

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/02/2022 7:09:29 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD616/2021
File Title:	WESTPAC BANKING CORPORATION ABN 33 007 457 141 & ANOR v FORUM FINANCE PTY LIMITED (IN LIQUIDATION) ACN 153 301 172 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/02/2022 7:15:49 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



FIRST APPLICANT'S OUTLINE OF SUBMISSIONS

FOR HEARING ON 9 FEBRUARY 2022

Introduction

1. By interlocutory application filed on 7 February 2022, the First Applicant (**Westpac**) seeks specific performance of a deed executed by Mr Vincenzo Tesoriero (**Mr Tesoriero**) and 23 Margaret Street Pty Ltd (**23 Margaret St**) on or around 3 September 2021 (**Deed**), or an order that Mr Tesoriero and 23 Margaret St (the **Tesoriero Parties**) do all things necessary to ensure compliance with the relevant two subclauses of the Deed.¹
2. The Deed was executed in settlement of an interlocutory application filed by Westpac on 25 August 2021 (**August Application**). It governs the process for the sale of residential property known as 23 Margaret Street, Rozelle, NSW 2039 (the **Property**) and the holding of the surplus proceeds from the sale of the Property pending final determination of the proceedings. Despite repeated requests,² the Tesoriero Parties have not honoured their obligations under the Deed, relevantly for present purposes refusing to pay the net proceeds into a controlled moneys account. Their solicitors have asserted that the deed “is not binding” but, it might be said unsurprisingly, provided no basis for that *prima facie* hopeless proposition.³ Settlement of the Property is scheduled to take place on 9 February 2022.⁴
3. In support of the application, Westpac relies upon the affidavits of Ms Caitlin Maria Murray dated 25 August 2021 (**Murray Aug**) and 7 February 2022 (**Murray Feb**) together with exhibits CMM-10⁵ and CMM-22.

¹ A copy of which is at CMM-22 at p.50 (Tesoriero Parties counterpart) and p.67 (Westpac counterpart)

² In connection with the process for sale of the Property: see Murray Feb at [16], CMM-22 pp.91-145; in connection with the provision of information in connection with the sale of the Property see Murray Feb at [19]-[26], CMM-22 pp.150-184

³ Letter from Madgwicks dated 4 February 2022: CMM-22 p.180 at p.181.

⁴ Email from Thornton + King dated 31 January 2022 at CMM-22 at p.157; Letter from Madgwicks dated 31 January 2022 at CMM-22 p161.

⁵ Pages 236-623 only

Jurisdiction and Power of the Court

4. Section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) provides that the original jurisdiction of the Federal Court of Australia (**Court**) includes jurisdiction in any *matter* arising under any laws made by the Parliament. A “matter” is the justiciable (in the sense of capable of judicial determination) controversy between parties, comprised by the substratum of facts representing or amounting to the dispute or controversy between the parties. The “matter” is identifiable independently of the proceedings brought before the Court for determination: as authority for the prior two sentences, see *Palmer v Ayres* (2017) 259 CLR 478; [2017] HCA 5 at [24]-[27] citing, inter alia, *Fencott v Muller* (1983) 152 CLR 570 at 603–8; see also *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [2001] HCA 1 at [50].
5. Whether the Court has jurisdiction to enforce a deed or contract entered into in settlement of all (or, *a fortiori*, part) of proceedings in which this Court has jurisdiction was considered in *Macteldir Pty Ltd v Dimovski* [2005] FCA 1528 ; (2005) 226 ALR 773, where Allsop J held⁶ at [95]:⁷

The enforcement of a contract to settle a case (at least between the parties to the suit) concerning rights owing their existence to Commonwealth law, and hitherto sought to be vindicated in the Federal Court under the FCA Act or the Judiciary Act or another Commonwealth Act will be a matter arising under a law of the parliament.

6. Section 22 of the *Federal Court of Australia Act 1976* (Cth) (**Act**) confers power on the Court to make all orders to which a party is entitled in a “matter” which is before the Court, including to enforce a settlement: “*Practice and Procedure High Court and Federal Court*” (LexisNexis) (looseleaf) at [32,950.35]. Section 23 of the Act confers on the Federal Court of Australia a broad power “*to make orders of such kinds ... as the Court thinks appropriate*”, which includes those sought by Westpac.

Enforcement of the Deed

⁶ Applying the reasoning of the High Court in *LNC Industries Ltd v BMW (Aust) Pty Ltd* [1983] HCA 31 ; (1983) 151 CLR 575.

⁷ See further at [59]-[62] and also *Needlework Warehouse Pty Ltd v Chansonette Pty Ltd* (2005) 226 ALR 252; [2005] FCA 1525 at [41] –[47] (Lindgren J); and recently *Hafertepen v Network Ten Pty Limited* [2020] FCA 1456 at [37]-[45] (Katzman J).

7. The Tesoriero Parties' position that the Deed is not binding has no apparent basis. Not only has none been enunciated, the circumstances of entry into the Deed show the Tesoriero Parties' position to be unarguable.
8. The circumstances giving rise to the negotiation of and entry into the Deed are set out in Murray Feb at [7] to [15]. The entry into the Deed followed an application made by Westpac in relation to the foreshadowed sale of the Property. The August Application was filed following concerns that the Tesoriero Parties would seek to sell the Property below market value: Murray Aug [47]-[52], and identified the basis for a further freezing order and order appointing a receiver to the Property in aid of the freezing order: Murray Aug at [32]-[37]. Following a hearing before Lee J at which the Tesoriero Parties were represented by Senior Counsel,⁸ the parties through their solicitors negotiated the execution of the Deed: Murray Feb at [10]-[11].⁹ Upon execution of the Deed, the parties agreed to consent orders dismissing the August Application: Murray Feb at [14]. The Deed records a binding settlement negotiated and was entered into in a conventional manner between represented parties. In the circumstances, there is no reason to not enforce the Deed. In any event, no application has been made to set aside the Deed.
9. Further, enforcement of the Deed, specifically requiring the surplus funds to be paid into a jointly held controlled monies account, best protects the interests of the parties in connection with the surplus funds. No different position is justified. *First*, to allow a different arrangement would change the agreement reached between the parties. *Second*, this matter involves a history in which, presumably on instructions from Mr Tesoriero, his former solicitors initially refused to comply with their undertaking and pay proceeds of another sale into Court, instead claiming a lien. *Third*, the Deed reflects an agreement which Westpac was prepared to enter to protect its claimed rights and avoid or minimise the risk of exposure to *inter alia* priority arguments (as demonstrated by the previous solicitors' claim to a lien: it matters not that the previous solicitors, to say the least, were likely wrong, the Deed protects against being exposed to the argument).
10. Payment of the surplus funds into a controlled monies account will ensure that the surplus is preserved to abide by the outcome of the trial.

⁸ CMM-22, p.1

⁹ See correspondence at CMM-22, pp.24-39

11. In light of the circumstances surrounding the entry into and execution of the Deed, and the object of the Deed being to preserve the surplus funds, the Deed should be enforced. No cogent reason has been identified as to why the Deed ought not be enforced.

Costs

12. The Tesoriero Parties' repeated and unmeritorious refusal to acknowledge and confirm compliance with the processes provided for in the Deed have necessitated the making of this application. The Tesoriero Parties ought to be ordered to pay the costs of and associated with this interlocutory application.

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8 February 2022

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