

NOTICE OF FILING

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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: 21/07/2022 10:14:59 AM AEST

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.

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Westpac Banking Corporation & anor v Forum Finance Pty Ltd (in liquidation) & ors ★

Federal Court of Australia NSD 616/2021

APPLICANTS' (WESTPAC PARTIES') OUTLINE OF SUBMISSIONS

20 July 2022

1. The interlocutory application by 17 June 2022, Mr Vincenzo Frank Tesoriero (**Mr Tesoriero**) seeks:
 - a. a variation to the freezing orders made against him¹ (**Freezing Orders**) to increase the amount provided for his reasonable legal expenses to \$1,866,000; and
 - b. an order to allow certain funds to be paid into his solicitor's trust account, up to the amount of \$1,866,000, to pay his legal expenses.²
2. As set out in the Applicants, Westpac Banking Corporation (**WBC**) and Westpac New Zealand Limited (**WNZL**) (together **Westpac**), submissions dated 30 June 2022 (**Westpac Submissions**) oppose the variation to the Freezing Orders in the terms proposed by Mr Tesoriero. Having regard to the hearing that took place on 1 July 2022, Westpac does not oppose a variation to the Freezing Orders to increase the exception provided for reasonable legal expenses to be in the amount of \$1,250,000: T16.34-T17.25 (1/07/2022).
3. That leaves for determination only the issue in relation to whether Mr Tesoriero should have access to funds over which Westpac make proprietary claims in order to pay those legal expenses. As indicated in the Westpac Submissions, Westpac, without admissions, does not oppose the release of funds held up to the amount of \$462,511.65 from an identified controlled monies account, because that release of funds from that controlled monies account will not erode funds in respect of which proprietary claims have been made.
4. The legal principles and their application to this application are set out in paragraphs [28]-[38] and [70]-[76] of the Westpac Submissions. Relevantly, there is no predisposition to

¹ Initially made on 2 July 2021: varied and extended on 9 July 2021; 27 August 2021; and 12 November 2021.

² To the extent the order seeks the amount of \$1,866,000 to be released to the trust account of Mr Tesoriero's solicitors it is noted that Mr Tesoriero's evidence is that the amount of \$180,000 has already been paid from frozen funds to Mr Tesoriero's solicitors: see Tesoriero June Affidavit at [35] and as such this amount is overstated.

allow access to trust funds for the payment of legal expenses: see [72] Westpac Submissions, rather Mr Tesoriero bears the onus of satisfying the Court that he does not have any other assts available out of which the legal expenses could be paid: see paragraph [33] of the Westpac Submissions. He has not done that.

5. The Court cannot be satisfied as to the assert position of Mr Tesoriero or that he has discharged that onus for the following reasons.
6. **Property Valuations:** Mr Tesoriero has given unsatisfactory evidence in relation to the valuation of the properties referred to as the petrol station properties. Mr Tesoriero sworn in his July 2021 affidavit as to value of those properties, based on formal valuations obtained in 2020: see Exhibit G.
7. In April 2022, a schedule of properties was prepared: Exhibit C, that set out the indicative valuation of various properties, including the petrol station properties. Under cross-examination Mr Tesoriero said at T35.5-38:

5 You satisfied yourself that the indicative value stated in the document was correct – were correct?---It was indeed. I was satisfied the indicative values were correct. They were values that the brokers thought could potentially be had. That was some discussion that was had. I didn't think it was entirely, but - - -

10 You didn't think it was what, sorry?---I didn't think it was entirely possible, but we didn't have a valuation at the time.

Well, if you go to the regional petrol stations – that is, items number 27 to 36, you see that the indicative values are the same as the indicative values in MFI 1?---The indicative values are the same as the indicative values in MFI 1.

15 Yes, for those same properties. Do you remember the table in MFI 1?---You've lost me, Mr Giles. Whereabouts is that?

20 Go back to the 1 April email.

HIS HONOUR: Remember the first email – the first – the first email that you were sent?---This page here, yes.

25 Yes. That had an annexure?---This annexure here, yes.

Confidential for draft discussion only?---Yes.

30 And down the bottom of that page, it says, "regional petrol stations"?---Yes.

And that's what you're being asked about it?---Yes. Yes, the figures are consistent, Mr Giles.

35 MR GILES: And what I wanted to suggest is that having seen the 8 April email and the attachment, you know you did verify the values – the indicative values in the email of 1 April?---I disagree with your comments. Nothing was verified, Mr Giles. There was no valuations. If you've gone through SMEs file, you will see that no valuations have taken place. It's merely a discussion.

8. In July 2022 Mr Tesoriero, after orders were made on 1 July 2022 for an updated affidavit as to his assets and liabilities to be provided, swore a further affidavit that set out the value the petrol station values that was unchanged from the 2021 affidavit. When asked why there was no change in the value between the July 2021 affidavit and the July 2022 affidavit, Mr Tesoriero said that he did not have a further formal valuation and did not think that the prices had materially changed.
9. **Forbearance Deed:** Exhibit G, p81. There is no reference to the Judo Forbearance Deed in Mr Tesoriero’s 12 July or 18 July 2022 affidavit. The Deed was executed on 14 June 2022. To the extent that he asserts that the Deed has not come into effect, this is plainly inconsistent with the terms of the Deed. The effect of the Forbearance Deed is to reduce the monthly repayments on the Berkely property to the amount of \$33,000 per month (subject to interest rate changes). Mr Tesoriero’s 12 July 2022 affidavit sets out that the repayments are \$58,600 per month: page 6, item 12.
10. **Double payments:** Statements for the various Judo loan accounts show that there has been a double payment from those accounts in the month of April: see CMM-26 at p70, 76, 79, 82, 85, 88, 91, 94. No explanation has been provided for this, instead, Mr Tesoriero maintained that the double payment was due to the payment on the second facility. Payment on the second facility is not in the amount of the second credit in the first facility account in the month of April, nor does it occur in other months. No proper explanation for the double payment. Although seeking to clarify that this was perhaps a “catch-up” payment, there is no independent evidence that reliably establishes that as the basis for the double payment.
11. **Current Account balances:** Mr Tesoriero has not been forthcoming in relation to his current account balances. Evidence now before the Court shows that Mr Tesoriero had:
 - a. \$150,841.76 in the Kirwin Road Account as at 12 July 2022;
 - b. \$11,945.42 in an account in the name 286 Carlisle as at 30 June 2022: Exhibit D;
and
 - c. \$40,921.15 in an account in the name Tesoriero Investment Group as at 30 June 2022: Exhibit E,which account balances were not disclosed in his 12 July or 18 July affidavits.
12. Mr Tesoriero’s evidence in relation to the Kirwin Road Account: CMM-26 p1 and its balance on 12 July 2022 was as follows:

Are you able to show me what the running balance was, that is? How much was in that account on - - -?---A hundred and - - -

10 - - - 12 July?---12 July, it was – I don't know if I can tell you 12 July, but I can tell you it would have been \$150,841.76.

HIS HONOUR: How much, sorry? Hundred and?---\$150,841.76, your Honour.

15 Thank you, Ms Tesoriero?---No problem.

MR GILES: Why did you not tell his Honour in your 12 July affidavit that that was the amount of money, the 150-odd thousand dollars, in the account?---Let me just double check that, Mr Giles, if it is actually as at 12 July, because that was as of now when all the rents have gone in. Yes, no, it would have been around that amount. As
20 I mentioned, Mr Giles, it's purely a transactional account, so there's often months where that account is actually – as you would have seen, there's actually months where the account is actually in the negative.

25 But weren't you - - -?---Quite often. More often than not.

Didn't you understand you were meant to be telling his Honour what all of the assets that you and your companies had access to?---I don't believe it to be an asset, Mr Giles.

30 Sorry, you don't believe that money in a bank account is an asset?---Not when the interest payment is due the next day to come out.

Is his Honour meant to take that answer seriously?---Well, I take it seriously.

35 This is money in a bank account. You're telling his Honour that that's not, to your mind, an asset?---I'm not sure what you're getting at, Mr Giles. No one was trying to hide the account. We attached them for you to see. This is - - -

13. **Additional Assets:** There are assets that have not been disclosed. Mr Tesoriero's various affidavits make no reference to the John Tesoriero Trust, of which Mr Tesoriero is a beneficiary. Mr Tesoriero told the Court of that trust for the first time today.
14. **Café business:** no profit and loss statement or balance sheet has been put into evidence. The Court cannot be satisfied as to the financial position of that café. The Court simply has not been provided with sufficient evidence as to the financial position of the café.
15. There remains a failure by Mr Tesoriero to adequately disclose to the Court his asset and liability position.
16. **Accuracy as to evidence:** Mr Tesoriero's evidence does not reliably set out his position:
 - a. his evidence as to his parents residence was wrong. At T39 (19/07/22)

30 But if you look at paragraph 71(f), 30 Nelson Street is not your parents' personal residence, despite what you say?---No. It's an error that has been made, Mr Giles. I think this is another – there is additionally another property that is also missing from that list that you will see on this.

35 Did you reread this affidavit before telling Mr Hayes that its contents were true when he called you?---I did – I did definitely reread it, Mr Giles, but I've missed those. They're not mentioned elsewhere in this?

40 The statement in paragraph 71(f) - - -?---

In order to

--- is quite false to suggest that 30 Nelson Street is your parents' personal residence, isn't it?---Yes, it is. Yes. Completely.

45

b. Mr Tesoriero's various affidavits make no reference to the John Tesoriero Trust, of which Mr Tesoriero is a beneficiary. Mr Tesoriero told the Court of that trust for the first time today.

17. Having regard to the various matters set out back, the Court cannot find that Mr Tesoriero's evidence as to his assets and liabilities is complete and Court would remain concerning as to the adequacy of the disclosure of his assets. He has not satisfied the court that there are no other assets from which legal fees could be paid and in those circumstances he has not demonstrated that he should have access to funds over which Westpac has a proprietary claim.

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20 July 2022

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