

**Westpac Banking Corporation & another**  
**v**  
**Forum Finance Pty Ltd (in liquidation) & others**  
**Federal Court of Australia Proceedings NSD 616 of 2021**

**OUTLINE OF SUBMISSIONS OF THE LIQUIDATORS AND RECEIVERS**  
**INTERLOCUTORY APPLICATION FILED BY THIRD RESPONDENT DATED 17 JUNE 2022**

**Introduction**

1. By Interlocutory Application dated 17 June 2022, the Third Respondent (**Mr Tesoriero**) seeks orders, in effect, varying freezing orders made against him (**Freezing Orders**) for the purpose of increasing the reasonable legal expenses available to him from \$450,000 to \$1.866m. Mr Tesoriero also seeks an order that funds paid into Court and/or the controlled monies account set up pursuant to the Orders of Lee J on 9 February 2022 be released to his solicitor's trust account for the payment of legal expenses in the amount of \$1.866m.<sup>1</sup>
2. These are the submissions of Mr Jason Preston and Mr Jason Ireland (**Liquidators**), who are liquidators of the entities, and receivers & managers of the trust assets,<sup>2</sup> which it appears are entities and/or assets identified by Mr Tesoriero as a potential *source* of funds to pay his legal expenses should the Court grant his application to vary the Freezing Orders. The Liquidators dispute that Mr Tesoriero is entitled to use monies of companies in liquidation, or the proceeds of sale of properties over which the Liquidators are appointed receivers, for that purpose.
3. The Liquidators rely upon the affidavit of Jason Ireland affirmed 28 June 2022 (**Ireland Affidavit**), and Exhibit JI-6, on this application.

**Access to funds of companies in liquidation / trust assets under receivership**

4. *First*, Mr Tesoriero appears to contend that a source of monies available to fund the legal expenses of his defence, and the defence of his associated entities, are funds held in a controlled monies account relating to the sale of property at 6 Bulkara Street, Wagstaffe NSW (**6 Bulkara Property**).<sup>3</sup> Pausing here, the Liquidators infer from the evidence and submissions filed in connection with this application that this is a prospective source of funds sought to be relied upon by Mr Tesoriero, despite the Interlocutory Application not

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<sup>1</sup> Interlocutory Application dated 17 June 2022, Prayers 1 and 2 (**CB 5**).

<sup>2</sup> Ireland Affidavit at [6] (**CB 11**).

<sup>3</sup> Tesoriero 17.6.2022 at [16] (**CB 496**).

seeking relief for a release of those funds (the relief instead contemplating a release only of the sale proceeds of the property at 23 Margaret Street, Rozelle NSW held in the controlled monies account set up as ordered by the Court on 9 February 2022 (**Margaret CMA**)). Against the contingency that the proceeds of the 6 Bulkara Property are sought to be relied upon as a source of funds in this application, the Liquidators rely on these submissions.

5. *Secondly*, the registered proprietor of the 6 Bulkara Property was, prior to its sale, 6 Bulkara Street Pty Ltd (in liquidation) as trustee of the 6 Bulkara Street Unit Trust (**6 Bulkara**), being an entity over which the Liquidators were appointed and being a trust the assets of which are held by the Liquidators as Court-appointed receivers & managers.<sup>4</sup> The Liquidators submit that the sale proceeds of the 6 Bulkara Property must therefore be applied in accordance with the Liquidators' obligations as Court-appointed receivers, as well as their obligations under the *Corporations Act 2001* (Cth). In that respect, Mr Ireland gives evidence that 6 Bulkara has the following competing creditor claims to those proceeds:
  - (a) Westpac (proprietary claim) – \$253,766,555;
  - (b) Westpac New Zealand (proprietary claim) – NZD44,097,969; and
  - (c) FGFS (intercompany loan) – \$4,944,239.<sup>5</sup>
6. In addition, Mr Ireland also gives evidence that monies used by SMBC Leasing and Finance Inc, and Societe Generale, were paid (via FGFS) to acquire or maintain 6 Bulkara (amongst other real properties).<sup>6</sup>
7. *Thirdly*, Mr Tesoriero has not established any entitlement to the sale proceeds of 6 Bulkara. It is submitted that his interest is, at best, limited to a beneficial interest in a discretionary trust.<sup>7</sup> Accordingly, it is unclear, and unexplained by Mr Tesoriero, how those proceeds could be said to be capable of being available to fund his defence (and the defence of other entities to the proceedings) should the Court be minded to make the orders that he seeks increasing the cap on reasonable legal expenses.
8. *Fourthly*, to the extent necessary, the same process of reasoning applies, *mutatis mutandis*, to other entities over which the Liquidators are appointed liquidators and/or receivers & managers, including relevantly 14 James Street Pty Ltd (in liquidation) as trustee of the 14 James Street Unit Trust, 26 Edmonstone Road Pty Ltd (in liquidation) as trustee of the 26

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<sup>4</sup> Ireland Affidavit at [6] (**CB 11**).

<sup>5</sup> Ireland Affidavit at [22] (**CB 22**).

<sup>6</sup> Ireland Affidavit at [24(a)], [24(b)] (**CB 16**).

<sup>7</sup> Ireland Affidavit at [21(a)] (**CB 16**) (See also, [12(a)], [15(a)], [18(a)] at **CB 13-15**).

Edmonstone Road Unit Trust and 5 Bulkara Street Pty Ltd (in liquidation) as trustee of the 5 Bulkara Street Unit Trust.<sup>8</sup>

### **Margaret Street surplus sale proceeds**

9. Separately, insofar as Mr Tesoriero makes a claim to the surplus sale proceeds from the sale of 23 Margaret Street, Rozelle NSW held within the controlled monies account ordered by the Court on 9 February 2022 (**Margaret CMA**), the Liquidators respectfully submit that a further discretionary factor the Court ought to take into account before releasing those funds is that FGFS has issued a statutory demand to 23 Margaret Street Pty Limited in the amount of \$691,212.26,<sup>9</sup> claiming those monies as an unsecured debt payable by 23 Margaret Street to FGFS.
10. Westpac asserts a proprietary claim to a portion of the monies held in the Margaret CMA,<sup>10</sup> including the portion of monies the subject of the unsecured debt claim of FGFS as against 23 Margaret Street Pty Ltd, and has consented to a partial release of funds from the Margaret CMA. The Liquidators support that position, and understand that the consent given by Westpac to a partial release takes into account the \$691,212.26 the subject of FGFS's unsecured debt claim (as to which Westpac also asserts a proprietary claim).

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30 June 2022

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<sup>8</sup> Ireland Affidavit at [13], [16], [19] (**CB 13-15**).

<sup>9</sup> Ireland Affidavit at [25] (**CB 17**).

<sup>10</sup> Westpac's Submissions at [54]-[56].