112 As Denning LJ pointed out in *Hadkinson* ([1952] P at 296), the automatic issue of writs of attachment has long since disappeared. But the changes in modern civil procedure are more fundamental than this. The Court will no longer leave the management of litigation to the parties but insists on managing the flow of cases to its conclusion. In this sense every case is one

where the rules of court require the plaintiff to bring the case forward within a fixed time, as in *Ricketts v Mornington*.

113 Under current court management procedures, failure to comply with timetables may require an explanation and be subject to a costs sanction. In extreme cases of non-compliance the Court may respond by staying the proceedings (in the case of a delinquent plaintiff) or striking out the defence (in the case of delinquent defendant). It is unthinkable that the Court would limit itself to contempt procedures, which in modern practice are much more cumbersome. Indeed part of the decision in *Young v Jackman*, not subsequently questioned, is that the Court does not need to do so to apply the "rule".

114 What this underlines is that the "rules" described in *Daniell's Chancery Practice* and *Cooper's Reports* are not comparable to rules of substantive law laid down by the courts. They are at most rules of practice, developed in a particular court to govern the conduct of the litigation in that court according to the procedures existing at the time. They should not be applied rigidly in all other litigious contexts.

115 For these reasons, I consider that where a party is in default of an order of the court, whether to hear that party is ultimately a matter of discretion. It is open to the Court to decline to entertain an application by a party in default in order to secure compliance with earlier orders, but the Court is not limited to that approach.

Exercise of discretion

116 I have already quoted Hutley JA's trenchant observations on the desirability of requiring a party in default of an order from making an application to the court, even when the application is to have the order set aside. To similar effect are the observations of Vaughan Williams LJ in *Gordon v Gordon* (at 172):

> ... if an order has been made in the exercise of the discretion of the Court, and some one who is oppressed, or thinks himself oppressed by that order, appeals, saying that the Court has exercised its discretion wrongly, that

> person if he is in contempt cannot be heard to say anything of the kind until he has purged his contempt.

Even if there is no absolute rule against hearing the party in default, these observations show that there are powerful reasons why, in general, the court should refuse to do so.

117 In the present case, Ms Chiang on her own account breached the order so as to feed her gambling habit. The result is that monies which were to be preserved from dissipation have been lost. This was the very thing the court's order was designed to avoid.

118 I have already expressed scepticism about Ms Chiang's claim that she was unaware of the scope and effect of the orders. She shows no sign of having acknowledged the significance of her breach.

119 But there are countervailing considerations. One is the question of Ms Chiang purging her contempt.

120 All authorities recognise that the "rule" only operates until the party in default has purged his or her contempt. Despite the unanswered questions in the evidence, it seems very unlikely that the money can be retrieved. *Permewan* was a case where the conduct in breach was in the past and could not be undone. Hutley JA said that the motion should be stood over until the person in control of the company (the chairman or managing director or some such officer) came before the court and apologised in person on the company's behalf. His Honour said that an apology, even if hypocritical, had value.

121 This is, with respect, quite understandable in the case of a wealthy corporation which has breached orders of the court in pursuit of an ongoing business. But its utility in the present case is unclear. If I were to adjourn the application until Ms Chiang made some formal expression of contrition, that would probably only result in Ms Ip incurring further, potentially irrecoverable, costs.

122 There is also the circumstance that the application seeks to vary the existing orders. There is not a full analogy with the exception to the "rule" where the application was made to get rid of the breach which resulted in the contempt. If I made the variation sought by Ms Chiang in the application, her conduct in gambling the $220,000 away would still have been in breach of the varied form of the orders.

123 But I think that it is important to recognise that an asset preservation order virtually invariably contain an exception for legal costs and provides for liberty to apply to increase the amount of costs. Liberty to apply is granted because it would be impractical for the Court to try to fix the amount of costs the defendant may need once and for all at the beginning of the case. An application to vary the exception so as to provide an increased amount of money for the payment of legal fees is therefore not an indulgence sought for the "benefit" of Ms Chiang or an attempt to have a discretion, already exercised against the applicant, re-exercised in his or her favour.

124 Another relevant circumstance is that the application is designed to ensure Ms Chiang's representation by solicitors and counsel at trial. Again the analogy with the exception to the "rule" for defensive action is not complete. Representation is not a legal right. But the fact is that usually it assists the Court by making the course of proceedings smoother and more efficient. This, of course, also usually results in a cost benefit for the opposing party. In that sense, the application directly brings the overriding objectives of the Civil Liability Act into play.

125 For these reasons, I have concluded that I am entitled to entertain Ms Chiang's application, and that on balance I should do so, despite the fact that the evidence shows that she has committed a contempt of the asset preservation order.

Merits of application

126 In dealing with the merits, it is important to distinguish between an asset preservation order on the one hand, and an injunction to preserve an asset which is the subject of the proceedings, on the other.

127 An asset preservation order is made in cases where there is reason to think that otherwise the defendant will defeat the judgment by removing assets from the jurisdiction or dissipating them within the jurisdiction. Although the order may operate so as to provide security for the plaintiff's claim, that is not its purpose. The purpose of the order is to protect the court's processes and there is no justification for making an order which goes beyond the minimum necessary to do that.

128 This explains why there will usually be an exception built into the order which permits the defendant to pay for reasonable living expenses and reasonable legal costs. Although such expenditure may result in the dissipation of assets, it is not a dissipation which can be regarded as an abuse of process: see *Harrison Partners Constructions Pty Ltd v Jevena Pty Ltd* [2006] NSWSC 317 at [10].

129 On the other hand, an injunction against dealing with an asset is usually granted where there is an arguable case that the court will ultimately find that the plaintiff has proprietary interest in it. In such a case, to make an exception allowing for the use of the property to meet the defendant's legal costs could result in property belonging to the plaintiff being appropriated to the defendant's personal use. Although that does not deprive the court of power to make such an exception, it is often a good reason not to do so: *Gap Constructions Pty Ltd v Vigar Pty Ltd* [2011] NSWSC 1205 at [12].

130 The distinction is reflected in the present case in the difference between the asset preservation order and what I have called the restraining order. The restraining order reflects the fact that Ms Ip makes proprietary claims against the proceeds of sale of the Redfern property, in particular to the extent that they can be traced into the Pyrmont properties. To the extent that tracing is

not possible, the plaintiff has an unsecured claim which is protected by the asset preservation order.

131 I have already recounted the sequence of events. On Ms Chiang's evidence, the proceeds of the Redfern property were used to acquire the first three Pyrmont properties, namely the Pyrmont Street unit and the car spaces. But no more than $120,000 can have gone into the Harris Street unit. The balance was paid by the CBA and was later paid out by Mr Xu.

132 The concession that Ms Ip has a strong prima facie case carries with it the concession that she has a strong prima facie proprietary claim to the first three Pyrmont properties. She also has a strong prima facie proprietary claim to part of the Harris Street property, but that does not exceed $120,000.

133 The result is that the Harris Street property, which is presumably worth at least $600,000, is largely unencumbered by any proprietary claim. On the face of it, at least $480,000 in value is unencumbered, but this is subject to the asset preservation order. Counsel for Ms Chiang submitted that Mr Xu was effectively the owner, but there is no evidence before the Court from him to establish the basis on which he paid out the CBA; the payment could have been a gift to Ms Chiang or an unsecured loan.

134 In these circumstances I am firmly of the view that if the Court were to permit Ms Chiang to raise funds from the sale of assets for the purpose of paying legal fees, that should be done from the Harris Street property (and even then on terms quarantining a sum of money sufficient to satisfy Ms Ip's claim to proprietary entitlement to part of the property). There is no justification for allowing Ms Chiang to litigate at what would potentially be at the estate's expense when she apparently has other assets available to fund the conduct the proceedings. I have not forgotten that Mr Xu appears to have a restitutionary claim but on the evidence before the Court this may be no more than an unsecured one.

135 It is not a foregone conclusion that the Court would permit recourse to the Harris Street property for the purpose of funding legal costs. The Court would have to take into account whether there are any other assets held by Ms Chiang (in view of the doubts about this question in the evidence). The fact that Ms Chiang's dissipation of monies which could have been used to fund the proceedings occurred by gambling, which could be described as "wanton", would also be relevant: see *Harrison Partners* at [14]. It would also be necessary consider Ms Chiang's obligations to Mr Xu in more detail. But it is not necessary to go into these matters. Ms Chiang's application concerns the Pyrmont Street property. This was confirmed by counsel for Ms Chiang when I raised the issue at the hearing. That application fails and must be dismissed.

Orders

136 The orders of the Court are:

1. Order that the defendant's application by way of notice of motion dated 17 July 2019 be dismissed.

2. Order that the applicant pay the respondent's costs of the application.

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I certify this is a true copy of the reasons for judgment of the Honourable Justice Parker

8/11/19 ..... Associate
Date