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Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
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: 23/09/2022 11:39:01 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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Form 59
Rule 29.02(1)

Affidavit

No. NSD616/2021

Federal Court of Australia
District Registry: New South Wales
Division: General

WESTPAC BANKING CORPORATION ABN 33 007 457 141 and another named in the Schedule

Applicants

FORUM FINANCE PTY LIMITED ACN 153 301 172 and others named in the Schedule

Respondents

Affidavit of: NIGEL DAVID EVANS
Address: Level 1, 84 William Street, Melbourne, Victoria
Occupation: Solicitor
Date: 22 September 2022

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I, **NIGEL DAVID EVANS**, Solicitor, of Level 1, 84 William Street, Melbourne, Victoria, **DO SOLEMNLY AND SINCERELY DECLARE AND AFFIRM** as follows:

A INTRODUCTION

1 I am an Australian Legal Practitioner and Director of Aptum Legal (**Aptum**).

Filed on behalf of (name & role of party)	Third Respondent
Prepared by (name of person/lawyer)	Nigel Evans
Law firm (if applicable)	APTUM LEGAL
Tel (03) 7020 9230	
Email nigel@aptumlegal.com.au	
Address for service (include state and postcode)	C/- Aptum Legal, Level 1, 84 William Street Melbourne, Victoria 3000

2 Aptum is the solicitor for the Third Respondent (**Mr Tesoriero**) and his associated entities (collectively, the **Respondents**):

2.1 in this proceeding and proceeding number NSD681/2021 (collectively, the **Main Proceedings**); and

2.2 in proceeding VID778/2021 and NSD224-232/2022 (**Winding Up Proceedings**).

3 Aptum is also engaged (by separate engagement) as the solicitor for the Forty-Fifth Respondent (**Mr Tesoriero Snr**) in this proceeding.

4 I am authorised by the Respondents to make this affidavit on their behalf.

5 I make this affidavit in support of the interlocutory application by the Tesoriero Parties (as set out in Schedule 2 to that interlocutory application) dated 23 September 2022 seeking (among other things) a variation to the freezing orders made against him on 2 July 2021 (as varied on 9 July 2021; 27 August 2021; 12 November 2021; and 20 July 2022) (**Freezing Orders**).

6 By making this affidavit, I do not intend and have no authority to waive any legal professional privilege of the Respondents. Nothing in or exhibited to this affidavit ought to be construed as waiving privilege.

7 Except where otherwise stated, I make this affidavit of my own knowledge. Where I state in this affidavit that I depose to any matter based on any information known to me or based on a belief, I believe those matters to be true and correct.

8 Now produced and shown to me and marked "**NDE-3**" is a paginated bundle of true copies of the documents referred to in this affidavit (**the Exhibit Bundle**).

B VARIATION APPLICATION

9 I also affirm today a separate affidavit (**my Third Affidavit**). In that affidavit, I depose (at paragraph 13.5) to orders made by the Honourable Justice Lee on 20 July 2022 to vary the Freezing Orders.

█ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

█ [REDACTED]

[REDACTED]

█ [REDACTED]

[REDACTED]



As a witness, I certify the following matters concerning the person who made this affidavit (deponent):

1. This affidavit is witnessed over audio visual link in accordance with Part 2B of the *Electronic Transactions Act 2000* (NSW).
2. I saw the face of the deponent.
3. I observed the deponent signing a copy of this affidavit in real time.
4. I attest or otherwise confirm witnessing the deponent's signature by signing this affidavit.
5. I am reasonably satisfied this affidavit signed by me is a copy of the affidavit signed by the deponent.
6. I have known the person for at least 12 months.

Form 59
Rule 29.02(1)

Annexure certificate

No. NSD616/2021

Federal Court of Australia
District Registry: New South Wales
Division: General

WESTPAC BANKING CORPORATION ABN 33 007 457 141 and another named in the
Schedule

Applicants

FORUM FINANCE PTY LIMITED ACN 153 301 172 and others named in the Schedule

Respondents

ANNEXURE "NDE-3"

Before me:



Signature of **DAVID JEFFREY MASON
ADASON**

of Level 1, 84 William Street, Melbourne,
Victoria, an Australian Lawyer, a person
authorised under s 19(1) of the Oaths and
Affirmations Act 2018 to take an affidavit in
the State of Victoria.

Filed on behalf of (name & role of party)	Third Respondent
Prepared by (name of person/lawyer)	Nigel Evans
Law firm (if applicable)	APTUM LEGAL
Tel	(03) 7020 9230
Email	nigel@aptumlegal.com.au
Address for service (include state and postcode)	C/- Aptum Legal, Level 1, 84 William Street Melbourne, Victoria 3000

[Form approved 01/08/2011]

REDACTED

Pages 6 to 1100 of NDE-3



VIQ SOLUTIONS AUSTRALIA PTY LTD

ACN 008 711 877

T: 1800 AUSCRIPT (1800 287 274)

E: clientservices@auscript.com.au

W: www.auscript.com.au

Ordered by: Candy Nelson

For: Madgwicks Lawyers

Email: candy.nelson@madgwicks.com.au

TRANSCRIPT OF PROCEEDINGS

O/N H-1748224

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

LEE J

No. NSD 616, 642, 681 and 747 of 2021

WESTPAC BANKING CORPORATION and OTHERS

and

FORUM FINANCE PTY LIMITED (IN LIQUIDATION) AND OTHERS

**IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED
(ADMINISTRATORS APPOINTED) & OTHERS**

SYDNEY

9.29 AM, FRIDAY, 1 JULY 2022

MR J.C. GILES SC appears with MS C.A. HAMILTON-JEWELL for Westpac

MS E.L. BEECHEY appears for SMBC

MR R.K. JAMESON appears for the liquidators and receivers

MR P. HAYES QC appears with DR TURNER for Mr Tesoriero

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THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

5 MR J. GILES: May it please, your Honour. I appear with my learned friend, MS
HAMILTON JEWEL for the Westpac parties.

HIS HONOUR: Yes.

10 MS E.L. BEECHEY: May it please the court. I appear for SMBC.

HIS HONOUR: Yes.

15 MR R.K. JAMESON: May it please the court, Jameson, I appear for the liquidators
and receivers.

HIS HONOUR: Yes. You're muted, Mr Hayes. I can't hear you, Mr Hayes. Now
I can.

20 MR P. HAYES: Thank you, your Honour.

HIS HONOUR: Now I can.

25 MR HAYES: Your Honour – thank you, your Honour. I appear with DR TURNER
for the third respondent, Mr Tesoriero.

HIS HONOUR: Yes. Yes. I think it's probably worthwhile me just identifying –
asking people identify the evidence that they rely upon initially. Mr Hayes.

30 MR HAYES: Yes, your Honour. Your Honour, I read, firstly, the affidavit of Mr
Tesoriero sworn 21 July 2021.

HIS HONOUR: Yes. Yes.

35 MR HAYES: The affidavit of 19 October 2021.

HIS HONOUR: Yes.

40 MR HAYES: Your Honour, I'm not going to read the affidavit of 8 November
2021. There has been some correspondence between the parties. We won't both
your Honour about that today. We will take your Honour to the matters - - -

HIS HONOUR: Nor the affidavit of 3 September.

45 MR HAYES: That's right, your Honour. Yes. It's not relative to today. And the
affidavit of Mr Tesoriero sworn 17 June 2022.

HIS HONOUR: Yes.

MR HAYES: And I also read the affidavits of Mr Nasimi sworn on 9 November 2021 and the affidavit of Mr Nasimi on 28 June 2022.

5

HIS HONOUR: Yes. Yes. All right. So it seems to me then the – referring to the index of the court book, you’re reading the affidavits in six, eight, 10, 12 and 13 and not reading the balance of the affidavits. All right.

10 MR HAYES: That’s right. That’s right, your Honour.

HIS HONOUR: I will – any objections to those affidavits?

15 MR GILES: Only to the document which is at court book page 555. It’s the accountant’s letter obviously prepared for the purpose of the litigation.

HIS HONOUR: 555.

MR GILES: 555.

20

HIS HONOUR: Well, I’m at a disadvantage because mine only goes up to 300. There’s a second volume. All right.

25 MR GILES: Because I don’t know why your Honour was told this was a half hour hearing by our learned friend’s instructors. Obviously it never was.

HIS HONOUR: No. I was going to come to that.

MR GILES: Well, quite.

30

HIS HONOUR: So - - -

MR GILES: Maybe your Honour just simply takes it for what it’s - - -

35 HIS HONOUR: Yes. Well, I reject the tender of the document which is at page 555.

MR GILES: Grateful.

40 MR HAYES: Your Honour, I’ve had no notice of the objection. I don’t understand why my friends are being heard on it and I - - -

45 HIS HONOUR: Well, it’s just so self-evidently inadmissible that I didn’t think that you would wish to be heard on it but if there’s anything you wish to say about it. It’s a series of representations made by his accountant, not on oath. I just thought it was just self-evidently inadmissible but I will vacate that ruling if there’s anything you wish to say about it, then by all means do so.

MR HAYES: Well, if that's the basis upon which – I haven't had the courtesy of being notified as to any objection, your Honour, but if that's the basis upon which Mr Giles is objecting to it, I don't – I won't trouble your Honour any further – trouble your Honour with it any further.

5

HIS HONOUR: All right. Thank you. All right. Well, I confirm that ruling. Now, so that's the evidence by the applicants. Did you want to cross-examine any of those witnesses?

10 MR GILES: No, your Honour.

HIS HONOUR: All right. So going back to the court book index, can I take it that you read the affidavits behind four and five.

15 MR GILES: Four and five.

HIS HONOUR: Sorry. Read the affidavit at four with the – and tender the exhibit behind 5.

20 MR GILES: Yes, your Honour.

HIS HONOUR: And the receiver, I take it, reads the affidavit of two and 10. This is documents behind three, is that right? So that's the affidavit of Caitlin Murray sworn 28 March 2022 which I will take as read, and the affidavit of Jason Ireland
25 sworn 28 June 2022 and take as read. And I will also accept those bundles of documents subject to any objections you have, Mr Hayes.

MR HAYES: No, your Honour.

30 HIS HONOUR: All right. Well, that material – that seems to – there's additional bundles of documents, apparently.

MR GILES: There are two things from my side. There's the further documents behind tab 14 which just proves something your Honour has seen many times before.
35

HIS HONOUR: Yes. Well, subject to anything Mr Hayes wishes to say, I will accept those and mark them as exhibit A on the application.

40 MR GILES: And I also read the affidavit of Caitlin Maria Murray sworn 30 June 2022.

HIS HONOUR: I don't think I've got that. I don't think I've got that one.

45 MR GILES: Could I hand a copy to your Honour. I should also explain it's - - -

HIS HONOUR: I've also got an affidavit by Christopher Michael Prestwich of 1 July 2022; do you read that one as well?

MR JAMESON: I do and I seek leave to file it in court, your Honour.

5 HIS HONOUR: I will make that the affidavit of Christopher Michael Prestwich,
P-r-e-s-t-w-i-c-h, affidavit sworn 1 July 2022 is read subject to anything you wish to
say, Mr Hayes.

MR HAYES: I've never seen it, your Honour.

10 HIS HONOUR: Well - - -

MR JAMESON: My instructing solicitors did send it to Mr Hayes' instructing
solicitors but I can make arrangements - - -

15 HIS HONOUR: Well, I will defer that material going into evidence until Mr Hayes
has had the opportunity of seeing it.

MR JAMESON: I'm grateful.

20 HIS HONOUR: Apparently it has gone to your solicitors, Mr Hayes.

MR HAYES: Thank you, your Honour. Perhaps Dr Turner can review it while I'm
dealing with the application if your Honour pleases.

25 HIS HONOUR: Yes. Yes.

MR GILES: And Ms Murray's affidavit of 30 June 2022 I should explain, your
Honour.

30 HIS HONOUR: Can I just check whether Mr Hayes has that one. 30 June 2022.

MR HAYES: I do, your Honour. Yes.

35 MR GILES: I read that. It hasn't yet been filed because apparently the registry's
down so I don't know whether I seek leave to file it in court.

HIS HONOUR: No. No.

MR GILES: Or I just tell your Honour it will be filed in due course.

40 HIS HONOUR: No. You can just file it in the electronic court book when it's - - -

MR GILES: I'm grateful, your Honour.

45 HIS HONOUR: Well, I note the affidavit of Caitlin Maria Murray sworn 30 June
2022 is also read.

MR GILES: Grateful, your Honour. The reason it has just come in, so to speak, is that it proves some documents. Your Honour may have seen that we served a notice to produce the bank records on Mr Tesoriero. He has just not responded to that and hasn't – it was called on the other day before the registrar with nothing produced.

5

HIS HONOUR: Was the notice to produce stood over to today?

MR GILES: I will get some instructions.

10 HIS HONOUR: Yes.

MR GILES: In the meantime, we served subpoenas on some of the banks and this is not the universe of documents produced. It is the documents produced by the ANZ and a financier, I think is the right word, Judo Bank. I'm told that the notice to produce was not stood over. I don't know why.

15

HIS HONOUR: All right. All right. Well, thank you. Well, that's the material. Then I should perhaps turn to Mr Hayes' application so I should perhaps turn to him.

20 MR HAYES: Thank you, your Honour. Has your Honour seen a copy of the third respondent's outline of submissions?

HIS HONOUR: I have and I can say to the parties that I've had the opportunity, for which I'm grateful, of reviewing the detailed submissions not only on behalf of the third respondent for the variation of freezing orders but also the outline of submissions filed on behalf of Westpac and also the liquidator and receiver's submissions. So you can assume familiarity with those documents.

25

MR HAYES: Thank you, your Honour. Well, I might have been a little ambitious to say half an hour. We, nonetheless, think this can be dealt with in relatively short compass given the level of preparation with the submissions. Your Honour, it shouldn't be an overly onerous imposition on your Honour's time this morning. Your Honour, I will just very briefly speak to the applicant's submissions. In a nutshell, your Honour, what – sorry, the third respondent's submissions. In a nutshell, what the third respondent is seeking is, firstly, a variation of the freezing order to allow for his reasonable legal expenses up to and including the trial, estimated in the amount of about 1.866 million.

30

35

I will turn to the amount in due course, your Honour, and, secondly, he would seek a release of funds for his reasonable living expenses. Your Honour had previously made orders to allow for that but there has been some difficulty on the part of Mr Tesoriero being able to access those moneys and he hasn't been able to do so since about September, your Honour, and has not been able to drawdown upon that. He has been relying upon the greatest and goodwill of friends and family to sustain him until this point of the proceedings. Your Honour, firstly - - -

45

HIS HONOUR: Is that because, Mr Hayes, he has attempted to withdraw moneys from a particular account and he has been told he can't or what's the difficulty?

MR HAYES: Yes, your Honour. Yes.

5

HIS HONOUR: That's the difficulty, is it.

MR HAYES: That's the difficulty. Yes.

10 HIS HONOUR: All right.

MR HAYES: And, your Honour, the – turning to the question of his legal expenses, your Honour. My instructing solicitors and his present team have been in the matter now for seven months and, your Honour, suffice to say, this is certainly a factually
15 complex and legally complex hearing, or claim that he's facing. Your Honour - - -

HIS HONOUR: Is it really, Mr Hayes? Is it really?

MR HAYES: Yes, it is - - -

20

HIS HONOUR: I mean, I know there's a lot of things pleaded, but as you correctly identified at paragraph 34 of your submission, the case stands or falls by reference to whether or not Mr Tesoriero knew about the scheme. If he knew about the scheme, he loses. If he didn't know about the scheme then he likely wins.

25

MR HAYES: That's right. But it doesn't mean to say, your Honour, he can ignore everything else that is wrapped up in the claim against him. How the claim is being brought against him, your Honour, it essentially falls into three sections of statement of claim, which runs over 600 pages, and also the defence in part C, part H and part
30 F, which he – your Honour will have seen from the pleadings, he very squarely joins with and puts into issue, firstly, his knowledge of the scheme, which goes to the very heart of the contention of Westpac's asserted property interest in those monies. Your Honour - - -

35 HIS HONOUR: Quite. So all the aspects of the case pleaded against him, be it the unlawful means conspiracy, the knowing receipt case - - -

MR HAYES: Yes.

40 HIS HONOUR: The knowing assistance case and the misleading deceptive case, all have at their kernel, this notion of the scheme and the notion of his knowledge of the scheme.

MR HAYES: That's right.

45

HIS HONOUR: And subject to any correction that Mr Giles says, but it does seem to me from my relatively cursory review of the pleading, is that what you say about

that is clearly correct. the other things you seem to say is that the paragraph 48, as a result of this evidence, would suggest that the applicants haven't established a prima facie entitlement. I wanted to ask you a bit about this, that – about the scope of the trial, so I can understand this application a bit better, I haven't got the orders in front
5 of me in the court book, I don't think, but my recollection is the time has now passed for Mr Tesoriero to file any further affidavit material of the trial, so I'm assuming that you're essentially running this case on the basis of – indistinguishable, in a sense, from a no case submission, so you don't propose to go into evidence by Mr Tesoriero at the trial.

10

MR HAYES: Yes.

HIS HONOUR: Does that - - -

15 MR HAYES: Your Honour should not make that assumption. Your Honour, discovery was only recently completed. Over 35,000 documents have been discovered by Westpac and this is a case where the case against Mr Tesoriero is a circumstantial one, and inferences will be asked to be drawn from various documents. Now, what has happened, your Honour, is that my instructing solicitors
20 have written to the applicant's solicitors inviting them to identify which particular documents of those 35,000 documents they might be relying upon at trial, so at the very least, Mr Tesoriero will be able to have a deeper appreciation of the case against him at trial, and what is the likely evidence from which Mr Giles will be inviting your Honour to draw inferences of knowledge.

25

It would seem, your Honour, that some week ago, when that email was sent, it would seem that it didn't actually reach MinterEllison. It's in the material, your Honour, that an email for that effect was sent, but we've since – it has since been revealed that it actually, for whatever reason, it didn't get through the server, and didn't get to
30 MinterEllison. But nonetheless, your Honour, it highlights the difficulty that Mr Tesoriero faces. If your Honour looks at the way in which the case has been pleaded, and I won't rehearse that, but then your Honour will see that on 31 January, if your Honour goes to page 467 of the court book, and what your Honour will see at 467 until - - -

35

HIS HONOUR: But, sorry, before we get to that date, I – I will go to that document in a moment, Mr Hayes, I just want to understand something a bit better than I do now.

40 MR HAYES: Yes. Certainly, your Honour.

HIS HONOUR: There wasn't – there was an order – had understood, but maybe I'm incorrect about this, but I had understood that the applicants had served all the material upon which they propose to rely at the hearing, in chief. Is that right?

45

MR GILES: Affidavit evidence, yes. Not their whole documentary tender.

HIS HONOUR: Sorry?

MR GILES: Not the whole documentary tender.

5 HIS HONOUR: I don't know why Siri has submissions.

MR GILES: If only I had that effect usually.

10 HIS HONOUR: I don't know how to turn her ability to make submissions off, but the last thing was it's all good. I'm not sure if that's a reference to Mr Hayes' submissions or yours, Mr Giles, but getting to the point, so you haven't identified the metes and bounds of your documentary tender? Right.

MR GILES: I have done what I've been ordered to do.

15

HIS HONOUR: No, I no, I'm just trying to work out – that wasn't something which was built into the timetable. What was ordered was that by 4 pm on 22 May that Mr Tesoriero, relevantly, filed and serve any affidavit evidence upon which you propose to rely?

20

MR GILES: That's right. And by the 15th – I know this isn't quite your Honour's point - - -

HIS HONOUR: No.

25

MR GILES: But by 15 July I have the - - -

30 HIS HONOUR: 15th you will serve a section 50 summary and that was the reason why it was structured that way, because I'm hoping that we don't have to have such a large documentary tender.

MR GILES: Yes. That's right. That's right.

HIS HONOUR: Yes.

35

MR GILES: So the problem is, Mr Hayes' client has not complied with the order.

HIS HONOUR: Yes, I know. I just wanted to work that out.

40 MR HAYES: No. No, your Honour.

MR GILES: Yes.

45 HIS HONOUR: So I can assume, Mr Hayes, I must say, before coming on, given that you hadn't served the affidavit material by 4 pm on 27 May, that you didn't propose to rely on anything at the trial?

MR HAYES: No, your Honour, that would be wrong to make that assumption. There was some correspondence between the parties which I think were extensions were sought because discovery hadn't been completed, and it's well understandable, your Honour, while he hasn't put on evidence, in a case which involves serious
5 allegations against him in what is a circumstantial case against him, for him to make that forensic decision as to whether or not or not he goes into evidence, discovery was only completed a matter of a week or two ago, as I understand it, your Honour, and Mr Giles has made mention of a tender bundle. He can find himself facing a whole series of documents to be tendered against – Mr Giles will be inviting your
10 Honour to draw inferences and he will not have had an opportunity to consider whether or not, firstly whether or not the inferences arise, secondly, whether he responds to them and thirdly, if he does, what his response will be. He's not in a position - - -

15 HIS HONOUR: Well, if you say he's just going to ignore the orders of the court until different orders are made, that is, I require the applicants to serve every document they propose to tender in the trial, that's one thing. And this appears to be what you're saying. He's not going to - - -

20 MR HAYES: No, it isn't, your Honour.

HIS HONOUR: Well, when are you going to file your affidavit?

MR HAYES: Your Honour, I'm not saying he has chosen to ignore your Honour's
25 orders at all. It's a matter which has been sought to be agitated between the parties without troubling your Honour at this point, and we're here today, but it certainly – there was certainly correspondence between the parties endeavouring to sort it out between themselves, without needing to prevail upon your Honour to do so, and we're now at this point, your Honour. So - - -

30 HIS HONOUR: Well, Mr Hayes, I'm sure – please, just let me finish this, because whatever the attitude taken by other judges in relation to things, I don't expect an order which expired well over a month ago to be ignored and only being brought to my attention the next time one comes to court, because I made those orders and I
35 made them after hearing argument in a particular way, and what effectively is being told to me this morning is your client is not in a position to make a forensic decision as to whether it puts on affidavit material until he acquires further information from the applicant. Well, I should have been told that at the time the orders were made, and if what you're saying is that given the nature of the allegations made against him,
40 that you believe that the order should be changed to extend the time for you to do it until after the applicants have identified with precision what their documentary case is in chief, then that seems to me, the logical starting point.

MR HAYES: Well, two – three things arise from that, your Honour. Firstly, we
45 apologise that – and we certainly don't wish to convey any disrespect to your Honour for not having - - -

HIS HONOUR: No, no, no.

MR HAYES: - - - followed your Honour's order to the letter, but as I've addressed your Honour that that matter was sorted out between the parties. Secondly, your Honour, there's an additional matter where Mr Tesoriero has also been encumbered by – which is the purpose of this application – a lack of resources. He has been handicapped by a lack of resources to this point, your Honour. So it's - - -

HIS HONOUR: Well, I must say – I must say to you, Mr Hayes - - -

MR HAYES: - - - he's running on the smell of an oily rag legally, your Honour, if I – I'm sorry, your Honour, there's a bit of a delay.

HIS HONOUR: No, no, it's the delay. I don't mean to interrupt you and I'm sure you don't mean to interrupt me, it's just – it's just the inevitability of the remote hearing, Mr Hayes.

MR HAYES: Your Honour pleases.

HIS HONOUR: So I'm sorry, I didn't mean to speak across you. I must say – I must say, my preliminary view is that – and you can try to suggest to me why I shouldn't have this, but – this preliminary view, but he – as I understand it, thus far in relation to these proceedings, Mr Tesoriero, including when one has regard to the fees that he incurred with his previous solicitors, has expended in relation to these proceedings – well, from at least the time that he was served until 10 April, an amount of \$780,000.

MR HAYES: No, your Honour. In paragraph 34 – sorry, including the sum of Fortis - - -

HIS HONOUR: Yes.

MR HAYES: - - - is that what your Honour was – yes. Well, look, the sum of Fortis is well in dispute, your Honour, and that's the subject of a matter on taxation at the moment. But – so it may be less than that. But certainly, with his current representation, it's just over half a million dollars for seven months' work. And I should – this is complex litigation in a superior court, and relative – it's a relatively modest amount, if I might respectfully suggest to our Honour, compared to what the applicant and the first respondent have no doubt been spending in fees up until this period in time. So while I have to persuade your Honour at trial that it's really – his defence is relatively simple, and we can drill it down to the very essence as to his question of knowledge, it would be foolish to ignore everything else on the periphery from which Mr Giles will no doubt be inviting your Honour to draw inferences from everything left, right and centre, which is no doubt the way in which the applicants are bringing their case.

And nowhere is that more apparent in the document I was about to before, and your Honour doesn't need to read it in detail, but your Honour will see the letter from Minter Ellison to Madgwicks dated 31 January 2021 at page 467 to 491 of the court book.

5

HIS HONOUR: Just let me grab that, Mr Hayes.

MR HAYES: Certainly, your Honour. This was a document, your Honour, in response to a request for further and better particulars of the second amended – second further amended statement of claim. And your Honour doesn't need to go into this document in detail, but just a cursory review of this document will show your Honour - - -

10

HIS HONOUR: Sorry, I think we may be at cross purposes. Page 491 of the court book I've got is just a - - -

15

MR HAYES: That's the last page, your Honour. Page 467 is the first page.

HIS HONOUR: I see.

20

MR HAYES: And 491 is the last one.

HIS HONOUR: Yes, yes. I've got that, yes.

MR HAYES: And just a cursory review of that, your Honour, will – it just brings to the fore numerous facts, documents and the like from which – what is essentially a circumstantial case against Mr Tesoriero, your Honour. They're all matters which no doubt need to be carefully – especially of a circumstantial case as to what the documents are, what they mean, what each document – flows from each particular document, looking at them together – what do they mean when – the combined effect of a series of documents, or how it is the case is to be put. So it's – while we say it's a weak case, your Honour, and I hope to persuade your Honour that ultimately we get to the point that it's a relatively simple defence, he just had no knowledge. And that hasn't been established on the documents. A lot – one needs to wade through a lot of material to push to one side, to dismiss that material to get to that very simple point. So that's what Mr Tesoriero is up against, and we say the point is – sorry, your Honour.

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HIS HONOUR: No, I think that was some interference from somewhere, Mr Hayes.

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MR HAYES: Thank you, your Honour. And so we say that the burden upon Mr Tesoriero is to push to one side a very large amount of evidentiary material which we say amounts to very little. And – if anything at all. And to be able to make the submission that there is still no case on the question of knowledge, and central to the case is really what he knew about the scheme and in particular the 137 transactions requires me to address everything that the applicant has thrown at Mr Tesoriero in terms of discrete factual allegation and, ultimately, documents. And that's the case

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against him. And we say, at the moment, it doesn't amount to anything, but it doesn't in any way alleviate the burden on his defence having to deal with all of that material and push it to one side, which is central to the submission, your Honour, that it effectively means nothing.

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So when your Honour looks at that in the context of the case that he has to respond to, your Honour, there will be – it's – there's a fair bit of work involved. And that's – your Honour can see that certainly in the seven months, spending a little over half a million dollars, and Mr Nasimi refers to it, I don't need to take your Honour to the specific passages, but there is an awful lot of correspondence going back and forward between the liquidator and Westpac and the parties in this matter, your Honour. There is a lot going on behind the scenes, and Mr Nasimi has actually sworn up to that in his affidavit. There is the fact that this interlocutory application, regrettable as it is that it has to be made, one would have thought that – or one could be forgiven for thinking the parties should have been able to sort this out between themselves. And, your Honour, if you look at the way in which the – certainly the nature of the proceeding, the scale of the proceeding, and the manner in which the litigation is being conducted, the amount of just over half a million dollars on the part of Mr Tesoriero relative to the resources that are being thrown at this matter by Westpac represented by Minter Ellison, and also the liquidators represented by Allens, your Honour, is – it looks very modest indeed, I should have thought.

So if – in terms of the – if your Honour goes back to Mr Tesoriero's affidavit, and I imagine that your Honour was referring to paragraph 34 of that affidavit, which is at 498 of the court book, we say that relative to the resources put to this case by our opponents, your Honour, it's a modest amount. And this picks up, your Honour, on what's referred to in the third respondent's submissions, and in particular the quality of arms point, your Honour, which is developed in paragraph 12 and 13 of our submissions. And subject to ensuring the trial runs fairly, your Honour, while your Honour is quite right to expect the resources allocated to Mr Tesoriero's defence be carefully managed and prudently managed, there can be certainly no suggestion that they're being extravagantly managed or anything of that nature, your Honour. The whole point about balancing those interests between – with the careful and anxious examination that the authorities require between what is alleged to be a proprietary claim and the very essence of that proprietary claim is hotly in dispute. That's what the case is about.

The applicant is a long way from establishing a prima facie – or certainly an entitlement to that money. That's a matter for adjudication before your Honour. They've certainly brought up a prima facie entitlement to it but that entitlement is very much in the balance because Mr Tesoriero is hotly in dispute about it and he goes, "The pleadings make that very clear where he puts that in issue in his defence." So, your Honour, in terms of the equality of arm's principle, he has to be afforded at least a reasonable opportunity to present his case in a manner that doesn't place him in a position of disadvantage compared to Westpac or the liquidators. Now, this is not suggesting that he's after a free for all and wants to stack a team with being able to run the case extravagantly. Far from it.

But to meet the sort of case - and if your Honour can gain a deeper appreciation from the way in which there has been a request for particulars and also the way in which Mr Nasimi refers to it, the way in which the case is being run, almost daily there's correspondence going back and forth between the parties. He's at a grave
5 disadvantage unless he can properly fund that that defence and at least have – he's not asking for the exact same resources as Allens or Minters are. I think that Mr Nasimi, in one of his earlier affidavits, indicated that there were nine fee earners at one stage working on the Westpac brief for the solicitors for Westpac but no doubt a few solicitors and two or three counsel in responding to these contentions and the
10 case against him, which are serious matters, is by no means extravagant. Indeed, it's necessary and what's necessary in this instance is what we say is reasonable in terms of equality of arm's, your Honour.

HIS HONOUR: Well, can I just work out where we're up to so I can form a view
15 about what is necessary in order to ensure this equality of arm's which, as you correctly point out, is a very important aspect of this application. How far aware are you from completing the material in order to comply with order 7 that was made by the court on - - -

20 MR HAYES: In was in March, your Honour.

HIS HONOUR: - - - 10 March.

MR HAYES: On 10 March, I think.
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HIS HONOUR: 10 March. So how far aware are you from that?

MR HAYES: Yes, your Honour. I expect to be able to – if within a week the
30 applicants could indicate what their documents are that they propose to tender at trial, I should have thought within two to three weeks of the applicant's – or if the applicants could indicate maybe by the middle of July, he should be able to do so by no later than the first week of August as to whether or not he goes into evidence.

HIS HONOUR: Well, can I – there's no difficulty, as I understand or no subsisting
35 difficulty with the particulars that have been provided of the claim.

MR HAYES: No.

HIS HONOUR: So you have a particularised claim. One of the features of the
40 orders made on 10 March is reflected in order 9 and that is I don't want the applicants to tender documents unless a matter is bona fide in dispute. What I asked them to do by 15 July, that is a fortnight from today, was to serve a summary for the purposes of section 52 of any documentary evidence to be relied upon by the hearing. That is, I wanted them to go through the bank statements they rely upon and have a
45 summary what the bank statements say. I want them to go through the other transactional documents and have a summary of what the transactions say. I don't

want those documents to be tendered into evidence. It's completely contrary to the overarching purpose.

MR HAYES: Yes, your Honour.

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HIS HONOUR: And that's the regime I wanted to put in place. And in respect of a properly joined defence, which has been properly particularised, I don't understand why you need – if what you say to me is that you can't – and I understand the seriousness of the allegations made and you're highly experienced counsel so if you say to me – and you know a lot more about the case than I do. If what you're saying to me now, and I hadn't appreciated this when I made the orders on 10 March, is that you're not going to make a forensic decision about whether or not you call your client until Westpac close their case, then we will proceed on that basis but that's not what I understood your position was to be. I didn't think there was an opposition to you filing affidavit material along the lines of the timetable that I set out.

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MR HAYES: That's fair, your Honour, and I will take full responsibility for that but that's my position now. Yes.

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HIS HONOUR: Well, then why wouldn't we proceed on the basis that you don't file an affidavit now. You wait till the conclusion of Westpac's case and if you wish to call your client, you can call him orally.

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MR HAYES: I'm attracted to that position, your Honour, but I would like to get some instructions on that and – but I'm attracted to that proposition.

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HIS HONOUR: And you will save an enormous amount of money that way, it seems, because if all you were going to do was effectively take a passive – I'm not being critical. It's a perfectly legitimate way given a fraud case. If what you're going to do is effectively say, well, you may decide this is a weak case. You don't propose to go into evidence at the close of Westpac's case and I express no view one way or the other and one of the dangers on these applications is judges expressing views on the strength of otherwise of prima facie cases and it's one of the reasons why I think the course adopted to standing over that summary charge decision until the trial was a sound one from a case management point of view in a case of this type.

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If you want to run the case that way, it seems to me you're perfectly entitled to do so but, really, I don't understand, in those circumstances, why there would be a need for – I don't know why there would be a need for an expert, which is \$370,000 the estimate. If there is – what's the expert evidence going to go to?

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MR HAYES: Your Honour, it was essentially as to the money that was to – effectively a reconstruction of his accounts as to the money he invested into the business but it's - - -

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HIS HONOUR: But that's not – I don't think it's in dispute about what money that Mr Tesoriero provided to what I will describe generally as the Papas interest.

5 MR HAYES: Your Honour, I hear exactly what your Honour is saying about the expert. I'm not going to agitate that in front of your Honour for now.

HIS HONOUR: All right.

10 MR HAYES: If your Honour – that can be put to one side for the moment.

HIS HONOUR: So it seems we can draw a line through that 370,000 then and we can draw a line through a significant part of the lay evidence - - -

15 MR HAYES: Well, I'm not abandoning it, your Honour, at this point but I'm not asking for it now. And it's possible I might not ask for it at all.

20 HIS HONOUR: Well, I can tell you though I don't want there to be any misunderstanding. You're not putting on expert evidence unless I give leave because I don't understand why it's consistent with the overarching purpose to put on expert evidence.

MR HAYES: That's right.

25 HIS HONOUR: If there are any genuine opinion evidence questions that arise in the case and at the present I don't see them, then I would expect that probably to be something that I would refer out not to have contested expert evidence.

MR HAYES: Yes.

30 HIS HONOUR: Now, I don't think - - -

MR HAYES: Well, we don't ask for it now, your Honour.

35 HIS HONOUR: To be perfectly frank, I don't see your trial preparation is excessive. I don't see the trial estimate as excessive and it seems to me that I have little visibility on what has been done for the 546 and how that relates to the so-called discovery and reply work but at present it seems to me that – and these are just tentative views without hearing from Mr Giles, that I would have thought that the amount conceded to by Westpac is a little on the shy side and the amount that you
40 seek is a little on the excessive side and I think – I would have thought, on those figures, an amount of around 1.25 for the past work to your firm. I'm leaving to one side, at the moment, the – to your instructing solicitor's firm. I'm leaving to one side now the Fortis Law material together with an amount to – for the trial would be something which would be fair in all the circumstances.

45 MR HAYES: Something at 1.25 to – in that ballpark, your Honour. Yes. Maybe that would be getting close to the amount I should think.

HIS HONOUR: Mr Giles.

MR HAYES: It might be the absolute bare minimum, your Honour, I hate to sound
5 like Oliver in the West End, I don't want to come back begging for any more, your
Honour.

HIS HONOUR: Then you might get the same reaction that Oliver got.

MR HAYES: That's why I'm asking for it now, your Honour.
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HIS HONOUR: It's a hard knock life. It is a hard knock life. In any event, yes.

MR HAYES: We would say, perhaps, and we're not suggesting at all that your
Honour is – we suggest that perhaps we would – perhaps maybe another hundred
15 thousand might be appropriate. 1.35 might be appropriate, in this instance.

HIS HONOUR: Mr Giles. I mean, for a case of this magnitude, it seems to me that
from starting at scratch, because it doesn't appear that there is a huge amount of – I'm
20 leaving aside the previous material, I'm just focusing on the people who had to run
this case and are running it through to a hearing. I would have thought for a case of
this length, with Senior Counsel involved, and given the scope of the case, that I
think anything less than that is a bit skinny.

MR GILES: 1.25, your Honour. I'm the last person who would stand up and
25 coherently argue to the contrary.

HIS HONOUR: Mr Giles, you probably spill more than that.

MR GILES: I don't want to quibble, but there's an anterior point, and I'm not
30 making the point that your Honour understood that we've got proprietary relief, that's
now said to be prima facie, and I know – could I ask your Honour to take up Ms
Murray's affidavit.

HIS HONOUR: Yes.
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MR GILES: Of yesterday. And most importantly, the exhibit to it. Would your
Honour go to page 1 of the exhibit.

HIS HONOUR: Yes.
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MR GILES: So this is a bank account with the ANZ. It is an account that was
actually previously disclosed. That's how we've lucked into it, if I might put it that
way.

45 HIS HONOUR: I see.

MR GILES: So it's misdescribed, as it happens, as described as being held by a different company, but the account number was disclosed by Mr Tesoriero in one of his earlier affidavits. One finds when one receives it, that it's an account for a company called 14 Kirwin Road, Morwell as trustee for the 14 Kirwin Road Morwell Unit Trust, a party to these proceedings. What one has, though, very curiously, is most of the rent, it looks like it's rent, being earned by Mr Tesoriero's companies, those still in his control, go into this account. Curious. It's not all of it, because there are two properties in Balaclava in - - -

10 HIS HONOUR: So this is a – sorry, hadn't looked at this affidavit.

MR GILES: No, I understand.

15 HIS HONOUR: So this is an affidavit – and this is material which has been disclosed recently on subpoena.

MR GILES: And when one says “disclosed”, yes, obtained on subpoena, but - - -

20 HIS HONOUR: Well, sorry - - -

MR GILES: We have sought - - -

25 HIS HONOUR: You're quite right. I didn't mean disclosed by Mr Tesoriero, but just so I understand, so 14 Kirwin Road Morwell Proprietary Limited as trustee for the 14 Kirwin Road Morwell Unit Trust, just remind me, 14 Unit Road Morwell is a company owned by what entity?

30 MR GILES: It's ultimately one that Mr Tesoriero has the ultimate interest in, if I – sorry. The company he has the ultimate interest in, I can't tell your Honour whether it's through other corporate entities, but I don't know - - -

HIS HONOUR: Well, anyway, 14 Kirwin Road Morwell is that a commercial premises, or a residential premises?

35 MR GILES: Tesoriero. It's a country petrol station.

40 HIS HONOUR: Country petrol station. And there appears to be quite considerable credits coming into this account from not only 14 Kirwin Road Morwell Proprietary Limited from other properties at Oakleigh, is that what I would - - -

MR HAYES: Yes.

45 HIS HONOUR: It says from Buxton Oakleigh, 14 Kirwin, or – but it has also got Oakleigh 4 Cowslip, which I presume is another property or Oakleigh 274 High Street, etcetera.

MR GILES: Each of those are properties owned by one of the defendant – one or other of the defendant companies.

HIS HONOUR: Associated with Mr Tesoriero?

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MR GILES: Associated with Mr Tesoriero.

HIS HONOUR: And this is an account, an ANZ account where credits have been paid, including over the last few months?

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MR GILES: Quite.

HIS HONOUR: And was this disclosed in the – this was not disclosed in the affidavit material?

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MR GILES: All one receives in the affidavit is volume 1, page 186, item 10, your Honour sees the point which I made a moment ago, item 10 is, in fact, the correct account number, but it's described as something called the 31 Hallinan Street Trust, which I might say, it's not.

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HIS HONOUR: So these – this was the document – is this the first freezing order affidavit?

MR GILES: Yes.

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HIS HONOUR: Or there was a subsequent disclosure of assets. There's two affidavits which disclose assets, and you both say they're materially deficient.

MR GILES: That's right. So what we did have, and there's a summary of this at page 151. 151 of the book, your Honour, is a summary document prepared by our solicitors, summarising the property then the third column, what Mr Tesoriero disclosed as the monthly interest expense, I will come back to that in a moment, because it's just not consistent with what I'm about to show your Honour. And then the monthly mental income. So what first of all, your Honour sees, is that the two properties, from their numbers, one would infer, because I'm in the world of inference, because I don't get told these things, infer that these are apartments in Carlile Street Balaklava, which is suburban Melbourne, I think, next to St Kilda.

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In this account, which I have opened before your Honour on page 1 of CMM 26, there's no money coming in from the Carlile Street Balaclava properties. What one can see, though, is for example, item 4 under petrol stations 2-4 Cowslip Street, this is back on page 151, said to be an income of \$20,000 now, perhaps a little bit oddly, that appears – yes, sorry, one now sees, back on page 1 at about point 5 on the page, an amount of slightly over \$23,000 coming in from the Cowslip property, and I can follow that through it. The estimates are - - -

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HIS HONOUR: So the bottom line is, it appears that through some sort of analysis of the materials, he has got rental income of 113,150 coming in with monthly expenses of 71,400 so he has access to a little over \$40,000, it appears, on those records?

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MR GILES: Well, subject to this, your Honour. We know how much was being received from the properties other than the Carlile ones in March, April and May this year, because that's what our subpoena called for, and your Honour sees that at the foot of page 1, page 2, page 3, and I don't know why – there's no explanation as to why the numbers bounce around, but they are between – on page 3 is a low point at 97-odd thousand dollars and the high point is \$117,000 on page 2. One sees that at the total of the end of the period at the bottom of the page in the credits column.

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HIS HONOUR: Yes.

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MR GILES: And we have the unknown about from Carlile – the two Carlile Street properties. What one then has on the debits column - - -

HIS HONOUR: Well, Mr Giles, I don't think – I've got a trial at 10.15 - - -

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MR GILES: I know.

HIS HONOUR: - - - but it seems to me that two things emerged from this morning. One is I've given my view about the fact that I do think, in all the circumstances, it's appropriate that Mr Tesoriero be in a position to fairly deal with the case and we've heard from Mr Giles as to why he says that the orders that I've made preparing the case now no longer affect the way he wants to run the case.

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MR GILES: Mr Hayes.

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HIS HONOUR: So they need to be varied. The – I've indicated what I think is a fair amount to run a trial of the nature which seems to me to be the type I'm talking about but I do think there needs to be some satisfactory explanation as to what the true position is and why the – it may be that I've missed something but it doesn't appear that, at least in the earlier affidavits, there has been a frank disclosure of what exactly the asset position is and what's happening on a monthly basis and I think it would be wrong for me to determine this application without there being some ability to get some further clarify from Mr Tesoriero about that point and for you to have the opportunity to cross-examine him if he wishes because that might be a discretionary factor which bears upon how much money be released in order to get to what – a figure that I regard as being fair.

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MR GILES: Quite. Just so that – I don't want – I'm not going to talk your Honour out of that, at least I don't intend to talk your Honour out of that because we think that that's right

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HIS HONOUR: Yes.

MR GILES: I mention one other thing so at least out learned friends know.

HIS HONOUR: Yes.

5 MR GILES: I mean, page 70 of the bundle.

HIS HONOUR: Yes.

10 MR GILES: So this is a Judo Bank statement. This is the - - -

HIS HONOUR: 70, sorry. This is in the affidavit of Ms Murray.

MR GILES: Ms Murray. Sorry.

15 HIS HONOUR: Sorry. I was looking at the court book. Yes.

MR GILES: Perhaps one should go back to page 69.

HIS HONOUR: Yes.

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MR GILES: This is the company that owns the house in Toorak that Mr Tesoriero is presently living in.

HIS HONOUR: Yes.

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MR GILES: Hawthorn, I'm told. I see. Page 69 one sees that there's a – this is a loan facility. It seems to be from the account type entry, right-hand column at about point 3 on the page. Business loan variable IO, which, again, I'm in a world of drawing inferences, interest only. One sees there, on that day – that month, that is

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HIS HONOUR: Yes.

35 MR GILES: \$2000 is not going to change anything but if one goes over to page 70, your Honour, what it appears to be - - -

HIS HONOUR: There's a couple of big whacking credits.

MR GILES: Quite.

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HIS HONOUR: Of \$66,000.

MR GILES: Quite.

45 HIS HONOUR: Yes.

MR GILES: And then if one goes over to page 72. Yes.

HIS HONOUR: I really don't need to see anything more, Mr Giles.

MR GILES: No.

5 HIS HONOUR: I need to – I don't need to see anything more other than to reach the conclusion I need to see a lot more.

MR GILES: Yes. Yes.

10 HIS HONOUR: If you understand what I mean.

MR GILES: I understand your Honour's point.

15 HIS HONOUR: Mr Hayes, some of this or – I presume this is that – this material on subpoena may have been material that you haven't had the opportunity of looking at before.

20 MR HAYES: No. We haven't and it's not explained in the affidavit of Ms Murray so this is all news to us and while we accept our learned friends, in the world of inference, we certainly – it would seem as though it might be slipping into speculation. Obviously, it one goes back to pages 1 and 2, what my learned friend was doing was comparing to a schedule.

25 HIS HONOUR: I don't – sorry, I don't want to get into a debate about it at the moment, Mr Hayes, because I am satisfied on the basis of the differences between the affidavits filed today that there has been – there's the July affidavit and the September affidavit and it's clear that there are material inconsistencies between those affidavits in any event but it appears even now the September affidavit may need to be, I will use a neutral word, revisited.

30 MR HAYES: Well, two things - - -

HIS HONOUR: Sorry.

35 MR HAYES: Sorry, your Honour. I didn't – sorry, your Honour.

40 HIS HONOUR: That's all right. What I was going to suggest is I want – if I'm going to make an order releasing legal funds, I want complete transparency and an understanding of precisely what the asset position of Mr Tesoriero is as of today because the – those statements raise questions which I think you should have the opportunity of answering. The course I propose to – I've indicated my preliminary view concerning that amount – the amount. An additional amount should be released in order to allow you to prepare and appear at trial. I also – it's going to be necessary to amend the orders that I've made to reflect the way you now want to run the trial.

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MR HAYES: And I should say, your Honour, in respect of those orders it was only apparent after – on 10 March when your Honour made – when we had an opportunity reflect on the strikeout matter being - - -

5 HIS HONOUR: Yes. I'm not being critical in the least, Mr Hayes. The - - -

MR HAYES: We could have and should have raised it earlier with your Honour.

10 HIS HONOUR: Yes. The forensic decisions called for in a case such as this are not necessarily easy.

MR GILES: As your Honour's doing that, might - - -

15 MR HAYES: But the two things – but, your Honour, it might be timely for an update by Mr Tesoriero because my learned friend was comparing monthly rental from 12 months ago so it's not necessarily a given and there's not a vast difference between the figures if one compares page 151 of the court book to pages 1 and 2 of the court book.

20 HIS HONOUR: I think you should – I won't hold you to anything you say at the moment but I think you should take some instructions about this very carefully because there – the discrepancies in those two affidavits at the moment are a concern to me and I must say the documents annexed to Ms Murray's affidavit of 30 June highlight concerns I already have about whether or not there has been a full and frank
25 disclosure of assets and continuing access to funds.

MR HAYES: If your Honour pleases.

30 HIS HONOUR: Now, I may be – it may be that those concerns can be allayed easily if I had more information from your side and it may be that Mr Giles wishes to explore any further explanation. In which case – but I don't think we can afford to rush this and I've got a hearing that has already been delayed for 15 minutes. Are you – when are you back from the United Kingdom?

35 MR HAYES: I'm in chambers on 18 July, your Honour.

HIS HONOUR: Well, it probably can't wait till then. I think - - -

40 MR HAYES: And I'm no longer in the United Kingdom as of this weekend.

HIS HONOUR: I see. Is it - - -

MR HAYES: I will be back in chambers in a fortnight, your Honour.

45 HIS HONOUR: Well, I think I should stand this over till 19 July if that's convenient for you, Mr Giles and Mr Hayes.

MR HAYES: Yes, your Honour.

MR GILES: I wonder if we might have an afternoon – I have something which I think has got a high prospect of going away before O’Sullivan J at 10.45 for the rest
5 of that morning but – and this is – I mean, this is important.

HIS HONOUR: It is important.

MR GILES: I’m not sure whether in the afternoon or a 9.30 start - - -
10

HIS HONOUR: I think it has to be a day.

MR GILES: Yes.

15 HIS HONOUR: Particularly if there’s going to be cross-examination. We can’t rush this.

MR GILES: No. I mean, in fairness, it’s a security for costs application. It’s hardly
20 terribly important but - - -

HIS HONOUR: Well, I think your junior can do the other one.

MR GILES: If I had one. Yes. We will work that one out.

25 HIS HONOUR: Accepting a brief unless you have a junior.

MR GILES: It’s just - - -

30 HIS HONOUR: But – so the – so I will set it down and we will commence at 9.30 am on 19 July. I think at that stage I’m going to make any further orders I need to make to ready this matter up for hearing on – that order for you to file – I’m going to vacate order 7 and 8 that I made on 10 March insofar as they relate to Mr Tesoriero.

35 MR GILES: While we’re doing that, your Honour, might I ask your Honour when we can expect to get Mr Tesoriero’s discovery.

HIS HONOUR: There has been no discovery yet.

40 MR GILES: No.

HIS HONOUR: When are you going to give discovery, Mr Hayes?

45 MR HAYES: It should have been done by now, your Honour, but we’re hopeful it can be done very soon.

HIS HONOUR: Well, I expect it – I’m not going to extend time for that. You’re in default and I’m not going to grant any application to Mr Tesoriero unless extant defaults are remedied so you better get it on quick sticks because every day is - - -

5 MR HAYES: Would your Honour be – sorry, your Honour.

HIS HONOUR: No. I won’t extend the time. You’re just going to have to get it done. So – but I will vacate the order you’re to file your affidavit material.

10 MR HAYES: Thank you, your Honour.

HIS HONOUR: The – by the 19th – on 15 July Westpac will serve their summary and I would expect that you would be able to be in a position on 19 July to indicate your attitude towards that, Mr Hayes.

15 MR HAYES: Yes, your Honour.

HIS HONOUR: And – all right. Well, they’re the - - -

20 MR HAYES: Just briefly before your Honour rises, would your Honour be prepared to release at least some of the money. Westpac consented, I think it was to \$670,000.

HIS HONOUR: No. No. I’m not releasing – as a matter of discretion I’m not releasing any money to people who are in subsisting default of my orders, as a matter of discretion.

25 MR HAYES: As your Honour pleases.

HIS HONOUR: And we will come back. And if you could notify whether you require Mr Tesoriero for cross-examination and Mr Tesoriero – any affidavit as to assets. Updated affidavit material by Mr Tesoriero as to his current asset and liability position should be filed by no later than – I think no later than 11 July and I will make any subpoenas returnable that might emerge from that. They can be – I will give you leave in chambers to have subpoenas returnable on 15 July at 9.30.

35 MR GILES: May it please, your Honour. Assets and liabilities, given the debate, includes statement – income and expenditures.

HIS HONOUR: Yes. Yes.

40 MR GILES: Of course.

HIS HONOUR: Assets and liability including his current income position. Income and expense position. Yes.

45 MR GILES: And reserve the costs of today.

HIS HONOUR: I reserve the costs of today.

MS BEECHEY: I will be just 15 seconds. I'm here because - - -

5 MR HAYES: Your Honour pleases.

MS BEECHEY: I'm here because SMBC has – is suing some of the companies. It does not sue Mr Tesoriero and we have an interest particularly in the Margaret property – Margaret Street property and we may seek just to be heard in relation to
10 that. I raise that now because Mr Tesoriero may wish to keep that in mind when preparing his affidavit material of the companies, from our perspective, from the different position to Mr Tesoriero as an individual.

HIS HONOUR: Well, yes, but the affidavit material should be dealing with any
15 entity or entities in respect to which Mr Tesoriero has any type of interest, including an object of a discretionary trust.

MS BEECHEY: Up to this point, there has been a merging of information regarding
- - -
20

HIS HONOUR: I understand that but it's important it be merged for the purposes of me getting a true position of his assets and liabilities position but I understand the different point that you're making. All right. Could your solicitors send up a copy of a minute of order which reflects that and I will make those orders in chambers and
25 I will now adjourn to – and I will come back on presently.

MATTER ADJOURNED at 10.34 am INDEFINITELY



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Email: candy.nelson@madgwicks.com.au

TRANSCRIPT OF PROCEEDINGS

O/N H-1753354

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

LEE J

No. NSD 616 of 2021

No. NSD 642 of 2021

No. NSD 681 of 2021

No. NSD 747 of 2021

WESTPAC BANKING CORPORATION and OTHERS

and

FORUM FINANCE PTY LIMITED (IN LIQUIDATION) AND OTHERS

SMBC LEASING AND FINANCE, INC

and

**FORUM ENVIRO (AUST) PTY LTD (VOLUNTARY ADMINISTRATORS
APPOINTED) and OTHERS**

**IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED
(ADMINISTRATORS APPOINTED) and OTHERS**

SYDNEY

9.32 AM, TUESDAY, 19 JULY 2022

MR J.C. GILES SC appears with MS C.A. HAMILTON-JEWELL for Westpac

MS E.L. BEECHEY appears for SMBC Leasing and Finance

MR R.K. JAMESON appears for the liquidators and receivers

MR P. HAYES QC appears with DR P. TURNER for Mr Tesoriero

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5 MR J. GILES SC: May it please your Honour, I appear with my learned friend MS HAMILTON-JEWELL for the Westpac parties.

HIS HONOUR: Yes.

10 MS E.L. BEECHEY: May it please the court, Beechey, B-e-e-c-h-e-y. I appear for SMBC Leasing and Finance.

HIS HONOUR: Yes.

15 MR R.K. JAMESON: May it please the court, Jameson. I appear for the liquidators and receivers and companies in liquidation.

HIS HONOUR: Yes, thank you.

20 MR P. HAYES: May it please your Honour, I appear with DR TURNER for the third respondent.

HIS HONOUR: Are you still overseas, Mr Hayes?

25 MR HAYES: No, no. I'm back in chambers, your Honour. I'm back in Melbourne.

HIS HONOUR: Then why aren't you here?

MR HAYES: We understood - - -

30 HIS HONOUR: I hadn't appreciated – I thought one of the reasons we're having it today was you could be back and appear in court.

MR HAYES: Yes.

35 HIS HONOUR: Appear in court.

MR HAYES: I understood it was online, your Honour. That was my understanding.

40 HIS HONOUR: No, no. I don't have hearings online unless there's a – a substantial hearing online unless there's some good reason for it, so in respect of the balance of the appearances in this case, if you could appear in person, I would be grateful.

45 MR HAYES: If your Honour pleases. I'm terribly sorry, your Honour. It was our - - -

HIS HONOUR: No, no. There was obviously a misunderstanding, Mr Hayes.

MR HAYES: short matter this morning, your Honour, and we will - - -

5 HIS HONOUR: Is it? Sorry. Mr Giles - - -

MR GILES: Shaking his head.

10 HIS HONOUR: - - - shaking his head saying it's not going to be short. In any event, perhaps, I will hear from Mr Giles first, and we will see where we go from there.

MR HAYES: If your Honour pleases.

15 HIS HONOUR: Mr Giles.

MR GILES: Could I deal with an administrative matter, your Honour, so that you've got the paper. Could I hand up a folder of the material that came in late, and the - - -

20

HIS HONOUR: This is material from – that has come in since the last occasion, is it?

25 MR GILES: Yes. So your Honour will see that behind tab 1 – I will read it for the benefit of our learned friend. Behind tab 1 is Mr Tesoriero's affidavit with exhibit VTF6 of 12 July, served sort of in accordance with your Honour's directions, sort of because it was late. Behind tab 2 is Mr Tesoriero's affidavit of 18 July, which is also accurately described as being last night. Then behind tab 3 is an affidavit of Mr Nasimi together with exhibit SM6 also accurately described as being of last night.
30 Behind tab 4 is our learned friend Mr Hayes's written submissions. Behind tab 5 are some written submissions from our learned friend Ms Beechey, and behind tab 6 is an affidavit of Mr Prestwich, which doesn't affect Mr Tesoriero, at least, in any direct way, but it's just something that should be dealt with so a third party that requires it. So that's the additional material, your Honour, subject to one matter,
35 which I will come to in a moment. If Mr Tesoriero's affidavits are to be read, as one imagines they will be, we've notified that we required him for cross-examination, and your Honour, I thought, had made pellucidly clear that if there was to be cross-examination, he was to be here.

40 HIS HONOUR: Yes. All right.

MR GILES: And I've got some paper that I wanted to put to him.

45 HIS HONOUR: Yes. What's the position, Mr Hayes? Do you rely on this additional material?

MR HAYES: I'm sorry, your Honour?

HIS HONOUR: Do you rely on this additional material?

MR HAYES: Yes, we do. It's referred to in paragraph 4 of our supplementary submissions.

5

HIS HONOUR: Right.

MR HAYES: And Mr Tesoriero is available for cross-examination online, your Honour. As we - - -

10

HIS HONOUR: I'm not having cross-examination online. I'm going to stand the matter down, and you and your client can appear in court. When can you do that?

MR HAYES: I'm available this week, your Honour, and I imagine Mr Tesoriero is similarly available. I arrived back in chambers yesterday, and I'm available all this week.

15

HIS HONOUR: Right.

MR HAYES: We can head up there - - -

20

HIS HONOUR: Is Mr Tesoriero in Sydney?

MR HAYES: No. He's in Melbourne, your Honour.

25

HIS HONOUR: So what do I do, Mr Giles? Just see whether I can – how are you placed tomorrow?

MR GILES: I can move things and do tomorrow.

30

HIS HONOUR: Yes. Unfortunately, I have a funeral I need to go to in the afternoon from 2.30 to 4.30, but I will - - -

MR GILES: I will cut my cloth.

35

HIS HONOUR: We will start early, and we will come back after that.

MR GILES: I will cut my cloth as well.

HIS HONOUR: No, no. You don't need to. No doubt, I'm not having you inconvenienced or your cross-examination truncated because people presumed that things would occur in a different way. Is there any reason why Mr Tesoriero couldn't be here at half past 2 his afternoon?

40

MR HAYES: I will take some instructions, your Honour. I can, certainly, endeavour to get up there this afternoon as well. If your Honour stands the matter

45

down, I can get those – and I will ask for those instructions if it’s possible, your Honour. If we can get a flight, we will be there.

5 HIS HONOUR: All right. Well, I do think it’s important that cross-examination occur in person for a host of reasons, and my intention today was to have a hearing in person but, particularly, in circumstances where I noted, at page 25 of the transcript, that I thought there would be cross-examination, and it would occur in person. All right. Well, I’m going to stand the matter down to 2.30.

10 MR GILES: I wonder – your Honour, some documents have been produced on a notice to produce, as I understand it. They’re in the registry. I don’t know whether I need an access order to it, but to the - - -

15 HIS HONOUR: Yes, you will.

MR GILES: Yes.

HIS HONOUR: So who is the notice to produce directed to?

20 MR GILES: To Mr Vince Tesoriero and Mr Giovanni Tesoriero.

HIS HONOUR: And those documents have been produced to the registry.

25 MR GILES: Something has been produced. I don’t know what.

HIS HONOUR: Well, yes, you can have access to those documents in the registry. If there’s some difficulty when you got down to the registry in getting them, they can contact my associate, and they will - - -

30 MR GILES: May it please.

HIS HONOUR: - - - facilitate access to them. You can also access which – and bring them back in court at 2.30 this afternoon.

35 MR GILES: May it please.

HIS HONOUR: Is there anything that – is there anything not involving Mr Tesoriero so Mr Hayes and Tesoriero can make the necessary arrangements?

40 MR JAMESON: Your Honour, the issue of the Palante freezing order doesn’t involve Mr Tesoriero, and I wonder - - -

HIS HONOUR: All right. Well, you’re excused, Mr Hayes - - -

45 MR HAYES: Thank you, your Honour.

HIS HONOUR: - - - and that matter is stood down to 2.30, and I will deal with this other matter now.

5 MR HAYES: And, your Honour, our most profound apologies for the misunderstanding.

HIS HONOUR: That's all right, Mr Hayes. These things happen, but I – these things happen, and we will sort it out at 2.30.

10 MR HAYES: And it's a different world up there, your Honour. We've been hearing things online here in Victoria at the moment, or most things are, so we just - - -

15 HIS HONOUR: Right. I see. Yes.

MR HAYES: We just - - -

HIS HONOUR: Well, that's all right, Mr Hayes. If you get here at 2.30, we will have time between this afternoon and tomorrow to deal with it.

20 MR JAMESON: Your Honour, my instructing solicitor sent - - -

MR HAYES: your Honour.

25 MR JAMESON: - - - some short minutes of order to your Honour's associate – I have a copy for your Honour – on about 6 July.

HIS HONOUR: Yes. No. I've got a copy of that.

30 MR JAMESON: They're consented to by Westpac, the applicant, for a freezing order in respect of Palante Proprietary Limited in liquidation, which is a company wholly owned by Mr Bill papas. The reason for seeking a variation is to allow the liquidators to realise some shares that are held to Palante's benefit in an account called a Macrovue trading account and to reallocate some cash in an account to be
35 held by the liquidators. That's consented to by Westpac, and this order simply seeks to vary the freezing order against Palante to deal with it.

HIS HONOUR: All right. Yes. Well, I'm happy to make orders in accordance with that consent short minutes of order. Is there any – you haven't provided any further
40 supplementary submissions, I see.

MR GILES: No, I haven't, just a - - -

45 HIS HONOUR: Right. Okay. Do you intend to, or - - -

MR GILES: No. It's just a question of fact, your Honour, which - - -

HIS HONOUR: Just a question of fact. All right. That's fine. All right. Well, I will stand the matter down to 2.30.

MR GILES: May it please.

5

ADJOURNED

[9.42 am]

10 **RESUMED**

[2.57 pm]

15 HIS HONOUR: Yes. Can I just ask my associate to hand to the parties a copy of a list which identifies what we think is the material that's currently before the court on the application, the evidentiary material. So I think the first step is for – you've got no further evidence, I take it? Yes. All right – well, for you, then, to read the additional material upon which you rely, Mr Hayes.

20 MR HAYES: Thank you, your Honour. The further material I read is the affidavit of Vince Tesoriero sworn 18 July 2022 and the further affidavit of Mr Sas Nasimi sworn on 18 July 2022. Your Honour, those affidavit are in addition to the affidavits relied upon and referred to in paragraph 4 of the respondent's submissions.

25 HIS HONOUR: In relation to the affidavit of 12 July, is there any objection, Mr – any objection?

MR GILES: No, your Honour.

30 HIS HONOUR: No objection.

MR HAYES: We - - -

35 HIS HONOUR: All right. Well, I don't think the affidavit of – do you read this one, 12 July, did you say?

MR HAYES: We do, your Honour, yes.

40 HIS HONOUR: Yes. The affidavit of Vincenzo Frank Tesoriero sworn 12 July 2022 is read without objection, and exhibit VFT6, being a bundle annexed to that affidavit, will also go into evidence with that exhibit marking.

**EXHIBIT #VFT6 BUNDLE ANNEXED TO AFFIDAVIT OF VINCENZO
FRANK TESORIERO DATED 12/07/2022**

45

HIS HONOUR: And the affidavit of the same deponent sworn 18 July 2022 is also read without objection.

5 MR GILES: Seeing his affidavit, your Honour, I do object to. It came in last night. It's not what your Honour directed, and - - -

HIS HONOUR: This is the sixth affidavit of Mr Nasimi.

10 MR GILES: Yes.

HIS HONOUR: Yes. Just let me have a look at that. Well, it's only directed to the topic referred to in paragraph 5, Mr Giles. If it's received on that basis, is there any problem with it?

15 MR GILES: If it's received on that limited basis - - -

HIS HONOUR: Yes.

20 MR GILES: Although, could I say, I would invite – and it can be done from the bar table – a clarification on instructions as to how paragraphs 9 and 10 are to be read together. The tense of it has left me, to say the least, confused as to whether what is being said is that discovery has now been – “Discovery was a difficult task and has now been given,” or what has been said is, “We've given some discovery, and there's more to come.”

25 MR HAYES: We will clarify that, your Honour.

HIS HONOUR: Yes, Mr Hayes.

30 MR HAYES: On the material available to date, I'm informed that the discovery has been completed, but, of course, it's an ongoing obligation, your Honour, and if matters come to the fall that should be discovered, they will be discovered.

35 HIS HONOUR: Has an affidavit of discovery been sworn?

MR HAYES: It has, 14 July, your Honour, I'm instructed.

40 HIS HONOUR: Yes. All right. All right. Well, the affidavit of S-a-r-w-a-r Nasimi, N-a-s-i-m-i, sworn 18 July 2022 is read, and I will make a limitation pursuant to section 136 of the Evidence Act that the representations contained in that affidavit are restricted to an explanation for the delays referenced by Westpac appearing on 1 July 2022.

45 MR JAMESON: Your Honour traverse your Honour's ruling. I just receivers and liquidators there were some affidavit to the conduct of the receivership and the correspondence in connection with the receivership and liquidation. I just simply wish to make that liquidators and receivers dispute

some of the matters in this affidavit I just wish to make that claim
circumstances yesterday evening opportunity to respond to it fully.

HIS HONOUR: For example?

5

MR JAMESON: For example, your Honour, paragraph 16 through 18, the position
of the liquidators nature of those communications I just didn't want to go
..... your Honour.

10 HIS HONOUR: Well, if you want to cross-examine the deponent, you can.
Otherwise, the material is there. It's limited in its scope, so I will just allow you to
make whatever decision you wish to make about it. All right. Should we proceed,
then, with Mr Tesoriero?

15 MR HAYES: Yes, your Honour. I've just had the opportunity to see your Honour's
precis of the material before the court. Mr Tesoriero's later affidavits to refer to
earlier affidavits, and we do say, in paragraph 4, that we rely upon them, of our final
submissions. Has your Honour read the third respondent's outline of submissions in
this matter?

20

HIS HONOUR: I have, and it's one of the reasons – because I was surprised to see
that there because they weren't read on the last occasion.

MR HAYES: No, no. But - - -

25

HIS HONOUR: So they're not in evidence.

MR HAYES: Well, but they are read now because - - -

30 HIS HONOUR: Well, the evidence is - - -

MR HAYES: Well, to this extent, your Honour, it arose on the previous occasion.
There was a complaint about disclosure. They didn't need to be read on the previous
occasion. To the extent, now, that the later affidavits deal with the latest complaint
35 about disclosure, they need to refer back to the earlier disclosure affidavits to have
meaning.

HIS HONOUR: Well, you say there has been complete disclosure now.

40 MR HAYES: We say yes.

HIS HONOUR: Yes. That - - -

MR HAYES: As best as Mr Tesoriero's ability in terms of the difficulties he has
45 had in gaining access to documents, and the circumstances which have been
addressed in his later affidavits set out - - -

HIS HONOUR: Sure.

MR HAYES: But, yes, we say there has been.

5 HIS HONOUR: And I'm – the fact was, previously, the subject of challenge. I'm
not sure whether it will continue to be the subject of challenge. No doubt, that will
emerge during the process of the cross-examination. What I think I will do is I will
defer the issue of whether or not you wish to, for example, make reference to those
10 additional affidavits in the process of re-examination, but I think, in circumstances
where I did give you – my recollection was that the evidence closed, and I made a
direction for you to put on - - -

MR HAYES: Further material.

15 HIS HONOUR: - - - additional material. That wasn't leave to, as it were, reopen
your case unless there is material in those affidavits which would properly go in in
re-examination, but, perhaps, let me deal with – I don't want to create a tempest in a
teacup.

20 MR HAYES: No. And we don't wish to - - -

HIS HONOUR: If there's – is there a particular unfairness associated with receiving
that material which you've had for some time, Mr - - -

25 MR GILES: I thought was being asked a question.

HIS HONOUR: I was just going to ask if there's a particular unfairness in receiving
it.

30 MR GILES: Only 8 November because that's the affidavit that has, sort of, floated
before your Honour a couple of times and then not been read because that's the one
which, it may be said, has reference to the substantive possible defence in it. Now, it
wasn't read on the – consciously not read when I took objection to it on the last
occasion. Now, Mr Hayes says to me he's not reading it today, so if 8 November is
35 not being – 8 November '21 - - -

HIS HONOUR: All right. Well, the other - - -

40 MR GILES: - - - is not being read, I, otherwise, don't mind.

HIS HONOUR: So you're better – all right. 8 November is not read, but in respect
of those other affidavits, if you could just identify them for the transcript - - -

45 MR HAYES: Certainly, your Honour.

HIS HONOUR: - - - and I will take those as being read.

MR HAYES: It's 21 July 2021.

HIS HONOUR: Yes.

5 MR HAYES: 3 September 2021; 19 October 2021; and then 17 June, which was
read on the previous occasion, 2022; and then 12 July and 18 July, which I've also
read today; Mr Nasimi's affidavit of 9 November 2021 at paragraphs 13 to 21; his
affidavit of 8 February 2022; and then the affidavit that has been read today, your
Honour, of 18 July.

10 HIS HONOUR: So does – sorry. Go on. I didn't mean to interrupt you.

MR HAYES: The earlier affidavits, your Honour – they are referred – in the more
recent affidavits, as Mr Tesoriero endeavours to explain anomalies in those earlier
15 affidavits, they are referred to, and so giving that he's referring to them in subsequent
affidavits, it's probably prudent, in our respectful submission, your Honour, that
those earlier affidavits be read into evidence because he refers to them in his later
affidavits.

20 HIS HONOUR: Well, it's a matter for you, but if they contain inaccuracies,
adducing them in chief – it wouldn't seem to me to be the regular course. What you
would do is ask that, to the extent that they're referred to in the affidavit which gives
the correct evidence – that they be marked for identification, but, look. There's no
objection to them.

25 MR HAYES: No.

HIS HONOUR: That's the course you wish to take, so I will receive them, those
affidavits referred to on the transcript. They can all be taken as read as your
30 material.

MR HAYES: If your Honour pleases.

35 HIS HONOUR: All right. Is that – are you ready to proceed? If we could have Mr
Tesoriero, please, in the witness box. Court officer, could you, please, swear the
witness.

MR HAYES: And, your Honour, Mr Giles – I've had the advantage of having a
very helpful discussion with Mr Giles. It has been agreed between counsel that
40 cross-examination won't trespass on matters in respect of the substantive dispute. It
will only go to matters of disclosure and means of Mr Tesoriero, given the nature of
this hearing.

45 HIS HONOUR: That's the way Mr Giles if there's an objection – that I will deal
with it on the basis of the Evidence Act.

<EXAMINATION-IN-CHIEF BY MR HAYES

5

HIS HONOUR: Yes. Please, take a seat, sir. Mr Hayes.

10 MR HAYES: Mr Tesoriero, could you please state your full name and address for the record?---Vincenzo Tesoriero, 64 Berkeley Street, Hawthorn.

And you're the third respondent in this proceeding?---Yes.

15 And, your Honour, might Mr Tesoriero be shown his affidavits of 17 June, 12 July and 18 July 2022.

HIS HONOUR: Have we got a copy of the court book? They're in the court book, aren't they, or the supplementary court book? Court officer, if you could - - -

20 MR GILES: I will give Mr Tesoriero volume 2 of the court book and also the volume that I handed to your Honour this morning, which is

25 HIS HONOUR: Thank you. That material should contain the affidavits to which counsel has made reference, Mr Tesoriero?---Thank you, your Honour. Thank you. Can I lift this up or no?

MR HAYES: And in respect of the court book – just excuse me, your Honour.

30 In respect of the – could you please go to 492 of the court book, tab 12, and from tab 12, the pages 492 to 562. That's an affidavit you swore on or about 17 June 2022?---Yes, that's correct.

35 And the contents of that affidavit are true and correct to the best of your recollection and knowledge?---That's correct, yes.

And could you then, please, go to tab 13 – sorry. My apologies – of the second bundle. There will be a tab there. Thank you – an affidavit you swore on 12 July 2022?---The one I have is 28 June here.

40 When you have – the 28th. All right – and tab 1. Do you have that? Second bundle, the - - -?---Second bundle. I beg your pardon, Mr Hayes.

Yes. Tab 1 of the second bundle?---Yes.

45 That's an affidavit you swore on 12 July 2022?---Yes, it is. Yes.

Now, the contents of that affidavit are true and correct to the best of your knowledge?---Yes, they are.

5 And tab 2 of that bundle, or the second bundle, that's an affidavit that you swore on 18 July 2022?---That's correct, yes.

And the contents of that affidavit are true and correct to the best of your knowledge?---That is also correct, Mr Hayes.

10 If you just wait there, Mr Tesoriero, Mr Giles will have some questions for you?---Thank you.

<CROSS-EXAMINATION BY MR GILES

[3.11 pm]

15

MR GILES: I wonder if Mr Tesoriero could be handed a bundle of documents marked CMM26, which was the bundle which I gave your Honour on the last occasion. It's behind Ms Murray's affidavit of 30 June 2022?---I can close these up for now, Mr Giles?

20

You can, Mr Tesoriero?---Slowly running out of room, otherwise.

I am going to take you back to the volume that has got - - -

25

HIS HONOUR: Sorry. What was the number of that again? I apologise.

MR GILES: That's - - -

30 HIS HONOUR: CMM25?

MR GILES: CMM26, your Honour.

35 HIS HONOUR: Have I got that electronically? No. Was that the additional bundle of documents?

MR GILES: Your Honour, it's in your Honour's very helpful document of material before the court on the application. It's the final entry on the first page, so it's - - -

40 HIS HONOUR: Yes, thank you.

MR GILES: At the risk of me being characteristically old-fashioned, your Honour, would your Honour like a hard copy?

45 HIS HONOUR: Yes. I will get a hard copy. Thank you. I do want to this – my preference would be to do this, in due course, though – this case electronically trying to force myself to do it.

MR GILES: Yes.

Now, Mr Tesoriero, what you should see is you've got an affidavit of Ms Murray
- - -?---Yes.

5

- - - which goes for, with a list of parties, about five pages, and then something called
an exhibit certificate?---Yes.

10 And then after the exhibit certificate, you have a bundle of documents which are
paginated in the bottom right-hand corner?---Yes.

Could I ask that you go to page 1 of that bundle, and you see there – you should see
there a bank statement - - -?---In the name of - - -

15 - - - in the name of 14 Kirwin Road, Morwell Proprietary Limited?---Yes, that's
correct.

And you should see that that's the statement for the – for March 2022?---Yes, I do,
31 March 2022.

20

Yes. Now, you direct attention to this bank account, that is, the bank account for 14
Kirwin Road, Morwell - - -?---Yes.

- - - in your affidavit of 12 July this year?---Yes.

25

And I just want to make sure that I understand this. All of the rent from the petrol
station properties is paid into that account?---That is correct, yes.

That has been the case since November last year?---I believe it was November, yes.

30

None of the rent from the petrol station properties is paid to any other account; is
that your evidence?---No, sir. No.

And from that account - - -?---Sorry, Mr Giles. Previously, it had been.

35

Yes?---Yes.

But after - - -?---But from - - -

40 - - - November '21 - - -?---After November, it has been going to this account, yes.

Yes. And the only other rent that you describe as presently receiving, that is, in the
last six months – I withdraw that, in the last three months is rent from the properties
known as unit 305 and 306/48 Blenheim Street?---No. I think they were disclosed in
45 the previous affidavit last year. I don't think it's for the last three months.

I'm not quibbling with that - - -?---Sorry. No. Only because you mentioned - - -

- - - but over the last three months - - -?---Yes.

- - - the only other rent that you have received are from units 305 and 306/48 Blenheim Street?---That's correct, yes. Yes.

5

And that rent is paid into a Commonwealth bank account in your parents' name?---It goes into a Westpac account in my parents' name, and then from there, it's usually distributed to a CBA loan account.

10 All right?---Covers the loan for that – those two properties.

All right. So all of the income that you have received - - -?---Yes.

- - - other than from units 305 and 306 Blenheim Street this calendar year has been paid into the 14 Kirwin Road, Morwell account?---That is correct, yes.

15

And you pay, from that account, the interest that is payable by your companies on various loans?---Correct. That's correct.

20 And, as I understand it, you pay nothing else from that account?---That is correct, yes.

So the case is that in the first six months of this year, there should be no payments from the 14 Kirwin Road, Morwell account for anything other than interest on loans owed by companies which you control?---That's correct, yes.

25

And the payments from this account, as I understand it, you say, all go to the ANZ or Judo Bank?---That is correct, yes.

30 Now, can I first ask about this. The payment you see at the foot of that page that we're on, page 1, on 31 March 2022 - - -?---Yes.

Where was that paid to?---I'm unfamiliar with that particular payment, but I would say it would have gone to one of the banks for an interest payment.

35

All right. Well, the bank statements for the ANZ start on page 7, and the first one for March is on page 11, and, please – you may wish to go through ANZ or Judo Bank, but what I want to suggest is that no payment was made to the ANZ or Judo Bank by your companies on 31 March or, for that matter, on 1 April this year. Does that accord with your recollection?---I would have to – I would have to look into that, Mr Giles, and see, but it would definitely be for – for some sort of interest payment with ANZ or Judo. There's no other – the accounts are all locked, so - - -

40

HIS HONOUR: I'm sorry. The accounts are - - -?---The accounts have all been locked, your Honour, so it's not that I can transfer money anywhere else other than directed by ANZ. Either Judo sends an email to get interest directed, or ANZ takes their interest payment. That's - - -

45

MR GILES: Who locked your accounts?---The accounts – the accounts are all locked, Mr Giles.

5 So then - - -?---All of my accounts are locked since the freezing orders of last – last year.

But - - -?---So any time a payment needs to be made, I need to have the account unlocked.

10 HIS HONOUR: You need to what? You will have to keep your voice up. I'm terribly sorry?---I'm sorry, your Honour.

15 No, not at all?---Every time a payment is need to be – needs to be made, the accounts would need to either be unlocked, or an email needs to be sent to – to instigate the – the transfer. It's not that a transfer can just be done, Mr Giles.

All right?---So there will be some record of that transfer.

20 So you instructed the payment of \$25,000, then, did you?

HIS HONOUR: Twenty-four, isn't it?

MR GILES: Twenty-four thousand dollars. I'm sorry?---Most likely, yes.

25 Right. Well, what I'm asking you, the round payment of \$24,000 that you made four months ago – four and a-half months ago – to whom was it made?---I would say it would be ANZ direct debiting their own account, but I would have to check, Mr Giles.

30 Right?---And that's not a problem for me to come back to you with that.

All right. We may do that?---That's all right.

35 But at present, you're unable to tell his Honour where that payment was made to. Is that the case? You can't tell his Honour where that payment was made to?---No, that's correct, Mr Giles, but that's no difference to a lot of the other payments that are here. They don't have a reference on this particular statement, but there's definitely a reference attached somewhere. There's – money wouldn't just get transferred without having known where it's gone.

40 All right. And it would be transferred out of that account which you control on your direction, wouldn't it? It would be transferred - - -?---That is correct.

45 - - - out of that account on your - - -?---Yes, that's correct.

Thank you. Right. Could I ask that you go to page 19 now?---Yes. Yes.

You see this is an account – this is a statement for a loan account - - -?---For 160 Murray Valley, is that the one?

For 160 Murray Valley?---Yes.

5

And you see the only entry on that page – I withdraw that. The last entry on that page - - -?---Yes.

On 15 March:

10

Interest redirected from account 3202 –

I shouldn't have read it all out. You see - - -?---Account ending in 71117.

15 HIS HONOUR: Well, it's already in evidence. Doesn't matter.

MR GILES: Now, do you know what account – the account – who holds the account number 1117?---I would say that would be the – I will double check, but I would say that that would be the 14 Kirwin Road account.

20

Okay. Well, I invite you to go back to page 1 - - -?---Yes.

- - - and you will see that it's not the 14 Kirwin Road account. You see the account number there - - -?---Yes, I do see that.

25

- - - which finishes in 6238?---Yes. Well, then, it might reference back to the Murray Valley loan account, in which case I believe ANZ have got their own system where they would transfer – if you – if I can take you back to the Kirwin Road Morwell account, Mr Giles.

30

Yes?---You will see that there is lump sums there that have been transferred internally, I believe, to ANZ. So if you look at – I think if you look at 17 March, there's one there for 7183. I don't think that references exactly to a particular loan account. I think what you will see is that ANZ transfer it and then distribute it to the accounts, if that makes sense.

35

No. Well, I think – I actually think I see your point?---Yes.

In fairness, I should direct your attention to page 18, and perhaps that's what you're trying to explain to me, that - - -?---Page 18. What am I looking at, Mr Giles?

40

Well, you see the account, that's also a 160 Murray Valley account?---Yes. Yes.

And you see the account number that ends in 1117?---There you go. That's exactly – yes.

45

Right. So as I – I should understand that what happens is money is paid from the 14 Kirwin Road account - - -?---Yes.

5 - - - into a bank account with a – for the debtor company with the ANZ Bank, and then from the debtor – that bank account pays off the loan?---I believe that’s the case, yes.

10 I see?---ANZ does all that themselves. Once the money leaves the 14 Kirwin Road account, then they distribute it accordingly.

All right. Could I ask that you take up your affidavit - - -?---Yes.

- - - of – which is behind tab 1 of the bundle, which is your 12 July affidavit?---Yes.

15 And in that affidavit, you sought to tell his Honour about all of your and your company’s present assets?---Yes. You’re referring to the table, Mr Giles?

I’m referring to the affidavit as a whole - - -?---Sorry.

20 - - - but your intention was to tell his Honour about all of the – your assets and your company’s assets?---Yes.

25 Well, nowhere in it do you tell his Honour how much money is in the Kirwin Road bank account, do you?---Well, I think I would have to go through the table and double-check it, Mr Giles, but I think it – I think it would have been noted there, but it’s not that that’s a holding account. It’s – it’s purely a transactional account.

30 It has still got money in it?---No. I think if you look – I – that’s – it would definitely be noted somewhere, Mr Giles, maybe in one of the attachments in the exhibits.

Well, can I ask you to go to page 45?---You can.

35 I think those are probably National Australia Bank?---Page 45, yes. Maybe, I will come around to this another way. Could I ask that you be handed a bundle of documents, one for Mr Tesoriero and one for his Honour?---Thank you.

And I ask that you go to - - -?---So I’m leaving this one now, Mr Giles?

40 You can leave that one now?---Okay.

HIS HONOUR: Sorry. I’m a little confused. You made reference to page 45, which is annexure C to the affidavit. What was I supposed to be looking at at page 45?

45 MR GILES: I was directing - - -

HIS HONOUR: Which number?

MR GILES: The answer is I don't think that the Kirwin Road account appears there at all, your Honour.

HIS HONOUR: So why was – why - - -

5

MR GILES: Well, I'm just asking.

HIS HONOUR: All right.

10 THE WITNESS: I'm pretty sure it would have been, Mr Giles, but if it's - - -

MR GILES: Okay?---Copies of statements and all that, you had, sir.

15 All right. Well, could I ask that you go to page 51 of the bundle that I've just handed to you – to you and to his Honour?---Page 51, is it? Yes.

Now, that's a bank statement for the 14 Kirwin Road account?---Yes.

20 And if you go over to page 52 - - -?---Yes.

- - - you will see that that's for the period through till the end of June or, at least, 28 June this year?---Yes, I can see that.

25 And what you see is that the sum of 65-odd thousand dollars is in that account?---I do see that, Mr Giles. Yes.

30 Yes. What happens is that you receive the bulk of the rent from the service stations in the first couple of the days of the month, isn't it?---It's spread across the month, I believe. They all come at different times. If you look there, you can see the dates are spread. There's some at 2 June, some at 14 June.

The bulk of it's at the start of the month?---I wouldn't say that. I would – I would say it's spread pretty evenly.

35 And then the interest payments are towards the end of the month. You see the \$100,000 deduction on – withdrawal on 23 June?---That – that one could have been particularly late, but I think there's three – if my memory serves me correct, I think there's three different times where interest is – is deducted over the month, being the start of – I think one might fall over to the start of the month, which you may have
40 missed on that statement, being 1 July or 1 June, and then, I think, there's two other times where interest is taken. That 100,000 you see is a lump sum. There would have been – where one was behind, so we've tried to catch it up.

45 All right?---That will be reflected in – in the Judo Bank statements.

Well, Mr Tesoriero, if you go back to CM 26 and page 1 of that. That is, Ms Murray's affidavit I was asking you about. The loose one?---I beg your – so I'm going to this one?

5 Yes?---Sorry.

Page 1?---Page 1, is it?

Page 1 of the?---Of Ms Murray's affidavit, yes.

10

So go past Ms Murray's affidavit and go back to the bank account that I was asking you about before. Flick?---You lost me, Mr Giles. What are you asking me to - - -

Yes. Go past the affidavit again.

15

HIS HONOUR: You see the numbered pages in the bottom right-hand corner?---Yes.

Or – of each folio. If you go to page 1?---I'm on page 1. This one, you're saying?

20

MR GILES: No, no, no. No, no. Let's do it - - -

HIS HONOUR: No. This – the first document. The first document that you were asked to look at?---Right.

25

Yes. Thank you?---Yes, Mr Giles.

MR GILES: So page – page 1 shows, again, two, four, six, eight, nine payments of rent in - - -?---That is correct, yes.

30

- - - on the first, third, and some on 10 March?---That is correct. Yes.

And that's before any interest payment goes out?---That is correct, yes.

35 And again, similarly on page 2?---But if I can just draw your attention for a moment, Mr Giles. If you look on this particular month, the interest gets deducted on 10 March, whereas if you refer back to the one where you asked me for – it's – it comes out on the 23rd of June. So it's not a hard and fast rule on when the dates – when they actually come out.

40

Yes. All but three of the rent payments come in before the first interest payment; that's right, isn't it?---It's not always the case.

Well, let's have a look - - -?---Unless you can draw my attention to the last twelve months with the statements, your Honour.

45

Let's have a look at page 2 where all but three of the rent payments come in before the first interest payment?---Yes.

5 And then in page 3, all of the rent has come in before the first substantial interest payment. There might be a small one on 17 May that's different?---Yes.

And page 4. All of the interest payments before - - -?---All of the rent – rental payments, yes.

10 All the rent payments before the first interest payment. And then similarly, if you put that away, the document I was asking you about in the bundle on page 52?---Yes.

The bundle I handed to you?---Similarly, the rent has come in prior to the interest gets paid.

15 Right. So what happens is the bulk of the rent is paid in the month prior to you paying any interest payment from this account, isn't it?---The month of, Mr Giles.

Yes?---We typically need the rent to be able to pay the interest.

20 Well, that's what I'm putting to you?---I can't pay the interest without having the rent paid.

25 You had \$62,000 in this bank account at the end of June. How much was in it when you swore your affidavit of 12 July?---I would need to double check that, but I would say it would have been down to probably – it was – it would have probably been negative because the interest payments would have come out. So if you – if you go and check our statement as of 1 July, you will see that it would have been drawn down and then rent would go down again.

30 I want to suggest to you, Mr Tesoriero, that that is inconsistent with what I have just shown you, namely that after the end of the month, most of the rents are – that – the end of the prior month, early the next month, that would be July, rent is received and that rent is received before any interest is paid. That's the model, isn't it?---Well, it –
35 I don't understand your point, Mr Giles. It's very hard for me to pay interest with money I don't have. I need the rent to come in to be able to pay the interest. So yes, that is correct. The rent comes in and then the interest comes out shortly after.

40 Right?---And that is the case every – each and every single month. It has been.

With the - - -?---Since I've purchased those properties.

45 With the consequence that because there was \$65,000 in the account at the end of June, you would then receive rent on top of that amount prior to 12 of July?---Possibly.

And the interest payments were following this model, other than – following this model, have been made after 12 July, haven't they?---I would have to check the July statement. Do you have the July statement there? I would have to check it.

5 Did you check how much money was in this bank account before swearing the affidavit on 12 July?---I would have checked it, yes.

Well, did you? Not “would have”; did you?---I regularly check the statement to check on the rents that go in, so yes, I would have checked it.

10

I don't want to know what you would have done. Did you check it before swearing the affidavit for his Honour about what your assets were?---Yes. Yes, I did, Mr Giles.

15 And why is it not referred to in the 12 July affidavit? That is, how much money is in this bank account?---Because quite typically by 12 July, the interest would have probably come out.

HIS HONOUR: Mr – can I ask this question, Mr Tesoriero?---Yes, your Honour.

20

Do you have access to - - -?---Internet banking?

- - - your accounts electronically?---Yes, I do.

25 On an app?---Yes, I do, your Honour.

On your phone?---Yes.

So have you got your phone with you?---Yes, I do.

30

MR GILES: Can you open the account?---My phone is in my coat on the chair.

HIS HONOUR: You can go and get it if you like?---I can go get it?

35 Yes?---Thank you, your Honour.

MR GILES: Through the app, could you open up the ANZ – well, open up the ANZ app - - -?---I can do that.

40 - - - so that it show – and then do that which is necessary to be done to show the transactions on the 14 Kirwin Road Morwell account in July this year?---So there was – would you like me to read them out, Mr Giles?

I would actually like you to show them to me?---So - - -

45

HIS HONOUR: Both counsel can approach if they wish?---So as you can see, the last one that came out was 100,000 on 23 June as per that statement, then you will

see all the rent has gone in and then it has now started to come out, the interest payments. So there will be another 100,000 that will come out in a couple of days.

MR GILES: Can you – are you able to - - -?---

5

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

- - - 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.

10

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

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

15

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 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.

20

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

25

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.

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.

30

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

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 - - -

35

HIS HONOUR: attend to Mr Giles' question. Do you regard money in a bank account as an asset or not?---No, I didn't, Mr – your Honour, because I thought that was a transactional account. But I do believe it was attached in one of the affidavits.

40

I'm sorry?---I do believe it was attached for Mr Giles to have seen. Maybe not as at 12 July, but it's definitely shown here as of 28 June.

45

I'm sorry, you had better explain that to me. I don't quite understand that, Mr Tesoriero. It's – I've got the affidavit of 12 July 2022 in front of me. The only

parts I've been taken to in that affidavit, you refer – if you go to page – if you go to that affidavit, 12 July - - -?---I'm sorry, your Honour. I – which page is that?

Sorry?---You're right.

5

The affidavit of 12 July?---Yes.

Have you got that one there?---Yes, I do. I do.

10 And you will see on page 2 up the top there it has got your name, it describes - - -?---Yes.

- - - who you are. Paragraph 5:

15 *I refer to the previous affidavits I've sworn in these proceedings.*

?---Yes.

And the first one is your July affidavit?---Yes.

20

And then at paragraph 9, you say:

I've attached four annexures to the affidavit which are marked (a), (b) and (c).

25 ?---Yes. Yes.

Relevantly, (c) over the page says:

30 *Annexure (c) lists all the National Australia Bank accounts that, to the best of my knowledge, I have with that bank. I intend to refer to these annexures throughout my affidavit.*

Do you see that?---Yes, I do.

35 And I think I was taken to page 45 of that affidavit, and the account which is 66238 doesn't appear to be there. So if you could – if you want to take your time - - -?---I'm pretty sure it's somewhere, your Honour.

Well, take your time?---Because I definitely shared it with my lawyers at the time.

40

No, that's fine?---Yes.

45 Take your time. I think you're being asked whether or not there's any reference to it in the affidavit, so by all means, just take your time, and you indicate to me where in the affidavit there's a reference to that account. While that's happening, Mr Giles, and Mr Tesoriero is looking at that, is there any evidence about when this account, the 66238 Business Extra account, was opened?

MR GILES: Yes. November – November last year.

HIS HONOUR: 2021.

5 MR GILES: 2021.

HIS HONOUR: See, that might be where the problem has arisen, because he – what he says in paragraph 9 is that he has updated, in effect, the - - -

10 MR GILES: Sorry.

HIS HONOUR: - - - same form as the table in July 2021.

15 MR GILES: No, I'm – I understand why your Honour says that. I'm wrong. Paragraphs 18 and 19 of the affidavit are to the effect that he started using the account in November '21 for that purpose. The account actually existed back when the first affidavit was sworn, although it is misdescribed in that affidavit.

20 THE WITNESS: But it wasn't used for that purpose at that time, Mr Giles.

MR GILES: That's right. But it was - - -?---Yes. So it was - - -

25 It was open at that time, wasn't it, back in July last year?---It was open at that time, yes. Yes. I believe it – I would have to double check, but I'm pretty sure it was open at that time. There's quite a number of accounts, Mr Giles.

If you go to page 33, Mr Tesoriero, you will see a reference to the 14 Kirwin Road Trust as being account number 21.

30 HIS HONOUR: Annexure - - -

MR GILES: Sorry.

35 HIS HONOUR: I think - - -

THE WITNESS: Thirty-three?

40 HIS HONOUR: I think I found it on annexure (b). Number 10 in annexure (b)?---Thank you, your Honour.

MR GILES: Sorry, your Honour.

45 HIS HONOUR: The electronic version. It's – let me get the electronic version. Page 186 of the court book.

MR GILES: Yes.

HIS HONOUR: This is the July 2021 affidavit. Annexure (b) of the July 2021 affidavit.

MR GILES: Yes. And there's the – that's right. There's the error that - - -

5

HIS HONOUR: Yes. Okay. It's described there as 31 Ellman Street Trust.

MR GILES: That's right.

10 HIS HONOUR: Yes.

MR GILES: So, Mr Tesoriero - - -?---Yes, Mr Giles.

15 You did disclose the existence of that account with the 14 Kirwin Road account number - - -?---Yes.

- - - in your affidavit of 21 July 2021?---Yes.

20 In your affidavit of 12 July '22, if you could go to page 33 - - -?---Yes.

You see, item 21 on page 33 is an account described as the 14 Kirwin Road account trust?---Yes.

25 But that's the wrong account number, but if you go down to 23, row 23, you see it's the right account number?---25, is it?

No, 23. Yes.

30 HIS HONOUR: Yes. Because it has been taken from the other affidavit.

MR GILES: That's right.

35 Okay. My point is why didn't you tell his Honour that you had \$150,000 in that account as at 12 July?---I still believe that it was in – in the documents somewhere here, Mr Giles. I - - -

40 Do you have money in any other bank account as at today?---Nothing of significance. Whatever – whatever I have has been disclosed in the – in the last affidavit.

Well - - -?---It's up – up to date for whatever is in those accounts.

45 Doing the best you can and not worrying about whether I consider something of significance or not, do you have money in any other bank account?---I would – yes.

MR HAYES: Well, your Honour, I - - -

THE WITNESS: There would be. There would be money in other bank accounts, definitely, most definitely.

5 MR HAYES: No, your Honour. Your Honour, I object to this question now because there have been numerous - - -

HIS HONOUR: Do you want the witness to go outside?

10 MR HAYES: It might be best, your Honour. Yes.

HIS HONOUR: Mr Tesoriero, if you just wouldn't mind going outside for a moment, we just want to be able to have a candid discussion without embarrassing you, giving your giving evidence, so if you wouldn't mind just going outside of the court - - -?---Okay.

15 - - - and the court officer will come and get you momentarily?---No worries, thank you.

20 <THE WITNESS WITHDREW [3.47 pm]

MR HAYES: As your Honour will apprehend, Mr Tesoriero has no trouble being fully transparent about all of these matters, but to invite him to consider what the
25 precise balance might be of a particular bank account when there has already been, in substance, proper disclosure and where there have been multiple bank accounts – if I count them up, your Honour, in annexure – in the bank accounts referred to in annexure A, there's 29 bank accounts, and if my friend is going to split hairs over what the balance might be as at 12 July as opposed to what it would have been in
30 June, it's just unfair to this witness, and it's not productive, and it doesn't assist your Honour.

What we've seen out of the last exchange between – or most recent passage of evidence, your Honour, is that the balance was disclosed a matter of only some
35 weeks ago when that affidavit was updated. There were no balances for those current accounts, but the witness has faithfully explained, your Honour, the nature of those accounts and how it is that, while there might have been 150,000 there on 12 July, that would have changed very suddenly, as it had in previous months when the interest payments were due, and - - -

40

HIS HONOUR: Well, no. I may have the wrong end of the stick, Mr Hayes, but I thought the point that was being made was that the end of the financial year, 30 June 2022 - - -

45 MR HAYES: Yes.

HIS HONOUR: - - - there was an amount of 60-odd thousand dollars - - -

MR HAYES: Yes.

HIS HONOUR: - - - which was a credit amount, and that's, obviously, after all expenses had gone out in June - - -

5

MR HAYES: Yes.

HIS HONOUR: - - - prior to the receipts coming in at the beginning of July.

10 MR HAYES: Yes.

HIS HONOUR: It gets up to \$150,000 - - -

MR HAYES: Yes.

15

HIS HONOUR: \$150,841.76 on the day he swears his affidavit.

MR HAYES: Yes.

20 HIS HONOUR: And there's no mention of that in his affidavit which has been ordered to be put on to disclose what his current financial position was.

MR HAYES: Well - - -

25 HIS HONOUR: I think that was the burden of what was being put.

MR HAYES: Well, indeed, but there's no – and I see what your Honour - - -

30 HIS HONOUR: I wouldn't have thought \$150,000 sitting in a bank account to his credit is something which would ordinarily be regarded as a trivial admission from an affidavit - - -

MR HAYES: We don't - - -

35 HIS HONOUR: - - - as to assets.

MR HAYES: We don't say that, your Honour, but there's no concealment. There's, certainly, no concealment. It has been less than – and coming back to the next question, your Honour, it's inviting this witness where he has got 29 accounts – he has already gone into evidence saying that he's having difficulty getting information from his accountant about it, his own view of his own accounts and his state of affairs is far from complete, given the challenges he has encountered which he swears to in his affidavit, your Honour.

45 HIS HONOUR: Well, I think these are all matters for submissions at the end of the time, Mr Hayes.

MR HAYES: Well - - -

HIS HONOUR: But I think the question you objected to is he was asked whether or not he had any cash in any other bank accounts at the moment. And I don't see
5 what's objectionable about that question.

MR HAYES: Well, unless he is going to be invited to go through each of the 29 bank accounts, it's an unfair question. If Mr Giles is going to say, "I got you, there's \$5000 in this account you have overlooked." Or something of that nature is – there's
10 29 accounts here, your Honour. For him to have a – it would require almost a – it would be a very unusual person who could remember the exact balance of 29 different accounts on a day to day basis. And - - -

HIS HONOUR: I don't think he's being asked - - -
15

MR HAYES: I think he is, your Honour. This - - -

HIS HONOUR: I don't think he is being asked to remember the balance of 29 different bank accounts on one day. I think he's being asked a question. Was it –
20 perhaps I will ask this. Mr Giles, you're asking him to make reference to any accounts in respect of which he has not made reference to in his affidavits. Is that the question?

MR HAYES: Your Honour, not with precision. I'm including the accounts in his
25 affidavit. Your Honour put it to my learned friend a moment ago perfectly. It's, "Do you have cash in any other account at all?"

HIS HONOUR: Yes. I don't think that's an unfair question.

30 MR HAYES: Well, it should be entitled to go to the - - -

HIS HONOUR: Of course.

MR HAYES: He should be entitled to go to all the accounts.
35

HIS HONOUR: Of course.

MR HAYES: And go through all 29 accounts as of today.

40 HIS HONOUR: He can, presumably. That's why he's got an app there, so presumably he can do so.

MR HAYES: Yes. If my friend wants to go that way, that's - - -

45 HIS HONOUR: All right. We can have the witness back in, please.

MR HAYES: But otherwise, to invite him to recall it without him having the opportunity to go through it - - -

HIS HONOUR: No, no. I will give him any opportunity if he - - -

5

MR HAYES: If your Honour pleases.

HIS HONOUR: Just do it in whatever way he wishes.

10

<VINCENZO FRANK TESORIERO, RECALLED [3.52 pm]

<CROSS-EXAMINATION BY MR GILES

15

HIS HONOUR: Thank you, Mr Tesoriero. If you come back and just take a seat in the witness box, sir. Thank you?---Thank you.

20

MR GILES: Mr Tesoriero, do you or your companies have money in any bank account other than the 14 Kirwin Street bank account?---I believe there is money in other accounts, yes.

25

Right. Are you able to tell his Honour how many other accounts there's money in?---I would have to double-check. All the accounts that we have have all been shared in the material that has been shared over the last couple of days. I have seen emails. This shows all of those account balances.

30

Would you be able to tell his Honour approximately how much money is in those other accounts?---There might be a few thousand dollars spread across the accounts.

35

And you didn't identify how much money was in any of those other accounts in your 12 July affidavit, did you?---I would have to double-check the attachments on that, Mr Giles. But I believe that some accounts would have been shared, yes.

40

All right. In your 12 July affidavit, you have referred – and you can go to it, page 21 and following – to various properties that your companies own?---Various companies. You're talking on page 4, Mr Giles?

21 and following, there's a table of them?---Yes.

And you see you give an approximate value of them in - - -?---Yes, I can see that.

45

- - - sixth – and if you – you have given that valuation on the basis you believe that to be true, have you?---The valuation that I believe to be true, yes.

And that's for each of those properties?---That's correct, yes.

And to your understanding, the value of the properties has not changed in any material way in the last three months?---We haven't had valuations done in the last three months. But most of these properties have been liquidated by the liquidators, I believe. And the service stations, we haven't.

5

Now, who is Mr Michael Johns to your understanding?---Michael Johns works at SMA Finance.

10 And what is SMA Finance?---They're a brokering house in – located in South Yarra in Melbourne.

All right. And have you got SMA Finance currently engaged to act on your behalf?---I've been talking to them to try and refinance some properties, yes.

15 And they've been approaching financiers on your behalf, haven't they?---Not on my behalf. It's on behalf of my father.

And also on your behalf?---Well, I've been – I've been assisting. Yes, that's correct.

20 But also to refinance, for example, the service station properties?---We discussed the potential of it, but, no, we haven't. They're quite comfortable with our Judo and ANZ.

25 I wonder if you could be shown an email that we received out of the documents we received this morning of 1 April 2022?---Are we finished with the bank accounts now, Mr Giles? Is that - - -

30 You can close up each of the - - -?---Sorry. Just because I'm getting lost in documents, your Honour. That's - - -

You can close up the bank accounts.

35 HIS HONOUR: no, no, no. I'm suffering the same difficulty, so if you close them up and just put them to one side, Mr Tesoriero - - -?---Sure.

You're just being shown a different document now which I will get a copy of and I will mark as MFI1, so MFI1 will be - - -

40 MR GILES: An email from Mr Johns to Mr Tesoriero and Mr Pratt of 1 April 2022 with an attachment.

**MFI #1 EMAIL FROM MR JOHNS TO MR TESORIERO AND MR PRATT
WITH ATTACHMENT DATED 01/04/2022**

45

HIS HONOUR: Thank you.

THE WITNESS: Yes.

MR GILES: You see there an email chain?---Yes, I do.

5 The one earliest in time, that is, lower on the page of MF11, is an email from you to Mr Johns or Mr Pratt, also of SMA Finance?---Yes.

And you ask for a current updated property list?---For property values.

10 So that - - -?---Is it?

Well, you see what you say?---Yes.

You wrote:

15

Hi, Michael. Can you please send me the current updated property list you guys have so I can confirm values, etcetera.

?---That's correct, yes.

20

And the list was sent to you?---Yes.

And you reviewed it?---Yes.

25 And you confirmed the values stated in the list?---There's an email to that effect, is there? But we – yes.

Yes, you did confirm the values in that list?---I can only see the email you have here from Michael to me.

30

All right. Well, there's an attachment to it which - - -?---There's only one page here, Mr Giles.

35 HIS HONOUR: Well, don't worry at the moment about the email. I think you were being asked to you recall – do you recall confirming the values in that list or not. If you can't, it's either yes, no, or "I can't recall"?---I can't recall confirming the values, but - - -

40 You can't recall?---With Michael Johns, we did discuss these values and they gave me an indicative value. They thought the property in Wagstaffe could be worth nine and a-half, but we have never had an evaluation to that effect. So my belief was that I think we put it in – whatever it was in my affidavit, because I don't have a valuation. I think the liquidators were going to share a valuation, but they never did.

45 MR GILES: All right. But in the attachment - - -?---So it's – I'm not a valuer, Mr Giles. I can't go around swearing valuations.

But you have sworn to a valuation, Mr Tesoriero, in your affidavit, haven't you, of 12 July?---I haven't sworn a valuation, no.

5 You have sworn to a valuation, though?---I have sworn to an indicative value of what I believed it was worth.

All right?---Yes.

10 HIS HONOUR: An approximate valuation?---Approximate value, yes. But I definitely don't have a valuation that shows it at nine and a-half million and never had.

15 MR GILES: And you don't have one that shows it at eight million either, do you?---no, I don't.

And if you see the attachment to the email, MFI 1, there's a table that lists a series of properties with indicative values?---Is that this table you're referring to.

20 Yes?---Yes. That's the one I was looking at.

All right. And did you instruct Mr Johns that you confirmed that those indicative values were correct?---We thought that they may be able to get a valuation to that effect, but we were waiting on the valuations to be shared by the liquidators and they never were. So this never progressed further than this sheet of paper, Mr Giles.

25 Are you sure about that, Mr Tesoriero?---Yes, I am.

30 I wonder if you could be shown an email – and one for Mr Hayes. Can I hand to your Honour and the witness an email chain with attachments, the latest in time email being from Mr Johns to Mr Tesoriero and Mr Pratt of 8 April 2022.

HIS HONOUR: Yes. Well, I will mark the email from Mr Johns to Mr Tesoriero and the attachments MFI 2.

35 **MFI #2 EMAIL FROM MR JOHNS TO MR TESORIERO WITH ATTACHMENTS DATED 08/04/22**

40 MR GILES: Please take your time to familiarise yourself with that document?---No, I'm aware of this document. What would you like me to - - -

Okay?--- - - - to look at, Mr Giles.

45 You see the - - -?---Indicative values?

No, just slow down. You see in the email at the top of the page, the one of 8 April 22 from Mr Johns to you and Mr Pratt, subject re Tesoriero, with the attachment, loan scenario summary Jadig?---Yes.

5 J-a-d-i-g?---Yes.

Jadig was a financier that Mr Johns had approached on your behalf?---That is correct, yes.

10 And what had happened was that he had given them a summary – that is, the summary which is the attachment loan scenario summary?---Yes.

15 Did he also sent to the Commonwealth Bank the attachment?---He would have sent my father's properties to the Commonwealth Bank, but not these – I don't believe he would have sent all these ones.

20 Right. But he sent - - -?---this would have been shared with Jadig, because at the time we were trying to extract some value out of these properties to try and see what we could do in terms of refinancing.

Yes. And indeed, if you go to the first of the spreadsheets, the one top left-hand corner, top confidential scenario?---Yes.

25 You see in the second box against the left-hand column, a heading, Jadig and loan draw of \$28.75 million that you were seeking; is that right? You see that?---Yes, I can see that. Yes.

30 And that was the amount of finance you were seeking to raise from Jadig?---That's correct, yes.

And you were seeking to raise that over your properties and your father's properties?---That is correct, yes.

35 And then if you go over to the next spreadsheet?---Yes.

Which is the table with various properties in it?---Yes.

40 That's a document that you caused to be sent to Jadig for the purpose of seeking finance, isn't it?---I believe this would have been shared with Jadig, but I'm not 100 per cent certain, to be honest, Mr Giles. If - - -

45 It's a document - - -?---If I'm swearing under oath, I would like to double-check whether it was sent to Jadig. I'm familiar with the document, but I don't know that it was sent to Jadig.

In any event, in the first week of April this year, you satisfied yourself that the document was appropriate to be sent to a financier, didn't you?---Again, I would have to double-check that, Mr Giles.

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.

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.

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

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

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.

40 HIS HONOUR: Well, can I ask you this question, Mr Tesoriero?---Yes, your Honour.

If you look at the email of 1 April; MFI 1?---Yes.

45 This is an email from you:

Can you please send me the current updated property list you guys have so I can confirm values, etcetera. Thank you.

?---Yes. Yes.

5

Do you think it's more likely than not given that email that what you did was confirm the values after you were sent the current updated property list?---Possibly. We could have met and we could have discussed it, yes.

10 MR GILES: Does possibly mean that it was likely that you did so?---Well, I don't know that it was each and every value that's here.

HIS HONOUR: Well, wasn't the point of obtaining the current updated property list so you could confirm the values? That seems to be what I read the email to mean,
15 but have I got the wrong end of the stick with that?---There's a lot of properties listed there, your Honour. So there's some that – like, Wagstaffe was in liquidation, you know, so that might have been irrelevant at the time. And the same with the James Street Factories. So - - -

20 I see?---So he could have been referring to the Asterlink properties.

I see.

25 MR GILES: But - - -?---There is a number of properties on that list, Mr Giles.

But directing attention to the regional petrol stations?---Yes.

30 You did confirm the values of the regional petrol stations, didn't you?---No. I don't think I did.

Well, that's why - - -?---Again, there's an old valuation on that which is significantly less than what's in there.

35 Well, why did you write the email of 1 April 2022, then?---Again, Mr Giles, I could have been referring to the Asterlink properties. If you look, nothing progressed with Jadig. And SME Finance has been working on the restructure of the Asterlink properties for my father that are currently with CBA. If you look at his file, the majority of his file is working on the Asterlink properties.

40 Going back to MFI 2 and the attachment to that - - -?---Yes.

- - - the list of documents?---Yes.

45 The list of properties - - -?---Yes.

- - - with indicative values; did you see that before it was sent to - - -?---I can't recall.

- - - Jadig?---I have seen the document. I don't know if I saw it before it was sent to Jadig. Or if it even was sent to Jadig, to be honest.

5 Right. Did you pay attention to the indicative values stated in this document when preparing your affidavit of 12 July?---Did I pay attention to it?

10 Did you give consideration to it?---I'm not sure of your point, Mr Giles. It would be in my best interests to push those values up more on those properties. There was no one trying to bring the property values down. Did I pay attention to it? Of course I would have paid attention to it.

15 Mr Tesoriero - - -?---But am I able to be a sworn valuer, Mr Giles, no, I'm not. I can't go around making valuations that I haven't got. So without a sworn valuation, in my opinion I thought the property might have been worth 8 million.

Just keeping MFI 2 open?---Yes.

Could you go to page 27 of your 12 July affidavit, please?---Page 27. Yes.

20 Do you see there you've deposed to an approximate valuation of \$3.4 million for the petrol station at 2-4 Cowslip Street, Violet Town?---Yes. Yes. I do see that, yes.

25 Could you go back to MFI 2 and see that the indicative valuation given to the proposed financier was - - -?---\$5,177,343?

Yes?---Yes. Yes, I can see that, Mr Giles.

30 Can you explain the difference to his Honour?---It's approximately \$2 million difference. Maybe a little bit less - - -

35 Can you explain how it came to be that you swore to a approximate valuation of \$3.4 million when this document sent on your behalf to a financier has a valuation of \$5.177 million in it?---I don't know if you've had much experience with brokers, Mr Giles, but they often promise the world and under deliver, but I actually have a valuation for this property that says it's worth 3.4 million.

40 I thought you - - -?---So that's why we've put that indicative of 3.4. I don't have a valuation of 5.1. That was just something the broker thought he might be able to evaluate.

HIS HONOUR: That's something the - sorry, that - - -?---This is by no means a sworn valuation. This hasn't been sworn.

45 I'm sorry, it's my fault, I just couldn't hear what you were saying. Can you just repeat that last part of that answer? I'm sorry, I didn't hear it?---So there's a - sorry, your Honour. There's a variation of two values here.

Yes?---Because I actually have a sworn valuation for this property that says it's worth 3.4 million. The broker that we were using at SME Finance thought that it might be able to be increased; the value on the property may have increased. But we have never had a sworn valuation to that effect.

5

So you had a value – a sworn value of 3.4?---I have a sworn valuation of 3.4 million and that's why I attached that to my affidavit at 3.4 million.

MR GILES: How old is that sworn valuation of 3.4 million?---It's approximately 12 months old.

10

I call for that document.

MR HAYES: We will endeavour to obtain it overnight, your Honour.

15

HIS HONOUR: Thank you.

MR GILES: Do you also have sworn valuations of the other regional petrol stations referred to - - -?---Yes. Yes, I do, Mr Giles. Yes. We have sworn valuations for all of them and they are the indicative values that we've shared.

20

Sorry, you said you have sworn valuations for all of them and they are the indicative valuations did you just say?---No, no. We have sworn valuations on all of the petrol stations.

25

Right?---Yes.

Well, I call for those?---No problem.

MR HAYES: Again, we will obtain them over night, your Honour.

30

HIS HONOUR: Thank you. Thank you, Mr Hayes.

MR GILES: Just while we're on MFI 2?---Yes.

35

Could I just direct your attention in the spreadsheet with the properties in it?---Yes.

To the comments column. So the right-hand column?---Yes.

Property number 11; 44 Howard Road, Caulfield North?---Yes.

40

That's your parents' residential address, isn't it?---It is my parents' residential address. Yes.

Where they live?---That is correct. Yes.

45

And it's not one of the properties over which the Commonwealth Bank has issued a demand, is it?---They have issued demands over all my parents' properties, I believe.

5 Well, could you go back to paragraph 71 of your affidavit of 12 July. And there you list a series of properties owned by your parents?---I'm sorry, Mr Giles, the page numbers disappear on this one as it goes forward. Is that - - -

It's paragraph 71 that I was directing your attention to?---Yes. On page - - -

10 Page 17 at the top of the page of your 12 July affidavit?---Page 17. Sorry. Yes.

So you list a series or properties there?---Yes.

15 They are properties owned by your parents?---Yes.

None of those are their personal residence, are they?---No. They're not mentioned there, but they were definitely mentioned.

20 Well, I just want to ask how you came to swear in the fourth line:

Additionally, both my parents took out a loan secured by a mortgage over their personal residence in order to advance my funds. I believe these properties were listing

25 None of those properties are your parents' personal residence, are they?---Those – those two seem to have been missed. The rest have all been included, Mr Giles, but those seem to have been missed. The debt facility with CBA is all cross-collateralised.

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

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

And, indeed, in order to fund the acquisition – a number of property acquisitions prior to July 2021 - - -?---Yes.

- - - they didn't mortgage 44 Howard Street, did they?---Yes, they did.

Because if they had done so, you would have told his Honour about it. It would be hard to forget your parents' actual address, wouldn't it?---It was mentioned
5 somewhere, definitely, Mr Giles, because they've all been mortgaged. 44, 46,
Street, 30 Nelson, 32 – they've all been mortgaged. As I mentioned, they're all on
this list because they're all cross-collateralised with the CBA.

Just returning to that - - -?---And I'm pretty sure it's attached here somewhere
10 because you've got all the CBA statements and everything is included.

Just returning to MFI2 and the spreadsheet and the comments column?---Yes.

Can you go to the last comment. Net monthly income from service station property
15 after servicing existing debt to Judo and ANZ is approximately \$30,000 per
month?---That's correct.

360,000 per annum?---That is correct, yes.

20 And that's a correct statement, is it?---No, it's not.

Where was that? Sorry, Mr Giles. Where's that?---The last page of MF 2, your
Honour.

25 MR GILES: Right-hand column.

HIS HONOUR: I see. Yes. Thank you.

MR GILES: Well, how did that statement come to be made in a document sent to a
30 prospective financier?---Because SME, as I mentioned to you, Mr Giles, was looking
to refinance a lot of these properties for us.

Do you approve this statement being sent to a financier?---I told you I would have to
35 double check if this was the actual one that was sent, but this was a high-level
discussion that was had with SME. As I mentioned to you, no evaluations have
taken place and this – none of this debt has been placed anywhere at present.

Well, is that something you told SME finance?---Is that something I told SME?

40 Yes. Did you tell - - -?---We were trying to refinance them to extract extra income
out, yes.

Right. So in order to obtain - - -?---But it's not – it's not the actual case.

45 So in order to obtain finance, you told SME something that was not true; is that
.....?---No. It's – I think it's - - -

MR: Your Honour.

MR HAYES: No, your Honour. Your Honour.

5 HIS HONOUR: We will just a – just bear – perhaps you just go outside for a moment. If you go for outside – if you just go outside for a moment. I just have to deal with an objection. It’s just something we have to do?---Your Honour, I don’t want to answer any of these questions, your Honour. It’s just clarification. I think Mr Giles is confused. Sorry.

10 That’s fine?---Sorry.

No, that’s fine. If you just go outside for a moment?---Happy to answer

15 Yes, thank you. Just bear with me for a moment. Just bear with me for a moment. I’m thinking of section 192G of the New South Wales Act. That’s why I stopped it because as the question arises whether section a hundred and eighty – section 128 of the Evidence Act should be a certificate, because you’re effectively – if section 192G of the new – I’m not – this all happened in Victoria, did it?

20 MR HAYES: Yes.

HIS HONOUR: Well, I’m not sure if there’s a Victorian cognate of section 192(g) of the New South Wales Crimes Act, which is a person who dishonestly makes or publishes or concurs in making or publishing any statement, whether or not in writing, that is false or misleading, any material particular with the intention of obtaining a financial – relevantly, intuitively obtaining a financial advantage does offence. I just want to make sure that - - -

30 MR HAYES: Well, my objection even preceded that, your Honour, because firstly it was in the comments column, there was – we let it go to a point, but there was no evidence as to who made those comments. That’s the first – in other words, whose comments they are. Secondly, there’s no evidence so far that that information was conveyed or told to the person whoever made those comments by Mr Tesoriero. So
35 the foundation hasn’t been established to this point, your Honour, and that was really – we’re not at the point at which your Honour apprehends yet and we might not even – apprehend we might not ever get there.

40 HIS HONOUR: Right, yes. Can I go back a step. These documents, Mr Giles – they were produced on subpoena directed to whom?

MR HAYES: SME Finance, I understand, your Honour, which is a finance brokerage in Melbourne.

45 MR GILES: Well, I’m instructed that it was a notice to produce to Mr Tesoriero.

HIS HONOUR: This email?

MR GILES: Yes. I – we got that on the – the documents that - - -

HIS HONOUR: MFI 2?

5 MR GILES: - - - your Honour gave access to this morning. And I understand that to have been those which were produced by Mr Tesoriero. I should say we have issued a subpoena to SME. It's possible that I – what I have just said is wrong. But our understanding is that it was on the notice to produce.

10 MR HAYES: Your Honour, I'm instructed that we don't think it has come from us. We think it's from SME.

HIS HONOUR: Well, I think that should be - - -

15 MR HAYES: But that's beside the point, your Honour.

HIS HONOUR: I think that should be clarified. If - - -

20 MR HAYES: Even if it has come from Mr Tesoriero, he has been sent a copy of this – sorry, your Honour, the other one – spreadsheet. So who prepared it? And whose comments appear there? And the basis for those comments - - -

25 HIS HONOUR: If it's Mr Tesoriero or from the financier, it's clearly a business record he is entitled to cross-examine on.

MR HAYES: Sure. But as to – yes, that's right. But subject, though, as to the type of question, your Honour, insofar as to attribute - - -

30 HIS HONOUR: I thought he had already – I thought he had already given evidence concerning the document which is attached to MFI 2, that it was something that was prepared – at least prepared by the broker.

MR HAYES: That's right.

35 HIS HONOUR: Yes. Well, it's a broker who is putting together a financial proposal on his behalf.

40 MR HAYES: That's right. And the provenance – I'm sorry. Your Honour, I'm instructed it has come – just excuse me, your Honour.

HIS HONOUR: Sure.

45 MR HAYES: Your Honour, the provenance of the document came under the notice to produce to Mr Tesoriero, which is not surprising, given that it's attached in an email sent to him.

HIS HONOUR: Yes.

MR HAYES: But the spreadsheet itself, your Honour, that's not Mr Tesoriero's document. It's a document prepared by the broker, not by him.

HIS HONOUR: So this document has not been produced by the financier.

5

MR HAYES: Well, it might have been. It might have been produced. I would expect, your Honour, that if a subpoena has gone to SME Finance, it - - -

HIS HONOUR: Well, the questions seem to be premised on the basis that this is a business record that was either – that the broker deployed by providing it to the finance company. Is that your instructions, Mr Giles?

MR GILES: But I thought that I had the witness accept that. That was my understanding of the email. I was cross-examining on that basis. On the first couple of questions I asked, I thought I got the acceptance from Mr Tesoriero that it had been provided to the financier – the prospective financier. He was not sure whether it had gone to the CBA as well.

HIS HONOUR: I see.

20

MR HAYES: The next step, your Honour, as to whether or not he has adopted – in other words, he has explicitly adopted those before the document has gone to the financier or not, your Honour, that's – it was never put to him in those terms as to whether he – the way I want to put it, your Honour, the foundation hasn't been established as to that next step as to what his role was without going to the financier.

HIS HONOUR: Well, I would infer, I must say – I mean, I don't have recollection of those questions and answers, Mr Giles. But you say they were the answers. I'm sure your – I'm sure the transcript will bear you out. But am I to infer that the communication from Johns to Mr Tesoriero and Mr Pratt at the top of MFI 2, that is:

30

Thanks, Vince. See you on Monday. I have sent the summary info to them this afternoon, left CBA at 15 million. Cheers.

Is that the summary that we're talking about?

35

MR GILES: That's my understanding, because that's the attachment. And Ms Hamilton-Jewell might - - -

HIS HONOUR: I think in fairness to Mr Hayes, if – I think I had better look at the transcript. If this document has been sent to the financier, then it seems to me he would be perfectly entitled to cross-examine in relation to it, because it's a representation made about the financial value, which you're asking – you're going to ask me to infer at the end of the day was something that, at the very least, his agent has put forward - - -

40
45

MR HAYES: That's right.

HIS HONOUR: - - - on their behalf in order to obtain financing. Yes. I – given we started so late, I was proposing to sit until 5 o'clock. Are you - - -

MR HAYES: I can move on to a different topic.

5

HIS HONOUR: If you want to move on a different topic, you're not going to be finished by 5 o'clock in any event, I expect.

MR HAYES: I don't think so, no.

10

HIS HONOUR: We can come back to that.

MR GILES: I should then seek to tender MFI 1 and MFI 2.

15

HIS HONOUR: Do you mean you wish to tender them?

MR GILES: Yes.

HIS HONOUR: Okay. Any objection?

20

MR HAYES: No objection, your Honour. As your Honour says, they are business records.

HIS HONOUR: Yes. MFI 1 will become exhibit B.

25

EXHIBIT #B MFI 1

30

HIS HONOUR: And MFI 2 will become exhibit C.

EXHIBIT #C MFI 2

35

HIS HONOUR: Yes. Court Officer, if we could have Mr Tesoriero back in, please.

<VINCENZO FRANK TESORIERO, RECALLED

[4.27 pm]

40

<CROSS-EXAMINATION BY MR GILES

45

HIS HONOUR: Mr Tesoriero, Mr Giles is going to move on to something else?---Thank you, your Honour.

MR GILES: Now, Mr Tesoriero, you've got the two documents that I have been referring to as MFI 1 and MFI 2 sort of open - - -?---Yes. Yes, I do.

- - - more or less to your right?---Yes, Mr Giles.

5

You can fold those up and get them out of your way?---Okay.

Indeed, you could even give them back to the court officer, because I'm not going to ask about them again this evening?---No worries.

10

Now, you can also, for now, close your affidavit of 12 July?---Yes, Mr Giles.

I don't think I can tell you you can put that one away or give it to the court officer, but you can close it and put it - - -?---That's all right.

15

- - - out from in front of you?---No worries.

And I would like you to pick up again Ms Murray's affidavit?---Yes. That's this one, isn't it, Mr Giles?

20

Of 30 June?---Yes.

That's right. And I think you have now seen how it works. The first five pages are Ms Murray's affidavit. They've got numbers in the - - -?---Yes.

25

- - - at the top of the page. Then there's an exhibit certificate?---Yes.

And if you then turn over there, the pages are paginated in the bottom right-hand corner?---Yes.

30

Now, I would like you to go to page 70, please?---Judo Bank.

That's right. And see that's the - - -?---Berkeley Street Hawthorn one? That's the one you're referring to, Mr - - -

35

That is?---Yes.

That's the 64 to 66 Berkeley Street Hawthorn Unit Trust?---Yes.

40 Now, the director of - the trustee of the 64 to 66 Berkeley Street Unit Trust is - - -

HIS HONOUR: Surely it's "Berkeley".

MR GILES: "Berkeley". "Berkeley" or "Berkeley"?---Whatever you like.

45

MR HAYES: "Berkeley" is the correct pronunciation, your Honour, as in - - -

THE WITNESS: I think you're right, your Honour. I think you're right.

MR HAYES: - - - Bishop Berkeley, the famed diarist scholar - - -

5 HIS HONOUR: Right.

MR HAYES: - - - of Trinity College Dublin.

MR GILES: I made the mistake of following the witness.

10 There's a company, 64 to 66 Berkeley Street - - -?---That is correct. Yes

- - - Proprietary Limited?---Yes.

15 You're the sole director of that company, aren't you?---I believe so. I will need to double-check that, Mr Giles.

Now, you see on this page there are two payments that are made of \$33,600 on 12 April and then one of \$33,000 on 28 April?---I do see those. Yes.

20 Could you explain to her Honour – to his Honour why two payments were made to the financier in April?---There is always two payments that are made to that facility.

25 I understand why you say that, and I should be clear. Could you go to page 73?---Yes.

You see in April there was a third payment of \$25,600 made?---I do see that. Yes.

30 So why were three payments made in April to the financier?---I think what you will find, Mr Giles, is – is similar to the ANZ. Judo puts money into one account, and then they redirect it to the various loan accounts as they deem appropriate.

35 Right. Step back from that. Did you direct each of those three payments to be paid?---I would have directed them. Yes.

Why did you direct the three payments be made in April?---I – I don't think it's three payments. I think what you will find is one of those payments are redirected from the other account.

40 Well - - -?---If that makes sense. I – I could be wrong. I would have to clarify for you, Mr Giles, but typically, it's – it's around the 57 to 60 thousand dollars a month, and often there is months that are a little bit in arrears, because the petrol station rents aren't enough to cover them on occasion, so it could have been a top-up. It could have been – I would have to double-check that.

45 All right. Well, page 70 - - -?---Yes.

You see a payment was – of \$33,600 was made on 12 April?---Yes. I do see that.

And then one of \$33,000 made on 28 April?---Yes. I do see that.

5 And both of those record payments being made by the company as trustee of the trust to Judo; that’s how you understand the statement?---The – the – this is Judo’s statement, so the money would have come from ANZ.

10 No. No. But once it - - -?---So it has landed in the Judo statement, so I think you will find, if you look at the other one - - -

That’s right. So - - -?---You said that’s on the 28th, so that would be the same – it doesn’t show up on the other one, so I think it’s the same money doubled up going from one account to another unless I’m wrong.

15 Well, can I suggest that can’t be right, because the – where there – the day on which there are two payments to Judo - - -?---Yes.

20 - - - is on 28 April - - -?---Yes.

- - - and one is for \$33,000 on page 70, and one is for \$25,600 on page 73?---Yes. But if you look at the facility reference, they’re two different facilities.

25 That’s right?---Yes.

Right. So they’re not - - -?---But it’s – it’s the same loan for Berkeley Street, but there is two different facilities on that loan, so as I said, money would go into one account and then be redistributed to the other account by Judo themselves.

30 I understand. As at today - - -?---Yes.

- - - there is only one facility - - -?---The facilities have been – has - - -

35 - - - secured by a mortgage over - - -?---Berkeley Street.

- - - Berkeley Street?---The – I don’t know.

Berkeley Street?---As of today, the facilities are in the process of being merged.

40 That’s right?---Yes.

Because about a month ago, you refinanced these facilities, didn’t you?---No. I didn’t refinance these facilities at all.

45 You entered into a deed of forbearance with Judo Bank, didn’t you?---We did. Yes.

You extended the term of the facilities, didn't you?---I would need to double-check that, Mr Giles.

5 You gave a release to Judo Bank, didn't you?---Again, I would need to double-check that, Mr Giles.

10 You agreed that Judo Bank would release its claim over Forum Group of Companies, didn't you?---I think that is – that's what Judo requested in the deed of forbearance. Yes.

15 Why did you do that? Why did you agree to that happening?---Because the interest payments are becoming too much, and with the increases in interest, I spoke to the at Judo Bank, and we've tried to work out a way with the interest payments increasing on the service stations and on the Berkeley Street facility to be able to merge the facilities to bring the interest payments down. Otherwise, it won't be able to be maintained.

20 So as at today, there's just the single facility, which is the merger of the two previous facilities?---I don't know if it has taken effect as of yet, Mr Giles. I believe it hasn't taken effect as of yet.

But back in April, there were two facilities secured by mortgage over Berkeley Street?---That is – that's correct.

25 Right?---One of the same, but split over two facilities.

That's right?---If that makes sense.

30 And - - -?---But I believe still as of today it still remains like that. I don't think it has taken effect of the new facility as yet.

So the point is that on page 70 is the statement for one of the facilities - - -?---Yes.

35 - - - in existence?---Yes.

Two payments were made in April?---Yes.

40 Why?---I – I thought I just explained that, Mr Giles. There was – there was two facilities. There is still two facilities. There has always been two facilities on that property - - -

Two payments - - -?--- - - - from - - -

45 - - - were made on the facility - - -?---Yes.

- - - which is the – if you look in – on page 70 - - -?---Yes.

--- described as “account type” ---?---Yes.

--- “business loan variable I/O”, and the facility name ---?---The – the ---

5 --- ends with 572?---One ends in 572, and if you look on the other one, it ends in 571. They’re two different facilities.

That’s right?---Yes.

10 Two payments were made on 572 in April?---Yes. That’s correct.

Right. One payment was made on 571 in April?---Yes. But – but if you look, there is – there is a debit across of 29,688, as well, so money gets transferred, like I said to you. I don’t know – I would have to double-check what occurred, but Judo transfers
15 money themselves internally, the same as ANZ does, to satisfy the facilities.

But, Mr Tesoriero, on page 70, the twenty-nine thousand dollar payment is not a transfer. It’s the interest being charged to you?---That’s – that’s correct, Mr Giles.

20 Right. It’s the long and the short of it that you can’t tell his Honour why two payments were made from the ---?---I thought I just explained that.

--- 572?---No. I did. Did I not clarify, your Honour? Did you ---

25 Could I ask that you turn up the cross-examination bundle and go to – so the slimline bundle that I gave you?---Before we move on, Mr Giles, did you want me to further clarify that? Because you seem to be confused. I’m happy to clarify it, if – if there’s – there’s two facilities – two payments.

30 Mr Tesoriero, what I’ve been trying to ask you is that there are two payments on the – on one facility and a third payment on the second facility?---No. That’s not correct.

35 So you’re saying that the Judo Bank statement at page 70 is wrong?---I – I believe so. Yes.

All right?---There should be money coming into that account, and you’ve obviously missed one of the dates where it goes back out to the other account.

40 Okay?---I do love my relationship manager at Judo Bank, Mr Giles, but I wouldn’t pay him double interest.

Well, could I ask you this, then?---Yes.

45 Could you go to page 76 ---?---Yes.

--- of CMM26?---Yes.

You see there are two payments made in April on the 4 Cowslip - - -?---Yes. I do see that.

- - - loan account?---Yes.

5

Right. Why were those made, that is, why were two payments made on that account?

HIS HONOUR: Did you say “page 26”?

10

MR HAYES: 76.

MR GILES: 76, your Honour.

15

HIS HONOUR: 76.

THE WITNESS: I’m just having a look now, Mr Giles, to see if potentially maybe one of the months prior might have got missed. I would need to clarify that, Mr Giles, but we definitely don’t pay interest twice. It could be a catch-up from a previous month. Like I said, sometimes the rent isn’t enough to cover the interest. There’s often months where the account that you referred to earlier today with 150,000 – there’s often months where that account is in – in negative debits. So that could potentially be why, but I would need to clarify, and I’m happy to get back to you on that.

25

HIS HONOUR: I’m a little confused?---Yes, your Honour.

It’s obviously my fault. Page 76, Mr Giles – you said there were two payments. There’s two credits.

30

MR GILES: That’s right. Reducing the loan.

HIS HONOUR: I’m sorry?

35

MR GILES: So it’s a credit reducing the loan. It’s from the bank’s perspective rather than the – so you see the right-hand column, the loan amount is decreased.

HIS HONOUR: Yes.

40

THE WITNESS: I think you’re wrong, Mr Giles. That’s a running balance.

MR GILES: That’s right.

HIS HONOUR: So the opening balance is \$1923 – 10658. That’s a loan account.

45

MR GILES: That’s a loan account.

HIS HONOUR: That's a loan account debit.

MR GILES: That's right. That's the amount owed.

5 HIS HONOUR: \$8000 has been put, which reduces that balance to - - -

MR GILES: Correct.

10 HIS HONOUR: - - - \$1914 – a further 8000, which is reducing that balance – 1907.

MR GILES: That's right.

HIS HONOUR: So what's the issue?

15 MR GILES: I'm just trying to ask why there were two payments made on that loan account in April.

THE WITNESS: I did explain, Mr Giles.

20 HIS HONOUR: Well, there was only one that was made in April.

MR GILES: There was only one – if one goes back to 75, there was only one made in March. 76 – there are two made in April. 77 – one made in May. See that?---I haven't got it open in front of me, Mr Giles. I'm - - -

25 Could you open it up in front of you - - -?---Yes.

- - - Mr Tesoriero?---So the only – I have page 70 here – is the Berkeley Street – or Berkeley Street, and then - - -

30 Just another page?--- - - - as I keep going, I have the March statement, I believe, here – yes – which shows one payment for Cowslip, and I have two in May, but I don't have April shown here.

35 Page 76 – you see the dates?---Yes. But the – if you look at the – where did I just see that?

HIS HONOUR: There are varying credit amounts paid unless I'm missing something?---It does vary, your Honour. Yes.

40 There are various credit amounts paid at various months, but they're all – it's a P&I loan, and there are amounts being paid off from time to time – this Judo - - -

45 MR GILES: Right. I'm just trying to suggest – Mr Tesoriero, was it a matter of your choice that two payments were made to – on the – on each of those loans - - -

HIS HONOUR: Yes.

MR GILES: - - - I've directed your attention to in April?---Again, Mr Giles, I would have to double-check. I'm – I'm sure there's a plausible explanation as to why, but I'm just trying to see if there's a statement date that's missed here, and possibly that's why.

5

HIS HONOUR: Well, it's pretty clear. You've got all the statements. It's from - - -?---Yes.

10 It's from April, May, June for both facilities?---But there could be a potential – a different facility with that - - -

Well, the facility reference - - -?---See, if I look – if - - -

15 The facility reference is up the top?---Yes. So if you look at the two different facility – there's two different facility references there, Mr Giles. If you look at the exhibit on page 78 and page 77, there's two different facility references there. But – yes. The account name stays the same.

20 MR GILES: Yes?---Again, I'm not saying that's the answer. I would need to check with Judo and come back to you on that. I'm happy to – to come back to you on that. Is it just the one month that you're questioning, the 8000, or is there another one?

I've been asking you about the double payment made in April – what I have - - -?---Yes.

25

- - - characterised as a double payment made in April - - -?---Yes.

- - - in relation to Cowslip Street - - -?---And a double payment on - - -

30 - - - in relation to Berkeley - - -?--- - - - Berkeley, you're suggesting.

- - - Street - - -?---Okay.

35 And a double payment, also in April, on 275 High Street at page 82?---Okay. Bless you.

HIS HONOUR: Thank you.

40 MR GILES: And a double payment made on page 85 for a second account on 275 High Street, also in April, and on page 88 another double payment in April, also High Street?---Yes. I – I believe it's – it's definitely an error, Mr Giles. I don't think I would be making double payments.

45 HIS HONOUR: Well, there's was a double credit always in April on pages 79, 82, 85, 88, 91, 94, 100 and 103?---I think your Honour will find it would be redirected to a different facility. But again, Mr Giles, if you can make that list, and we can – we can respond to you.

MR GILES: I will just draw your attention to it?---It's no – no problem.

No doubt – yes?---Happy to oblige.

5 Could I then ask you to turn up the slimline folder that I gave you earlier?---Slimline folder. Yes.

That's the one which I think I've called the cross-examination folder. I wonder if that might be marked MFI3 for now.

10

HIS HONOUR: I don't think I've got a copy of it, Mr – is it this one? Yes. I have.

MR GILES: Yes.

15 HIS HONOUR: All right. The folder entitled Cross-Examination Bundle for Hearing on 19 July 2022 will be marked MFI3.

20 **MFI #3 FOLDER ENTITLED CROSS-EXAMINATION BUNDLE FOR HEARING ON 19 JULY 2022**

THE WITNESS: What page would you like me to go to, Mr - - -

25 MR GILES: Page 81, please?---Page 81? Forbearance deed. Yes.

And if you go to page 96, you see that this was executed by you on 14 June 2022?---Yes. That's correct.

30 And you see, on page 86, Judo has released?---Yes. I do see that.

And you see, on page 89, clause 7.1, "oblige all party", which is relevantly the Berkeley Street company and you, have released Judo?---Which point is that – sorry – you said?

35

7.1?---Yes.

And you see, on page 93, that the term has been varied - - -?---Yes.

40 - - - for 15 years?---Yes. I think the original term might have been something similar, also.

HIS HONOUR: But this is a variation of mortgage, effectively.

45 MR GILES: It is.

THE WITNESS: Yes.

HIS HONOUR: It doesn't appear to be stamped.

MR GILES: No. But I thought the consequence of the Full Court was – section 55 would mean that that's not picked up. But - - -

5

HIS HONOUR: No.

MR GILES: No.

10 HIS HONOUR: That's an exception. It's an exception. The revenue laws are picked up in federal jurisdiction - - -

MR GILES: Are they?

15 HIS HONOUR: - - - under section - - -

MR GILES: Well, Ms Hamilton-Jewell corrects me that there's a further exception - - -

20 HIS HONOUR: Section 9.

MR GILES: - - - because I am not the party liable for the duty.

25 HIS HONOUR: Yes. Okay. Good. You haven't tendered it yet, anyway. So you can tender it.

MR GILES: Well, to crystallise that, I tender the document at page - - -

30 HIS HONOUR: In any event - - -

MR GILES: - - - 81 and following. Your Honour, I tender the document at page 81 to 96.

35 HIS HONOUR: Well, why don't we just tender all the documents that you wish out of – we will do that in one hit.

MR GILES: We will do that at the end.

40 HIS HONOUR: Out of MFI3 – because I presume there's other ones you want to go to, as well.

MR GILES: I'm grateful.

45 Now, this was executed on 14 June '22 by - - -?---That's correct. Yes.

- - - Judo Bank. It was also executed by you, was it? I should direct your attention to page – yes. It was?---I – I think I executed it.

96?---I think I executed it. If we're going on dates, Mr Giles, I think I executed it prior to Judo Bank, and they might have been a week or two later.

5 All right. And this was an agreed, in effect, refinance of the loan, wasn't it?---No. It wasn't a refinance. No.

It was extending - - -?---It was – it was purely a merging of facility to – to be able to allow it to – my interest payments to be met.

10 It was extending the term, though, wasn't it?---No. I don't think it was. I think the term is the same.

Could I ask that you go, then, back to page 66 of MFI 3?---Yes.

15 Slightly curiously described – addressed document, 13 November 2020 to – addressed to you as 64 to 66 Berkeley Street Hawthorn Proprietary Limited?---Yes.

“Dear Basile” – Basile?---Yes. Yes, I can see the document you refer to.

20 Back to that in a moment. But the – if you go to page 68, the term. And 69, you see the term on page 68 for one part – for facility 1 was 60 months?---Yes.

And on 69, 36 months?---That is correct, yes.

25 So then agreement you entered into less than a month ago, you extended the term of that, facilities as well as merging them?---I would – I would need to double-check with you, Mr Giles, because I believe that the 60 month term had a rollover to continue. So I would need to double-check that with Judo and come back to you. And the 36 month one was always on a run-out, so it was always going to pay itself
30 off, if that makes – it was principal in interest. So as that depleted, it was going to diminish and disappear in any case and just roll into the one facility.

And the fact - - -?---Does that make sense, Mr Giles?

35 No. The Basile referred to on page 66 is Mr Papas, isn't it?---Yes, it is. Yes. Would you like me to clarify that last point if it doesn't make sense?

HIS HONOUR: Your counsel can seek to clarify anything he wishes to in due course?---Sorry.

40

That's all right.

MR GILES: So this is aligned to 64 to 66 Berkeley Street Hawthorn?---Yes.

45 Now, that's a trustee of a trust, isn't it?---I believe - - -

That company?---I believe so. Again, I would need to check for you, Mr Giles.

Well, I did promise you that you didn't need your 12 July affidavit, but perhaps you do. Could you take up your 12 July affidavit?---Yes, I can. What page would you like me to go to, Mr Giles?

5 I'm just trying to find where you describe the companies that you have an interest in.

HIS HONOUR: Just bear with me for one moment, Mr Giles. I had a horrible thought I was supposed to give a speech in five minutes, but it's an hour and five minutes.

10

MR GILES: Yes, page 22, item 6. You see there you've described in the third column legal owner?---Yes.

64 to 66 Berkeley Street Hawthorn as trustee for the - - -?---That's correct.

15

- - - similarly named unit trust?---Yes.

Then in the next column which you see from what the heading of the next column is from back on page 21, extent of interest or control?---Yes.

20

50 per cent of the units on issue - - -?---Yes.

- - - in the Berkeley Trust are held by TIT Trust, which you know is the Tesoriero Investment Trust?---That is correct, yes.

25

The other 50 per cent of the units is held by a company called Eaross, isn't it?---I would have to double-check, but quite possibly, yes.

And Eaross, to your knowledge, is a trustee of - - -

30

MR HAYES: I object to the question. Unless the – unless it's an entity associated – if it's an entity associated with Mr Tesoriero, I don't press the objection. If it's going to be suggested it's an entity associated with someone other than Mr Tesoriero, I do, because it's irrelevant. What we have an inquiry into today is into Mr Tesoriero's circumstances.

35

MR GILES: No. I am going to suggest it's an entity other than Mr Tesoriero, and - - -

40

MR HAYES: Well, it's plainly irrelevant, your Honour.

MR GILES: No. I – there is an obvious relevance, if I might say.

HIS HONOUR: Well – sorry.

45

MR GILES: Yes.

HIS HONOUR: I'm sorry. Can we - - -?---You're going to make me leave again, your Honour.

5 Yes, please. Thank you?---I've got a pretty thick skin. My feelings don't get that hurt.

<THE WITNESS WITHDREW

[4.55 pm]

10

MR GILES: I'm going to suggest that Eaross is controlled by Mr Papas. The beneficiaries – I actually don't know who they are, but I'm going to put they were either Mr Papas or his children. And then I'm going to suggest that he's causing his companies to make payments for the benefit of a trust or, more accurately, the trustee of a trust of which Mr Papas has a 50 per cent interest in and that that's going to relevantly going to go to your Honour's discretion as to whether you allow legal fees out of money over which my client has a proprietary interest.

20 HIS HONOUR: Just say that again. I don't have - - -

MR GILES: Yes.

25 HIS HONOUR: - - - the affidavit in front of me, so this affidavit – it's the July 2021 affidavit.

MR GILES: No. July '22.

30 HIS HONOUR: July 2022. I couldn't see it in the – when you were cross-examining on it. I thought I must have had the wrong affidavit, because it – could you give me the page number again.

MR GILES: Page 22.

35 HIS HONOUR: What I've got at page 22 of the 21 – 12 July or 21 July?

MR GILES: 12 July.

40 HIS HONOUR: 12 July is Buxton Oakleigh Commercial Industrial Pty Limited statement.

MR GILES: No. Mr Tesoriero's - - -

HIS HONOUR: Well, that's what I got - - -

45 MR GILES: - - - 12 July - - -

HIS HONOUR: That's what I got - - -

MR GILES: - - - '22 affidavit?

HIS HONOUR: That's what I got confused about. 12 – his 12 July 2022 affidavit.

5 MR GILES: Page 22.

HIS HONOUR: Sorry. I was looking at page 22 of 366, which was the - - -

10 MR GILES: Yes. I'm sorry.

HIS HONOUR: - - - exhibit numbering. I'm sorry. That's my fault.

MR GILES: No. No. It's my fault for operating off last night's version.

15 HIS HONOUR: Yes. Now that I've got it in front of me – so - - -

MR GILES: The row with the number 6 in it, 64 to 66 Berkeley Street.

20 HIS HONOUR: Yes.

MR GILES: Legal owner is the company as trustee, so the third column, and the fourth column is extent of interest or control; 50 per cent of the units on issue are held by the TIT trust.

25 HIS HONOUR: Yes.

30 MR GILES: I was going to ask – well, the other – in effect, put the proposition the other 50 per cent are owned by a Mr Papas controlled entity and that what's happening is Mr Tesoriero is choosing to make payments for the benefit of a trust that Mr Papas or his entity has a 50 per cent interest in. And ultimately, in submissions, I will say, well - - -

HIS HONOUR: But he's liable. He's liable, isn't he - - -

35 MR GILES: Well - - -

HIS HONOUR: - - - to pay them?

40 MR GILES: Well, except the persons making the payment aren't, of course, because they have – they are other companies.

45 HIS HONOUR: I know, but I'm just finding it – I understand why this might be relevant to a whole range of things, but I'm a little perplexed as to why it would be relevant to the issue I have to determine at the moment.

MR GILES: There's one point I slipped over. Of course, 64 to 66 Berkeley Street doesn't actually pay the money itself. He – Mr Tesoriero causes his other

companies, that is, the income-earning ones, to do it – to make the payment. That’s just the point.

5 HIS HONOUR: Well, why – I mean, to the extent that that’s relevant – and undoubtedly you will explain that in submissions – why is it – there the necessity to cross-examine on it?

MR GILES: I suppose there’s not.

10 HIS HONOUR: No. All right.

MR GILES: Well, yes.

15 HIS HONOUR: Well, we can - - -

MR GILES: Okay.

20 HIS HONOUR: - - - move on. We can move on, then. I think that would be a convenient time. Perhaps I will get my associate to go out and explain to – or perhaps I will ask the witness to come back in. Could you ask the witness to come back in, please.

25 MR HAYES: Prior to giving him the conventional explanation, your Honour, while he’s under cross-examination, I would ask that we would be permitted to at least get instructions to obtain the various documents that were called for under the notice to produce.

HIS HONOUR: Yes. By all means.

30 MR HAYES: Thank you, your Honour. Excuse me, your Honour.

35 HIS HONOUR: Mr Tesoriero, there’s no need to come back in the witness box at the moment. That concludes the cross-examination for the purposes of today. If – no. It’s all right. You can stay there. That’s fine. No. No. It’s fine. You can stay there. That concludes the cross-examination for today. If you can come back at 9.30 am tomorrow when the cross-examination will continue.

MR TESORIERO: Sure.

40 HIS HONOUR: I’m saying this – I say it to every witness. It has got nothing to do with you. But given you’re under cross-examination, you can’t discuss the matter with anyone whilst you are under cross-examination. The one exception is that your legal advisers will speak to you before you leave, if you wait outside for a moment, about documents that you should seek to try to obtain overnight, and so they will
45 identify those documents for you, but otherwise, if you could just then make sure you come back here at, say, 25 past 9 tomorrow. It will – I will just check whether it will

be in this courtroom. Yes. If you come back here to this courtroom, it will either be here or, alternatively, someone will give you an indication of where you need to go.

MR TESORIERO: Yes.

5

HIS HONOUR: Thank you. So you're – if you could leave now.

MR TESORIERO: Do I leave these documents here?

10 HIS HONOUR: You can leave that there for present purposes.

MR TESORIERO: Thank you.

HIS HONOUR: Thank you. Is there anything further?

15

MR GILES: No.

HIS HONOUR: All right. Well, my associate will be in touch about what courtroom we're in tomorrow.

20

MR GILES: May it please.

MR HAYES: If your Honour pleases.

25

MATTER ADJOURNED at 5.02 pm UNTIL WEDNESDAY, 20 JULY 2022

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O/N H-1753355

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

LEE J

No. NSD 616 of 2021

No. NSD 642 of 2021

No. NSD 681 of 2021

No. NSD 747 of 2021

WESTPAC BANKING CORPORATION and OTHERS

and

FORUM FINANCE PTY LIMITED (IN LIQUIDATION) AND OTHERS

SMBC LEASING AND FINANCE, INC

and

FORUM ENVIRO (AUST) PTY LTD (VOLUNTARY ADMINISTRATORS APPOINTED) and OTHERS

IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED (ADMINISTRATORS APPOINTED) and OTHERS

SYDNEY

9.30 AM, WEDNESDAY, 20 JULY 2022

Continued from 19.7.22

DAY 2

MR J.C. GILES SC appears with MS C.A. HAMILTON-JEWELL for Westpac

MS E.L. BEECHEY appears for SMBC Leasing and Finance

MR R.K. JAMESON appears for the liquidators and receivers

MR P. HAYES QC appears with DR P. TURNER for Mr Tesoriero

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HIS HONOUR: Yes, Mr Giles.

5

MR GILES: I've made a call for some valuations yesterday.

MR HAYES: Your Honour, they've been, I think, a matter of only moments ago,
forwarded in PDF format to our learned friend's instructors, and I'm instructed that a
10 hard copy is on the way up to court this morning. It should be here by 10 am.

HIS HONOUR: All right. Well, when it arrives, if in the – it can be produced to the
court and I will make an access order in relation to it.

15 MR HAYES: We don't oppose access, your Honour.

HIS HONOUR: Yes.

MR HAYES: And as I've said to Mr Giles, if he doesn't tender it, I will.
20

MR GILES: The transcript hasn't arrived, as I understand it, yet, your Honour, and
I will just do things another way.

HIS HONOUR: There's a partial transcript, I think, till 3.30.
25

MR GILES: Yes. Doesn't get me far enough to the question that arose.

MR HAYES: We haven't seen that.

30 MR GILES: But I will just – I'm just going to move on, I think.

HIS HONOUR: Well, I will let you know. I will have my associate chase up
Auscript to see what's happening with the balance of the transcript.

35 MR GILES: I think our instructors have done the same, and as of about 10 minutes
ago it was foreshadowed to be about 20 minutes then.

HIS HONOUR: Okay. All right. Well, we will – I indicated yesterday that I have a
difficulty. I'm just going to see how things go. I'm making some inquiries about
40 something. So I'm just a bit, at the moment, up in the air about sitting hours today,
but I will let you know in due course.

MR GILES: Yes, your Honour.

45 MR HAYES: If it assists, your Honour, and appreciating your Honour's
circumstances, we're free tomorrow as well, if that helps.

HIS HONOUR: Yes. Unfortunately, I'm in Canberra tomorrow.

MR HAYES: Your Honour pleases.

5 HIS HONOUR: Yes. All right. Well, if we have Mr Tesoriero. If you could come back in the witness box, sir. And, Court Officer, could you reswear the witness, please.

10 <VINCENZO FRANK TESORIERO, RESWORN [9.33 am]

<CROSS-EXAMINATION BY MR GILES

15 HIS HONOUR: Yes. Thank you, Mr Tesoriero?---Thank you. Thank you.

Mr Giles.

20 MR GILES: Thank you, your Honour.

Mr Tesoriero, I wonder if you might be given back a copy of your affidavit of 12 July 2022?---Thank you.

25 Mr Tesoriero, sorry was trying to give you something different. Mr Tesoriero, could you go to page 35 of your 12 July affidavit, please?---Yes, Mr Giles.

Now, you see there is a second row, a company called 286 Carlisle Street Proprietary Limited?---Yes.

30 And you identify there that that's a company which you hold shares in?---Yes.

Are you the sole shareholder in that company?---I believe so.

35 And you don't act as a trustee. That's what the word "no" indicates there, in relation to those shares. So you hold them for yourself?---I believe so.

40 And the "beneficially owned" column – does that mean – or maybe I've got it back to front. Anyway, the company is not a trustee?---I believe so, Mr Giles, if that's what it says there. Yes.

Yes. I see. All right. And then Tesoriero Investment - - -

45 HIS HONOUR: Sorry. I think that's a different question you asked before.

MR GILES: I will - - -

HIS HONOUR: I think – I would just like to clarify. I thought you were asking for whether he held the share as a trustee or whether the company was acting as the trustee.

5 MR GILES: I had intended to ask those two questions. I will do it again.

I've messed up the questions. I do that sometimes, Mr Tesoriero?---I – I might have messed up the answers, too, Mr Giles.

10 The share you hold in 286 Carlisle Street: you own that yourself and not as trustee?---I believe so. That's what it's marked at – as there. So I – without having it in front of me, I believe that's the case. Yes.

15 Right. And 286 Carlisle Street is not a trustee of any trust, either?---No. I don't believe it is.

No. And if one goes down to the ninth row, Tesoriero Investment Group, you're a shareholder in - - -?---Yes.

20 - - - Tesoriero Investment Group?---Yes.

You hold that share yourself and not as trustee?---I'm not 100 per cent certain on that one, Mr Giles.

25 But Tesoriero Investment Group itself holds all of its assets on a trust?---I would have to get back to you, Mr Giles. I'm not 100 per cent sure.

Isn't that what acting as trustee indicates, the second column?---Potentially, yes.

30 And then the trust of which Tesoriero Investment Group is trustee is a discretionary trust?---Again, I believe it is, but I would have to check to be certain.

And you're described in the trust deed as a primary beneficiary of that trust?---Again, I would need to check, but I believe so. Yes.

35 If it helps, you can go back to page 20 of that affidavit, and you see the numbered row 1?---Yes. It's – it's definitely marked there as a discretionary trust.

40 Could I ask that you be handed two bank statements. A copy for Mr Tesoriero. A copy for his Honour.

HIS HONOUR: What does “default beneficiary” mean? Is that the same as an object or is it something different?

45 MR GILES: I don't - - -

HIS HONOUR: Anyway, it may not matter.

MR GILES: Could I say – I can say, your Honour, from the structure of these trusts normally – and we all know they are a fairly common form.

HIS HONOUR: Yes.

5

MR GILES: For tax reasons, so that – in case the trustee does not make a distribution of income by 30 June, the default trustee – the default beneficiary the income is automatically distributed to is the usual way that happens.

10 HIS HONOUR: Yes, but he’s also an object of the discretionary trust.

MR GILES: Quite, yes. A default beneficiary must also be an object.

HIS HONOUR: Yes, yes.

15

MR GILES: Or – yes.

20 So the top one – the top statement that I’ve given you, Mr Tesoriero, is a bank statement for an account that 286 Carlisle Street Proprietary Limited has with the Commonwealth Bank?---Yes.

As at 1 June 2022, you see it had almost \$12,000 in that account?---Yes. I do see that.

25 And as at today, it also has an amount of almost \$12,000 in the account, doesn’t it?---That – that is correct.

I see. I wonder if that bank statement might be marked – sorry, might be - - -

30 HIS HONOUR: Yes.

MR GILES: I withdraw that. I tender that bank statement.

35 HIS HONOUR: All right. That’s the bank statement for the period ending 30 June 2022 for Tesoriero Investment Group Proprietary Limited – will become exhibit D.

MR GILES: It should have been 286 Carlisle Street. I handed up - - -

40 HIS HONOUR: I’m sorry, which was MFI4. So it will become – I was going to mark it MFI4, but that will be exhibit D.

45 **EXHIBIT #D BANK STATEMENT FOR 286 CARLISLE STREET PTY LTD
FOR THE PERIOD ENDING 30/06/2022**

HIS HONOUR: Yes.

MR GILES: Grateful.

5 HIS HONOUR: Sorry.

MR GILES: Then the second document – bank statement that I’ve handed to you is one for Tesoriero Investment Group?---Yes. That’s correct.

10 And you see it’s also for the period ending 30 June 2022?---Yes.

And if you go over to the second page, there’s a closing balance of almost \$41,000?---That’s correct, Mr Giles. Yes.

15 And as at today, it also has a balance of almost \$41,000 in it, doesn’t it?---That is correct. Yes.

Thank you. I tender that, as well.

20 HIS HONOUR: Yes. Well, the statement for Tesoriero Investment Group Proprietary Limited for the period ending 30 June 2022 will be marked as exhibit E.

25 **EXHIBIT #E BANK STATEMENT FOR TESORIERO INVESTMENT GROUP PROPRIETARY LIMITED FOR THE PERIOD ENDING 30/06/2022**

MR GILES: All right. Now, Mr Tesoriero, you can put those two bank statements to one side?---Sure.

30 MF13 – I wonder if Mr Tesoriero could be handed MFIC – sorry, MF13.

THE WITNESS: Thank you.

35 MR GILES: I wonder if we could just go back to a document that I took you to yesterday. Page 81, you see the forbearance deed?---Yes.

You see on page 93 of it (f), Repayment?---Yes.

40 And you see (f)(ii), Monthly Repayments?---Yes.

And the effect of this forbearance deed, to your understanding, was to combine – was, amongst things, to combine the two loans secured over the property in Berkeley Street?---That – that’s correct, Mr Giles.

45 And another effect of it was to reduce the monthly interest payments down to 30 – about \$33,000 a month?---It’s – it’s a bit more than that now, with the interest rate

changes. That document is quite a few months old, but the idea was to reduce the monthly payments. Yes.

5 Yes. So a month ago, you entered into this – less than a month ago, because it’s the – I withdraw that. Just over a month ago, five weeks ago, you entered into this forbearance deed?---I would have to check the date. I don’t know if we entered into it at that time, because I still think it hasn’t taken into effect.

10 Try page 95?---It was signed then. Yes.

Try reading page 96, where I went to yesterday. Prior to 14 June 2022, you had two – there were two loans secured over the Berkeley Street property?---Yes. That’s correct.

15 And the monthly payments on those, which you disclose to his Honour, were about \$33,000 plus about \$25,000?---That’s correct.

And since about 14 June, in fact, the monthly repayments have been reduced to \$33,000, haven’t they?---No, they haven’t, Mr Giles.

20 They haven’t?---No, they haven’t. I believe they are going to take effect from the next month.

I see, but you didn’t tell his Honour about - - -

25 HIS HONOUR: I’m sorry.

I didn’t quite hear that last answer, Mr Tesoriero?---They haven’t actually taken effect yet, your Honour. The document has been signed, but that has been procedurally.

30 MR GILES: And when you told his Honour in your affidavit of 12 July that you were making monthly repayments of slightly over \$58,000 on the Berkeley Street property, is there any reason why you didn’t mention the forbearance deed and that it was to be reduced to \$33,000 a month?

MR HAYES: Well, I object to the question, your Honour.

40 HIS HONOUR: Yes. What’s the objection?

MR HAYES: Because the order requires him to say what his assets and liabilities and – maybe if Mr Tesoriero just goes outside for a moment.

45 HIS HONOUR: Yes.

Mr Tesoriero, if you would go outside for a moment, please?---I was happy to answer.

There's no point showing exasperation. It's done for the benefit of the integrity of your evidence, Mr Tesoriero.

5 <THE WITNESS WITHDREW

[9.44 am]

MR HAYES: Might have been with me, your Honour.

10 HIS HONOUR: Yes. Go ahead.

MR HAYES: If your Honour pleases. The order – your Honour's order is very plain in what it requires of Mr Tesoriero, namely, that he disclose his assets and liabilities, and the picture – and also his income and expenses, and the picture that he
15 has – this document doesn't any – it doesn't in any way undermine, on this discrete issue, what he disclosed in that affidavit on 12 July. So, essentially, what Mr Giles is endeavouring to do is to cast upon Mr Tesoriero responsibility or a more onerous burden than that contemplated by your Honour, and if it's going to be suggested that, "Well, you should have told his Honour that things might change in the future,"
20 your Honour, that in its own right has got – if he was swearing the affidavit next week, that might be a different proposition, and - - -

HIS HONOUR: Well, if your submission is – if this deed took effect when the second counterpart signature was made on it - - -

25 MR HAYES: Yes, on 14 June.

HIS HONOUR: Both signatures appear to have – made on 14 June. This affidavit was sworn - - -

30 MR HAYES: On 12 July.

HIS HONOUR: - - - on 12 July, which is after the date of the deed. If your submission at the end of the day is that it was the truth and the whole truth and
35 nothing but the truth that his expenses were 58,000 in respect of that, because the terms of the deed hadn't yet taken effect and they had been – they – he was still obliged to pay \$58,000 until the first payment of \$33,000 – then, obviously, that's a submission you make. What I understand Mr Giles will submit is the fact that it wasn't frank to swear an affidavit not making reference to the forbearance deed, and
40 if that submission is going to be put, it seems to me this question is relevant.

MR HAYES: Well, no, your Honour, because what it endeavours to do – it's unfair in the extent that it invites the witness to speculate beyond the precise terms of your Honour's order. Your Honour's order of – just excuse me – of your –
45 your Honour's order of the 9th of – or your Honour's freezing order was clear in its terms as to what it requires, and the most recent iteration of it is in the Westpac proceeding. Mr Tesoriero is to file and serve an affidavit deposing as to his current

assets and liabilities position, including his current income and expense position, as at 11 July 2022.

HIS HONOUR: Yes.

5

MR HAYES: He has done that.

HIS HONOUR: I understood the submission when you articulated it the first time. You say that an affidavit made in those terms, where someone has executed a deed some weeks before which materially changed the nature of those expenses, is irrelevant to the question of whether or not that order has been complied with. I understand that submission. You're free to make it.

10

MR HAYES: Your Honour pleases.

15

HIS HONOUR: Mr Giles is making a different submission.

MR HAYES: Yes.

HIS HONOUR: And it seems to me it is relevant to the determination of the fact in issue – in me determining whether or not I accept that submission for this question to be asked, but I will hear submissions about it in due course.

20

MR HAYES: Well, we say it's no more relevant, your Honour, as to going to – if that is your Honour's approach, we say it's no more relevant to the question as to the current extent of his resources to fund the proceeding. It might be relevant to that issue, but it doesn't in any way – and I simply take objection on this point, your Honour. If it's going to be said that - - -

25

HIS HONOUR: Well, I was only addressing the relevance ground that you articulated.

30

MR HAYES: Yes. If it - - -

HIS HONOUR: I do see it is relevant, because – on a broader basis, because what you're seeking to do was to seek an order from the court releasing funds.

35

MR HAYES: That's right.

HIS HONOUR: His financial position going forward is clearly material to the exercise of the broad discretion.

40

MR HAYES: On that, yes, but we say this, your Honour: if it's going to be put on the basis that he has in some way not complied with your Honour's order, that's – it's nothing of the sort. I've taken your Honour to the order, and he has – what he has done - - -

45

HIS HONOUR: Well, the question is whether it's relevant within the meaning of section 55 and 56 of the Evidence Act. It is. I will allow the question.

MR HAYES: Your Honour pleases.

5

HIS HONOUR: I will hear submissions in due course.

MR HAYES: Your Honour pleases.

10 HIS HONOUR: It's a very broad discretion that I'm exercising, and I don't think the question Mr Giles was asking is unfair in all the circumstances. Can we have the witness back in, please, Court Officer.

15 <VINCENZO FRANK TESORIERO, RECALLED [9.48 am]

<CROSS-EXAMINATION BY MR GILES

20

HIS HONOUR: Yes, Mr Giles.

MR GILES: Mr Tesoriero, when you swore your 12 July affidavit, why did you not refer to the forbearance deed?---The forbearance deed hadn't been signed, I believe, by the other side – hadn't been returned as yet, but I would have to check that, Mr Giles.

25

Well - - ?---So it hadn't actually – in any case, it hasn't taken effect. And in addition to that one, there's also the other loans with the petrol stations, which have also gone up in interest rate. If you've seen that one, you would have seen the others would have also gone up, Mr Giles. So between the two, they almost work out the same.

30

You told me yesterday, I think, that you signed it before Judo Bank signed the forbearance deed?---I signed – I signed it before. That's correct.

35

Right. And I thought you also told me yesterday that you thought that Judo Bank signed it on 14 June?---I think I said I had to double-check that, but if that's what I said, yes.

40

And it's the best of your recollection that Judo Bank and you signed it by no later than 14 June, isn't it?---I would need to double-check that, Mr Giles, but in any case, it hasn't taken effect. As of 12 July, it had not taken effect.

45 Can I direct your attention on page 93 to the opening words under the heading Schedule 2?---Yes.

The amended terms – you’ve read this before, haven’t you?---Yes, I have, Mr Giles.

And you know that the forbearance commencement date is a defined term?---Yes, Mr Giles.

5

Go back to 84. It’s the date of this document?---Back to 84, is it?

Page 84, second-last definition?---Yes.

10 And the only date on the document is 14 June, isn’t – 14 June 2022, isn’t it?---That’s what I saw, yes.

15 Yes. Right. Having had your attention directed to that, do you still maintain that the forbearance deed had not taken effect at the time you swore your 12 July affidavit?---Yes, I do.

20 HIS HONOUR: Why is that?---Because we had signed it with Judo, and the gentleman at Judo said he had to go back and go through their procedures and all that sort of thing and come back to us with – with a date when it would take effect.

MR GILES: That’s just not right, is it? That evidence that you’ve just given his Honour is just not right?---I believe it to be right, Mr Giles.

25 Well, could you go to page 80, please.

HIS HONOUR: Can I understand – I’m sorry, Mr Giles.

MR GILES: Yes.

30 THE WITNESS: Yes, your Honour.

HIS HONOUR: Can I just understand this. I just want to clarify this?---Yes.

35 When you say “not taken effect”, is what you’re saying the amount that you were – you hadn’t understood that the amount that you were required to pay pursuant to the new arrangements, that is, the drop from \$58,000 to approximately \$33,000, hadn’t yet taken effect?---That is correct, your Honour. Yes.

40 Right. So the - - -?---And – and hadn’t been - - -

So to - - -?---Sorry.

So just so I understand - - -?---Yes.

45 So you had signed the deed, but the obligation to pay hadn’t yet changed, because you hadn’t yet made a payment; is that what you’re trying to say?---No. Judo Bank still said they had to come back to confirm, because this deed had been discussed for

about six months or so. We had been in discussions with Judo Bank, so when it was finally signed after such a long period of time, he said he – the gentleman at Judo Bank, Lou Todesco, said he would have to go back and discuss it and then confirm what would happen next. So nothing was set in stone as to what date it was going to take effect, whether it was going to be July or whether it was going to be August.

5
So sitting in the witness box there, today, you say that you haven't – you have or have not received that confirmation from Judo Bank?---I have received the confirmation, yes.

10
And when did - - -?---Just – that was two days ago. On Monday, I think it was.

Monday, was it?---Yes.

15
Okay. And what was that gentleman's name?---Lou Todesco.

Luke?---Lou.

20
Lou?---Todesco.

Todesco?---Yes.

How do you spell that, T-e-d?---T-o – T-o-d-e-s-c-o.

25
And where's he?---He's at Judo Bank.

In Victoria?---In Victoria, yes.

30
Yes. All right?---And the figure now, your Honour, is closer to 40,000, because of the interest rate increases.

And your evidence - - -?---So it's – it's actually an old document.

35
So your evidence is that, around 14 June, Mr Todesco told you that deed was no effect until he came back to you?---That's correct. Yes.

And he only came back to you two days ago?---On – on Monday, yes.

40
On Monday. All right. Thank you?---To confirm that everything was taking place.

MR GILES: Could you go to page 80, please, Mr Tesoriero?---Yes, Mr Giles.

Is this a document you've seen before?---Yes, Mr Giles.

45
See it's a statement for the combined loans - - -?---Yes, Mr Giles.

- - - over Berkeley Street?---Yes.

Shows the combined loans were drawn down on 24 June '22?---On 24 June, it shows – it shows a credit of 25,000 going in, Mr Giles, on the 24th, and a credit of 25 going in on the 30th.

5 Just look one further entry up, Mr Tesoriero?---Yes.

The first 24 June loan drawdown of 6.7-odd million dollars?---Yes.

10 Then a repayment of just under \$26,000?---And there's 5000-something above it, also. That's the two you're talking – referring to – the debits?

The second 24 June entry, Mr Tesoriero?---You're referring to the one at the top, the 6,756,000?

15 HIS HONOUR: No, he's referring to the one underneath it?---The one underneath reads – reads zero. Which way are you going, Mr Giles?

MR GILES: The "credit" column?---Yes.

20 \$25,959.38 - - -?---Yes.

- - - on 24 June '22?---Yes.

25 Right. That was a repayment made by the company, of which you're a director, on that date?---Yes.

Right. You received this statement shortly after 1 July '22, didn't you - - -?---Yes.

30 - - - and prior to swearing your affidavit on 12 July '22, didn't you?---I would need to check the date I received this statement, Mr Giles. I believe we got them together to send across to you guys, just prior to this. So I would need to check the date I received the statements. Yes.

35 And having seen this statement, you knew, prior to 12 July, that the forbearance deed was in effect, didn't you?---No, I didn't, Mr Giles. I stated that before. Do you have a July statement there, Mr Giles?

40 Now, I wonder if you could just put MFI3 to one side for the moment and be shown exhibit C again, which is the 8 April 2022 email that I cross-examined you about yesterday?---No, I don't. Can I have a copy, please, Mr Giles.

I wonder if you might - - -

45 HIS HONOUR: Exhibit C.

THE WITNESS: Yes, Mr Giles.

MR GILES: If we go back to the spreadsheet with the properties on it - - -?---Yes.

- - - which I was asking you about yesterday?---Yes.

5 Towards the bottom, there's a reference to other properties held outside this portfolio?---Yes, Mr Giles.

And there are 12 properties in Carlisle Street, Balaclava?---Mmm.

10 HIS HONOUR: I'm sorry. I've got the wrong document, I think, Mr Giles. It's my fault. I was looking at exhibit C - - -

MR GILES: C.

15 HIS HONOUR: - - - which is the email of 8 April.

MR GILES: Yes, the attachment to it – second spreadsheet attached to it.

HIS HONOUR: The second attachment.

20

MR GILES: Sorry.

HIS HONOUR: Sorry. I beg your pardon. I was looking at the first.

25 MR GILES: No, no. My fault.

HIS HONOUR: No. I had it in a different that's my fault. Yes, I see that.

THE WITNESS: Yes, Mr Giles.

30

MR GILES: Now, those are properties – are they owned by your father?---They're owned by my father and his two sisters.

And the indicative value that's expressed there - - -?---In – in companies, Mr Giles.

35

The indicative value expressed there of \$40 million: is that your father's share?---No, Mr Giles, it's not.

But it's the indicative value that - - -?---Of the properties, yes.

40

Of the properties, and an indicative value you were happy to be put forward to a financier?---It was - - -

MR HAYES: I object. I object to the question.

45

HIS HONOUR: I allow the question. I allow the question.

MR HAYES: Your Honour - - -

HIS HONOUR: I allow the question. I've made a ruling.

5 THE WITNESS: That's fine.

HIS HONOUR: It's a relevance objection, I take it?

MR HAYES: No.

10

HIS HONOUR: All right. Mr Tesoriero, if you would go out, please?---Mmm.

<THE WITNESS WITHDREW

[9.59 am]

15

HIS HONOUR: Yes, Mr Hayes.

MR HAYES: This arises on the matters canvassed yesterday, your Honour. It's
20 now at the point where the witness may need to be warned under section 128,
because it's – the question was put in such a way it – put in such a way, in respect of
the whole document, that this is a – I think, as I recall the question, "This is a
document you were happy or prepared to send your financier?" This falls from what
your Honour said yesterday.

25

HIS HONOUR: Mr Giles.

MR GILES: That is – that's the question, I think. Yes.

30 HIS HONOUR: There is a cognate provision, is there, in Victoria?

MR HAYES: There is, your Honour. Yes. It's section 82 of the corresponding
legislation in Victoria, your Honour.

35 HIS HONOUR: Just having a look.

MR HAYES: It's cast in, perhaps, broader terms than the New South Wales
equivalent.

40 HIS HONOUR: So it's the Crimes Act of 1950. It's the 1950 - - -

MR HAYES: '58, your Honour.

45 HIS HONOUR: '58, yes. Sorry, you mentioned the section. I'm sorry. I didn't
pick that up.

MR HAYES: Section 82(1), your Honour, cast in - - -

HIS HONOUR: All right. Thank you.

MR HAYES: - - - considerably broader terms than the New South Wales
equivalent. And if upon your Honour providing a warning or a direction to the
5 witness and the witness requires a moment to obtain some advice in respect to
your Honour's warning, we would ask the matter be briefly stood down for a minute
or two, so that that advice could be offered.

HIS HONOUR: Yes. The issue, however, is section 128(4). And, Mr Giles, this is
10 something, I think, perhaps, you should address me on. I'm satisfied that there
would – I think I would be satisfied – I'm not sure in respect of that particular
question, but certainly cross-examination directed to the same end – and the section
contemplates evidence being given on a particular matter, so representations made by
– to a financier, which you allege were made falsely in order to obtain a financial
15 advantage – if we can describe that as evidence on a particular matter – I would be
satisfied that there would be reasonable grounds for the objection within the meaning
of section 128(2) – subsection (2). So that would then mean that I should provide a
warning, but that's, of course, subject to section 128(4), that I would only require
him to give the evidence if I was satisfied - - -

20 MR: The interests of justice.

HIS HONOUR: - - - the interests of justice require the witness to give the evidence.
It's really a – this is a matter which - - -

25 MR GILES: Could I try it another way, your Honour. If I might just – no. I do
want to come to it another way, which might alleviate the problem, because I have
put it more – I put the question more broadly than I needed to, on reflection,
your Honour. This was – on this occasion, I was using it as a stepping stone to
30 where I was going, and I really need only ask him whether the value of 40 million
reflects his view as to the value of the properties.

HIS HONOUR: Well, I guess, it ultimately – it's ultimately directed to what the
submission is going to be at the end of the day, because if the submission is going to
35 be, at the end of the day, that - - -

MR GILES: Going to be that the - - -

HIS HONOUR: Let's remove it from the circumstances of this case and
40 deliberately speak in the abstract. If one had a situation where, in one context,
someone was giving a low estimate of assets and you say – and there's a reason – but
you say there's a motivation – giving a low estimate. And there was another
situation where someone was giving a high estimate and he was saying this for
financial motivation for doing it. In a sense, I – someone faced with that where you
45 said it was a credit point – I don't need to form a view one way or the other as to
which was accurate.

MR GILES: No.

HIS HONOUR: It might be that one is accurate. It might be the other was accurate. So I don't have to, as it were, make a determination on the falsity or otherwise of –
5 save for the fact that you say, if you said it's more important to make a false statement if someone was under oath, then you may. I can see of circumstances where that submission is put.

MR GILES: If I keep talking in the hypothetical, I might – I will put a submission
10 in what – the circumstance your Honour has just put to me of the judicial officer hearing that circumstance couldn't come to a conclusion as to what was right or be satisfied that an onus on our learned friends had been discharged. That's what I'm going to put.

15 HIS HONOUR: Well - - -

MR GILES: I might come to it - - -

HIS HONOUR: Look, I - - -
20

MR GILES: - - - another way.

HIS HONOUR: I think I should – I mean, there is another way of – I mean, I had
25 understood – and I may be wrong about that but I wanted to be careful about it and see the transcript – but is there any further clarity as to whether or not this document has shown up in the subpoenaed materials that have been produced by Judo?

MR HAYES: Your Honour, I persist on that. There are three documents that turned
30 up overnight that have been referred – or three emails that – brought to my attention just before court his morning dealing with this. Those emails – and they were in a folder – in the documents that were produced marked privileged.

HIS HONOUR: Right.

MR HAYES: Those documents – the date and description of them has been
35 identified and the ground of privilege articulated – and it's the same ground of privilege that I'm claiming here that are relevant to this document – were provided to Westpac's solicitors this morning. Is that what you - - -

40 MR GILES: I didn't know any of that.

MR HAYES: That was just before we came into court.

HIS HONOUR: What I might do is just stand this matter down for five minutes so
45 you two can chat.

MR HAYES: Yes.

HIS HONOUR: So I can get some clarity precisely – if it’s possible to agree what has happened in relation to these documents and that’s not an issue, then it may be – there may be an ability to short cut this. If this document has been - - -

5 MR HAYES: Sure.

HIS HONOUR: - - - forwarded to Judo – it’s full – and it’s not in contest that – obviously enough, that Mr Tesoriero would have seen it – then, obviously enough, all this cross-examination is irrelevant. So what I might do is just stand it down for, say, 10 minutes to allow - - -

MR HAYES: That would assist, your Honour.

HIS HONOUR: Just to allow you to have this discussion with Mr Giles and perhaps, at least, then we know what the ambit of any dispute it.

MR HAYES: The point of this is he has given the more conservative valuation to your Honour. And, aside from inflaming what my – I expect my friend will say is a collateral issue which goes to the issue of credit or reliability - - -

HIS HONOUR: Well, it - - -

MR HAYES: We say it really goes nowhere.

HIS HONOUR: Yes. All right.

MR HAYES: In terms of your Honour’s determination of this discrete - - -

HIS HONOUR: Yes. All right. Well, look, I might adjourn for 10 minutes.

MR HAYES: If your Honour pleases.

ADJOURNED [10.09 am]

RESUMED [10.27 am]

MR GILES: I’m going to try this a – I’m going to try what I was aiming to do a different way, your Honour.

HIS HONOUR: All right. We just get the witness back, do we? Yes. Thank you.

<VINCENZO FRANK TESORIERO, RECALLED [10.28 am]

<CROSS-EXAMINATION BY MR GILES

MR GILES: Mr Tesoriero, you can close up the folder that you have in front of you,
5 that had the forbearance deed in it?---Yes.

And I would like you to take up again your affidavit of 12 July and go to page 18 of
the affidavit, paragraphs 76, 77 and 78?---76, 77, 78, was it?

10 That's right?---Yes.

In the first sentence of paragraph 78, where you refer to "all of my father's
investment properties", were you referring to the properties at 242 through to
272 Carlisle Street?---No, I wasn't.

15

No. Now, just above that, in paragraph 77 - - -?---Yes.

- - - you refer to an email that you – you say that a true copy of the email
correspondence sent by Mr Mitchell of the Commonwealth Bank, dated 7 July 2022,
20 is exhibited. Do you see that?---Yes.

Could you go to the final page of your exhibit?---Is that at the back of the folder, is
it, Mr - - -

25 Back of the folder. Sorry, back of tab 1 of the folder?---Back of tab 1. Right.

Yes. Should have page 366 on the bottom?---Yes, Mr Giles.

30 Is that the email you describe as being the true copy of the email from
Mr Mitchell?---Yes, I believe so.

Well, just take as long as you need. Is it the document you describe as being the true
copy from Mr – of the email from Mr Mitchell?---I would need to check, Mr Giles.

35 What is it that you need to check to know that that is the document you describe back
in paragraph 77 as the true copy of Mr Mitchell's email?---I would need to confirm.
I believe it is the email, but I would need to confirm if that's the full email.

40 Well, why - - -

HIS HONOUR: Well, when you swore the affidavit, at paragraph 77, you said:

45 *A true copy of the email correspondence sent by Darren Mitchell, dated
7 July 2022, is exhibited to VFT6 at page 366.*

?---It appear - - -

Page 366 is an email from Mr Mitchell. I mean, I would have taken that to be a true copy of the email?---I believe you're correct, your Honour.

Yes?---I think that is the email. Yes.

5

All right.

MR GILES: And a moment ago, before his Honour's question, you said you would have to check to see if it was the whole email or something similar. Why did you think you needed to do that?---I thought that's what you were asking, Mr Giles. I – I believe that is what has been represented there.

10

Right. Could I show you a document?---Thank you.

I've just shown you a document, which is an email chain finishing, that is, the end of – end of the chronological sequence - - -?---Yes.

15

- - - of an email from Mr Mitchell to Mr Pratt of 7 July 2022 - - -?---Yes.

20

- - - time-dated 12.58 pm?---Yes.

You see the document at 366 of your affidavit is an email from Mr Mitchell to Mr Pratt, time-dated 12.57 and 52 seconds pm?---Yes.

25

Same "re", the same text in bold?---Yes.

Same first sentence with two bullet points; see that?---I think it's an additional email, isn't it?

30

Just - - -?---That one is – that one is 12 pm. The other one is 12.04 pm. They're two different emails.

Just bear with me. Go back to the email that I've just given you?---Yes.

35

The email chain I've just given you. The top of the front page, email from Mr Darren Mitchell - - -?---Yes.

- - - to Mr Pratt, copied to you, of 7 July 2022, sent at 12.58 pm?---Yes.

40

Page 366 of your affidavit?---Yes.

Mr Mitchell to Mr Pratt, copied to you. Both of them are also copied to Mr Johns?---Yes.

45

Of 12.57 and 52 seconds pm?---Yes. This would be the same email.

Yes. Same – the two of them, just working through, have the same bold text as the first line:

5 *CBA information classification: customer and personal.*

?---That – that is the same email that - - -

Well, then you see on the one that I've just given you that the email from Mr Mitchell finishes:

10 *[CBA information trading guidelines can be found on our website - - -*

?---Yes.

15 Continuing:

- - - commbank.com.au/dataclass.]

?---Yes.

20 And that appears at 366 of your affidavit?---Yes.

And then there's the signature block of Mr Mitchell in your affidavit - - -?---That is correct. Yes.

25 - - - but not on the document that I've just given you?---No, it's not.

At least, not there?---No.

30 Under – on the document I've just given you, there's then an email from Mr Pratt to Mr Mitchell?---Yes.

And if you go over to the next page, there's then an email from Mr Mitchell to Mr Pratt?---Yes.

35 And then at the bottom of Mr Mitchell's email, on the second page, appears his signature block?---Correct. Yes.

40 And what has happened is that someone has deleted the intermediate email. In preparing the document at page 366 of your affidavit, someone has deleted the intermediate email from Mr Pratt to Mr Mitchell of 7 July, at 12.04 pm, and all of the text of Mr Mitchell's email to Mr Pratt, other than the signature block?---No. I don't believe that to be the case, Mr Giles. I believe that the email from Darren Mitchell would have been forwarded and not the ones from Michael Pratt, because it was – if
45 – if you refer back to the affidavit, it mentions a true copy of the email sent by Darren Mitchell. So it doesn't mention a true copy of the email sent by Michael Pratt.

And what I'm putting to you is that it - - -?---So I think we just forwarded the email from Darren Mitchell.

5 And what I'm putting to you is that it's not a true copy of the email from
Mr Mitchell, because what's in your affidavit has Mr Mitchell's signature block on it
immediately after five lines of text, but, in fact, on the true copy of the email, there is
in between those five lines of text and the signature block two other emails?---I don't
think that is correct, Mr Giles. Like I said, I think the email was forwarded and that
10 is how it forwarded from our side. I'm not an IT person. I can't explain why the
signature is missing on this one, but it could be because that has been sent through
the chain that included Michael Pratt. But in the affidavit we make mention to the
email sent by Darren Mitchell, and that is a true copy of the email sent by Darren
Mitchell that refers to the home loan exposures for my parents. That email has not
15 been edited or deleted, as you've implied. That is a true copy of that email.

That's your evidence to his Honour, that that's a true copy of the email, even though
it has the – the one at 366 has the signature block, yet what has been produced by the
Commonwealth Bank doesn't. Produced by you – did you produce the document
I've just given you in your – on the notice to produce?---This – this email has Darren
20 Mitchell's signature on it, in the – in the affidavit. Yes.

No, no. The two-page email that I've just given to you: did you produce that to my
solicitors in – to the court, in response to the notice to produce?---Is it – are you
25 suggesting as part of this affidavit, Mr Giles?

The two-page document that I've handed to you?---Where is the two-page – this –
this one here?

Yes?---Yes.

30 Three-page document that I've just handed to you, that finishes in the email from
Darren Mitchell to Mr Pratt - - -?---Yes.

- - - of 12.58 pm?---I – I am unsure if I've – if my solicitors have given that to you
35 guys, Mr Giles, but if you say they have, then they must have.

HIS HONOUR: While you're interrupted, the document being shown to the
witness, which comprises the email from Darren Mitchell to Mr Michael Pratt,
Mr Tesoriero and Mr Johns, with the subject "re Tesoriero Group", on 7 July 2022 at
40 12.58 pm, will be MFI4, or do you wish to tender it?

MR GILES: Well, I tender that document.

45 HIS HONOUR: All right. Well, that can be exhibit F.

EXHIBIT #F DOCUMENT COMPRISING THE EMAIL FROM DARREN MITCHELL TO MICHAEL PRATT, MR TESORIERO AND MR JOHNS, WITH THE SUBJECT “RE TESORIERO GROUP”, DATED 07/06/2022 AT 12.58 PM

5

MR HAYES: Your Honour, it should be noted on the tender, at the moment, we don't concede that it's a document that emanated under the notice to produce. I'm waiting for instructions on that. We think it might be on subpoena from SM –
10 SME Finance.

MR GILES: All right.

Well, just while we're on exhibit F, could you go to the second page, Mr Tesoriero –
15 Mr Mitchell's email to Mr Pratt copied to you of 7 July at 12 pm?---Yes.

Mr Mitchell refers to – it says:

20 *Hi Michael. Good to meet today.*

Just pausing there, did you go to a meeting with Mr Mitchell on 7 July? I'm not suggesting that this says that you did, I should - - -?---I would – I would need to check my diary. But – but I – yes, I believe I may have. I have met with Mr Mitchell and Mr Pratt.

25

And in that he – Mr Mitchell describes the current exposures of the Commonwealth Bank - - -?---That is correct, yes.

30

- - - to the Tesoriero Group?---Yes.

Included in that is Tesoriero Investment Group – \$6.8 odd million?---That is correct, yes.

35

Is that a loan secured over any property?---Yes, it is.

What property?---It's – as I mentioned to you yesterday, Mr Giles – it's cross-collateralised – all the CBA debt across all those properties that are on the spreadsheet.

40

On - - -?---When I say all those properties – particular ones, if you like, I can take you - - -

45

Could you tell me – are any of the properties owned by Tesoriero Investment Group?---No, they're not.

What assets does Tesoriero Investment Group have?---I don't believe it has assets. It only has debt.

Other than, of course, the money in the bank account you told me about this morning?---The money in the bank account is held by CBA because, if you look further down, you will see that there's a position of arrears. That's frozen by CBA at the moment. That's CBAs money. Not my money, Mr Giles.

5

What about 286 Carlisle Street?---What about it, Mr Giles?

That's a company of which you're a director and a shareholder?---I believe so, yes.

10 And it has \$40 odd thousand – about \$40,000 – I withdraw that. It has about
- - -?---No. It - - -

- - - \$11,000 in its bank account?---It has 11,000 something dollars in it, yes. That –
15 that is also in arrears and been frozen by CBA. That is not my money. That's CBAs
money.

And what other assets does 286 Carlisle Street have?---It does not have assets. It
only has debt.

20 And what's the source of that debt?---What is the source of that debt? What – what
do you - - -

Why does it - - -?--- - - - mean by that question?

25 - - - owe the money?---Sorry?

Why did it borrow the money?---It borrowed the money – part of it went into paying
for my boat. And part of it went into the Forum pool which was used for
30 acquisitions.

30

Just explain that. Paying for my boat?---Paying for the boat, yes.

Which boat?---The boat that was liquidated.

35 The XOXO?---That's the one, yes.

Now, what was the second thing it did?---And – and the second part of it would have
been used in acquisitions within the group.

40 Acquisitions of what?---I would need to check that, Mr Giles. But various properties
which have also been liquidated.

HIS HONOUR: 286 Carlisle Street – that's – is that a company – 286 Carlisle
Street Proprietary Limited?---I would need to check, your Honour. But I believe so,
45 yes.

And am I take it that 286 – if it is 286 Carlisle Street Proprietary Limited – that would be a special purpose entity which purchased 286 – sorry, it would be an entity that is the registered proprietor of the land at 286 Carlisle Street, Balaclava – would that be - - -?---No. That’s not correct, your Honour. The - - -

5

Right?---The property at 286 Carlisle is held by my father but the entity was set up to borrow the money against - - -

But - - -

10

MR GILES: And then to do what with the money? Lend it to other entities?---No. The money was borrowed against that entity and that money was used, as I mentioned to you, Mr Giles, in purchasing the boat and in – in then acquiring other properties.

15

HIS HONOUR: But could I just understand this because I - - -?---Yes.

I was looking at the – you will recall, you were taken to the document behind exhibit C?---Where is that, your Honour, sorry?

20

Which is the other properties held – so outside this portfolio spreadsheet. Do you recall that?---This – this one here, yes.

Yes. It has got:

25

Note other properties outside this portfolio.

And that’s 242 Carlisle Street, 244 Carlisle Street, 246 Carlisle Street, 248 Carlisle Street - - -?---Yes.

30

- - - 250 Carlisle Street, 252 Carlisle Street, 254 Carlisle Street, 262 Carlisle Street, 264 Carlisle Street, 266 Carlisle Street, 268 Carlisle Street, 270 to 272 Carlisle Street, relevantly. And this company – 286 Carlisle Street - - -?---Yes.

35

It – can you just explain to me the relationship between – so I understood from what you said before that your interests associated with your father were the registered proprietors of these properties?---These properties are owned in companies and trusts and they’re held by my father and his two late sisters.

40

Your father and his two late sisters?---Yes.

And is that the same for 286 Carlisle Street or is that subject to a different arrangement?---No. 286 is owned solely by my father.

45

Owned solely by your father, I see?---Yes.

Yes. All right. And that's a large – what is it? Are they a series of - - -?---It's a group of shops.

5 Group of shops?---Yes. It was bought by my grandfather many years ago and has since been passed onto my cousins and my father.

I understand. Thank you?---Yes.

10 MR GILES: But 286 – the property 286 Carlisle Street is owned by your father?---It's owned by my father, yes.

And that's rented out to a tenant?---It is, yes.

15 And it generates income for your father?---It does, yes.

If you go back to the first page of exhibit F – there's Mr Pratt's response to Mr Mitchell?---Yes.

20 HIS HONOUR: The transcript has arrived, by the way.

MR GILES: The – sorry, your Honour?

HIS HONOUR: The transcript has arrived, by the way.

25 MR GILES: Grateful.

HIS HONOUR: I'm having my associate print out a couple of copies.

30 MR GILES: Thank you, your Honour.

And was the purpose for which Mr Pratt was speaking with Mr Mitchell seeking to refinance debts owed to CBA?---We were trying to get to a position – CBA has appointed receivers over my father's properties because of all the court - - -

35 But not all of the - - -?--- - - - proceeding.

Not all of the properties?---Well, the majority that have debts against CBA. So - - -

40 Well - - -?---When I say all of my father's properties – the ones that are owned by my father, yes. The other ones are owned by a company with my cousins.

Just to be clear, which ones are they?---They were the ones that your Honour just referred to.

45 No – no. Which ones have – has the CBA appointed receivers over?---You – you have the list of CBA properties there. They're referred to as the Elsternwick properties on the spreadsheet.

Right. And what I want to - - -?---Can you see those, Mr Giles?

What I want to suggest is that the CBA has not appointed receivers over all of those properties, has it?---Yes, it has.

5

Including, it hasn't appointed a receiver over your parents' residence at 44 Howitt Road?---All the properties are cross-collateralised, as I mentioned yesterday, Mr Giles. KPMG have been appointed to sell down the properties to a point where the debt is cleared.

10

But in any event, the CBA doesn't have security over the properties on Carlisle Street?---No. It – well, it does have security over properties at 286 Carlisle Street.

But none of the others?---Not the other ones, no.

15

By the way, what does Haidi, H-a-i-d-i, Holdings own?---It owns a portion of those properties on Carlisle Street.

And it holds those properties on the John Tesoriero Family Trust, doesn't it?---Yes, it does, I believe. I would - - -

20

And your - - -?--- - - - need to check that, Mr Giles. But I believe it does.

And you're a beneficiary of that trust, aren't you?---I believe I'm a beneficiary of that trust, yes.

25

And there's no mention of the – your interest in or through the Haidi Trust in your affidavit, is there?---No, there's not.

And there's no mention of your interest in the properties as a discretionary object of the Haidi trust on Carlisle Street, is there?---No, there's not, Mr Giles.

30

Sorry, the John Tesoriero Trust, I should have said. There's no - - -?---That's – I understood what you meant. Yes.

35

So coming back to exhibit F, what was happening as of 7 July, just under two weeks ago - - -?---Yes.

- - - was that a proposal to refinance the CBA debts owed by your parents was being put forward?---No. That's not correct, Mr Giles.

40

A detailed plan to go forward was going to be put forward?---A detailed plan to go forward, yes, in terms of doing some sort of forbearance deed with CBA to potentially get a 12-month hold on them selling the properties.

45

All right. And has that proposal been put?---That proposal has been put. Yes.

And has there been any response?---No, there has not been any response.

5 All right. Now, if I might have one second. The full email is in – the full email in exhibit F is in packet S94, which is your production, Mr Tesoriero, on the notice to produce.

MR HAYES: Your Honour, I should formally record it. It would seem that it was produced by my instructing solicitors.

10 HIS HONOUR: Thank you.

MR GILES: Grateful.

15 What I want to ask, Mr Tesoriero, is given you had the document that's now exhibit F, how did it come to be that you exhibited as a true copy of the email from Mr Mitchell to Mr Pratt of 7 July 2022 the document that's at page 366 of your 12 July affidavit?---I'm – I'm not sure what you're asking there, Mr Giles. I – it is a true copy of Darren Mitchell's email, and this is a copy of Michael Pratt's email to Darren Mitchell, but the email referring to Daren Mitchell referring to the arrears, 20 which is marked out in point 77 – that is a true copy of that, is it not? Am I missing something?

Mr Tesoriero, I will give you one last – I will ask this one more time. The document at 366 has got Mr Mitchell's footer on it?---Yes.

25 The document that you've produced as exhibit F does not have his footer as part of the email of 7 July '22 at 12.58 pm. It rather has two other emails, and his footer appears below those?---Well, I – I can't – as I said, Mr Giles, I'm not an IT person. I can't explain why the footer is missing, but the email is the same on both emails. On 30 the one on page 366 and the one in exhibit F, the email is exactly the same.

HIS HONOUR: Well, could I ask a - - -?---So I can't explain why the footer is missing.

35 All right?---Yes, your Honour.

I was just going to – even though you're not an IT expert, even though you've given evidence about it being a true copy, and even though you've just said to me you can't explain it, perhaps, I could just ask you a slightly different question?---Yes, please.

40 And it's this: you certainly didn't print out or have someone print out a copy of the email and then, as it were, cut and paste the email?---No, I didn't. No, I didn't, your Honour. No.

45 Yes. All right?---Not at all, and – and the email in point 77 is the one that's referred to, and that is the one that's attached. A true copy of that email is attached. Thank you for clarifying that, your Honour.

Well, it's a matter for Mr Giles if he wishes to put the proposition or not.

MR GILES: Did you check the exhibit, including the document at 366, before you swore the affidavit?---Yes, I would have. Yes.

5

And when you swore that it was a true copy, did you check it against something?---No, I didn't at the time. No.

10 All right?---I didn't go back through – it's quite a large folder here, Mr Giles, so I didn't go back through and cross-check everything. I just had included it and sent it through, but I still believe that to be a true copy of that email, stating those facts that are on that point 77.

15 All right. Now, you can close up your affidavit. I just want to ask, are your parents still paying your entertainment expenses as at today?---My parents are covering all of my living expenses, Mr Giles.

20 I see. That included buying tickets for you to a Ferrari enclosure at the Australian Grand Prix, did it?---No. I didn't go to a Ferrari enclosure at the Australian Grand Prix, Mr Giles.

Including buying tickets to the Australian Grand Prix for you?---No, Mr Giles. I didn't go to the Australian Grand Prix.

25 All right. Did it include buying tickets to some Ferrari function or event in April of this year?---I may have gone to an event. Yes.

All right. And your parents bought those tickets for you?---Yes, they did, Mr Giles.

30 Paid for dinner at Rockpool last Saturday night?---Yes, they did, Mr Giles. It was my girlfriend's birthday.

35 Okay. Now, could I ask you to go back to exhibit – MFI3, please, the slimline bundle?---That's these folders.

And if you could go to page 1 of that, please. Now - - -?---Thank you for that. Sorry, I – thank you, sir. Page 1, did you say?

40 Yes, page 1?---Yes.

65 Nelson Street Enterprises Proprietary Limited - - -?---Yes.

- - - is a company that operates a cafe in Melbourne, isn't it?---That is correct. Yes.

45 You're a director of that company?---I am a director of that company.

It holds all of its assets on trust, doesn't it?---I would need to clarify that, but I believe so. Yes.

Right. And you're a beneficiary of the trust?---Yes, I believe so.

5

And you see on page 1 - - -?---Yes.

- - - registered to 65 Nelson Street Enterprises - - -?---Yes.

10 - - - at least, on 1 September 2021, was a black 2014 Porsche wagon?---That is correct. Yes.

It's a Cayenne, is it?---It's a Cayenne, yes.

15 All right. Now, you haven't referred to that as being one of the vehicles that you have an interest in, have you, in your affidavit?---No, I haven't, Mr Giles. No.

Why not?---Because I no longer own that vehicle.

20 But you did when you swore the first affidavit of disclosure, didn't you?---No, I didn't.

Well, can I just pause there. As of 1 September 2021, it was registered in the name of 65 Nelson Street, wasn't it?---Yes, and – and it is still also registered in the name of 65 Nelson Street.

25

But you say that you've sold it?---I have sold that car, yes.

30 And the registration hasn't been changed?---No. The registration hasn't been changed. Would you like an explanation, Mr Giles?

I suppose so?---I sold that car to my cousin back in 2020, and he didn't have the money for the car at the time. So I gave him the car, and then he was going to give me the money in 2021, and then with all the court proceedings that have happened, we haven't been able to transfer it to him. So he has since paid me for the car in early 2021, but we haven't transferred it. I no longer have that vehicle or own that vehicle.

35

And when did he pay you for it?---Probably, June 2021.

40

And into which bank account did he make that payment?---He didn't make a payment into a bank account. He's a builder and he did some work for me on a couple of jobs in exchange for the vehicle.

45 And what jobs were they?---He did a bathroom renovation, and he did some concrete work at my parents' place, and he's also working on the subdivision at Hartington Street for me.

And what's the subdivision at – sorry, did you say Hartigan Street?---Hartington Street, yes.

5 And that's one of the Elsternwick properties, is it?---That – that's correct. Yes.

And when you say did the subdivision for you, is that because it's a property which you have an interest in?---Hartington Street, yes. That's owned by Canter Investments, which I have an interest in.

10 And just considering the time of when the bathroom works were done, for example, does that make it possible for you to place when it was you were paid for the black Porsche?---I guess so, yes.

15 And when were the bathroom works done?---I would need to double-check that but, like I said, it was some time in 2021, prior – prior to the court proceedings.

How about a 1969 Ford Mustang Boss? Do you know about that car?---I do know about that car.

20 That was bought in September 2020, wasn't it?---I would need to check that. Yes, sounds about right.

25 Go to page 4 of MFI3. You will see the total cost was 239-odd thousand dollars on page 5?---Yes, I do see that.

That car is not presently registered, is it?---No, it's not.

30 And do you see that the tax invoice is made out to Ms Pagano, P-a-g-a-n-o?---That's correct. Yes.

And Ms Pagano is your girlfriend? That's a terrible turn of phrase. She's your partner?---She's my partner, yes.

35 Yes

HIS HONOUR: Why's it a terrible turn of phrase?

MR GILES: It's just a little informal. "Partner" has got formality to it.

40 THE WITNESS: Your question, Mr Giles?

MR GILES: If you go back to page 2, you see an email there from Grays Online - - -?---Yes.

45 - - - from who the car was bought?---Yes.

That's from Ms Pagano to, apparently, if you read the top email, someone called – well, someone at Grays Online, referring to a conversation between you and Jason?---Yes. I can see that.

5 And you're copied to that email?---Yes, I am.

HIS HONOUR: So which page is this, Mr Giles, I'm sorry?

MR GILES: Page 2.

10

HIS HONOUR: Page 2. Thank you.

MR GILES: Now, you caused the car to be paid for, didn't you?---Yes, I did. Yes.

15 And you asked Mr Bouchahine to make a payment from Forum Group Financial Services to buy the car?---That is correct, Mr Giles. Yes.

Yes. All right?---I don't know if it was made from Forum Group Financial Services, but I asked Mr Bouchahine to make the payment for me. Yes.

20

And who owns the car?---My girlfriend or my partner, as you so kindly put. It was a gift for my – for my partner.

I see?---Yes.

25

And it remains unregistered today?---It remains unregistered. Yes.

Okay.

30 HIS HONOUR: Sorry, just so I understand how this document works, Mr Giles – so this email to Ms Pagano, copied to Mr Tesoriero, refers to:

Please find attached a copy of your invoice, totalling \$239,197.18.

35 Are they – so that – what's attached to that is – was the tax invoice. At 4 and 5 I see the total?---I believe so.

So that was – the total cost of a 1969 Ford Mustang Boss is \$222,000, is it?

40 MR GILES: That's right.

THE WITNESS: That's correct, your Honour.

HIS HONOUR: All right.

45

THE WITNESS: I love my girlfriend, your Honour. I do love my girlfriend.

MR GILES: You're the man with the interest in cars, though, aren't you, Mr Tesoriero?---We – we both have an interest in cars, Mr Giles.

Now, could I ask you to go to page 13, please?---Yes.

5

Just by the way, you know that my instructing solicitors have asked your solicitors about the Ford Mustang before, don't you?---I believe so, yes.

Yes, and the explanation was not given that you bought it for your partner, was it?---I
10 – I would have to check on the explanation that was given, but, no, probably not.

Why not?---I didn't think it was anybody's business, Mr Giles.

But that request was made at a time when my - - -?---I think the request was made
15 whether the car was mine or not, and – and the response was that it's not.

And, similarly, my instructing solicitors have asked about the 2014 Porsche, haven't they, to your knowledge?---No. I don't believe anyone has ever asked about the
20 2014 Porsche.

20

Could you go to - - -?---That's the first time today I've been asked about that car.

HIS HONOUR: I'm sorry. I must be being obtuse, Mr Giles, but the two hundred
25 and – the invoice for \$239,197.18 – the payment of the invoice came from funds
from where? What was the evidence?

MR GILES: Page 6, point 4 on the page, your Honour, from Forum GRPFS, that I
put was Forum Group Financial Services.

30 HIS HONOUR: No, I – yes. I heard that evidence, but then I understood it was
being – it was purchased by the witness as a gift for his girlfriend, so I was looking
for the reference to the transaction by which Forum Group FS were reimbursed for
that sum.

35 MR GILES: Your Honour won't find that.

HIS HONOUR: Right. Okay.

40 How did you reimburse Forum Group FS for the present given to your girlfriend?---It
was part of a payment that was owed to me, your Honour, as per the other ones that
have been outlined by my lawyers.

I see?---It was money that was owed to me by Bill.

45 So there was a loan account that was adjusted, was there?---Correct. Yes.

I see. Thank you.

MR GILES: I would have to get into the substance of the case if I asked about that, your Honour.

HIS HONOUR: It's a matter for you, Mr Giles.

5

MR GILES: Yes, I understand.

HIS HONOUR: I haven't made any ruling, but some – it's - - -

10 MR GILES: I understand, your Honour.

Could I ask that you go to page 13, please?---Yes, Mr Giles.

See that's your tax return for the year ended 30 June 2020?---Yes.

15

Have you completed a tax return for the year ended 30 June '21?---I don't believe it has been prepared as yet.

20 Okay?---My accountants had some trouble getting information since all these proceedings started.

So it's overdue?---I believe it's overdue, yes, as are many of the other entities, as well.

25 Can you go to page 14, please?---Yes.

See in your 2020 tax return - - -?---Yes.

30 - - - you describe your main salary and wage occupation as consultant – management?---Yes.

Who was your employer or engaged you as a consultant – management?---No, nobody, Mr Giles.

35 You were working for yourself, were you?---Yes.

So that's – who paid you the income?---I'm sure my accountant would have distributed that from one of my entities, potentially. But I would need to clarify that, Mr Giles.

40

Well, you see the next row down:

Payer's Australian Business Number

45 ?---Yes, I do see that.

Tax withheld and income – so income of \$148,955?---Yes.

In completing this tax return, you declared that it was true and correct, didn't you?---Again, Mr Giles, I would need to clarify. But if it's a - - -

Well - - -?--- - - - tax return, it would be true and correct, yes.

5

MR HAYES: Well, your Honour, as to what happened in financial year 2020 – this is some 12 months before the freezing order was made and we just say it would – just could be of no impact or relevance on what's before your Honour today. We've endeavoured to give some latitude in terms of cars and things like that but this is really starting to stray beyond the bounds of relevance for your Honour's discrete determination on this application. It's 12 months before the freezing orders were made.

10

HIS HONOUR: Well, I think the question of who his employer - - -

15

MR HAYES: We didn't object to that.

HIS HONOUR: - - - was in 2020 and who his employer was - - -

20

MR HAYES: Didn't object to that.

HIS HONOUR: If - - -

MR HAYES: This is now starting to drift into - - -

25

HIS HONOUR: Well - - -

MR HAYES: - - - how his affairs are conducted.

30

HIS HONOUR: I will allow this question. I understand what you say.

MR HAYES: Thank you, your Honour.

HIS HONOUR: But, Mr Giles, I will allow that question.

35

MR GILES: Well, what I - - -

HIS HONOUR: Which I think has been answered.

40

MR GILES: What I wanted to suggest was that the payer who paid you the income – is recorded as having paid you the income of \$148,955 was the Forum Group of Companies.

MR HAYES: Well, again, your Honour, this is descending now into the substantive

45

HIS HONOUR: No – no. I will allow that question.

MR HAYES: - - - merits of the - - -

HIS HONOUR: No, it doesn't.

5 MR HAYES: - - - substantive proceeding, your Honour. And it's 12 months - - -

HIS HONOUR: This is a cross-examination about this man's assets and liability expenses. It's clearly relevant to who his employer was. I - - -

10 MR HAYES: Well, your Honour, this is not – this is 12 months before the proceedings were even commenced. This is financial year 30 June 2020.

HIS HONOUR: I appreciate - - -

15 MR HAYES: The freezing order was more than a – well over – was 12 months later on 6th of - - -

HIS HONOUR: It allows me to get an understanding of payments this man has received over the last few years in order to ascertain his overall financial position.

20

MR HAYES: But, your Honour, he shouldn't be – he – the difficulty here is on this discrete issue where he may well be seeking to pursue various – in his overall defence, your Honour. It should not be used as an opportunity to elicit admissions

- - -

25

HIS HONOUR: I think he's - - -

MR HAYES: - - - that go to - - -

30 HIS HONOUR: - - - just asking him who his employer was. It's not exactly - - -

MR HAYES: We didn't object to that. Didn't object to that.

HIS HONOUR: Well, there - - -

35

MR HAYES: It's now suggested - - -

HIS HONOUR: There's an entity which is a payer:

40 *Payer's Australian Business Number 72 151 964 626.*

So I presume the reason why Mr Giles has asked the question is that on his instruction that part – the Australian Business Number that that relates is the Forum entity to which he asked questions. If that's not in dispute, the - - -

45

MR HAYES: I don't think it is.

HIS HONOUR: Well, if it's - - -

MR HAYES: But - - -

5 HIS HONOUR: If it's not in dispute that the payer of the income for the year ended 30 June 2020 was that Forum Group entity, then I can't see why there is further relevance in - - -

MR HAYES: No.

10

HIS HONOUR: - - - that. But if that's not in dispute.

MR HAYES: Well, it couldn't be if that is the right registered – if that is the correct attribution for the ABN – that is what it is. And to have this witness endeavour to then descend into issues that might otherwise touch upon the substantive issues in dispute where - - -

15

HIS HONOUR: Well, I don't think that question - - -

20 MR HAYES: He may very well elect, your Honour – such is the weakness on the case against him on the substantive issues – not to give evidence. And this should not be seen as an opportunity to - - -

HIS HONOUR: Well, you read the - - -

25

MR HAYES: - - - elicit admissions - - -

HIS HONOUR: You read the - - -

30 MR HAYES: - - - as - - -

HIS HONOUR: - - - affidavit, Mr Hayes. And the price of reading an affidavit in support of an application is the ability of someone to cross-examine. And it is relevant in my mind to understand what I can about this man's financial circumstances in order to form a view whether there has been a frank disclosure of what his assets and liabilities are now. Now, in and of itself, who his employer was at 30 June 2020 is only going to have tangential relevance.

35

MR HAYES: I hear your Honour.

40

HIS HONOUR: But I'm not - - -

MR HAYES: I hear your Honour.

45 HIS HONOUR: - - - going to shut down a cross-examination because, together with other material, it may well be relevant. I don't know. I don't think this is really going any further in understanding the general financial circumstances of this man.

MR HAYES: I hear your Honour.

MR GILES: The payer was the Forum Group of Companies Proprietary Limited, wasn't it?---I would need to check that, Mr Giles. But if you say so.

5

If you go to page 27 you've got an ABN Lookup for that same ABN number?---It appears to be the same, yes.

10 So what were the consulting services you were then providing to the Forum Group of Companies – that is, in the year to 30 June 2020?---As previously stated in my affidavit, I used to look after a lot of the property holdings.

15 And what is your present, that is today, income?---I don't have an income from the Forum Group of Companies. It no longer exists, Mr Giles.

What about from someone else? Anyone else?---As I said, the tax return hasn't been done for '21.

20 Well, that - - -?---Or '22 and I've been - - -

HIS HONOUR: He's not asking – Mr Tesoriero, he's not asking you that question?---I – I don't - - -

25 He's not asking about his tax return. He's asking about what your current source of income is. If you could - - -?---I'm sorry, your Honour. I thought he was referring to the tax - - -

30 No – no?---He – Mr Giles was referring to the tax return. I – I don't have an income, Mr Giles. I manage - - -

You had - - -?---I manage the various property holdings that myself and my family have and I – I manage the café business and I – I don't take an income out of those because there isn't sufficient funds at present to take an income.

35 When you say you manage the property holdings – that's the whole of your family's property holdings including the Carlisle Street properties?---No. Not the whole of them.

40 You also work in the café, don't you?---I wouldn't say I work in it but I oversee it, yes.

Ms Pagano works in it?---She does, yes.

45 And she is paid a salary?---Sometimes. When there's enough funds, she is, yes.

And if you go to page 25 in the – of the – back into the 30 June 2020 tax return?---Yes.

You see a distribution at the top of the page – partnerships and trusts declaring a distribution of some \$127,000 odd from the 65 Nelson Street Enterprises Trust?---I can see that, yes.

5 Now – and you did receive that in that amount from the 65 Nelson Street Enterprises Trust in the year to 30 June 2020?---I believe I probably would have, yes. If it's loaded as that, yes.

And that was - - -?---Prior to COVID, yes.

10

That was - - -?---Sorry, if that was your question.

- - - part of the profit generated by the café in the year to 30 June 2020, wasn't it?---Part of it, yes.

15

And I think – are you able to present to the court any financial statements for the 65 Nelson Street Enterprises Trust after – that are dated after 30 June 2020?---I would need to check with my accountant and come back to you on that, Mr Giles.

20 That was a café, was it?---It's a café, yes.

Café. So it wouldn't have - - -?---It was closed for most of 2020.

Yes.

25

MR GILES: Open during 2021, though?---Yes, I believe – yes, it was, yes.

Open this year?---Yes, Mr Giles, yes.

30 Currently trading?---Yes.

Currently generating an income?---Currently generating an income – currently generating revenue.

35 Revenue that exceeds its costs?---No, Mr Giles.

But you don't have any financial statements for 2022, do you?---No, I don't.

40 Do you keep management accounts?---I would need to check with my accountant what management accounts he has at present. But we have all the bank statements which I think have been shared. And you can see that the money sort of comes in and it sort of breaks even at the moment. It sort of hasn't recovered since COVID. You do have a copy of the bank statements for that business, Mr Giles.

45 HIS HONOUR: Where is Nelson Street?---It's in Balaclava, as well.

Balaclava.

MR GILES: Does it operate out of one of the properties owned by your father?---Yes, it does, Mr Giles.

5 Does it pay rent to your father?---It pays rent to my father and his two late sisters' families, as well.

In fact, is it one of the properties own by Haidi Holdings?---Yes, it is. Yes.

10 A property held on trust for, amongst other people, you?---Yes. That's correct.

And you caused the 65 Nelson Street Trust, operating the cafe, to pay rent to the Haidi Trust?---That's correct. Yes.

15 Is there a lease agreement?---There is a lease agreement, yes.

Right. Now, could you put away MFI3 and just take up your affidavit of 12 July 2022 again?---Yes.

20 I just want to ask you about paragraph 29 – sorry, 28?---28, is it, on page 10?

Yes, and particularly 28(e), pages 10 to 11?---Yes, Mr Giles.

25 You see paragraph 28(e)? You refer to the July affidavit. That was your original disclosure affidavit, sworn in July 2021?---Yes.

30 You say that you unintentionally included rent of \$9000 from 22 High Street, Rushmore – never owned a receipt?---I think that was a – that was an error made by my previous solicitors and wasn't – wasn't noticed by me at the time when the affidavit was signed.

35 Sorry?---That was – that - - -

40 You swore an affidavit saying – an affidavit disclosing your assets and liabilities to this court?---That is correct.

45 You deposed in that affidavit to owning or having an interest in the property at 22 High Street, Rushmore?---That is correct.

And - - ?---That was an error at the time. That wasn't done – wasn't done deliberately, Mr Giles.

Well, did you check the affidavit before swearing it?---Yes, I did, Mr Giles, but there was a lot happening in July 2021, as you know.

45 Did you take care to ensure that you were accurately disclosing assets and liabilities that you had an interest in?---Yes, I did, Mr Giles.

Your evidence is that you have never owned or had an interest in the 22 High Street, Rushmore property?---That – that is correct.

5 How did you – how did it come to your understanding to be in your disclosure affidavit?---Because I placed a deposit on that property, Mr Giles, at that time, and then, due to the freezing orders, I was unable to complete the – the contract, so the property was sold and my deposit was lost. So at the time of July affidavit, that’s – that’s the – that’s what had occurred.

10 But you never received - - -?---That’s why it was noted, and I never received any income from that property. No.

15 Well, how did you come to have a figure of \$9000 of rent, then?---Because once it had have settled, that was what the rent was going to be. So I apologise if I overstated my position back in July, but that property does not belong to me, nor has it ever belonged to me, Mr Giles.

20 Why did you disclose as an asset the High Street property, which you hadn’t acquired but had a contract to acquire, but you didn’t disclose the Natalia Avenue property, which was, as I understand it, the same, namely, you had a contract to acquire it but you hadn’t completed?---No. It wasn’t the same, Mr Giles. The Natalia Avenue property had been nominated to somebody else. The Rushworth property was still under my contract.

25 Mr Tesoriero, in July 2021, the Natalia avenue property had been nominated to a company of which you were a director and a beneficiary of the trust?---No. That’s not correct.

30 That’s your evidence, is it?---I’m – I’m fairly certain that is not correct. The property was nominated off to somebody else, and then - - -

That’s - - -?---That person had failed to be able to complete, and then – so then we – the contract was given back to me, and then given to a further person to settle.

35 But you – either you personally or the company, 8-12 Natalia Avenue, had a right to be paid by the nominee as the price of the nomination, didn’t you?---No. I don’t think that - - -

40 There was a fee owing to you?---No. I don’t think so.

All right?---I don’t think that’s correct, Mr Giles.

Nothing further, your Honour.

45 HIS HONOUR: Yes, Mr Hayes.

MR HAYES: Thank you, your Honour.

THE WITNESS: If I can just clarify that one further, Mr Giles. In fact, the deposit was paid back into court for that property, as you know.

HIS HONOUR: Anything arising out of that, Mr Giles?

5

MR GILES: No, your Honour.

HIS HONOUR: Yes, Mr Hayes.

10 THE WITNESS: Thank you, your Honour.

<RE-EXAMINATION BY MR HAYES

[11.25 am]

15

MR HAYES: Mr Tesoriero, yesterday, in response to some questions from Mr Giles, in particular in respect of a \$24,000 entry in the ANZ accounts at CMM26, page 1 - - -?---Yes. I recall the amount.

20 Do you remember saying to his Honour you couldn't precisely recall or recollect where that \$24,000 was paid to? Do you remember giving evidence to that effect?---That – that's correct. Yes.

25 Why is it that you can't precisely say where that \$24,000 went to?---Because on the document that was presented to me by Mr Giles, it doesn't actually have a reference there, so I would need to check. It's something that can be checked very easily with ANZ, but I - - -

30 All right?---I would need to check that, but, in any case, I believe it has gone internally within ANZ.

Do you recall, yesterday, Mr Giles asking you about some valuations - - -?---Yes, I do.

35 - - - for service stations?---Yes, I do.

And you were requested to produce those valuations overnight?---Yes, I do.

And you produced those to your instructing solicitors?---Yes.

40

And in respect of those valuations for the service stations – just excuse me, your Honour. Just excuse me, your Honour. There were – my learned friend and I - - -

45 HIS HONOUR: No, no.

MR HAYES: We've come up with a means so as not to oppress your Honour with any paper that isn't overtly necessary. We're going to tender, in due course, a table in respect of these service station valuations. Just excuse me, your Honour.

5 MR GILES: What's proposed is, instead of tendering two volumes of documents, there will be a table that identifies the property, the value and the date of the valuation. It doesn't need to be done through this witness, so please explain.

10 MR HAYES: I would like to take – you asked him about it.

MR GILES: No. Okay.

15 HIS HONOUR: Provided both parties agree that that – there's nothing bespoke about the valuations which is – I need to look at. That seems, with respect, a sensible course.

MR HAYES: What it goes to, your Honour, is there were valuations, in fact, in place in respect of the evidence he gave in his disclosure affidavit, and those valuations - - -

20

HIS HONOUR: Is this 2021?

MR HAYES: Sorry?

25 HIS HONOUR: 2021 or 2022?

MR HAYES: Twenty - - -

30 HIS HONOUR: The recent affidavits or the 2021 affidavit?

MR HAYES: Just excuse me, your Honour. It was the twenty - - -

THE WITNESS: I believe it's both, your Honour.

35 MR HAYES: Just excuse me. It is both, isn't it? It's both. Mr Tesoriero is correct again, your Honour. It's both. Just excuse me, your Honour. Just excuse me for a moment, your Honour.

40 HIS HONOUR: Yes, of course. Take your time.

MR HAYES: Your Honour, might you just give us a moment, so we – if I can just have a couple of minutes - - -

45 HIS HONOUR: Sure. Would - - -

MR HAYES: - - - just to identify the document.

HIS HONOUR: Do you want me to come back at - - -

MR HAYES: We could truncate this quite quickly.

5 HIS HONOUR: Should I come back at quarter to? Would that be convenient, or you need - - -

MR HAYES: We wouldn't need any more than that, your Honour.

10 HIS HONOUR: All right. Well, I will adjourn till quarter to.

MR HAYES: Thank you, your Honour.

15 **<THE WITNESS WITHDREW** [11.30 am]

ADJOURNED [11.30 am]

20 **RESUMED** [11.47 am]

MR HAYES: Thank you, your Honour. Might Mr Tesoriero be recalled.

25 HIS HONOUR: Yes.

MR HAYES: We appreciate the break, your Honour. It will allow us to truncate things considerably.

30 HIS HONOUR: All right. Not at all.

MR HAYES: Your Honour, I propose to ask Mr Tesoriero a series of questions about the service station valuations and cross-examine it then, and then we will be tendering, before your Honour rises at the end of the day, a table that summarises what I will be putting to Mr Tesoriero in respect of the valuations offered in both of his affidavits, your Honour.

40 **<VINCENZO FRANK TESORIERO, RECALLED** [11.48 am]

<RE-EXAMINATION BY MR HAYES

45 MR HAYES: Mr Tesoriero, do you recall, yesterday, Mr Giles asking you some questions about the petrol stations and their values?---Yes, I do, Mr Hayes.

And just to refresh your memory, your Honour, might the witness please be taken to court book page 180.

And what I'm showing you at page 180, Mr Tesoriero, is - - -

5

HIS HONOUR: When you say the - - -

MR HAYES: - - - an annexure to your first affidavit - - -?--- thank you.
Thank you.

10

- - - that you swore on 21 July 2021, about a fortnight after the freezing orders were made against your property?---I don't have the correct book just yet, Mr Hayes, but, yes, I know what you are referring to. Thank you. Thank you.

15

Before I take you into - - -

HIS HONOUR: So when you say "court book 80", I'm not entirely sure what you're referring to.

20

MR HAYES: Court book 180, your Honour. It was the court book which was produced on the prior occasion.

HIS HONOUR: Yes. No. Thank you. I thought you said 80. That's why I was confused.

25

MR HAYES: No. I will try be a little clearer, your Honour.

And just if I can just segue for a moment. You describe to his Honour, and you describe that fortnight between when the freezing order was made and when you first signed this affidavit. What was happening in that fortnight?---The - this is the first one, is it, Mr Hayes?

30

This is your first freezing order affidavit?---There was a lot happening, I guess.

35

When you say, "There was a lot happening," what do you mean by that?---There was - well, there was a lot to digest of what had occurred and freezing orders that were being placed and accounts being frozen and - - -

When you say, "There was a lot to digest," just give a summary of what there was to digest for his Honour?---I don't know. There was - there was a lot - a lot happening - a lot of legal letters that were happening. I had to get legal representation. And so in terms of the time available to complete this affidavit, do you have anything to say about that?---It was done in quite a short period of time.

40

45

All right?---Yes.

And just looking there at paragraph 20 and onwards – sorry, page 180, items 20 and onwards – do you see there - - -?---Yes.

5 - - - for the Cowslip valuation – Cowslip service station – you’ve given a valuation of 3.4 million?---Yes, I do. Yes.

And items 20, 21, 22, 23 - - -?---Yes.

10 - - - and all the way over to items – item 30 - - -?---Yes.

- - - you’ve ascribed values as to those various service stations?---That – that is correct. Yes.

15 I’m going to take you to them in a moment. And then could I next take you, please, to your most recent affidavit of 12 July 2021, which is before his Honour. Do you have that?---Yes, I do. Yes.

20 And would you be so kind to go to page 27 of that affidavit, and, again, do you see from items 20 through until 30 you’ve ascribed a series of values - - -?---Yes, I do. Yes.

- - - to the service stations?---Yes.

25 Do you see that?---Yes, Mr Hayes.

And they’re the same value you’ve ascribed those service stations as your earlier affidavit, that was prepared in those expeditious circumstances, on 21 July?---I believe they are. Yes.

30 Yes?---I haven’t double-checked all of them here with you now, but I believe they are. Yes.

35 I’m going to show you a document, Mr Tesoriero – also hand up a copy to your Honour, one for your Honour’s associate, and one for the witness.

And you’ve just agreed with me that the valuations you’ve attributed to each of the petrol stations are the same in your 20 July affidavit, or 21 July affidavit, 2021, as they are in your 12 July affidavit, 2022. You’ve accepted that proposition?---Yes, I have. Yes.

40 And you gave evidence, yesterday, to a valuation or valuations you obtained shortly before your first affidavit - - -?---Yes.

45 - - - when Mr Giles - - -

HIS HONOUR: Sorry. I will just – I will mark the – I will mark the document that the witness currently has in front of him as MF14.

MFI #4 SUMMARY OF SERVICE STATION VALUATIONS

MR HAYES: Thank you, your Honour.

5

MR GILES: I object.

HIS HONOUR: It's only marked as an MFI.

10 MR GILES: No. Sorry, to the question.

HIS HONOUR: Sorry, what was the objection?

15 MR GILES: The question misstated the evidence that was given yesterday.

HIS HONOUR: Sorry?

20 MR GILES: The question had embedded in it the proposition that, "You gave evidence, yesterday, that the sworn valuations were dated shortly before the July '21 affidavit." I object.

MR HAYES: I withdraw the question, your Honour. Mr - - -

25 HIS HONOUR: Right.

MR GILES: That's not the effect of - - -

30 MR HAYES: Mr Giles has had the advantage of reading the transcript in the break, which I haven't had yet.

Do you remember giving evidence about obtaining some valuations - - -?---Yes.

35 - - - approximate to the time of your first affidavit, or relative to the time of your first affidavit? Do you remember - - -

MR GILES: I object.

THE WITNESS: It was prior to my first affidavit.

40 MR HAYES: Do you remember Mr Giles asking you about some valuations?---Yes, I do.

All right. And I've shown you a summary - - -?---Yes.

45 - - - of a series of valuations. Did you produce to your solicitors, reproduced overnight, a series of valuations for each of those petrol stations?---Yes, I did. Yes.

If you have a look at this summary. If I can just take you through them. In respect of the petrol station at Violet Town, did you produce a valuation, dated 5 March 2020, for 3.486 million?---I believe I did, yes.

5 And that was referred to in your affidavit as 3.4 million?---I believe so, yes.

Did you produce a valuation for the service station at Lake Boga, dated 29 April 2020, for 1.8 million?---I believe so, yes.

10 And that affidavit – or that reference in your affidavit to that service station’s value was 1.8 million?---That is correct. Yes.

These will – Mr Giles didn’t take these – you to these. I’m taking – putting you to them now; you understand?---Yes, of course.

15

Yes. Good. And then the service station at Dimboola – there was a valuation dated 30 April 2020?---Yes.

And that valuation was for \$1.050 million?---Yes.

20

And again, in both of your affidavits – same amount?---Yes.

The service station at Morwell – on 13 May 2020 – valuation for \$1.40 million – sorry, \$1.140 million. Again, that figure appeared in both your first and second affidavit, didn’t it?---It did, yes.

25

The service station at Mallacoota – dated 13 May 2020 – there was a valuation - - -?---Yes.

30 - - - for \$1.140 million. Again, in your affidavits you valued that one at \$1.2 million in both affidavits; is that right?---That’s correct. That one, I – I mistaked – maybe slightly higher than it should have been. But - - -

Yes. All right?---Yes.

35

And the one at Maryborough – 30 April 2020 – the valuation - - -?---Yes.

- - - \$1.2 million. Again, in your – both affidavits, \$1.2 million?---Yes.

40 Service Station at Ouyen – valuation dated 30 April 2020 – valuation of \$900,000. And again, the valuation in both of your affidavits of \$900,000?---That is – that is correct, Mr Hayes, yes.

45 Derrinallum – valuation dated 17 March 2020 – and again, valuation dated or that date – the valuation was for \$1.250 million?---Yes.

And again, in both of your affidavits – same amount?---Yes.

The service station at Taradale – valuation dated 5 March 2020 – not so valuable, that one. That was five hundred and sixty two and a half thousand. Again, 560,000 in both your affidavits?---Yes. That’s correct.

5 And then finally, the service station at Golden Square – affidavit dated 5 March 2020 – a valuation of \$3.58 million. And in both of your affidavits \$3.5 million?---That’s correct, yes.

Your Honour, I tender that document.

10

HIS HONOUR: Well, I will receive it under section 50 of the Evidence Act as a summary of the other material and say MFI1 will become exhibit G.

15 **EXHIBIT #G SUMMARY OF SERVICE STATION VALUATIONS**

MR HAYES: When you referred to valuations yesterday when Mr Giles was asking you about these valuations that you say you relied upon in the preparation of your affidavit, are these the valuations you’re referring to?---Yes, they are.

20

Thank you.

HIS HONOUR: Have you moved on from that topic?

25

MR HAYES: Sorry.

HIS HONOUR: Have you moved on from that - - -

30 MR HAYES: I have, yes.

HIS HONOUR: - - - topic, Mr Hayes? Would you mind if I ask a question now, then?

35 MR HAYES: Not at all, your Honour.

HIS HONOUR: The document which has become exhibit G which you just had in front of you identifies both the sworn valuation and the estimate that you’ve given in your - - -?---Yes, your Honour.

40

- - - sworn evidence; you understand?---Yes – yes.

I take it from the fact that, given what you said in your July 2022 affidavit, that you think that the property prices have not materially increased or not materially decreased. Would that be correct?---I – I haven’t – I haven’t gone into getting these revalued at all, your Honour.

45

Yes?---So I haven't - - -

So your estimate would be it would be around the same as - - -?---They – they would
- - -

5

- - - reflected in - - -?---They could be around the same. They may have increased.
But I haven't got a sworn valuation to see. The WALEs have decreased a little bit.
So - - -

10 All right?---The weighted average on them – so - - -

Yes. Thank you. I understand. Now, have you got exhibit C in front of you?---The
- - -

15 Which is the document with the two spreadsheets?---Yes.

Now, you were asked some questions about the indicative value in respect of the
regional petrol stations - - -?---Yes.

20 - - - which is on the second page there?---Yes.

And you gave this evidence – this is at transcript 35.5:

25 *You satisfied yourself the indicative value stated in the document was correct –
were correct?*

Your answer:

30 *It was, indeed. I was satisfied the indicative values were correct. There were
values that the brokers thought could potentially be had. There was some
discussion that was had. I don't think it was entirely but - - -*

And then a question:

35 *You don't think it was what; sorry?---I don't think it was entirely possible. We
didn't have a valuation at the time.*

?---That's correct, yes.

40 I'm just wondering if you could explain to me why it is that you would have – given
the evidence that you just gave to me concerning these valuations – you were
satisfied the indicative values were correct in this document?---It's not that I was
satisfied they were correct, your Honour. We hadn't done valuations for these at this
point in time. This was values that were suggested by the broker. And so until the
45 valuations had been conducted - - -

No – no. I'm sorry. I think we're at cross-purposes?---Sorry.

I was trying to ask you to focus on the evidence that you gave about – you were satisfied the indicative values were correct in the light of the evidence that you gave about how your – the values in your sworn evidence were informed by the sworn valuations. I was - - -?---Yes.

5

- - - wondering how you came to satisfy yourself that the indicative value in the second spreadsheet in exhibit C was also correct? I was just wondering if you could explain that. I just - - -?---Yes – no, I’m sorry.

10 - - - need your assistance in relation to that?---Yes – no. I think I clarified – and I could be wrong but I thought I clarified with Mr Giles yesterday, I was referring more to the Elsternwick portfolio of properties. And the ones at James Street and the Sydney residential and the regional petrol stations I noted we didn’t have valuations on. So they were just an indicative. But the Elsternwick ones we did have vals. So
15 that – that was where that was at.

All right. Well, I - - -?---It was more consistent. But I - - -

20 Is that - - -?---I think I was referring to those - - -

Is that all you want to say about clarifying that aspect of your evidence?---Yes – yes.

Yes. Anything arising from that?

25 MR HAYES: No, your Honour.

Do you recall yesterday, when you were being cross-examined by Mr Giles, he asked you about – on the Judo Bank statements – this is CMM26 at page – from pages 70
30 through until about 88 – about a series of double payments in April. Do you recall being - - -?---Yes.

- - - asked about that?---I do, Mr Hayes, yes.

35 And you gave evidence to the effect that your explanation was you definitely weren’t paying interest twice. It could be a catch-up and sometimes there wasn’t enough rent from the petrol stations to pay the interest. Do you recall giving evidence to that effect?---Yes, I do, Mr Hayes, yes.

40 What did you mean by that?---There’s occasions where sometimes rent might be paid twice for a month – so two months – and then it just so happens, then, the other month might be missed by the tenant.

45 So when you referred to a catch-up, what did you mean by a catch-up?---Catch-up of the interest arrears.

And why would there be a catch-up or the need for a catch-up?---Because the interest payment might have been missed in a month prior or somewhere.

All right. And - - -?---But I wasn't entirely certain of that, Mr Hayes. I was – I was
- - -

No?---Said I would go back and check and clarify that but - - -

5

You weren't shown any interest – you weren't shown any Judo Bank statements for the month preceding or the month after by Mr Giles, were you?---I can't recall, Mr Hayes. I would have to double check that.

10 No. He only took you to the April ones; is that what you recall?---That's what I recall, yes.

15 Yes. All right. You gave some evidence this morning to his Honour about the Balaclava café and 65 Nelson Road and about the income generated by that business?---Yes.

20 Are you able to say – and you were taken to the income that came – I think this is right – in financial year 2020 – are you able to say anything about the income and financial – I will withdraw that. You made reference to the pandemic; you remember - - -?---Yes.

- - - that?---Yes, I did, yes.

25 And in respect of the café in 2020 are you able to say to his Honour the effect that the pandemic had on the income for your cafe?---I think it was – everywhere was pretty much the same. We were closed for most of 2020 other than take-aways. So
- - -

30 And in twenty - - -?---And closed for a period, as well, completely.

And in 2021 in Melbourne – and perhaps this might be a little bit different to the experience of those in Sydney - - -?---Yes.

35 - - - are you able to say how the pandemic impacted upon that business in calendar year 2021?---It – it hasn't really recovered from 2020.

And what about in 2022? Has the effect of the pandemic on your business in Melbourne recovered in 2022?---No – no, it hasn't, no.

40 And in terms of, you say, the impact on your business, what has been the impact of the pandemic on that business in twenty – in the latter part of 2020, 2021 and 2022?---Just a reduction in revenue, I guess, and an increase in costs.

45 Excuse me, your Honour. Thank you very much, your Honour.

Nothing further, Mr Tesoriero?---Thank you, Mr Hayes.

Might Mr Tesoriero be excused, your Honour.

HIS HONOUR: Yes. That concludes your evidence, Mr Tesoriero?---Thank you, your Honour.

5

You're free to hang around, but that concludes your participation in the proceedings?---Thank you. Thank you, your Honour. Thank you for the opportunity.

10

<THE WITNESS WITHDREW

[12.05 pm]

15 HIS HONOUR: All right. Now, where do we go from there, Mr Hayes? Do you have any other witnesses that you wish to call, in light of Mr Tesoriero's evidence? If you do have any other witnesses that you do wish to call, then I would be open to that being done by video, if you need to call anyone from Melbourne.

20 MR HAYES: Thank you, your Honour. I note we read the affidavits of Mr Nasimi. He's not required for cross-examination. If I could have the benefit of spending about 10 minutes with Mr Tesoriero in respect of one discrete matter in – that may or may not be necessary to call a further witness - - -

25 HIS HONOUR: Yes.

MR HAYES: - - - that fell from Mr Giles' cross-examination. I would like to explore that, if your Honour would indulge me - - -

30 HIS HONOUR: Yes, certainly.

MR HAYES: - - - a short moment to do that.

HIS HONOUR: That's the gentleman involved in the deed of forbearance, I take it.

35 MR HAYES: Might be.

HIS HONOUR: Yes. All right. Yes. I'm more than willing to give you that opportunity. What I might do is take an early luncheon adjournment, if that's suitable.

40

MR HAYES: If your Honour pleases.

45 HIS HONOUR: Just bear with me a moment. Well, what I might do is come back at quarter past 1. I've indicated that I won't be available to – in respect of that commitment this afternoon, so I would then propose then to sort of sit on to try to conclude this. So if you have any additional witnesses, they could be called at

quarter past – at quarter past 1, if that’s convenient. Do you have any further evidentiary material, Mr Giles, apart from tendering MFI3?

5 MR GILES: Other than tendering parts of MFI3, no.

HIS HONOUR: All right. Well, if you might just indicate those parts of MFI3 that you propose to tender. You can do that – you can do that at 1.15.

10 MR GILES: May it please.

HIS HONOUR: And what I will ask be done is if that document, in electronic form, with the documents that have gone into evidence, can be filed electronically, and that will become – that will become exhibit H.

15 MR GILES: May it please.

MR HAYES: Before your Honour rises - - -

20 HIS HONOUR: Sure.

MR HAYES: Might your Honour give an indication as to what time your Honour was going to rise today, just so that we can plan the balance of our day. We’re going to try and finish today, if we can.

25 HIS HONOUR: When we finish.

MR HAYES: Sorry?

30 HIS HONOUR: When we finish.

MR HAYES: I understood your Honour had a commitment this afternoon.

35 HIS HONOUR: Yes. Well, I’ve regrettably said that I won’t be able to fulfil that commitment because of what happened yesterday, because I have no other time to finish this. If I don’t finish this tomorrow, then – today – then, unfortunately, I don’t think I will be in a position to finish it for some time, and I think it needs to be finished. But I will – I would hope we would be able to finish by half past 4 or something like that – another three hours.

40 MR HAYES: We would expect to be – I’m going to be about half an hour.

HIS HONOUR: All right.

45 MR HAYES: I’m not going to be terribly wrong. Your Honour will have read and had the opportunity – if not, hopefully will have the opportunity to do so over lunch – the third respondent’s written submissions.

HIS HONOUR: Yes. I scanned them, but I will have another look at them.

MR HAYES: I don't propose to rehearse them. Repetition doesn't make the written point better.

5

HIS HONOUR: If Westpac wishes – I mean, you've got an hour. I'm not sure. Ms Hamilton-Jewell has probably got nothing better to do over lunch, so she can, no doubt, produce a short document about what - - -

10 MR GILES: Yes.

HIS HONOUR: - - - credit issues you think I should deal with concerning the evidence of Mr Tesoriero, now you have the transcript, and what occurred today, and – in fact, what I will do, I think, in order, realistically, to give both sides the time to think about what they wish to submit, is I will come back at half past 1 instead.

15

MR HAYES: Thank you, your Honour.

MR GILES: May it please.

20

HIS HONOUR: All right. If you would adjourn the court to half past 1, please.

ADJOURNED

[12.10 pm]

25

RESUMED

[1.30 pm]

30 HIS HONOUR: I'm sorry about that. Something just came up. Yes.

MR HAYES: Your Honour, we won't be calling any further witnesses. Mr Tesoriero is not in a position to do that today. But there is one discrete matter.

35 HIS HONOUR: Well, if he's not in a position to do it today, I - - -

MR HAYES: We won't be calling any further witnesses, your Honour.

HIS HONOUR: Well, I just want to make it clear that that's – if you did wish to call further corroborating witnesses of Mr Tesoriero then I wouldn't require you to close your case today or - - -

40

MR HAYES: We're grateful for that, your Honour.

45 HIS HONOUR: And if you needed to call someone by video today, then I would give leave for a subpoena to be issued to them - - -

MR HAYES: We won't trouble your Honour with that.

HIS HONOUR: - - - by way of email.

5 MR HAYES: We won't trouble your Honour.

HIS HONOUR: All right.

10 MR HAYES: There is one discrete matter, your Honour, that Mr Tesoriero would like to just take further in re-examination. I didn't canvass that discrete issue. It's a matter relating to the Haidi Trust or Haidi Trust.

HIS HONOUR: No objection, Mr - - -

15 MR GILES: Well, there is because there's no reference to the Haidi Trust in the affidavit. I've established that it – through this cross-examination – that there's a Haidi Trust. He's a beneficiary, albeit that it's a discretionary trust and that it has assets including some of the properties on Carlisle Street in Balaclava. One might have thought that's not something I should have been having to elicit. The difficulty
20 with seeking to recall Mr Tesoriero and re-examine him - - -

HIS HONOUR: Well, it's not an application to recall in this sense. It is – see, he's not seeking to adduce this material in chief. He's seeking to re-examine and - - -

25 MR GILES: That's true.

HIS HONOUR: - - - the – you say there's nothing to clarify or there's nothing – isn't really a scope of – with re-examination - - -

30 MR GILES: I can't say there's nothing to clarify, your Honour. I mean, in a sense, it has obviously been left unclear what the circumstances are. But the difficulty is, having had to elicit in cross-examination – to have that which should have been, frankly, in chief – hearing about it in re-examination is something which should not be permitted. Should it - - -

35

HIS HONOUR: Well - - -

MR GILES: - - - rather be left in the state it is.

40 HIS HONOUR: I think there is an unfairness in being able to re-examine on that point, given the circumstances in which that evidence has emerged. However, I don't see what the prejudice is if I gave Mr Hayes leave to re-open and adduce that evidence-in-chief which would then give you the opportunity, if you saw fit, to further cross-examine on that point.

45

MR GILES: May it please.

MR HAYES: I hear what your Honour says and - - -

HIS HONOUR: I will give you leave to adduce some additional material by way of examination-in-chief.

5

MR HAYES: If your Honour pleases.

HIS HONOUR: Yes. You can come back to the witness box, Mr Tesoriero.

10 MR HAYES: It effectively will canvass areas where my friend didn't tread in his cross-examination but it's – I hear what your Honour says and I understand the proposition that it's being lead in chief rather than a re-examination. I - - -

HIS HONOUR: Yes.

15

MR HAYES: - - - understand the authority and principles behind it.

HIS HONOUR: So you're on your former oath, Mr Tesoriero. If you just take a seat.

20

<VINCENZO FRANK TESORIERO, ON FORMER OATH [1.35 pm]

25 **<EXAMINATION-IN-CHIEF BY MR HAYES**

THE WITNESS: Thank you. Thank you, your Honour.

30 MR HAYES: Mr Tesoriero, do you recall when Mr Giles was asking you some questions this morning about the Haidi Trust?---Yes, I do, Mr Hayes, yes.

35 And that trust – is there anything else you would like to say about it in terms of, firstly, the control of that trust?---The control of the trust, I believe, is with my father and was with his two late sisters but has now passed on to my aunties' children. And I believe what happens is that – I don't have any – you've got to forgive me, your Honour, with the way to explain it but I don't have any grab on that trust until my father passes away.

40 All right?---Is what I understand.

45 And when you say that's what you believe, why do you say that's what you believe? Have you seen a copy of this trust or do you know anything else about it?---I haven't seen a copy of this trust but that's always what has been discussed between the family members. And I've never received any distribution from this trust to date.

Do you know when this trust was established?---I believe it was in the late 1960s or 1970s.

Yes?---Early 1970s.

5

Yes. Nothing further, your Honour.

HIS HONOUR: Yes. Mr Giles.

10

<CROSS-EXAMINATION BY MR GILES

[1.36 pm]

15 MR GILES: Mr Tesoriero, you've just answered some questions about something our learned friend called the Haidi Trust?---Yes.

In fact, you know, don't you, that Haidi Holdings is the trustee of the John Tesoriero Trust?---That is – that is – I've never – that is correct, yes.

20 Right. And Haidi Holdings, to your understanding, holds all of its assets on the John Tesoriero Family Trust?---It holds a portion of them. A portion of the trust.

HIS HONOUR: Sorry, I thought it was the trustee.

25 MR GILES: That's what I'm – anyway, I'm trying to - - -?---The trustee, I understand, owns the properties unless I'm mistaken.

HIS HONOUR: Well, the trustee owns the property on trust for the trust?---Is that – you've got to forgive me, your Honour, I - - -

30

No. That's all right.

MR GILES: Could I hand to your Honour – and I've just given to my learned friend and to Mr Tesoriero – a copy of the trust deed of the John Tesoriero Family Trust.

35 You see in the top right-hand – have you seen this document before, Mr Tesoriero?---I can't recall, no.

See in the top right-hand corner there's some numbers starting FOG and then a series of - - -?---Yes, I see those, yes.

40

- - - numbers. If you just concentrate on the last four numbers, could you – where you see on page 1, it's page 7135 – could you go over to page 7170, which is right towards the back?---Yes, I can.

45 So when my learned friend was asking you about the Haidi Trust, did you understand that what he was trying to ask you about was the John Tesoriero Family Trust?---No, I don't – didn't.

But Haidi Holdings is the trustee of the John Tesoriero Family Trust?---I believe that's correct, yes.

Right. And you see who the primary beneficiaries are?---All children - - -

5

HIS HONOUR: Sorry, can we clarify - - -?---Yes.

- - - that a moment. I'm a little confused now whether there's more than one trust. It is, of course, possible that Haidi Holdings Proprietary Limited could be the trustee of more than one discretionary trust?

10

MR GILES: I understand.

THE WITNESS: And it is, your Honour.

15

MR GILES: Right. Okay. What trusts is Haidi Holdings the trustee of?---I'm not too sure at this point, Mr Giles. I would have to check and get back to you on that. But there is more than just this one trust that it's trustee - - -

20 But you're unable to tell his Honour how many others?---I – I believe it's two or three.

Who are the – do you know - - -?---But I'm not very familiar with it, to be honest.

25 Right. Do you know whether you're a beneficiary of any of them?---No. I don't believe I am. As I said, this was all – if you see the date on this, Mr Giles, it was made before I was even born. So - - -

30 HIS HONOUR: Sorry. But are you a child of Giovanni Tesoriero or - - -?---Yes. I am, your Honour. Yes.

Is there any reason for you to think that the trustees of the other trusts in respect of which Haidi Holdings Pty Limited as the trustee has different beneficiaries than the John Tesoriero Family Trust?---I – I know for certain that it does, your Honour.

35

You know for certain it does?---That – I know for certain that they do. Yes. They have different beneficiaries.

MR GILES: And how do you know that?

40

HIS HONOUR: No. Do you understand that the other trusts of which Haidi Holdings Proprietary Limited as the trustee - - -?---Yes.

45 - - - have a different class of beneficiaries than the John Tesoriero Family Trust?---No. That I'm unsure of.

Right. Is there any reason for you to think that they would have different beneficiaries?---I'm unfamiliar with those other trusts. I would have to clarify.

I see?---Yes.

5

All right. So the answer to my question is "no"?---I – I'm not - - -

You're unfamiliar with them, so you don't know?---I'm familiar with them. Yes. So I don't know. Yes.

10

Right. Thank you.

MR GILES: I think at that stage, your Honour, I might just tender the trust deed.

15

HIS HONOUR: All right. The trust deed of the trust known as the John Tesoriero Family Trust will become exhibit H.

MR GILES: I, I think.

20

HIS HONOUR: I. No. No. J.

EXHIBIT #J TRUST DEED OF THE TRUST KNOWN AS THE JOHN TESORIERO FAMILY TRUST

25

HIS HONOUR: There's no exhibit I.

MR GILES: Right. I can understand that.

30

HIS HONOUR: Well, that used to be the tradition in this state.

MR GILES: I – yes. Yes.

35

HIS HONOUR: Yes.

MR GILES: May it please, your Honour.

HIS HONOUR: All right. Anything arising out of that?

40

MR HAYES: No, your Honour.

HIS HONOUR: Yes. You're excused again, Mr Tesoriero?---I can leave the - - -

45

You can leave that there. Yes. Thank you.

5 HIS HONOUR: The bundle of – while we’re dealing with the exhibits, the bundle that you’ve provided of those documents out of MFI3, which were exhibit H, I’ve marked, as well, and if that could be filed electronically, I would be grateful. So is that your case, Mr Hayes?

10 MR HAYES: Yes, your Honour.

HIS HONOUR: Yes. Mr Giles, have you got any evidence in reply?

MR GILES: No. No case in reply, your Honour.

15 HIS HONOUR: All right. Yes, Mr Hayes.

MR HAYES: Thank you, your Honour. Your Honour, I don’t propose to rehearse the submissions I made on 11 July which went to the actual – I will traverse them in some general respects from time to time, but today – having already made those
20 submissions as to what is necessarily to ensure the fair and equitable defence - - -

HIS HONOUR: Sorry, Mr Hayes.

25 MR HAYES: It’s all right, your Honour.

HIS HONOUR: I’m just trying to get a copy of your submissions, which I think – sorry. I thought I had left it in my chambers, but I hadn’t. Yes. I’ve got those.

30 MR HAYES: Not at all. Your Honour, we – as we say, what is necessary to ensure a fair trial in this matter in order to – for your Honour to make an allocation of funds held in court from the controlled moneys accounts to Mr Tesoriero to ensure a fair trial in this matter for him to properly conduct his defence – we rest on our submissions made on 11 July, and I will traverse them from time to time in some respects, but your Honour having heard me on 11 July and also having had detailed
35 written submissions as to what we - - -

HIS HONOUR: So you seek an amount of 1.866 million in a lump sum and also ordinary living expenses of \$5000 per week - - -

40 MR HAYES: That’s right.

HIS HONOUR: - - - calculated from September 2021 to date - - -

45 MR HAYES: That’s right.

HIS HONOUR: And future from 1 July 2022 to date of judgment. Can I just - - -

MR HAYES: But there is a carve out, your Honour.

HIS HONOUR: Yes.

5 MR HAYES: We do – for now, we carve out the amount of money that was allocated towards expert witness expenses.

HIS HONOUR: So what it is that you seek, then?

10 MR HAYES: We seek today an amount on behalf of the reasonable legal expenses of 1.496 million - - -

HIS HONOUR: Yes.

15 MR HAYES: - - - bearing in mind that that's not only prospective until the end of trial from today's date, but your Honour should also be mindful that there has been no payment to Mr Tesoriero's legal advisers since December last year, so it's really covering the period from late last year up until the conclusion of the trial. And there is a carve out for the expert witness costs in light of what fell from the exchange with
20 your Honour on 11 July in that your Honour's views were – didn't see the need for expert evidence in this case. Your Honour - - -

HIS HONOUR: Could you just tell me – I'm sorry. I just want to get - - -

25 MR HAYES: Sure.

HIS HONOUR: Work out what – what is the state of evidence concerning the pre-November legal costs?

30 MR HAYES: The pre-November – last year, your Honour?

HIS HONOUR: Yes. So the 1,496,000 was taking up both the legal costs incurred from November last year to date - - -

35 MR HAYES: That's right.

HIS HONOUR: - - - together with the prospective costs, and I'm wondering about the post-commencement of proceedings pre-November legal costs, which are not caught within that 1.496.

40

MR HAYES: Sure.

HIS HONOUR: What the evidence discloses about those costs.

45 MR HAYES: There's an amount of two hundred and something thousand dollars which was paid to Fortis Law in respect of the costs that Mr Tesoriero incurred with Fortis Law from July 2021 until – I think it might have been August, September,

which – no – September, when Madgwicks replaced Fortis Law and come onto the scene. And then the amount – just excuse me, your Honour – and then, your Honour, the amount of \$270,000 was from September to November. I don't believe this is at all contentious – which was an original allocation that your Honour made just prior –
5 I think it was in November last year – for the work done by Madgwicks and the current legal team from September to November, over those three months.

HIS HONOUR: So does that mean – and this is the thing I'm unclear about.

10 MR HAYES: Sure.

HIS HONOUR: Does that mean he has paid \$470,000 worth of legal fees?

MR HAYES: It means he has paid 270,000. He hasn't paid Fortis.
15

HIS HONOUR: I see. You mentioned they paid to Fortis, but that - - -

MR HAYES: I'm sorry, your Honour.

20 HIS HONOUR: No. No. That's all right.

MR HAYES: My loose language is - - -

HIS HONOUR: I had actually thought he hadn't paid those sums.
25

MR HAYES: He hadn't.

HIS HONOUR: But I was - - -

30 MR HAYES: No.

HIS HONOUR: That's why I was - - -

MR HAYES: No. That's - - -
35

HIS HONOUR: - - - seeking clarification.

MR HAYES: That's my loose language. I apologise, your Honour.

40 HIS HONOUR: That's all right. So he has an extant liability for an amount of around \$200,000 to Fortis, but that's subject to dispute.

MR HAYES: Subject to dispute and taxation. That's right.

45 HIS HONOUR: And what has happened about – what's the situation with the taxation?

MR HAYES: It's not - - -

HIS HONOUR: Has that been progressed?

5 MR HAYES: - - - completed yet, your Honour. So there's no - - -

HIS HONOUR: Has it started?

MR HAYES: It has. Yes.

10

HIS HONOUR: So they would be required to - - -

MR HAYES: The process - - -

15 HIS HONOUR: They've filed an itemised bill of costs?

MR HAYES: I believe that has happened. Yes. And that has been challenged. And I'm not sure whether there has been a hearing on taxation or assessment. In fact, we're awaiting a decision on it. So it's reserved. So there has been
20 consideration of it, your Honour, but it hasn't been determined as yet.

HIS HONOUR: So that's administrative – this is an assessment of costs, is it, under the relevant Victorian legislation? Or is this costs incurred - - -

25 MR HAYES: It would be up here, your Honour. Fortis were - - -

HIS HONOUR: It's here. So it's - - -

MR HAYES: Yes.

30

HIS HONOUR: - - - the regime here.

MR HAYES: Yes.

35 HIS HONOUR: I see. So that's with a – that's a taxation – there's a – whatever it's called – a taxation assessment being done but a costs consultant that you're awaiting
- - -

MR HAYES: A determination of. Yes.

40

HIS HONOUR: Your solicitor is nodding her head, so yes. All right. So do we know how much he has alleged he should get back in relation to that – what his liability should be, what his contention is before the assessor?

45 MR HAYES: Well, we will come back to that, your Honour.

HIS HONOUR: All right.

MR HAYES: But it's - - -

HIS HONOUR: Thank you.

5 MR HAYES: - - - substantially less than what his previous lawyers had - - -

HIS HONOUR: Yes.

10 MR HAYES: - - - rendered over those couple of months. I should also add, your Honour, that there has been no living expenses. He has been getting by on the assistance of friends and family since that time. In terms of the amount, your Honour, in terms of the expert expenses or the amount of money allocated towards the cost of expert evidence - - -

15 HIS HONOUR: Just before we come to that, I just want to get an idea of what relief you're seeking. So you're seeking – in respect to those living expenses, you're seeking the 5000 calculated from September '21 – 2021 to date.

MR HAYES: Yes.

20

HIS HONOUR: That is, a lump sum of 5000 times how many weeks of – there is from September '21 to date; is that right?

MR HAYES: That's right, your Honour. It's about 40 weeks.

25

HIS HONOUR: So – all right.

MR HAYES: We had the calculation - - -

30 HIS HONOUR: So a \$200,000 cash - - -

MR HAYES: Approximately.

35

HIS HONOUR: - - - payment for living expenses.

40 MR HAYES: Whatever it is, yes, and you will see in his most recent affidavit he has sworn up – your Honour, no doubt, has read affidavit which we've read in court. I can take your Honour to the relevant passage where he has given evidence, your Honour, that he has been supported both by family – and that's all dealt with from paragraphs 70 – well, really, 75, where he says that he has been supported financially and emotionally by his family over the last 12 to 18 months and that his family, at this point, is no longer able to support him any further, and his resources have been stretched to the maximum. That's his unchallenged evidence, your Honour. He's - - -

45

HIS HONOUR: Well, I'm not sure it's – I'm not sure how you challenge a hearsay suggestion about – that his father has indicated, "He's unable to support me any

further.” I mean, I saw what the – I saw what the apparent extent of the father’s financial position is. Why should I accept that the father is no longer prepared to provide any financial support in the absence of any evidence from him? Why shouldn’t an inference be drawn that there’s a forensic decision that has been made
5 not to call his father?

MR HAYES: Well, firstly, your Honour, it’s an interlocutory application.

10 HIS HONOUR: So what?

MR HAYES: Secondly, your Honour, you’ve got the evidence from Mr Tesoriero, and there’s no reason why you shouldn’t accept his evidence to that effect.

15 HIS HONOUR: Why? His father has been – his father has been supporting him to the extent of, presumably, paying money to go to Rockpool and paying money to go to Ferrari events - - -

MR HAYES: Your Honour, there - - -

20 HIS HONOUR: - - - and the like. I mean, why, in the absence of his father saying he’s not going to provide any further funds to him, in the absence of evidence from him, shall I accept that proposition?

25 MR HAYES: Your Honour, two sensationalist questions put to Mr Tesoriero about - - -

HIS HONOUR: What’s sensationalist about it?

30 MR HAYES: - - - going to a Ferrari event and to a restaurant - - -

HIS HONOUR: What’s sensational about - - -

MR HAYES: - - - for his partner’s - - -

35 HIS HONOUR: What’s sensational – sensationalist about it? It’s up to you to convince me, it seems to me, that he doesn’t have access to funds, including his father is not going to support him in relation to his ongoing living expenses.

40 MR HAYES: Well, his lawyers haven’t been paid for eight months, your Honour.

HIS HONOUR: It’s quite different, Mr Hayes.

45 MR HAYES: There’s an inference you can draw from that, and, your Honour, what you’ve got is two occasions in terms of – two occasions of going to an event – whether it’s a Ferrari event, a Volvo event or a Hyundai event, it’s just an event – and going to a restaurant which – for his girlfriend’s birthday. Admittedly, it’s a well-known restaurant, but that’s the – that’s over a 12-month period of time. If my

friend is going to invite your Honour to draw an inference from those two discrete facts that Mr Tesoriero is somehow living the high life, from those two – those two discrete moments - - -

5 HIS HONOUR: No, I think we - - -

MR HAYES: - - - in – over the period of a year, that's - - -

10 HIS HONOUR: I think we're at cross-purposes. I don't – I will wait for Mr Giles' submissions. This arose from your contention to me - - -

MR HAYES: Yes.

15 HIS HONOUR: - - - and your submission to me, based on the evidence, that I should essentially find as a matter of fact that his father is no longer willing to support him. If the evidence in truth – if you wish to make me a finding that the father is no longer prepared to support him, then I asked you why it is that I don't have – I don't have any evidence other than, "My father has indicated that he's
20 he's financially unable to support him, that he has access to insufficient funds, because his resources have been stretched to the maximum.

MR HAYES: Yes.

25 HIS HONOUR: Now, that, I must say to you, is a conclusion which does seem to me to be one which exhibits – how can I put it – a degree of tension with some of the documents I've seen concerning his financial position.

30 MR HAYES: Well, we would respectfully disagree, your Honour, and we say – and I will take your Honour through some of that in a moment.

HIS HONOUR: Yes.

35 MR HAYES: But we say that it was never put to him squarely that that was not a truthful or a correct statement, and, your Honour, it's – while your Honour might be looking at the possibility of drawing an inference in the absence of Mr Tesoriero to give evidence – and if this was a trial and it was dealing with a substantive issue, that might be a different – I might be in a different position, but this is – this started off, your Honour, as an interlocutory application seeking reliefs of moneys, which
40 your Honour was almost prepared to grant on 11 July, when we were last before your Honour.

HIS HONOUR: Yes, I was.

45 MR HAYES: And we're now – and I understand your Honour's concerns and anxiety that was provoked by my learned friend's submission at the very end of the hearing on the 11th, and that's why we're here today, and this is an inquiry into the –

it's still an interlocutory part-heard application into the level of disclosure, and I'm going to take your Honour through the series of complaints.

5 It may well serve your Honour, to put all of this in context, to take your Honour very carefully through the complaints made about the level of disclosure, which I can appreciate is causing your Honour some concern, in respect of Mr Tesoriero, and, secondly, dealing with the evidence that would – we say doesn't go so far to support any positive inference that he has means to be able to properly fund his defence of this proceeding – in fact, quite the opposite. That's why he's here, seeking to prevail
10 upon the use of moneys that are sitting there in a controlled moneys account, which he says is his money to be able to fund his proper defence of this proceeding, to ensure a fair trial. That's why we're here.

15 HIS HONOUR: No, no. I understand all you're saying, Mr Hayes.

MR HAYES: And - - -

20 HIS HONOUR: And I'm not seeking – I deliberately – what I – I deliberately said what I said – was prompted by a specific submission you made concerning his father and a specific aspect of part of the evidence. I have no doubt that Mr Tesoriero is – because of the financial circumstances he finds himself in, will have difficulty funding a defence without a release of funds. I indicated it on the last occasion.

25 MR HAYES: Yes.

30 HIS HONOUR: The point I was making is that you asked me to accept the evidence at the end of 75, which – his father is unable by – to support him, by which I reach the – by which I read to be has exhausted his financial resources, and I've got documents such as exhibit C, which is unexplained, his father having an enormous portfolio of property which is unencumbered.

35 MR HAYES: And your Honour has also heard evidence – and I don't think it's a matter of controversy in this proceeding. Receivers have been appointed over many of his father's properties.

HIS HONOUR: Well, it's a completely unsatisfactory state of the evidence there. I have no idea. I really have - - -

40 MR HAYES: Well, Mr Giles - - -

HIS HONOUR: I really have got a great – a very – a great opaqueness about the financial position of Mr Tesoriero. It's obviously something which is highly complex, with a very – a vast series of family trusts.

45 MR HAYES: Yes.

HIS HONOUR: And to be perfectly frank, I'm left – I mean, even the last evidence, after you recalled him – there are trusts which I have no understanding what all – what property they have – whether he's a beneficiary. It's just a complete blur to me precisely what the financial position is of his father and Mr Tesoriero.

5

MR HAYES: And your Honour would have seen in some respects it's a genuine blur to Mr Tesoriero. I seize upon the word "complex". On any view, your Honour, this is a very complex series of arrangements. In fact, if we have a look for a moment, your Honour, at the annexure to his affidavit – and this is why I was hoping to take your Honour through the alleged – or the supposed – or the complaints about the supposed non-disclosure on the part of Mr Tesoriero, who might not have the level of acuity or sophistication of an investment banker or an accountant but has endeavoured to do his very best to reveal the scope and extent of his interests, your Honour. They have been chipped about by the edges by our learned friends in what is a series of quite voluminous and complex arrangements to suggest, "We've got you on a couple of small things around the periphery, so, therefore, you can't rely upon his evidence," and that's essentially what we say is the case we're responding to.

20 If you look at what he has disclosed, your Honour – and, in substance, we say that while his disclosure has been less than ideal, and a lot of that would reflect upon the nature and the complexity of the arrangements, it's still reasonably good in the circumstances, and what your Honour would have been satisfied of is, given the extent and the complexity of the arrangements and the ongoing disclosure by Mr
25 Tesoriero, that in substance he has endeavoured, to the best of his ability, to disclose what his interests are and – certainly to the court in his two affidavits, and certainly he hasn't in any way sought to conceal assets or anything of that nature, your Honour. At best, he might have made an error or a mistake here and there, but in the overall scheme of things, when you look at the scale of these assets and the
30 complexity of these companies, there are a few errors and a couple of omissions, but we say when you look at the bigger picture and what he has actually disclosed, it doesn't amount to terribly much.

35 And if your Honour goes to page 20 of his most recent affidavit – and if I can just take your Honour through this, he initially sets out the key ultimate holdings entities. And he lists six different companies. Then if you go over to 21, he identifies an eye-wateringly large number of properties, 19 of them, all of which are tied up in special-purpose vehicles, trusts, loans, which were all cross-collateralised against other properties, and he has put this together in a table as – which – if your Honour looks
40 at disclosure evidence – and your Honour has seen plenty of disclosure affidavits – it takes some doing to prepare a table of this kind. Then he has gone down – if your Honour then goes over to 27, he has identified the 10 petrol stations, and we say that your Honour shouldn't be distracted by what your Honour seized upon as an indicative – what he says was an indicative value in terms of his affidavit.

45

What he has given to this court is the most reliable evidence in support of those valuations. Don't worry for a moment – what we say, your Honour, is he might have

been painting a more optimistic picture to financiers doing his best trying to refinance his empire, which has been frozen by Westpac, which – he says unjustly frozen. Since his assets have been frozen, it has triggered a series of events where he has been put in dire financial strife, if you like, your Honour, and if he prevails in
5 this proceeding – and we say that he will. Without pre-empting what your Honour may determine, we say he – the case against him is not at all strong, and that will be dealt with at trial, your Honour. He will find himself in a situation where many of his assets have already been sold.

10 HIS HONOUR: Well - - -

MR HAYES: And - - -

15 HIS HONOUR: - - - with – like any skilled advocate, you’ve fastened upon a phrase to describe what was represented to financiers as a more optimistic picture.

MR HAYES: Yes.

20 HIS HONOUR: I will come back to that in a moment.

MR HAYES: But he hasn’t given your Honour the - - -

25 HIS HONOUR: It – just let me finish. It appears that the indicative figure given in the affidavits in both July 2021 and, more recently, in the last affidavit seems cogently – the valuation has seemed cogently supported by contemporaneous sworn valuations.

MR HAYES: Yes. So what he has told your Honour is - - -

30 HIS HONOUR: So the question is what do I do with the fact that, at least, on one view of it, what might be described – I don’t think unfairly – as staggeringly different values have been represented to financiers, which might go beyond what some people might fairly think as just a more optimistic picture.

35 MR HAYES: We would take issue with the use of the word – or the adjective “staggeringly”, your Honour. But nonetheless, your Honour, we say that what’s important is what he has told this court. He wouldn’t be the first borrower or developer or investor who has painted an optimistic picture to a financier in trying to refinance or borrow. Your Honour’s experience as both prior to and both on the
40 bench would be well seized of that. The most important thing here, your Honour, is what he has sworn up to in a sworn affidavit and what he has told your Honour. And Mr Giles touched upon it, and then he left it alone, and the valuations squarely support what it is that Mr Tesoriero – not what he’s telling some unknown financier in terms of trying to desperately rescue his empire caused by Mr Giles’ client
45 freezing his assets when we say the case against him is not sufficient. What he has done is – it’s what he has told you, your Honour, and what he has sworn up to in an

affidavit. And to use evidence, we say, to seek to undermine the reliability of the reliable evidence he has put before this court - - -

5 HIS HONOUR: Well, put another way, what you would say is that faced with the solemn task required by the court of identifying what his true position is, he has conscientiously gone about that task by reference to contemporaneous documents.

MR HAYES: Yes.

10 HIS HONOUR: And the mere fact that he may have had some motivation in inflating the value to a financier when he is in dire financial straits is something which is simply not relevant for present purposes.

MR HAYES: That's right.

15

HIS HONOUR: Yes. Understood.

MR HAYES: It's what he has told you, and what he has told you, your Honour, has been corroborated by the valuations that were produced overnight and supported an area where Mr Giles feared to tread yesterday but was clarified today in re-examination. And we say this, your Honour. Again, this brings it back to – and, in fact, even if he were to have inflated the values in this proceeding, that wouldn't have assisted him. So at the end of the day, what he has done, as your Honour has quite elegantly summed up, if I may say so, is, when faced with the solemn task of having to swear up to give evidence, he has taken the more conservative and more reliable approach. And that's the evidence before your Honour. That's – we say that irrespective of what he might have said to a prospective financier, it has very little, if any, impact on the affidavits given that they're supported by the sworn valuations, which are relatively contemporaneous, your Honour. If we then continue to go further – and I should say, your Honour, these annexures – they run – these spreadsheets – there's 25 pages of spreadsheets, and forgive me if I just go through them a little more, but already your Honour is beginning to see that this is quite an onerous task on anyone charged with dealing with this matter. He has then dealt with the café in Balaclava, 65 Nelson Trust. I'm going to return to that later, your Honour.

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Then we go to the bank accounts. And your Honour will see there are 29 bank accounts – 29 bank accounts – where he has had difficulty accessing that information as a result of the freezing orders. I should say, your Honour – and it – I don't know the full extent of it, but in the fullness of candour, I need to bring this to your Honour's attention. It was brought to my attention just as we were coming to court. The National Australia Bank over lunchtime have finally given him access to all of his bank statements, but I understand that they are encrypted, and he is not able to access them, but that has apparently happened over lunchtime, and I can say, your Honour, that once – that will be a task attended to with some expedition, and once those statements can be downloaded, your Honour, they will be properly discovered. But nonetheless, your Honour has heard in - - -

40
45

HIS HONOUR: So they're statements of the current position, are they? Or are they historical?

5 MR HAYES: I believe they're historical. April, May and June. But I should have
thought to your Honour that if we have April, May and June this year – then that's a
good start from the NAB. We should have little difficulty in being able to obtain the
historical statements back to 1 July last year. And they should – which preceded the
freezing order by a matter of days. And they should be properly discovered and they
will be. But that has just come to light. But nevertheless, your Honour, he has got
10 29 accounts where, firstly, he has had – against this complex web of companies and
trusts and the like – 29 different accounts – from page 32 onwards setting out all of
those different accounts. Then – which he has had limited access to.

15 And I should say, your Honour, in addition to this, not only is it the complexity but
it's the lack of resources where he has already given evidence saying that his
accountant – and this is where he need – it's no wonder he would need the assistance
of his accountants to be able to make sense of all of this. Obviously, your Honour
saw Mr Tesoriero give evidence. He's not an accountant. He's not an investment
banker or anything of that nature. He's a businessman. He has a café and he invests
20 in property. So it's no small wonder that he would need the assistance of his
accountant. But herein lies the paradox. He doesn't have the resources. And he has
done the best he can with very limited resources and within a highly complex
commercial environment to reveal what we say is, in the circumstances, your
Honour, a pretty good attempt – he has made a pretty good fist of it in terms of
25 disclosing what he is able to do under what are significant and onerous
circumstances.

30 There he goes over the page – to page 35 – and I haven't counted these but there's at
least 20 companies on each page. That is between 40 and 50 companies he has
disclosed in which he has shares. And whether – he has gone to the detail of whether
or not they're trustee companies or whether they're not. It keeps going – annexure B
– he has then dealt with the property where he receives rents. And this is from the
petrol stations. And so again, I'm counting about 10, your Honour. He has dealt
with all of that. Then he has gone over the page and dealt with the CBA properties,
35 of which there's another 15 odd properties – in fact, more – 15 to 20 properties, shall
we say. Then there's the service station properties. And then on it goes. And then
there's a further series of other bank accounts in annexure C which is the NAB bank
accounts.

40 Now, I'm going to come to the fact that this one in this – and there are balances there
on these NAB accounts – and I'm going to come to – so what your Honour has seen
is 25 pages in a spreadsheet of a – to use your Honour's expression – of a
staggeringly large number of companies, bank accounts, assets – highly complex.
Where he has had little or no resources in order to comply with his ongoing
45 obligations to disclosure. And we say that if you have a look at the affidavit and
compare it – I'm going to take your Honour to one instance in due course – with his
affidavit of July last year. And your Honour heard evidence this morning. You can

– just for a moment, you can imagine when you’re suddenly hit with a freezing order and a lot of assets which are a lot of your family’s assets – his parents and his family assets are all suddenly put under pressure and his personal assets are frozen.

5 Your Honour is well aware of the chaos that a freezing order can create. And against that backdrop of – or against that chaos, within a couple of weeks – if we can go to the original affidavit – he has done his very best in that very sudden and chaotic environment to disclose – and where he’s getting no assistance at all from the banks – his accounts were frozen. He couldn’t even get access to his National Australia –
10 to the accounts he had with the National Australia Bank. To be critical of someone – of anyone in those circumstances where their entire world is turned upside down and they’ve done the best they can to disclose what are their assets and comply with the terms of the order, your Honour – we say is perhaps a step too far when it’s not considered properly in context of what’s happening.

15 This is not a large-scale corporation whose assets have been frozen where there’s a term of – or a team of – a CFO and a team of accountants internally and advisors who can go through every single subsidiary and related associated company and every bank account and provide the sort of level of accuracy, your Honour, we might
20 be accustomed to seeing in high value corporate litigation or that type of thing. This is dealing with a real person who is a property developer and who owns a café. And you have to look at what he does, your Honour; and what he does for a living; what his training is; what his background is; and the very adverse circumstances he has been operating on. And we do concede it’s – his disclosure has not been perfect.
25 But in terms of substance, your Honour, and in terms of – yes, substantively – it’s – in the circumstances it has been reasonably good.

Your Honour, I’m going to turn for a moment – can I just take your Honour to our written outline of submissions. And we say this ongoing chipping away at his
30 disclosure by Westpac, we say, has revealed – it hasn’t progressed the matter, we say, with any real degree of meaning or effect. If anything, your Honour, all it has revealed is how desperate Mr Tesoriero’s circumstances really are and the fact that he does have very little in order to fund the proper and fair defence of the case brought against him. And the fact that we say, your Honour, it shouldn’t be made –
35 he already faces an onerous task. Your Honour has seen the evidence of Mr Naisimi and the sheer volume of material. Westpac has discovered over 35,000 documents. There is a team of at least half a dozen lawyers, counsel and the like. And that’s dealing with the substantive issues.

40 And yet, here he is having to deal with repeated requests regarding disclosure or his disclosure affidavits which he has endeavoured to faithfully respond to as best as he is able to in the circumstances. In paragraph 10 of our most recent set of submissions, your Honour – and I’m not going to rehearse them. But every single complaint – all twenty – with one exception on 24 June – item 24. But all 28
45 complaints – these rolling, if you like, sniping attacks at his disclosure that he has had to endure, distracting him from being able to focus on the substantive aspects of

the case which commenced on 27 July 2021 and continued all the way to 1 July this year. This is what he has had to deal with for over a year, your Honour.

5 Firstly, we deal with each complaint separately. Every single time there has been a complaint, it has been addressed. And I'm not going to rehearse the submissions. But initially, the first one started off saying he didn't disclose any interest in the Forum race car team. Well, that was dealt with and your Honour will see the reference to a response. And our submission is he never ever had an interest in a race car team. And we see this constant jumping at shadows and speculation as to
10 what may or may not be about his defences – or sorry, about his resources. And what was interesting – or I should say, what was notable about what was the cross-examination of Mr Tesoriero – at no stage was it ever put to him – say – well, here's a big pot of gold – here's an asset – a really big asset that you can use to fund your litigation that you didn't disclose, nothing like that at all.

15 It's all of these little, "You haven't quite put this right," or you haven't – you know, "You're out by \$24,000 here." Therefore, your Honour – and I imagine the case against me because of these what we say are ragged edges of his disclosure it's going to be put to your Honour that he's not a reliable witness and you shouldn't
20 accept his evidence. But there's no evidence before your Honour, not a skerrick of evidence to suggest that there is this large pot of gold that can otherwise support his defence to this case, and on it goes. I'm not going to go through each of them, your Honour. But your Honour can read them in the - - -

25 HIS HONOUR: I mean, it seems to me, without anticipating what Mr Giles is going to submit – but I presume that what is going to be – given the way he was cross-examined and what was put to him and what was not put to him, including the point that you just made - - -

30 MR HAYES: Yes.

HIS HONOUR: - - - it's not as to say that because of what you described as the ragged edges or the less-than-ideal aspects of the disclosure which you've made reference to being at the margins. The point to be made against that is, look, at the
35 end of the day I need to be satisfied that I have obtained a complete and frank picture of his financial position before I exercise the discretion, and on the evidence I could have no real confidence in the accuracy of the material. That's, I think, the highest it could be put.

40 MR HAYES: We would say that would be overstating it if it was put on those terms. It would be a gross overstatement.

HIS HONOUR: Be that as it may, (1) you'd say it's a gross overstatement and, secondly, I presume what you would say or what you're saying is, "Look, this isn't a
45 of perfection given the circumstances which you've raised. Although we accept there's ragged edges and it has been less than ideal in some respects, looked in the

broad and as a matter of substance he has obviously tried to do his best given the limitations he was – he has been under.

MR HAYES: That's right.

5

HIS HONOUR: But in any event, in the absence of me being affirmatively satisfied that there is some undisclosed amount the interests of justice require this man has access to significant funds in order to properly defend the proceedings.

10 MR HAYES: Yes. Yes.

HIS HONOUR: Which leads me to this point – and I say this to you. One aspect of this which troubles me somewhat – and I understand the force of what you've said – is some aspects of the evidence where I think things are just put too highly or a good
15 example is the one that we started with, the direness of the father's financial situation or the fact that 150,000 could not be an asset or because - - -

MR HAYES: I'm going to come to the 150, your Honour.

20 HIS HONOUR: No. No. But those sort of - - -

MR HAYES: Yes.

HIS HONOUR: Those sort of aspects of the evidence which in one sense are a little
25 troubling. But I must say – and this is as much a comment for Mr Giles' benefit as yours – even if I had some misgivings about aspects of that evidence, it doesn't really matter for present purposes - - -

MR HAYES: That's right.

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HIS HONOUR: - - - because at the end of the day what I have to do is ensure that there's a fair trial - - -

MR HAYES: That's it.

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HIS HONOUR: - - - that he has access to adequate resources.

MR HAYES: That's where I was going to finish, your Honour. That's exactly the
40 point, and we say that using that – that's – your Honour is ahead of me. That's where I was going to finish. That's exactly the point, and we say that, drawing upon what your Honour said using those two illustrations – we say that in some respects it betrays a lack of sophistication on the part of Ms Tesoriero in your Honour looks at the 150,000, and I'm going to take your Honour through that in a moment cause I do wish to unpick that. And I – it will – I won't be long with it. But I do wish to put
45 that in context, and we say that lack of sophistication on his part combined with the complexity and the onerous circumstances he's under explains why his disclosure

could be seen with a very well-armed and big legal team against him – it can be seen as raggedy around the edges when its’ chipped away at the way in which it is.

5 Your Honour, just dealing with that point, I will just get straight to the point on the 150,000. When you look at that carefully, your Honour – is – it starts out – and – yes. The fact that he didn’t see the \$150,000 in the account at the moment in time as an asset – I can see why that’s a matter of concern for your Honour, but it also betrays a lack of sophistication on the part of Mr Tesoriero in that sense, because what he has done, your Honour – there has been no act of concealment. He has 10 given evidence to your Honour – admittedly, it’s not strictly correct that it wasn’t an error. He’s in error about that. But his understanding of it was it was a transactional account. And when your Honour goes through it, what’s really important is that in his first affidavit – and this is – the criticism made of him is – if your Honour goes to his recent affidavit on 12 July at page 33 – and all this does – it underscores the 15 almost herculean task that he has been before him without full access to – with limited resources for his lawyers and accountants to deal with this. But if you look at line 23 - - -

20 HIS HONOUR: Sorry. This is page 33?

MR HAYES: 33 of his affidavit. It’s in the spreadsheet. It’s item 23. And this is a point that I expect will be made against me on the ANZ 14 Kirwin Road account in Morwell – this was the passage of cross-examination yesterday that dealt with the \$150,000 point, which – Mr Tesoriero erroneously, rightly or wrongly, said he didn’t 25 consider it to be an asset.

HIS HONOUR: Well, I don’t think there’s much doubt whether it’s rightly or wrongly.

30 MR HAYES: Well, rightly or wrongly for him. Your Honour, he’s – I suspect he’s not going to bed reading AASB 18 every night. But nonetheless, your Honour, he was in error about that. But his understanding – and this is what it revealed. His relatively unsophisticated understanding was that this was a transactional account, and if you go to - - -

35 HIS HONOUR: Well, I suppose your point is he has listed the account.

MR HAYES: He has listed the account secondly.

40 HIS HONOUR: And if you were playing a game of hide the sausage, why would you even refer to the account?

45 MR HAYES: Well, he has even got the name of the account wrong. He has got the account number right. But it just exposes the difficulties he has operated – been operating under. The sausage is there, your Honour, and he was – the sausage was grilled by Mr Giles. But we say Mr Giles burnt the sausage, and it’s not worth a look, because if your Honour goes back to his earlier affidavit – and your Honour

will see that, in the court book, at page 186 – and this is the affidavit he did under pressure after two weeks. And this exposes how badly the sausage was burnt. Allow me to find it, your Honour. Your Honour will see there – I’m sorry. His first affidavit at page 33. My apologies, your Honour.

5

HIS HONOUR: Yes.

MR HAYES: Your Honour will see the very thing he was criticised of he actually did in that affidavit. I’m just looking for the – I will find it. I did have it.

10

HIS HONOUR: I think - - -

MR HAYES: But your Honour will see he actually disclosed a balance in there – so what this document here at 33 doesn’t have - - -

15

HIS HONOUR: \$32,141.56.

MR HAYES: That’s the one. 33,000, so he has - - -

20

HIS HONOUR: Page 17 in annexure B.

MR HAYES: He has disclosed the balance. Sorry, it wasn’t his first affidavit. It was the one he filed a month ago.

25

HIS HONOUR: Yes.

MR HAYES: So four weeks earlier on, he disclosed the balance. He has then – that column somehow has gone missing in this one, but nonetheless there was a balance in that account four weeks ago. The account is there. It’s wrongly labelled, and then in his understanding – and, indeed, what was apparent was the 150,000, in some respects, is an illusory figure, because approximately \$100,000 comes out of that account each month on interests payments.

30

HIS HONOUR: Yes.

35

MR HAYES: 80 to 100 thousand. I don’t know the exact number, your Honour, but whatever it is that leaves you with a balance of around \$65,000, which is what was being put to Mr Tesoriero by Mr Giles, that as of the time of this affidavit, sworn a month later or three weeks later, in that account, where there was once \$32,000, there should have been a balance of about – either 150 or then, after interest payments are taken out, \$65,000. So we say that, really, if you look at it in that sense, your Honour, and you look at it in context, the cross-examination really goes nowhere.

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45

It doesn’t really assist your Honour terribly much in what your Honour is charged with adjudicating today, on the release of an appropriate amount of moneys to allow the fair trial of – or to allow the fair trial for Mr Tesoriero to defend the case that’s

brought against him. Your Honour, likewise, the \$24,000 payment in respect of the ANZ statement – there was – we say that, in the overall scheme of things, it’s an anomaly. He wasn’t able to explain it and, again, he hasn’t had full access to his material or anything of that nature, your Honour, but, again, you heard how he was
5 re-examined on that issue and as to how he dealt with it and, effectively, your Honour, there are multiple property accounts and assets and multiples companies, but the one thing your Honour can be sure about is that 24,000.

10 No evidence at all that he has been using that money for his own personal benefit or anything of that nature, your Honour – nothing at all. It’s just a transaction that he wasn’t able to – he said – his best explanation, your Honour, was, “It must be for interest, and I would say it’s the ANZ,” and he has given that answer where, effectively, he has given evidence about there being debtor accounts and how the ANZ, I think his words were, does all of the debits and transfers themselves.

15 HIS HONOUR: I understand what you say about those things, I think. Can I just raise - - -

MR HAYES: Yes, your Honour.

20 HIS HONOUR: - - - two other aspects of the evidence - - -

MR HAYES: Yes, your Honour.

25 HIS HONOUR: - - - and get your submission about what I should do with them and whether you think it’s necessary for me to deal with them at all.

MR HAYES: Certainly.

30 HIS HONOUR: One is the Judo Bank evidence relating to the deed of forbearance. The other is the cross-examination concerning exhibit F and page 366 of his exhibit, concerning the email from Mr Mitchell. My inclination, subject to anything Mr Giles says, is that it’s unnecessary for me to make – one of the things that occurs to me is, in circumstances where I may well have to hear Mr Tesoriero give evidence
35 again – I may or may not – I should be somewhat circumspect in dealing with any issues of credit at this stage.

It’s quite an interesting – it’s something I’ve thought about in other cases where one has cross-examination in interlocutory hearing and one is going to be a trial judge.
40 In a sense, it’s difficult to prevent oneself making – forming assessments in relation to matters after you’ve heard someone being cross-examined. Is it better to be transparent about your findings in relation to those things, even though it may not be necessary for the disposition of the case, so that people understand how – what views one has formed, or is it best not to make those findings? I would be interested in
45 both parties’ submissions in relation to that.

MR HAYES: We say two things, your Honour. Firstly, there's no need for you to make any finding in respect of exhibit F, because it's not going to assist your Honour.

5 HIS HONOUR: Well, in a sense, with exhibit F, I think I'm – in the absence of expert evidence, in a way, I mean, I – for all I know, there might be different printouts, but by – if it's in different – if it was forwarded to different recipients – I mean, I – if it was taken from the mailbox of different recipients. I don't really know, one way or the other, in the absence of some – particularly a finding of that
10 seriousness.

MR HAYES: Sure.

15 HIS HONOUR: That there would be an insecure evidentiary foundation, at this stage, I would have thought, to make it.

MR HAYES: That's right. It would be premature, and - - -

20 HIS HONOUR: There is no case in reply in relation to that.

MR HAYES: Well, we would say it's premature. Secondly, there's no reason – there's three things. Firstly, it's premature. Secondly, there's no reason to make a finding of credit on that discrete issue, because what it won't do in terms of weight – it won't disturb the overwhelming weight of the evidence, if one looks at everything
25 he has disclosed, the fact that he has got little or no resources to fund his case. So it doesn't really tip the scales on – when you look at the extent of his ongoing disclosure to the best of his ability, less than perfect as it is. It doesn't – it raises no more than, perhaps, a quizzical eyebrow of concern, and that would be well-placed. I shouldn't say that, your Honour. That would be – it would be easy to understand if
30 that were to occur.

35 And the third point, your Honour, is that in terms of the discrete issue itself, there may well be an explanation, and this isn't a trial. It has got to be remembered it's an interlocutory application, and even in the absence of an explanation, your Honour, there are – it doesn't – it doesn't pull down the whole house of cards. There are plenty of cases that your Honour has, no doubt, heard and participated in where witnesses can be accepted on all of their evidence except one discrete matter, and they're either in error – and there has been no real opportunity to explain it.

40 HIS HONOUR: No, no. I understand that point. Perhaps I expressed myself poorly.

MR HAYES: Yes.

45 HIS HONOUR: I'm not really concerned about that, because, to be perfectly frank, I don't think – my current view, subject to hearing Mr Giles, is it's really not material in my decision-making process relating to the issue.

MR HAYES: That's right.

HIS HONOUR: What I'm saying to you, in all candour, is that one forms a view.
It's whether you wish me to express that view or whether it's best for me to be
5 circumspect in a situation where I'm also slated to be the trial judge.

MR HAYES: If you're going to be the trial judge, your Honour, we would say
discretion would be the - - -

10 HIS HONOUR: All right. Well, as long as it's not - - -

MR HAYES: Yes.

HIS HONOUR: - - - suggested at some other place that – for example, that you say
15 that I should have expressed my view, because otherwise you could then have
formed a view whether or not you thought it was appropriate that I ought disqualify
myself from hearing the trial.

MR HAYES: No.

20

HIS HONOUR: All right.

MR HAYES: Because we say – and we understand where your Honour is - - -

25 HIS HONOUR: I just wanted to say that to you, because I think it's - - -

MR HAYES: We're grateful for that, your Honour.

HIS HONOUR: Look, I think there are a lot of advantages to the docket system, but
30 that's one of the potential downsides to a docket system – is the fact that - - -

MR HAYES: We would say two things, and we're grateful to your - - -

HIS HONOUR: And I'm not suggesting I've formed a view one way or the other.
35

MR HAYES: No.

HIS HONOUR: But all I'm saying is, if the parties wish me to do so, I would reflect
40 on that.

MR HAYES: Well, there are three things that – and we're grateful for your Honour
raising it. There are three things that arise from it. Firstly, even if it was material –
and it isn't – that kernel of evidence does not bring down the house of cards.

45 HIS HONOUR: No. I understand what you say about that.

MR HAYES: Secondly, your Honour, witnesses can be accepted on all of their evidence but not on a very narrow part of it or parts of it. And, thirdly, your Honour saw evidence given by Mr Tesoriero, and there are – I dare say, your Honour, there is much of what he has given evidence before your Honour over the last two days that
5 you would accept, and where he has been able to support what has been a rather cynical and suspicious approach to what he has disclosed by the applicant. You look no further than the petrol stations and – where he has been able to support the valuations given as what he has disclosed to your Honour. So there are many aspects of his evidence that you – and a large part of his evidence, your Honour, that you
10 wouldn't be troubled by. So in those circumstances, your Honour, we wouldn't ask or invite your Honour to make any specific finding and nor should you.

HIS HONOUR: All right. I understand.

15 MR HAYES: Thank you, your Honour.

HIS HONOUR: Thank you.

MR HAYES: I think that deals with exhibit F. The forbearance deed, your Honour,
20 is - - -

HIS HONOUR: Pretty much the same boat.

MR HAYES: Same boat, yes. And the evidence really only showed double
25 payments in April. He has given evidence about getting behind and catch-ups and where rents can get behind. That's perfectly plausible. There's – there is – and that's where the evidence is – there's evidence on either – unremarkable on either side of that. And look, the worst it gets for him is that even – he's either catching up a month behind or he's a month in front. That's – at the end of the day, it's
30 discharging a liability. And the best it gets for Mr Giles is he has got a month in front. On Mr Tesoriero's evidence, he's catching up for a month behind. So again, it really goes nowhere in terms of his overall wealth. That being the case, your Honour, I will just see that I've dealt with those matters. But I should have thought, subject to your Honour's concerns, I – does your Honour have any other matters you
35 would like to hear me on in response to Mr Tesoriero's evidence under cross-examination?

HIS HONOUR: No. That's fine. There's no particular questions I have.

40 MR HAYES: That brings us back then, your Honour, to where we are here. We say that your Honour should - - -

HIS HONOUR: Yes. I'm sorry.

45 MR HAYES: And, your Honour, I perhaps - - -

HIS HONOUR: Did you want to say anything about that figure that I indicated at page 16 on 1 July 2022?

MR HAYES: Sorry, page 16 on the - - -

5

HIS HONOUR: On the 1st – I – on 1 July I indicated I would have thought on those figures an amount of 1.25 – that’s leaving to one side the Fortis Law material. And you said something at – “1.25 – in that ball park, your Honour. Yes, maybe that would be getting close to the amount, I would think.” Is there anything else you wanted to say about that?

10

MR HAYES: It’s getting close, your Honour, but it’s not there, we say.

HIS HONOUR: I thought you might say that. All right.

15

MR HAYES: I will take it, your Honour. But we say - - -

HIS HONOUR: No. I understand.

MR HAYES: We say the amount is 1.5 or 1.496. And I did perhaps – the position – I overstated it, your Honour. My instructors were not paid – or there has not been \$270,000 paid up until November. The position is worse – it was \$180,000 that was paid up until November last year. So – and that’s dealt with in - - -

20

HIS HONOUR: \$180,000, yes.

25

MR HAYES: Yes. It’s dealt with in the 17 June affidavit.

HIS HONOUR: That’s September – November.

30

MR HAYES: Yes.

HIS HONOUR: Yes.

MR HAYES: So it’s – the position is far worse.

35

HIS HONOUR: But that’s – your solicitors came on in September.

MR HAYES: I think that’s right. September – October, wasn’t it? I’m told October, your Honour. Well, there’s – I think it was late September is my recollection, your Honour. There was - - -

40

HIS HONOUR: All right.

MR HAYES: It was – certainly, counsel – we came on board in – I think it would have been mid to late October. And I think the change of team started in September. So, your Honour, we say that – and this brings us back to the expert allocation - - -

45

HIS HONOUR: Now, well, what - - -

MR HAYES: Your Honour said - - -

5 HIS HONOUR: Yes, I saw a reference to that. What is the expert evidence that you were suggesting that you might adduce?

MR HAYES: The expert evidence, if it is lead – if he goes into evidence is – we think that there are other ways to deal with this issue because it shouldn't be as a
10 matter of controversy that Mr Tesoriero invested a substantial amount of money in Forum. And we will endeavour to deal with that prior to the trial through other processes where we need not trouble your Honour with that at the trial. And I'm thinking with – through the mechanism of the court's processes of notices to admit facts and documents – that we can deal with it that way. Your Honour, the - - -

15

HIS HONOUR: Well, can I say to you I'm intent in relation to this hearing to try to run it in accordance with the overarching purpose.

MR HAYES: Yes.

20

HIS HONOUR: And I see no reason why this case should be different from any other case in my docket where I require the junior counsel to sit down in a room together and prepare an agreed narrative – background facts – which are either admitted or not in dispute. And I would have thought the vast amount of the
25 adjectival material in this case would not be the subject of dispute. And the quicker that task happens, the better. I don't want to receive from Westpac volumes and volumes and volumes and volumes of documents. It's just not the way the litigation should occur in 2022.

30 MR HAYES: We would concur with everything your Honour has said with the added caveat that the room have natural light and air-conditioning for junior counsel. Your Honour, that of course, requires resources for that to occur.

HIS HONOUR: Well, I'm not sure whether that first submission is one I necessarily
35 agree with. There was a reason why 17th century judges locked up juries without bread and water. To make sure that they actually did the task to escape. So perhaps on that - - -

MR HAYES: Well, relative to me, your Honour, Dr Turner certainly needs to eat
40 more bread. But nonetheless, your Honour, we would like or we would hope that there would be – with – as part of the proper preparation of this matter, Dr Turner and Ms Hamilton-Jewell – Mr O'Haire – my other junior.

HIS HONOUR: Liquidators have pored over Forum Finance presumably in great
45 detail.

MR HAYES: Yes.

HIS HONOUR: No doubt, a vast amount of money has been spent by the liquidators and by the solicitors acting for the liquidators.

MR HAYES: And by the applicant.

5

HIS HONOUR: I don't understand why it is that the key propositions that Westpac wish to establish around the hinterland of the case – but are important adjectival material – isn't able to be extracted and be the subject of being presented to me in a narrative form.

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MR HAYES: Well, we would - - -

HIS HONOUR: If material is put bona fide in dispute by your client, which ought not to be put bona fide in dispute, then that's what the obligations on your solicitors and counsel is meant to prevent. And there's conscientious people on all sides in this case. And I'm sure people will approach it in the right way. But I really want to get to that stage. So the whole idea that I could – that expert evidence of that nature could even be talked about – is just something which I don't understand.

MR HAYES: Well, we would share that hope, your Honour. And which is why we would say – which is why we've carved out the \$370,000 provision for expert evidence. That we would only seek a release of that money – of that \$370,000 for expert evidence if we made an application to your Honour for leave to adduce expert evidence. Because on the previous occasion, your Honour, I think, indicated that you wouldn't entertain expert evidence without an application for leave being made. And so we're not going to trouble your Honour with that \$370,000 expert allocation today because we also, in light of what has fallen from your Honour's – from the bench today, your Honour – in respect of – if Mr Tesoriero's case is appropriately resourced, then we would share that hope that that discrete issue and those types of issues, your Honour, could result in agreed facts and an agreed bundle of documents, if necessary. So that's something that junior counsel and our instructors should be able to address. Which is why we don't press today for that \$370,000 because we're similarly optimistic, your Honour, that if we have the resources to do that, then that would avoid the need to draw down on those funds.

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HIS HONOUR: All right.

MR HAYES: And while, your Honour, before – I don't want to get involved in horse trading with your Honour or anything – your Honour had in mind a figure of 1.25 million or something of that nature. I said it would take a little bit more. We do press for the 1.496. Your Honour will see how that's set out in Mr Nasimi's affidavit, and we say that relative - - -

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HIS HONOUR: Just give me – could you just give me a reference to where best part - - -

45

MR HAYES: Sure.

HIS HONOUR: - - - best place I see that.

MR HAYES: Yes, your Honour. Your Honour will see that in the court book. Mr
5 Nasimi's affidavit, your Honour, sets that out in his 28 June affidavit, which is set
out at 562A to 616A of the court book.

HIS HONOUR: Five - - -

MR HAYES: 562A - - -

10 HIS HONOUR: 562A.

MR HAYES: - - - to 616A of the court book. And it's also addressed in Mr
15 Tesoriero's affidavit of 17 June 2022, which is at 492 to 562.

HIS HONOUR: So reply to – yes, I – I've got a box there which is what I used
before. This is what I've marked up before.

MR HAYES: Yes. So we say, your Honour, that – and then important thing in
20 considering that, we say it's not an ambitious figure or anything of that nature. It's a
realistic one, and your Honour can take comfort from that by looking at – if one, for
a moment, considers the equality of arms principle – and look, you have a very
apparent what Mr Tesoriero was up against having seen what he has had to face in
the last two days, your Honour, in terms of a quality of arms and relativity of
25 resources. Even where fully afforded what we say is a proper grant from your
Honour to afford a fair trial to Mr Tesoriero, it would be a relatively small amount
compared to what both Westpac and the liquidator have already spent on this
proceeding to date.

30 HIS HONOUR: Yes, thank you.

MR HAYES: If your Honour pleases.

HIS HONOUR: Mr Giles.

35 MR GILES: Your Honour, we prepared the short note as - - -

HIS HONOUR: Thank you, I'm grateful.

40 MR GILES: Foreshadowed, requested, suggested.

HIS HONOUR: Hope you didn't impose too much on Ms Hamilton

MR GILES: Your Honour, it was already underway. We will have one filed on the
45 court file electronically as well.

HIS HONOUR: Should I read that before you commence, Mr Giles? Should I read that, Mr Giles?

5 MR GILES: I think just, yes, quickly cast – yes, your Honour. I do want to say a couple of things by way of preamble, but having read it

HIS HONOUR: Yes, thank you. That's useful.

10 MR GILES: I'm grateful, your Honour.

HIS HONOUR: I think, at the end of the day – I mean, I understand the force of what has been submitted here. I note what you put in respect of Westpac does not oppose a variation of the freezing orders to increase the exception provided for reasonable legal expenses the amount of 1.250, reflecting what I said on the last
15 occasion. But then, in paragraph 3, it says, well, that's fine in respect of the \$462,511.65, which is in the controlled moneys account. Does that mean that you accept that there should be an increase provided for in the legal expenses up to 1.250, but there – but, sorry - - -

20 MR GILES: I should explain.

HIS HONOUR: - - - there's no way – yes, can you explain how that works.

25 MR GILES: Of course. There are three aspects, too, by way of preamble, your Honour, and also to answer your Honour's question. There are three aspects to this application. There is the living expenses, including the historical living expenses, aspect.

30 HIS HONOUR: So that's \$200,000 plus \$5000 per week?

MR GILES: Right, \$5000 per week is already allowed.

HIS HONOUR: Already allowed, \$5000.

35 MR GILES: Always has been.

HIS HONOUR: I see.

40 MR GILES: I say always has been. I might be wrong about the first week or two, but - - -

HIS HONOUR: Yes, yes.

45 MR GILES: - - - always has been. It has been met presumably. I mean, your Honour knows the evidence that Mr Tesoriero's parents have been supporting. Now, that doesn't mean that he gets the historical amounts back.

HIS HONOUR: This is what I was trying to understand, because what happens, as you no doubt are aware, when the court makes a freezing order, is that the banks often over-comply in the sense that they really do prevent any access to the account at all.

5

MR GILES: For a period of time.

HIS HONOUR: And I think what has occurred is that even though he has been allowed access for \$5000 per month, the bank has prevented – the bank has not allowed the withdrawal of five – withdrawal of any money including at \$5000 per month. Am I – have I captured what I think the issue is, or you don't know?

10

MR GILES: Well, yes. I think that's the issue.

15 HIS HONOUR: Yes.

MR GILES: That's said to be the issue. Now, as your Honour was putting though, the banks react in a manner which is conservative, over-compliant. Of course, talking about banks other than my client at the moment. Don't think that your Honour experienced tells that they do so for a period of a year and plus normally. It can be – there is no doubt it can be a short term problem, and it's a real problem with freezing orders on an operating business.

20

HIS HONOUR: Well, usually a – usually there's a solicitor at the bank.

25

MR GILES: sort it out.

HIS HONOUR: Because usually a solicitor's letter to – well, it used to, in days when banks had in house legal departments.

30

MR GILES: They still do.

HIS HONOUR: You would go to someone like Les Taylor who would say, read the court order, and it would be sorted out. But banks don't seem to have in house legal departments anymore, so it might make it slightly more complicated.

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MR GILES: Well, I'm not sure about the first, your Honour. Well, in fact, I'm sure they do. But - - -

HIS HONOUR: Well, they don't have in house legal departments like they used to have.

40

MR GILES: But the point is this, your Honour: On that, the lack of clarity of – well, there are two points. First of all, the blur as to what has happened, what's at port, where money has come from, where the money that was disclosed in the first affidavit is – that is, the July '21 affidavit has gone. What he doesn't need is to be – what there is no entitlement to (a) the lump sum backwards, and - - -

45

HIS HONOUR: No, I understand that. But just looking forward, I hear what you say about what has occurred in the past. Looking forward, though, what do I do to secure the outcome anticipated by my former order?

5 MR GILES: Yes.

HIS HONOUR: Do I vary the order to make it more express that he's entitled to get the \$5000? I mean, one of the things that I heard, which – today is that he couldn't get access to the NAB bank statements except in an encrypted form. Why?

10

MR GILES: As I say, I don't know other than this: the NAB did actually produce bank statements when produced to the court with an – in an encrypted form but with a password on the subpoenas where the - - -

15 HIS HONOUR: Why? Well, what right of the bank is not to comply with an order of the court to produce statements and put encryptions on material? I mean - - -

MR GILES: Well - - -

20 HIS HONOUR: If I had been aware about that, I would have got the proper officer to come along and explain why there hadn't been proper compliance with the subpoena.

25 MR GILES: Well, I'm not sure that it – I must say, I'm not here for the NAB today, but I'm not sure that that's – other than where the code is produced to the court at the same time, it has a point that only people who are meant to get it get access to it.

HIS HONOUR: That's not the bank's business. It's the court's business.

30 MR GILES: Well, I'm not here - - -

HIS HONOUR: They should produce documents in compliance with the orders of the court, that is, a document which records the information in a readable form, and if they're concerned about other people getting access to it, then that's the reason why the implied undertaking exists.

35

MR GILES: As I say, I'm not here for the NAB today, your Honour.

HIS HONOUR: No, I know, but the - - -

40

MR GILES: But, I mean, I - - -

HIS HONOUR: But the point I'm making, Mr Giles, is I can't fail to recognise that, often, there's a disconnect between what the court endeavours to preserve, that is, a tempered regime which allows access to funds for living expenses and a freezing – indiscriminate freezing of bank accounts, non-provision of statements and various other things, and that's what I'm – I think what I would like is your assistance in

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what I can do in order to make sure – and I’m not being overly critical, because these things are complicated, these orders that people get, but something that can be done, and perhaps it’s a joint letter from the solicitors or something to the bank, in order to ensure that the intent of the order is followed.

5

MR GILES: Might I say, there’s no difficulty from our end, with respect to the bank that I’m here for today - - -

HIS HONOUR: Sure, sure.

10

MR GILES: - - - about that. I mean, if one were to ask the question at a more policy-based level, there is already, one knows, a direction – a note to the order – the standard form order that - - -

15 HIS HONOUR: Yes, yes.

MR GILES: Yes. At a more policy-based level, that is something which will be sensibly the subject of discussion by a rules committee or whoever promulgates that.

20 HIS HONOUR: Yes.

MR GILES: Because it’s obvious what it’s intended to do. Standing where I stand and as your Honour sits where your Honour sits, it’s pretty clear.

25 HIS HONOUR: Yes.

MR GILES: But having said that, we all know that it hasn’t quite achieved what it should do.

30 HIS HONOUR: Yes.

MR GILES: Could I say, returning to the present, there is no difficulty and never has been a difficulty with \$5000 a week - - -

35 HIS HONOUR: Going forward, yes.

MR GILES: - - - coming out. Now, there’s one caveat. Of course, where does it come from? Does it come from funds over which we claim proprietary relief?

40 HIS HONOUR: Well, if it doesn’t come from those funds, where does it come from?

MR GILES: Well, that’s the point. That’s the blur, your Honour. Where does it come from? The point about the four – the sum that we have identified in
45 paragraph 3 is that that sum is up – that is the sum of money which is in one of these funds, the Margaret – the one produced on the sale of the 23 Margaret Street property, over which no one claims proprietary relief. That’s - - -

HIS HONOUR: At 462?

MR GILES: Quite.

5 HIS HONOUR: Yes, yes, yes.

MR GILES: So that – the point – our point is this. No problem going forward at \$5000 a week.

10 HIS HONOUR: Yes.

MR GILES: I accepted that I wouldn't quibble about \$1.25 million.

HIS HONOUR: Yes.

15

MR GILES: Your Honour will – may remember or may have a note on page - - -

HIS HONOUR: Yes. No, no.

20 MR GILES:

HIS HONOUR: I've reacquainted myself.

MR GILES: Yes, because there's not going to be an affidavit-in-chief.

25

HIS HONOUR: As often as is the case, I've come round to thinking that what I suggested may not be a bad idea. Call me old-fashioned, but - - -

30 MR GILES: Yes. No, no. I won't say anything more. That brings us to the third issue. Does that money come from a fund over which - - -

HIS HONOUR: No. I understand.

35 MR GILES: - - - our clients and our learned friends' clients claim proprietary relief? And that's important on the onus point that we make.

40 HIS HONOUR: Yes. So it has really come down to that, hasn't it? May I – because this is what I thought when I read this helpful document which you just handed up. This has really come down to – I will leave aside Mr Hayes thinking that I should go above that preliminary indication that I gave, but the real dispute is that you say there's no issue in respect of 462,000 and the 1.25 – no issue in respect of the \$5000 going forward. The issue is that I need to be satisfied on the – that I have got the full picture of what Mr Tesoriero's financial position is. I haven't, hence he hasn't discharged his onus of persuading me that there isn't any other assets available
45 in respect of which the legal expenses could be paid. It's really - - -

MR GILES: Quite, quite.

HIS HONOUR: That's really the beginning and end of it, really.

MR GILES: That's the beginning and the end of it.

5 HIS HONOUR: Yes.

MR GILES: Discussion about whether the July '21 affidavit was done in a hurry or the circumstances of it is not today's point.

10 HIS HONOUR: Yes.

MR GILES: This is not a contempt motion. This is has he persuaded your Honour today to exercise that discretion.

15 HIS HONOUR: I just simply have no idea what this man owns and what he doesn't own - - -

MR GILES: Quite.

20 HIS HONOUR: - - - because, apart from anything else, it's labyrinthine, and perhaps that's a - perhaps that's a consequence of arranging your affairs in such an extraordinarily complex way - - -

MR GILES: Yes.

25

HIS HONOUR: - - - presumably, as a perceived financial there's a perceived financial benefit in complexity, but this is one of the downsides of it.

MR GILES: Quite.

30

HIS HONOUR: I understand.

MR GILES: Your Honour has no idea. At least, your Honour has the John Tesoriero Family Trust now - deed, but your Honour knows nothing more than -
35 about that. We don't know about Haidi, other than, apparently - - -

HIS HONOUR: Yes, two or three other trusts - - -

MR GILES: - - - two or three other trusts that - - -

40

HIS HONOUR: - - - which may or may not - which - in respect of which it may or may not be a beneficiary.

MR GILES: Quite. Just doesn't know. Could have been done or, at least, even if -
45 and it's difficult to do and, as your Honour says, it's a consequence of the arrangements that were made at an earlier time for, no doubt, perceived good commercial reason.

HIS HONOUR: Yes.

MR GILES: To which – could I then just tease out one or two points, very briefly.
Property valuations – the chronology, of course, is important. The valuations
5 your Honour knows from exhibit G, dated between March and the end of April 2000.
True is it that one may have understood them being used in July 2001 – July - - -

HIS HONOUR: 2021.

10 MR GILES: 2021.

HIS HONOUR: 2021, they were probably pretty conservative. 2022, they may not
be looking as conservative.

15 MR GILES: Maybe not in July 2022.

HIS HONOUR: They may have - - -

MR GILES: But, I mean, that's all just speculation, your Honour.
20

HIS HONOUR: July 2022, yes.

MR GILES: What your Honour has got is a chronology of valuation,
March/April 2020; an affidavit based on that a year – just over a year later, in
25 July '21; April '22, what is put to the financier, very substantially higher; and then
July '22, where there's no difficulty, might I say, in terms of pressure of time or the
like - - -

HIS HONOUR: Yes.
30

MR GILES: - - - returning to - - -

HIS HONOUR: When did lockdown commence in – these are all – these are – the
properties the subject of exhibit G – they're all – am I confusing this? They're all
35 petrol stations?

MR GILES: They are. They are country petrol stations.

HIS HONOUR: Yes. You wouldn't - - -
40

MR GILES: Well, could I say, non-suburban.

HIS HONOUR: Country petrol stations, not properties that – perhaps it's not
unduly stretching the bounds of section 144 of the Evidence Act to reach the
45 conclusion that country petrol stations may not be as affected by COVID-style
fluctuations as other commercial property, potentially.

MR GILES: Quite.

HIS HONOUR: Yes. 18 June, I'm told, was the date of the lockdowns commencing in Victoria, but I don't really think that matters for present purposes.

5

MR HAYES: No, April, your Honour. There were six lockdowns in Victoria. The first one happened in April. There were instances where the entire state was locked down and then instances where the so-called ring of steel around Melbourne locked down the city but didn't lock down rural Melbourne. So country Victoria was very much affected, your Honour. It was a very different proposition in Victoria to what it was in New South Wales.

10

HIS HONOUR: Yes.

15 MR HAYES: And I do say that with some bitterness, your Honour

MR GILES: That just adds to rather than detracts from the lack of clarity. The – this is just in the order that it was arranged. The forbearance deed, of course, goes to the income. Your Honour might have thought that you would know what his income is – monthly income and liabilities were. Now, I – the affidavit evidence would lead you thinking that he was paying \$58,000 on Berkeley Street.

20

HIS HONOUR: On?

25 MR GILES: The Berkeley Street property, 33 plus 25.

HIS HONOUR: I must say to you, there's a lot about the evidence that – to use a neutral term – put it this way. I don't think Mr Hayes was engaging in his – in any degree of overstatement by saying it's a little ragged around the edges when it comes to disclosure.

30

MR GILES: Yes, your Honour.

HIS HONOUR: I accept that. And there's some aspects of it which, without going further than it's necessary for me to go, are troubling. I didn't come down in the last shower. Having said that, the fundamental issue, it seems to me, Mr Giles, if we can cut to the chase – and why don't we – is you're instructed by a large firm with very large resources. The amount of correspondence that I have seen in relation to this matter is huge. Look at these letters. Look at the – I mean, is there any suggestion that that table in the supplementary submissions of Mr Tesoriero isn't a correct statement of the interrogation about these various topics?

40

MR GILES: put any evidence - - -

45 HIS HONOUR: That is, those 28 - - -

MR GILES: No.

HIS HONOUR: - - - issues.

MR GILES: No. That's true. I mean, some of them, by the way - - -

5 HIS HONOUR: But this court – but this - - -

MR GILES: It's – that has been accepted.

10 HIS HONOUR: I understand that, and I understand why people – but this causes individuals to have to spend money and solicitors to have to spend money.

MR GILES: We accept that.

15 HIS HONOUR: Your solicitors to spend money, their solicitors to spend more responding. And, I mean, I'm not being critical of anyone. All I'm saying is that it – there's a lot of process costs which are easy for your client to absorb.

MR GILES: Well, it has got the money to do it.

20 HIS HONOUR: Well, it has got the money to do it.

MR GILES: It has got the money to do it. I don't know that we – and - - -

25 HIS HONOUR: As – being the recipient of - - -

MR GILES: I've got to say, it has got the money to do it. Whether it's - - -

HIS HONOUR: - - - payments in - - -

30 MR GILES: - - - easy to do it in - - -

35 HIS HONOUR: - - - response to memoranda of fees I've sent to large financial institutions, I can – I understand that they probably didn't – the banks didn't pay those necessarily happily, but they paid them, and - - -

MR GILES: Well, it's an allocation of resources that, at the end of the day, depletes that which goes to the shareholders.

40 HIS HONOUR: All right.

MR GILES: But – yes. They can pay it.

45 HIS HONOUR: But the fact is that the trial – there is something important in the administration of justice that it be – that there be an equality of arms and – within limits, that is, within limits – equality of arms doesn't mean there's a perfect balance. What it means, though, is someone has the ability to obtain a fair trial. That's really it means. Put it - - -

MR GILES: Adequate arms rather than equality, if one were to - - -

HIS HONOUR: Yes.

5 MR GILES: - - - actually - - -

HIS HONOUR: Yes.

10 MR GILES: - - - use a better way of putting it.

HIS HONOUR: Well, I mean, that's Lord Woolf's expression in a slightly different context.

15 MR GILES: Quite.

HIS HONOUR: But what really matters is that I need to ensure that Mr Tesoriero gets a trial according to law and a fair trial and has sufficient resources given the scope and nature of the case in order to run that trial, and it seems to me that that sort of figure that I'm talking about – that I've talked about – that you agreed is that amount.

20 MR GILES: I'm not debating the figure.

HIS HONOUR: Now – but the only question is – the only question then becomes the onus question.

25 MR GILES: Quite.

HIS HONOUR: Whether or not that trumps the fact that you've got and others have got a proprietary claim in respect to some of these properties of which there be a diminution. That's really what it comes down to.

30 MR GILES: Quite. That's precisely what it comes down to. We've left the \$24,000 out of the note not because we wanted to deprecate it. It was just doing the note quickly. And your Honour knows it's page 1 - - -

35 HIS HONOUR: No. No. No. I see.

40 MR GILES: - - - of CMM26. Otherwise, yes. It's the onus point. It's just not there. Your Honour doesn't know, and I have to keep – quite frankly – true it is those who instruct me have written asking questions yet I am today on this application to get money from funds which we claim we have proprietary relief over – I've got to ask absolutely blind questions of this man about what his assets are – guess – and we just don't know. That's the point. Your Honour need make no finding about the - - -

45 HIS HONOUR: Has there been a liquidator's examination of Mr Tesoriero?

MR GILES: I don't believe so.

HIS HONOUR: Yes. All right. Well, I think I understand the way you put it.

5 MR GILES: Your Honour doesn't need to make a finding about page 366. If I might have one second, your Honour. No. There's nothing further, your Honour.

HIS HONOUR: Ms Beechey?

10 MS BEECHEY: Just a few sentences, your Honour. I gratefully adopt Westpac's written submissions both of 30 June and those handed up today, and I also rely on my written submissions dated 18 July, if your Honour has had an opportunity to see those.

15 HIS HONOUR: 18 July. Let me – yes. I have seen those. Just let me reacquaint myself. I looked at them the other day. Just bear with me. You're really concerned about 23 Margaret Street.

MS BEECHEY: Yes, your Honour.

20

HIS HONOUR: Now – in respect of which Westpac has a proprietary claim for 67,638.

25 MS BEECHEY: We might be able to assist with the figures, your Honour. The figure to which both Westpac and my client consent to have released from the controlled moneys account was 462-odd thousand. The gap between that and the figure of 1.25 million, which your Honour has mentioned today, is a gap of \$787,488.35. In my submission, this should be dealt with by considering what Mr
30 Giles described as the onus question or the blur. If we just take the simple fact that there was \$65,000 in the bank account – at least \$65,000 in the bank account of 14 Kirwin Road that wasn't disclosed and we multiply that by the 29 accounts of – in which Mr Tesoriero has an interest, even that comes to over \$1.8 million. The extent of the blur is far more than \$787,000. So in my submission, Mr Tesoriero can find in
35 his own resources, if the freezing order is varied to allow him to do so, sufficient funds to meet his legal expenses. And - - -

HIS HONOUR: Can I ask – sorry. I didn't mean to interrupt you. Go ahead.

40 MS BEECHEY: And my only interest in that is to the extent that the funds of 23 Margaret Street would be affected if your Honour made an order otherwise.

HIS HONOUR: If I were to form the view that in that – he should have access to this 787,000-odd figure, what in the overall justice of the case would be the best way of devising that as between the various persons who have proprietary claims? That
45 is, there would have to be some sort of pari passu type mechanism which would mean that it would diminish people's proprietary claims in some sort of equitable

way depending upon the extent of their proprietary claims. Is that something that could be worked out?

MR GILES: Yes.

5

MS BEECHEY: I will let Mr Giles address that first, I think.

HIS HONOUR: Yes.

10 MR GILES: It can be worked out.

HIS HONOUR: Yes. Yes. Okay. Yes. Thanks.

MS BEECHEY: We already know the proportions. That's all I have to say.

15

HIS HONOUR: Thank you, Ms Beechey. Yes, Mr Jameson.

MR JAMESON: Thank you, your Honour. Just two very brief points. The first is that I rely on the written submissions of the liquidators dated 1 July 2022. The limited purpose of those submissions is simply to identify that the source of the funds available, obviously, can't be funds owned by companies in liquidation, it's a matter Westpac has raised in their written submissions, or the subject of a receivership. Other than that, I don't wish to add anything further to what I have said in writing.

20
25 HIS HONOUR: Can you give me an indication of what that would stop particularly – or the – the external administration of the companies is before me.

MR JAMESON: Sorry, your Honour?

30 HIS HONOUR: The external administration is before me, it's on my docket, isn't it?

MR JAMESON: Yes.

35 HIS HONOUR: Yes. It's separate from the matter that is listed – sorry, that matter is listed today. It's NSD 947 of 2021, I think.

MR JAMESON: That's 747.

40 HIS HONOUR: But can you – while you're on your feet, can you give me an update of where you're at?

MR JAMESON: information in respect of which particular entity? There's multiple - - -

45

HIS HONOUR: Well, generally.

MR JAMESON: Can I take you to Mr Ireland's affidavit which - - -

HIS HONOUR: Just summarise it to me, that's fine.

5 MR JAMESON: - - - summarises it. I might have to take some instructions on where it's at, but there is actually multiple places of where it's at amongst all the various entities. We're appointed over a number of entities. One of the main steps that is being taken currently are a series of statutory demands that have been issued to a number of entities associated with, indeed, Mr Tesoriero.

10 HIS HONOUR: Right.

MR JAMESON: The next application in respect of those entities is actually before the court tomorrow. One of those entities, as it turns out, is 23 Margaret Street.
15 There's a winding up application on in respect of that entity and a number of other entities of Mr Tesoriero. There is a dispute about whether that winding up application can take place because there's a dispute as to the legitimacy of the statutory demands and annexed an application to set aside those demands listed before a judge in Victoria – the Federal Court registry in Victoria in late August.
20 There's – McEvoy J.

HIS HONOUR: Sorry, why is that being allocated in that way? Was there a separate proceeding commenced?

25 MR JAMESON: There was an application brought by Mr Tesoriero to set aside the statutory demands that the liquidators issued. That application was filed in the Victorian registry.

30 HIS HONOUR: Well, did the liquidators think it might be a good idea to contact my associate about that?

MR JAMESON: It was Mr Tesoriero's application and it was being heard and progressed through by a registrar of the Federal Court in Victoria.

35 HIS HONOUR: But the external administration of all these companies is on my docket.

MR JAMESON: Sorry, not in respect of those entities, your Honour. Those entities are not subject to external administration - - -

40 HIS HONOUR: No, it's Mr Tesoriero's company, I understand that, but it's connected to these matters, surely. I'm quite happy for someone else to have to deal with it, but I would just like to know what's going on in respect of the liquidation generally. As far as I'm concerned, another judge can deal with the whole of it, but I
45 don't think that's – I've got enough to deal with. But – so that is happening at the moment. All right. And that's – so McEvoy J has got a hearing in relation to that when?

MR JAMESON: That's at the end of August. However, there has been some correspondence trying to bring that forward because of an issue we say exists in the nature of the application and the timing under the Corporations Act which would see that be disposed of sooner rather than later. I understand that's disputed, but we're
5 hoping that's brought forward. The initial application was heard some months ago. There was a review of the decision of the registrar. A winding up application has nonetheless been filed because of the nature of the application. There was an issue – on our case, the statutory demands – the application to set aside the statutory
10 demands, on our case, did not engage the court's jurisdiction of the Corporations Act. That then triggered a series of timing requirements - - -

HIS HONOUR: So an application to set aside the statutory demands doesn't engage the court's jurisdiction?

15 MR JAMESON: In the form that it was made. The case that the liquidators put in response to the application was that it did not engage the court's jurisdiction by virtue of the form of the application. That was an argument successful before the registrar. What happened in substance, your Honour, was a number of statutory
20 demands are issued. One application was made to set aside those statutory demands. There is a series of cases which deal with the extent to which one application wound up and seeking a rolled up relief can set aside those demands engages the court's jurisdiction. Our case was it did not and that was successful at first instance.

25 There has been a review of that decision, but because the application on our case did not engage the jurisdiction, the timing under the Corporations Act ran and the liquidators then filed winding up applications to ensure they didn't lose their entitlement to do so for the comply with a statutory demand. It's a long way of saying that it's still yet to be determined by a judge of the court at the end of August, but that's the summary of the issue.

30 HIS HONOUR: All right. Thank you. My associate has received a communication a few hours ago saying, "We act for Aksara Holdings, the interested party in the proceeding, Westpac, and Forum Finance," understanding there's a final hearing for winding applications related to the main proceeding is listed tomorrow, and asking
35 my associate about it.

MR JAMESON: Can I - - -

40 HIS HONOUR: Well, at least someone thought it appropriate to draw it to my attention belatedly this morning. Not the liquidator, though.

MR JAMESON: I apologise, your Honour. The hearing tomorrow is being adjourned. The reason it's being adjourned is because there's a review application before McEvoy J in respect of an application to set aside - - -

45 HIS HONOUR: But are these – these are all New South Wales file numbers, NSD 234 of 2022, NSD 225, 226, 227, 228, 229, 230, 231, and 232 of 2022.

MR JAMESON: I understand the winding up applications, which are yet to be determined, are listed before the registry of the New South Wales registry of the Federal Court - - -

5 HIS HONOUR: They're listed before a registrar tomorrow?

MR JAMESON: It is, as I understand it. And it's not proceeding because of the extant issue about whether the statutory demands were properly set aside or not. It would be premature for us to progress a winding up application based on a failure to
10 comply with that statutory demand. And so tomorrow's - - -

HIS HONOUR: So Aksara Holdings is, what, a supporting creditor in respect to some of the winding up of these companies, is it?

15 MR JAMESON: I'm not sure if they have filed a supporting – could your Honour pardon me one moment.

HIS HONOUR: They say they're an interested party though.

20 MR JAMESON: They're an interested party because they're second-ranking creditors.

HIS HONOUR: Yes. Secure creditors.

25 MR JAMESON: Unsecured creditors. I'm told of the petrol stations. They will be interested in those entities for that purpose, but tomorrow's hearing is directions only. There has been some timetabling orders exchanged with Mr Tesoriero's instructing solicitors to progress the winding up applications, but, once again, it's not
30 a final hearing tomorrow because of the need to determine the issue with the statutory demands.

HIS HONOUR: So this is – so what litigation has Mr Tesoriero commenced? He has commenced applications to set aside – how many statutory demands?

35 MR JAMESON: Nine.

HIS HONOUR: Nine statutory demands directed to nine different Tesoriero-controlled entities.

40 MR JAMESON: Yes, issued by Forum Group Financial Services.

HIS HONOUR: Unsuccessful at first instance before a registrar subject to him then commencing a proceeding seeking a review by a judge of the determination of the registrar.

45

MR JAMESON: Yes, your Honour.

HIS HONOUR: This is – these files are the winding up of the same companies, being proceedings commenced in the New South Wales registry by your client.

MR JAMESON: Yes, your Honour.

5

HIS HONOUR: So we've got proceedings in Victoria, proceedings in New South Wales, this before a registrar, not before the same judge.

MR JAMESON: Indeed.

10

HIS HONOUR: It's a mess, isn't it?

MR JAMESON: Indeed. And it's a mess, and the reason that the winding up application - - -

15

HIS HONOUR: It seems like a lot of money being spent for not a great deal of - - -

MR JAMESON: Well - - -

20

HIS HONOUR: - - - useful purpose, if I may say so.

MR JAMESON: With respect, your Honour, the NSD applications were commenced for the sole purpose of ensuring that moneys were not wasted on the statutory demands, because if we're correct on our construction of the Corporations Act, if we didn't commence the NSD proceedings, we would have lost the statutory presumption of insolvency under the Corporations Act, and the consequence of that would have been - - -

25

HIS HONOUR: Why was that dealt with by a registrar in the first place when the unsuccessful person has a right to a statutory review?

30

MR JAMESON: It was - - -

HIS HONOUR: If it had have been brought to my attention, I would have listed it and probably dealt with it in 15 minutes months ago.

35

MR JAMESON: That proposition - - -

HIS HONOUR: Honestly, I am not going to allow wasted costs to be spent in this liquidation. If issues like that happened before, they are – the liquidator is an officer of the court. They've got to start thinking about what is the quickest and cheapest way of doing that, and the quickest and cheapest way of doing that is not engaging in this prolonged process before another judge of the court – before a registrar. Having hearings before a registrar, which – all it's going to mean is the disappointed party is going to go to a judge.

45

MR JAMESON: I hear your Honour. Can I just – in relation to the application in Victoria, that was not an application filed by the liquidator. In relation to that application, there was a request made to the registrar, I believe – I’m just confirming my instructions – to have that determined by a judge by my client. That request was
5 not accepted, and it proceeded before a registrar. But I hear what your Honour says and - - -

HIS HONOUR: But that’s why you bring it to a judge to have it case managed, the judge who is actually dealing with the external administration. I’m not being critical
10 of the registrar. I’m not being critical – I mean, these things happen, and, look, the last thing you want is a judge with – not having a full picture of things being critical of anyone, and I’m not seeking to be critical of your solicitors at all. All I’m saying is please just bring these things to my attention, because I do want to try to stop unnecessary expenditure and try to make sure this is dealt with as efficiently as
15 possible, and bifurcating it in different registries – and I know that’s not your - - -

MR JAMESON: I understand.

HIS HONOUR: I don’t know – is Madgwicks acting in this?
20

MR JAMESON: Yes.

HIS HONOUR: Yes. Why did your solicitors commence proceeding in the Victorian registry when the external administration is in New South Wales? Mr
25 Hayes, do you know?

MR HAYES: I’m not sure, your Honour. Mr O’Haire of counsel appeared on the previous - - -

30 HIS HONOUR: Well, anyway, I just want to make sure - - -

MR HAYES: My other junior in the matter, Mr O’Haire, appeared.

HIS HONOUR: And – well, I mean, I hadn’t realised that your client was actually
35 spending money on legal expenses in pursuing litigation in the court.

MR HAYES: I’m not sure he spent money on that either, your Honour.

HIS HONOUR: Well, he must have in order to file the proceeding, doesn’t he?
40 And presumably, this was – the companies were represented in front of the registrar.

MR HAYES: My apprehension, your Honour, is that the aggressive pursuit of these winding up applications by the liquidator prior to the determination of this proceeding, your Honour, would otherwise render his defence of this matter nugatory
45 if those companies are otherwise wound up. That’s – but I – that’s - - -

HIS HONOUR: All right. Well, perhaps I – I don't want to get too much off the track.

5 MR HAYES: But I'm not directly involved with those matters, your Honour.

HIS HONOUR: I do want to keep control of this. Has it been – leaving aside your point concerning – is it the submission that Mr Tesoriero's companies in relation to those proceedings be adjourned until after the determination of this proceeding?

10 MR JAMESON: Not this proceeding. Not the Westpac proceedings. The issue - - -

HIS HONOUR: These are statutory demands based on, what, loan accounts or something, are they?

15 MR JAMESON: That's correct.

HIS HONOUR: Demands.

20 MR JAMESON: Demands. The loan accounts held by FGFS in respect of those entities.

HIS HONOUR: Yes. Okay.

25 MR JAMESON: It's a narrow issue, but I'm grateful for what your Honour has indicated to me today.

30 HIS HONOUR: That's all right. Yes. So as far as you're aware, Madgwicks are not saying these things need to be deferred, so they can be dealt with immediately, as far as you're aware.

MR JAMESON: The deferral relates to the statutory demand issue, which pre-dates them, but that's - - -

35 HIS HONOUR: Which is just simply a question of statutory construction.

MR JAMESON: Quite. Statutory construction and a series of cases that deal with it, including the Full Court and jurisdictions.

40 HIS HONOUR: All right. Can your solicitors perhaps give me a list of the file numbers – Victorian file numbers, so I can work out what should happen in relation to in consultation with the - - -

MR HAYES: Your Honour, having - - -

45 HIS HONOUR: - - - docket judge.

MR HAYES: Having had the benefit of hearing of this exchange, it probably should be – those matters probably should be adjourned until after the determination of this proceeding. It’s only a matter of – it’s only three months.

5 HIS HONOUR: Well, they’re not before me. They’re not before me, and there may be very good - - -

MR HAYES: Well, I expect - - -

10 HIS HONOUR: There may be very reasons why that’s not the case. I don’t want to that. I’m just - - -

MR HAYES: Well, I expect there might be some correspondence about that tonight, your Honour.

15

HIS HONOUR: I’m just concerned about trying to ensure that these things are coordinated in some sensible way. If it’s a discrete point, I can’t understand why it can’t be dealt with immediately.

20 MR HAYES: Thank you, your Honour.

HIS HONOUR: Anyway – rather than – yes. VID778 of 2021; does that ring a bell to your solicitor?

25 MR JAMESON: That’s it, your Honour.

HIS HONOUR: All right. Well, I will have a chat to McEvoy J about it. Yes. Anything in reply, Mr Hayes?

30 MR HAYES: Just very briefly, your Honour. Your Honour won’t – I’m sure your Honour won’t wish me to elaborate on the grounds, but we would urge you to reject what was an extraordinary submission by Ms Beechey about the 29 – speculating on 29 times 65,000. Your Honour should pay no attention to that submission at all. Your Honour, just turning very briefly to what my learned friends said, the short
35 point – or the short response to the onus question is this. As your Honour said, it’s not a of affection, but in this instance, Mr Tesoriero has made substantial and, we say, sufficient disclosure, sufficient to satisfy your Honour that he doesn’t have the available means to properly fund this proceeding. It’s all very well for my friend to
40 talk about blind cross-examination on documents and second-guessing or speculating on what’s being produced, but all that can be done is for Mr Tesoriero to swear a series of affidavits, and all that has been done in response to that is chipping around the ragged edges – as what Mr Giles has effectively done.

45 He hasn’t disturbed in substance what Mr Tesoriero has put before the court, and what we say, your Honour, in this instance, is that it didn’t expose in any way a material or substantial flaw in the disclosure, and he can only disclose what he can do to the best of his ability. And your Honour will see that, that every shadow that

Westpac has jumped at, set out in the table at paragraph 10 of our supplementary submission, has been very earnestly and promptly responded to by Mr Tesoriero, and we say while there are ragged edges, and Mr Giles and Westpac can always speculate and test things and jump at the disclosure and wonder whether or not there has been
5 sufficient or adequate disclosure, the disclosure is what it is, and, in substance, we say he has – overall, he has made substantial and sufficient disclosure to discharge the onus for your Honour to properly exercise your Honour’s discretion that there be a release of funds from the controlled moneys account for him to be able to fairly conduct his defence in response to a claim brought against him by Westpac.

10 And we would say while 125 – or \$1.25 million, in terms of the amount – we are grateful for – the proper concession made by our friends is sufficient. Again, your Honour, dealing with that question, I – as I alluded to on the previous occasion, I am going to adopt the role of Oliver and ask for a little bit more, and we say that there’s
15 no reason to penalise – if your Honour had some concerns about the evidence, we say that to even detract from what his solicitor Ms Nasimi says – and there’s no reason to – for a moment to have any doubt that what he says is necessary to conduct the proper defence of this matter. His evidence is unchallenged as to the amount – then the amount of 1.496 million is an appropriate amount to be released to enable
20 the proper conduct of his defence. To release less, your Honour – it may well have the effect of unfairly handicapping Mr Tesoriero and the way in which he conducts his defence, and I will leave it at that, your Honour. I have no further submissions to make on that point.

25 HIS HONOUR: Yes. All right. Thank you.

JUDGMENT DELIVERED

30 MR HAYES: Would your Honour be prepared to consider costs be costs in the cause?

MR GILES: Sure.

35 HIS HONOUR: Yes.

MR HAYES: When we get our - - -

40 HIS HONOUR: Well, what I will do is I will put, yes, that the costs will be costs in the cause.

MR GILES: No worries.

45 HIS HONOUR: And I will - - -

MR HAYES: In the event that Mr Tesoriero prevails, he will ultimately get his costs back.

HIS HONOUR: Yes, yes.

5

MR GILES: And I will get my costs when I prevail.

HIS HONOUR: And vice versa. No. I'm happy for that. Now, could I then move – having dealt with that, can I then move to where we go from here.

10

MR HAYES: Did your Honour prepare to address the living – was prepared to address the living expenses?

HIS HONOUR: No. You can – sorry. I will give some reasons about that.

15

MR HAYES: If your Honour pleases.

JUDGMENT DELIVERED

20

MR HAYES: Thank you.

MR GILES: May it please.

25

MR HAYES: Thank you, your Honour.

HIS HONOUR: All right.

30 MR HAYES: It might also assist, your Honour, if that letter also includes a copy of your Honour – of the transcript of your Honour's remarks just then.

HIS HONOUR: I will leave that to the solicitors.

35 MR HAYES: And if your Honour could direct that those moneys be released expeditiously, if possible, or as expeditiously as possible, those being - - -

HIS HONOUR: No. I will make an order. When - - -

40 MR HAYES: If your Honour pleases.

HIS HONOUR: When the short minutes come up, I will make an order, and I don't expect that anyone will do anything other than obey with the order in a timely fashion, as is not always characterised what has occurred to date.

45

MR HAYES: Thank you, your Honour. We're grateful for that, your Honour.

HIS HONOUR: And I hope that changes in the future. All right. Now, can I just go back to where we are – the current orders. Where are the current – are they 1 April or - - -

5 MR GILES: 10 March. Someone has just given me - - -

HIS HONOUR: 10 March.

10 MR GILES: Ms Hamilton-Jewell has just given me 10 March.

HIS HONOUR: All right. No, I've got that. Sorry, the twenty – so by 27 March 2022, the active respondents were to file and serve the affidavit evidence upon which they rely. Now, did I amend that order? I thought I amended that.

15 MR GILES: Yes, you did, and, in fact, there was a debate about that. Your Honour amended the order with respect to Mr Tesoriero.

HIS HONOUR: Yes.

20 MR GILES: His solicitors also act for Mr Tesoriero Senior and have taken that to include Mr Tesoriero Senior. We didn't think your Honour meant that, but - - -

HIS HONOUR: No, I didn't. I didn't.

25 MR GILES: No.

HIS HONOUR: Just Mr Tesoriero's affidavit.

30 MR GILES: That's what I thought.

HIS HONOUR: The other material should be filed and served.

35 MR HAYES: I'm sorry, your Honour. I was getting some instructions on the matter when – I missed what fell from your Honour. I just came in on the end of it.

HIS HONOUR: I was just saying, the variation of the order I made about filing and serving any affidavit evidence by 27 May 2022 ran to Mr Tesoriero's evidence - - -

40 MR HAYES: Yes.

HIS HONOUR: - - - not to the evidence of any other witnesses the respondents wished to call.

45 MR HAYES: No, no. My instructors also ask for his father, Mr – who – Mr Giovanni Tesoriero or Mr John Tesoriero, who is a respondent - - -

MR GILES: Yes.

MR HAYES: - - - to this proceeding. Yes.

HIS HONOUR: Yes. So he should file his affidavit - - -

5 MR HAYES: If he – yes.

HIS HONOUR: - - - if you propose to call him.

MR HAYES: If we propose to call him.

10

HIS HONOUR: Yes.

MR HAYES: If we could do so, your Honour – what’s today’s date? If we could have three weeks to consider that, your Honour.

15

HIS HONOUR: All right.

MR GILES: Well, to do it.

20 MR HAYES: Sorry?

MR GILES: To do it. Not three weeks to make up your mind. Three weeks to do it or not do it.

25 MR HAYES: If we do it, yes.

HIS HONOUR: Yes.

MR HAYES: That’s right.

30

HIS HONOUR: All right. Well, that can be put in some short minutes of order, that the – any affidavit – any – the time for the filing of any affidavits proposed to be called by the active respondents, other than an affidavit of Mr Vincenzo Tesoriero, be filed and served by three weeks today. Now, there was an order:

35

...by 4 pm on 27 May 2022, the liquidators of the Forum companies serve any material which constitutes opinion accounting evidence –

did that happen?

40

MR JAMESON: That has occurred.

HIS HONOUR: And what does that look like? That’s - - -

45 MR GILES: That’s actually what is colloquially called, in our camp, tracing evidence – is following the money, but that has now been – because it had to be done

in order to do it. That has now been summarised – that’s a good word – I’m grateful to Ms Hamilton-Jewell – in the section 50 material, which was order 9.

5 HIS HONOUR: Right. I was about to just ask that. So the section 50 material has now been served.

MR GILES: The vast bulk of it has. There are three – there is the tracing in relation to three companies: Forum Group, 26 Edmondstone, and Mazcon, which are but everything else has been done either on time, or it was over – either on Friday or some trickled in over the weekend.

HIS HONOUR: And – all right. Now, when can the – when can counsel for both parties meet concerning this – preparation of this - - -

15 MR GILES: I think some orders have been made for that.

HIS HONOUR: It’s already ordered there. Right, 1 August. I didn’t make a change to that.

20 MR GILES: Paragraph 13, is it, order 13.

HIS HONOUR: 13 was the issues document principle contested facts in issue and contested legal and submission template. I was talking about the narrative document, the agreed background facts document.

25 MR GILES: I thought that – I have to say, I thought your Honour had directed that in part of the same process.

HIS HONOUR: No, it doesn’t look like it got there. So unless it was in the - - -

30 MR GILES: Maybe it’s embedded in (a)(i).

HIS HONOUR: Unless I note it in July, did I? No, it appears to have slipped out somehow. Well, how - - -

35 MR GILES: We will just vary it to add – sorry, I was going to say, from my perspective we would just vary it to add – come up with the form of words to add - - -

40 HIS HONOUR: Well, I think that should start now rather than waiting till then.

MS BEECHEY: Your Honour, I was just going to say, my recollection is there was discussion of that at the previous case management hearing. But the fact that Mr Papas remains a defendant – although perhaps not an active defendant – I understood your Honour to move to the idea of section 50 summaries which could then be served on the defendants and their agreements sought, rather than attempting to come up with agreed facts with just Mr Tesoriero and his companies without - - -

MR GILES: I think that's right.

MS BEECHEY: - - - Mr Papas being party to that process.

5 HIS HONOUR: Was that before I – just remind me: did I make an order for a separate trial in relation to this trial only proceeding against the active respondents? I did. And why didn't I do that?

10 MR GILES: Sorry. I didn't want your Honour to do that, because I've got to prove the case against Mr Papas as a starting point for the case against everyone else.

HIS HONOUR: And he was served.

15 MR GILES: Yes.

HIS HONOUR: So you're going to – you were moving and seeking judgment against him, I see. Yes, well that makes what Ms Beechey says make sense.

20 MR GILES: Yes.

HIS HONOUR: Yes. So you have to prove it that way, yes.

MR GILES: Yes.

25 HIS HONOUR: All right. Rather than that document being – or what I would like you to do, though, is work out amongst yourselves if I could get some sort of narrative which won't be an evidentiary – but I know what's not in dispute between you two. I won't make it a formal order, that effect, and it won't have any evidentiary value. You will have to tender, still, the section 50 notices, but at least
30 I've got a narrative form in some type of coherent way. It should be quite useful. So I won't make any orders about it, but I do understand why I came to the view that I came to.

35 MR GILES: Yes.

HIS HONOUR: Yes.

MR GILES: If the court please.

40 HIS HONOUR: All right. Well, if someone could send – is there anything else that needs to be done?

45 MR HAYES: Your Honour, I think Mr – I think Dr Turner and Ms Hamilton-Jewel can sort these out overnight, if your Honour would indulge us that time. And we will endeavour to have some agreed short minutes of order to your Honour's associate before lunchtime tomorrow, if your Honour would permit us that time.

HIS HONOUR: Yes, yes. Yes, that's – no.

MR JAMESON: Your Honour, there's one matter. I think in answer to your Honour's question earlier, your Honour asked me whether Aksara was secured or
5 unsecured. I've just been thinking, I think I answered your Honour they were
unsecured. What I meant to say was they are unregistered second ranking mortgage.
So just to correct.

10 HIS HONOUR: All right. Well, if there's nothing further, I will now adjourn.

MATTER ADJOURNED at 4.31 pm ACCORDINGLY

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FEDERAL COURT OF AUSTRALIA

Westpac Banking Corporation v Forum Finance Pty Limited (Freezing Order Variation) [2022] FCA 910

File number: NSD 616 of 2021

Judgment of: **LEE J**

Date of judgment: 20 July 2022

Date of reasons: 4 August 2022

Catchwords: **PRACTICE AND PROCEDURE** – application for variation of freezing order – whether to allow payment of Mr Vincenzo Tesoriero’s reasonable legal expenses in these proceedings – equality of arms – where variation would erode assets over which proprietary claims have been made – where disclosure of assets manifestly inadequate – whether Mr Tesoriero’s asset and liability position has been revealed – whether to increase exception to freezing orders for living expenses

Cases cited: *Clout (Trustee) v Anscor Pty Ltd* [2001] FCA 174

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

Number of paragraphs: 46

Date of hearing: 1, 19–20 July 2022

Counsel for the Applicants: Mr J Giles SC with Ms C Hamilton-Jewell

Solicitor for the Applicants: MinterEllison

Counsel for the Liquidators: Mr R Jameson

Solicitor for the Liquidators: Allens

Counsel for the Third Respondent: Mr P Hayes QC with Mr P Turner

Solicitor for the Third Respondent: Madgwicks Lawyers

Counsel for SMBC Leasing & Finance Ms E L Beechey

Solicitor for SMBC Leasing & Finance Jones Day

ORDERS

NSD 616 of 2021

BETWEEN: **WESTPAC BANKING CORPORATION ABN 33 007 457 141**
First Applicant

**WESTPAC NEW ZEALAND LIMITED (COMPANY
REGISTRATION NUMBER COMPANY NUMBER 1763882)**
Second Applicant

AND: **FORUM FINANCE PTY LIMITED (IN LIQUIDATION) ACN
153 301 172**
First Respondent

BASILE PAPADIMITRIOU
Second Respondent

VINCENZO FRANK TESORIERO (and others named in the
Schedule)
Third Respondent

ORDER MADE BY: LEE J

DATE OF ORDER: 20 JULY 2022

THE COURT ORDERS THAT:

In the Westpac Proceeding (NSD616/2021)

1. The freezing order made against the third respondent, Mr Vincenzo Frank Tesoriero (**Mr Tesoriero**), by Order 4 of the Orders dated 2 July 2021 in relation to the interlocutory application dated 2 July 2021 (as varied on 9 July 2021; 27 August 2021 and 12 November 2021) be varied in the form of **Annexure A** and be extended and apply until further order (**Freezing Order**).
2. The interlocutory application filed on 17 June 2022 by Mr Tesoriero (**Interlocutory Application**) otherwise be dismissed.
3. The costs of the Interlocutory Application be costs in the cause.

In the Westpac Proceeding (NSD616/2021), the SMBC Proceeding (NSD681/2021) and the Societe Generale Proceeding (NSD642/2021)

4. The time for compliance with Order 7 of the Orders dated 10 March 2022 (**March Orders**) be extended so that any affidavit proposed to be relied upon by any Active

Respondents (as defined in Order 6 of the March Orders) (other than Mr Tesoriero), is to be filed and served by 4pm on 10 August 2022.

5. The time for compliance with Order 8 of the March Orders be extended to 4pm on 31 August 2022.

THE COURT NOTES THAT:

6. As at 20 July 2022, Mr Tesoriero has paid the amount of \$180,000 to Madgwicks, the firm of solicitors currently acting for him in proceeding NSD616/2021, towards his reasonable legal expenses permitted under Order 10(b) of the Freezing Order up to and including 20 July 2022.
7. The release of funds pursuant to Order 10(b) of the Freezing Order occur as follows:
 - (a) the first funds to be released will be those over which no party makes a proprietary claim; and
 - (b) to the extent that amount is insufficient, the balance of the funds released under Order 10(b) of the Freezing Order will be from those over which there are proprietary claims on the basis the release of those funds is to operate so as to reduce the assets available to satisfy those claims on a pro rata basis against all parties who make proprietary claims.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ANNEXURE A – FREEZING ORDER

PENAL NOTICE – FREEZING ORDER

TO: VINCENZO FRANK TESORIERO

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

- (A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR**
- (B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,**

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

TO VINCENZO FRANK TESORIERO

This is a *'freezing order'* made against you on 2 July 2021 by Justice Lee at a hearing without notice to you after the Court was given the undertakings set out in Schedule A to this order and after the Court read the affidavits listed in Schedule B to this order. This freezing orders was varied on 9 July 2021, 27 August 2021; 12 November 2021; and 20 July 2022 by Justice Lee at hearings with notice to you.

THE COURT ORDERS:

INTRODUCTION

- (1) [Deleted]
- (2) Subject to the next paragraph, in accordance with the order 1 of the orders made by Justice Lee on 20 July 2022, this order has effect until further order of the Court.
- (3) Anyone served with or notified of this order, including you, may apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified.
- (4) In this order:
 - (a) *'applicant'*, if there is more than one applicant, includes all the applicants;
 - (b) *'you'*, where there is more than one of you, includes all of you and includes you if you are a corporation;
 - (c) *'third party'* means a person other than you and the applicant;

- (d) *'unencumbered value'* means value free of mortgages, charges, liens or other encumbrances.
 - (e) *'Relevant Amount'* means the amount of AUD\$253,766,555.76 and NZD\$44,097,969.
- (5) (a) If you are ordered to do something, you must do it by yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions.
- (b) If you are ordered not to do something, you must not do it yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions or with your encouragement or in any other way.

FREEZING OF ASSETS

- (6) (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\$253,766,555.76 and NZD\$44,097,969 (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.
- (c) If the unencumbered value of your Australian assets is less than the Relevant Amount, and you have assets outside Australia (**Worldwide Assets**):
- (i) You must not dispose of, deal with or diminish the value of any of your Australian assets or your Worldwide Assets up to the unencumbered value of the Relevant Amount; and
 - (ii) You may dispose of, deal with or diminish the value of any of your Worldwide Assets, so long as the unencumbered value of all of your Australian assets and Worldwide Assets still exceeds the Relevant Amount.
- (7) For the purposes of this order,
- (a) your assets include:
- (i) all your assets, whether or not they are in your name and whether they are solely or co-owned;
 - (ii) any asset which you have the power, directly or indirectly, to dispose of or deal with as if it were your own (you are to be regarded as having such power if a third party holds or controls the asset in accordance with your direct or indirect instructions); and
 - (iii) the following assets in particular:
 - (A) your shares in each of the following companies:
 - a. 23 Margaret Street Pty Limited ACN 623 715 373;

- b. 1160 Glen Huntly Road Pty Limited ACN 639 447 984;
- c. 14 Kirwin Road Morwell Pty Limited ACN 641 402 093;
- d. 64-66 Berkeley St Hawthorn Pty Limited ACN 643 838 662;
- e. 14 James Street Pty Limited ACN 638 449 206;
- f. Canner Investments Pty Limited ACN 624 176 049;
- g. Tesoriero Investment Group Pty Limited ACN 161 088 115;
- h. 123 High Street Taradale Pty Limited ACN 639 872 512;
- i. 160 Murray Valley Hwy Lake Boga Pty Limited ACN 641 392 921;
- j. 31 Ellerman Street Dimboola Pty Limited ACN 641 392 887;
- k. 4 Cowslip Street Violet Town Pty Limited ACN 639 872 352;
- l. 55 Nolan Street Maryborough Pty Limited ACN 641 392 912;
- m. 89 Betka Road Mallacoota Pty Limited ACN 641 393 179;
- n. 9 Gregory Street Ouyen Pty Limited ACN 641 392 707;
- o. 9 Main Street Derrinallum Pty Limited ACN 639 872 736;
- p. Forum Group Financial Services Pty Limited ACN 623 033 705;
- q. 26 Edmonstone Road Pty Limited ACN 622 944 129;
- r. 5 Bulkara Street Pty Limited ACN 630 982 160;
- s. 6 Bulkara Street Pty Limited ACN 639 734 473;
- t. Pankarn Pty Ltd ACN 104 616 051;
- u. 275 High Street Golden Square Pty Ltd ACN 639 870 545;
- v. 22 High Street Rushworth Pty Ltd ACN 641 392 903;
- w. 8-12 Natalia Ave Oakleigh Pty Ltd ACN 643 838 626;
- x. Vintes Qld Pty. Ltd. ACN 624 585 922;
- y. 65 Nelson Street Enterprises Pty. Ltd. ACN 612 614 632;
- z. 193 Carlisle Street Enterprises Pty. Ltd. ACN 612 615 237;
- aa. Vintes No 4 Pty Ltd ACN 639 726 524;
- bb. BV Holdings VT Pty Ltd ACN 639 891 624;
- cc. BV Holdings TD Pty Ltd ACN 639 895 257;
- dd. BV Holdings GS Pty Ltd ACN 640 218 864;
- ee. Vintes Qld No 3 Pty Ltd ACN 640 879 152;
- ff. BV Holdings DB Pty Ltd ACN 641 393 151;
- gg. BV Holdings RW Pty Ltd ACN 641 393 197;

- hh. BV Holdings MB Pty Ltd ACN 641 393 240;
- ii. BV Holdings LB Pty Ltd ACN 641 393 268;
- jj. BV Holdings MC Pty Ltd ACN 641 393 277;
- kk. BV Holdings MW Pty Ltd ACN 641 393 286;
- ll. BV Holdings DN Pty Ltd ACN 639 895 239;
- mm. 308 Carlisle Street Holdings Pty. Ltd. ACN 613 047 439;
- nn. 286 Carlisle Street Pty Ltd ACN 610 042 343;
- oo. Thrivi Group Pty Ltd ACN 625 491 858;
- pp. Mangusta (Vic) Pty. Ltd. ACN 631 520 682;
- qq. San Pel One Pty LTD ACN 651 919 265; and
- rr. San Pel Two Pty Ltd ACN 651 927 356;

(B) the following vehicles and vessels:

- a. Vessel "XOXO" Cayman Islands Official Number 734587;
- b. 2018 Porsche Cayenne with VIN WPiZZZ9YZKDA90623
- c. 2014 Alfa Romeo;
- d. 2020 Mini Cooper S with VIN WMWXX920802M95982;
- e. 2008 Ducati 1098R with registration DUCR;
- f. 2020 BMW S1000 with registration EOZ12;
- g. 1957 Chevrolet Bel Air;
- h. 2019 BRP Can-Am Ryker 600 registration RYKER;

- (b) the value of your assets is the value of the interest you have individually in your assets.

PROVISION OF INFORMATION

(8) Subject to paragraph 9, you must:

- (a) at or before **5pm on 14 July 2021** (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing of all your assets in Australia, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets;
- (b) by **5pm on 14 July 2021**, swear and serve on the applicant an affidavit setting out the above information
- (c) by **5pm on 3 September 2021** (or within such further time as the Court may allow) to the best of your ability, swear and serve on the applicants an affidavit setting out all your assets outside of Australia (**Worldwide Assets**), giving their value, location and

details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the Worldwide Assets.

- (9) (a) This paragraph (9) applies if you are not a corporation and you wish to object to complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that you:
- (i) have committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (ii) are liable to a civil penalty.
- (b) This paragraph (9) also applies if you are a corporation and all of the persons who are able to comply with paragraph 8 on your behalf and with whom you have been able to communicate, wish to object to your complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that they respectively:
- (i) have committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (ii) are liable to a civil penalty.
- (c) You must:
- (i) disclose so much of the information required to be disclosed to which no objection is taken; and
 - (ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and
 - (iii) file and serve on each other party a separate affidavit setting out the basis of the objection.

EXCEPTIONS TO THIS ORDER

- (10) This order does not prohibit:
- (a) you paying up to \$5,000 a week on your ordinary living expenses;
 - (b) paying up to the sum of \$1,250,000.00 on your reasonable legal expenses including:
 - (b)(A) the payment of \$270,000 currently held in the Madgwicks trust account (being the amount released from the controlled monies account with account number 033 003 667 565 (CMA) on 28 June 2022) towards your reasonable legal expenses;
 - (b)(B) the release of the further amount of \$800,000 from the CMA for the sole use in respect of your reasonable legal expenses;
 - (c) dealing with or disposing of any of your assets in the ordinary and proper course of your business, including paying business expenses bona fide and properly incurred; and

- (d) in relation to matters not falling within (a), (b) or (c), dealing with or disposing of any of your assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that before doing so you give the applicant, if possible, at least two working days written notice of the particulars of the obligation.
- (10A) This order does not prohibit:
- (a) you from directing Australia and New Zealand Banking Group Limited in respect of the bank account in the name of 65 Nelson St Enterprises Pty Ltd (ACN 612 614 632) as trustee of the 65 Nelson Street Enterprises Trust (ABN 74 545 512 288) (**65 Nelson St Co**) to make payments in respect of bona fide expenses:
- (i) for weekly wage payments for employees employed by and working in the business operated by 65 Nelson St Co;
 - (ii) lease payments for premises occupied by the business operated by 65 Nelson St Co;
 - (iii) operating expenses incurred by the business operated by 65 Nelson St Co;
- (b) you from directing any financial institution that holds bank accounts for any of the following entities:
- (i) 23 Margaret Street Pty Limited ACN 623 715 373;
 - (ii) 1160 Glen Huntly Road Pty Limited ACN 639 447 984;
 - (iii) 14 Kirwin Road Morwell Pty Limited ACN 641 402 093;
 - (iv) 64-66 Berkeley St Hawthorn Pty Limited ACN 643 838 662;
 - (v) 14 James Street Pty Limited ACN 638 449 206;
 - (vi) Forum Group Financial Services Pty Ltd ACN 623 033 705;
 - (vii) Canner Investments Pty Limited ACN 624 176 049;
 - (viii) 123 High Street Taradale Pty Limited ACN 639 872 512;
 - (ix) 160 Murray Valley Hwy Lake Boga Pty Limited ACN 641 392 921;
 - (x) 31 Ellerman Street Dimboola Pty Limited ACN 641 392 887;
 - (xi) 4 Cowslip Street Violet Town Pty Limited ACN 639 872 352;
 - (xii) 55 Nolan Street Maryborough Pty Limited ACN 641 392 912;
 - (xiii) 89 Betka Road Mallacoota Pty Limited ACN 641 393 179;
 - (xiv) 9 Gregory Street Ouyen Pty Limited ACN 641 392 707;
 - (xv) 9 Main Street Derrinallum Pty Limited ACN 639 872 736;
 - (xvi) 26 Edmonstone Road Pty Limited ACN 622 944 129;
 - (xvii) 5 Bulkara Street Pty Limited ACN 630 982 160; and
 - (xviii) 6 Bulkara Street Pty Limited ACN 639 734 473,

to make payments in respect of bona fide expenses of the following types in relation to properties owned by the entity:

- (xix) repayments of registered mortgages that were in existence before 2 July 2021;
- (xx) land tax;
- (xxi) insurance premiums;
- (xxii) council rates;
- (xxiii) water.

- (11) You and the applicant may agree in writing that the exceptions in the preceding paragraph are to be varied. In that case the applicant or you must as soon as practicable file with the Court and serve on the other a minute of a proposed consent order recording the variation signed by or on behalf of the applicant and you, and the Court may order that the exceptions are varied accordingly.
- (12) (a) This order will cease to have effect if you:
- (i) pay the sum of AUD\$253,766,555.76 and NZD\$44,097,969 into Court; or
 - (ii) pay that sum into a joint bank account in the name of your lawyer and the lawyer for the applicant as agreed in writing between them; or
 - (iii) provide security in that sum by a method agreed in writing with the applicant to be held subject to the order of the Court.
- (b) Any such payment and any such security will not provide the applicant with any priority over your other creditors in the event of your insolvency.
- (c) If this order ceases to have effect pursuant 12(a) above, you must as soon as practicable file with the Court and serve on the applicant notice of that fact.

COSTS

- (13) The costs of this application are reserved to the Court hearing the application on the Return Date.

PERSONS OTHER THAN YOU AND THE APPLICANT

(14) **Set off by banks**

This order does not prevent any bank from exercising any right of set off it has in respect of any facility which it gave you before it was notified of this order.

(15) **Bank withdrawals by you**

No bank need inquire as to the application or proposed application of any money withdrawn by you if the withdrawal appears to be permitted by this order.

(16) **Persons outside Australia**

- (a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.

- (b) The terms of this order will affect the following persons outside Australia:
 - (i) you and your directors, officers, employees and agents (except banks and financial institutions);
 - (ii) any person (including a bank or financial institution) who:
 - (A) is subject to the jurisdiction of this Court; and
 - (B) has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and
 - (C) is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience of the terms of this order; and
 - (iii) any other person (including a bank or financial institution), only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has jurisdiction over that person or over any of that person's assets.

(17) Assets located outside Australia

Nothing in this order shall, in respect of assets located outside Australia, prevent any third party from complying or acting in conformity with what it reasonably believes to be its bona fide and properly incurred legal obligations, whether contractual or pursuant to a court order or otherwise, under the law of the country or state in which those assets are situated or under the proper law of any contract between a third party and you, provided that in the case of any future order of a court of that country or state made on your or the third party's application, reasonable written notice of the making of the application is given to the applicant.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

- (1) The applicant undertakes to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.
- (2) As soon as practicable, the applicant will file and serve upon you copies of:
 - (a) this order;
 - (b) the application for this order for hearing on the return date;
 - (c) the following material in so far as it was relied on by the applicant at the hearing when the order was made:
 - (i) affidavits (or draft affidavits);
 - (ii) exhibits capable of being copied;
 - (iii) any written submission; and
 - (iv) any other document that was provided to the Court.
 - (d) a transcript, or, if none is available, a note, of any exclusively oral allegation of fact that was made and of any exclusively oral submission that was put, to the Court;
 - (e) the originating process.
- (3) As soon as practicable, the applicant will cause anyone notified of this order to be given a copy of it.
- (4) The applicant will pay the reasonable costs of anyone other than you and the respondents which have been incurred as a result of this order, including the costs of finding out whether that person holds any of your assets.
- (5) If this order ceases to have effect the applicant will promptly take all reasonable steps to inform in writing anyone who has been notified of this order, or who the applicant has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.
- (6) The applicant will not, without leave of the Court, use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in or outside Australia, other than this proceeding except for the purposes of any police, regulatory authority or prudential disclosure.
- (7) The applicant will not, without leave of the Court, seek to enforce this order in any country outside Australia or seek in any country outside Australia an order of a similar nature or an order conferring a charge or other security against you or your assets.

SCHEDULE B

AFFIDAVITS RELIED ON

Name of deponent	Date affidavit made
(1) Geoffrey Keith Anderson	28 June 2021; 8 July 2021
(2) Nicholas Anthony O'Brien	27 June 2021; 1 July 2021
(3) Caitlin Maria Murray	28 June 2021; 2 July 2021; 7 July 2021; 8 July 2021; 12 July 2021; 14 July 2021; 15 July 2021; 25 August 2021; 28 June 2022

NAME AND ADDRESS OF APPLICANTS' LAWYERS

The Applicants' lawyers are:

MinterEllison
Governor Macquarie Tower
Level 40, 1 Farrer Place
Sydney NSW 2000

Attention: Caitlin Murray
caitlin.murray@minterellison.com; T +61 2 9921 8514; M +61 422 977 971; +61 2 9921 8123
ref: CMM:1353397

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

LEE J:

A INTRODUCTION

1 Heard over three days has been an interlocutory application made by the third respondent, Mr
Vincenzo Tesoriero, to vary freezing orders made against him on 2 July 2021 (**Freezing
Orders**). In broad terms, Mr Tesoriero seeks an amount for his reasonable legal expenses of
up to \$1.866 million to be paid to his solicitor’s trust account, in order to allow him to defend
the proceeding through to the conclusion of the hearing with, he submits, a proper “equality
of arms”.

2 The attitude initially taken by the applicants, Westpac Banking Corporation (**WBC**) and
Westpac New Zealand Limited (**WNZL**) (together, **Westpac**), was to consent to a variation
of the Freezing Orders to provide for reasonable legal expenses of up to \$642,511.65.

3 After I provided some preliminary indications as to an appropriate amount, Westpac modified
its position, and now no longer opposes a variation to allow for an amount of \$1.25 million.
Senior Counsel for Mr Tesoriero conceded that something in “the ball park” of that amount is
“getting close” to the sum appropriate, but “is not quite there”.

4 For the reasons that follow, I consider that a variation of the Freezing Orders in the amount of
\$1.25 million for his “reasonable legal expenses” is appropriate.

B PROCEDURAL BACKGROUND

5 In understanding Mr Tesoriero’s interlocutory application, it is necessary to have regard to
some of the background.

6 Proceeding NSD 616 of 2021 (**Westpac Proceeding**) is being case managed together with
proceeding NSD 681 of 2021 commenced by SMBC Leasing and Finance, Inc. Sydney
Branch (**SMBC**) (**SMBC Proceeding**) and proceeding NSD 642 of 2021 commenced by
Societe General (**SocGen**) (**SocGen Proceeding**). Although some companies he controlled
are now respondents to the SMBC Proceeding, Mr Tesoriero is not a respondent in either the
SMBC or SocGen Proceeding.

7 The Westpac Proceeding was commenced on 28 June 2021, with Westpac seeking relief including damages against Forum Finance Pty Limited (**Forum Finance**), and the second respondent, Mr Basile Papadimitriou.

8 On 2 July 2021, the matter was brought back before me in my capacity as the Duty Judge to hear, relevantly, Westpac's *ex parte* interlocutory application seeking freezing orders against Mr Tesoriero. On that occasion, I ordered that Mr Tesoriero be joined as the third respondent in the Westpac Proceeding and made the Freezing Orders that are the subject of the present application.

9 The Freezing Orders are not "all assets" freezing orders, although they are of that practical effect, because they are relevant to assets up to the specified unencumbered value of \$254,219,440.23. Consistently with the usual practice, they initially provided for two exceptions relevant to the present application: they did not prohibit Mr Tesoriero from paying up to \$2,500 a week on his ordinary living expenses; or paying \$25,000 on his reasonable legal expenses.

10 Since the initial orders of 2 July 2021, the Freezing Orders have been extended and varied by consent, although on a without admissions basis, on 9 July 2021, 27 August 2021, and 12 November 2021. On 9 July 2021, the Freezing Orders were varied to allow an additional amount for legal expenses; namely, \$30,000 per month (up to the sum of \$350,000) and up to \$5,000 a week for ordinary living expenses. On 27 August 2021, the Freezing Orders were further varied and extended. On 12 November 2021, the Freezing Orders were again varied again to provide further for Mr Tesoriero's reasonable legal expenses in the amount of \$450,000 until 10 March 2022. This is the exception for reasonable legal expenses currently provided for in the Freezing Orders.

11 As is customary when orders are made by way of interim preservation, the Freezing Orders included common form ancillary information orders requiring Mr Tesoriero to disclose his assets and liability position by way of a statement of assets and an affidavit verifying that statement (subject to any claim not to produce information by reason of the privilege against self-incrimination). That affidavit was required to be filed and served by 5pm on 8 July 2021.

12 Mr Tesoriero did not comply with those orders. Nor did he comply with further orders extending the time within which to disclose his asset and liability position. However, in the face of an interlocutory process brought by Westpac on 20 July 2021 seeking to charge Mr

Tesoriero with contempt, Mr Tesoriero provided an affidavit of 21 July 2021 setting out his Australian assets (**July 2021 Affidavit**) and, subsequently, an affidavit of 3 September 2021 setting out his interest in assets outside of Australia (**September 2021 Affidavit**). As it turns out, an important aspect of the present application is the adequacy or sufficiency of this disclosure.

C THE APPLICATION

13 The present amount (of \$450,000 up until 10 March 2022) was fixed at a time when it was foreshadowed that a strike-out application to be brought by Mr Tesoriero would be heard and determined in early March 2022. However, in the light of the proceedings being fixed for a final hearing commencing on 10 October 2022, on 10 March 2022, I made orders adjourning Mr Tesoriero's summary dismissal application to the trial. The consequence of this is that, as agreed upon by the parties, further funds are now required for Mr Tesoriero to defend the proceeding through to the conclusion of the trial.

14 As noted above, Westpac no longer opposes a variation to the Freezing Orders to increase the exception providing for Mr Tesoriero's reasonable legal expenses to the amount of \$1.25 million. The source of those funds is, however, disputed. Namely, Westpac does not oppose the release of funds held up to the amount of \$462,511.65 from an identified controlled monies account, because the release of those funds would not erode funds in respect of which proprietary claims have been made. This leaves a sum of \$787,488.35 (from the proposed amount of \$1.25 million) which, if allowed, would be paid over from funds in respect of which either Westpac or SMBC allege they have a proprietary claim.

15 Accordingly, the dispute really revolves around two somewhat narrow points: *first*, whether the Freezing Orders should be varied to increase the exception providing for reasonable legal expenses to the amount of \$1.25 million or some greater amount (as contended for by Mr Tesoriero); and *secondly*, whether Mr Tesoriero should have access to funds, over which Westpac or SMBC make proprietary claims, in order to pay his legal expenses.

C.1 Adequate Disclosure

16 Given that the Freezing Orders are relevant only to those assets up to a specified unencumbered value, Mr Tesoriero bears the evidentiary onus of demonstrating that he does not have any other assets above and beyond that unencumbered value out of which the legal

expenses could be paid: see *Clout (Trustee) v Anscor Pty Ltd* [2001] FCA 174 (at [19]–[20] per Drummond J).

17 The kernel of Westpac’s opposition is that the disclosure of Mr Tesoriero has been manifestly inadequate or, at the very least, remains sufficiently opaque such that the Court cannot be satisfied that Mr Tesoriero does not have other assets available out of which reasonable legal expenses could be paid.

18 This opposition is unsurprising given the history of the matter. It is evident from the material that has now emerged that both the July and September Affidavits did not adequately and fully disclose Mr Tesoriero’s assets as required by the Freezing Orders. Without seeking to be exhaustive, on 1 July 2022, Westpac pointed to the following deficiencies in Mr Tesoriero’s disclosure to date.

- (1) The July 2021 Affidavit failed to disclose Mr Tesoriero’s interest in the Mangusta XOXO yacht (which was subsequently disclosed in the September 2021 Affidavit).
- (2) The July 2021 Affidavit did not disclose Mr Tesoriero’s interest in a property with the address 8-12 Natalia Ave Oakleigh South VIC 3167 and no explanation has been provided as to why this was not disclosed.
- (3) The affidavit of Mr Tesoriero sworn 19 October 2021 (**October 2021 Affidavit**) refers to a number of bank accounts that were not disclosed in the July 2021 Affidavit. Furthermore, despite Mr Tesoriero stating in his October Affidavit (at [4]) that he believes he may have “up to 30 accounts with NAB”, only 18 bank accounts are referred to in the October Affidavit.
- (4) Mr Tesoriero did not disclose in his July 2021 Affidavit other vehicles and motorbikes which have subsequently been discovered by Westpac, including, for example, a 2019 BRP Can-Am Ryker 600 registration RYKER referred to in the Freezing Orders.
- (5) The July 2021 Affidavit refers to a property with address “22 Hight [*sic*] St, Rushworth 3612” as being owned by a company associated with Mr Tesoriero namely, 22 High Street Rushworth Pty Ltd: see July 2021 Affidavit, Annexure A, item 24. However, a copy of the historic certificate of title for the property at 22 High Street Rushworth shows that the property is owned by Rushworth Property Holdings Pty Ltd and does not appear to have ever been owned by 22 High Street Rushworth Pty Ltd.

(6) Mr Tesoriero is said to have an interest in a café that is operated by 65 Nelson Street Enterprises Trust, however, no evidence as to the income or assets of this café has been provided.

19 For these reasons, Westpac submitted there is a significant disparity in the rental income and mortgage expenses as initially disclosed in the July 2021 Affidavit and the recent affidavit of Mr Tesoriero sworn 17 June 2022.

20 Mr Tesoriero has also been in default of other orders. When the interlocutory application was before me on 1 July 2022, I indicated that I was not disposed even to consider an application to exercise the discretion in favour of Mr Tesoriero in circumstances where he was in default of orders of the Court relating to discovery. Further, so I could have some assurances that there was transparency as to Mr Tesoriero's financial position, I required Mr Tesoriero to file and serve an affidavit deposing as to his current assets and liabilities position (including his current income and expense position) as at 11 July 2022, and stood the interlocutory application over part-heard to 19 July 2022.

21 Despite this, Mr Tesoriero did not comply with the order that I made on 1 July 2022. Belatedly an affidavit was filed and served on 12 July 2022, and a further affidavit was then filed and served on 18 July 2022 (**July 2022 Affidavits**). I am also now told that the default relating to discovery has been rectified.

22 On the recommencement of the hearing, Mr Tesoriero was cross-examined in relation to his affidavits and disclosure to date. As senior counsel for Mr Tesoriero correctly concedes, the disclosure of Mr Tesoriero in this case has been "less than ideal" and has "ragged edges": T140.27; T165.42. It might be thought that in some respects this is a fairly benign characterisation of the unsatisfactory approach taken by Mr Tesoriero to disclosure.

23 The following aspects of the evidence that he gave before me are of some particular concern.

24 *First*, there are assets that have not been disclosed. For instance, there is no reference in the July 2022 Affidavits to the existence of a Forbearance Deed with Judo Bank Pty Ltd: see Exhibit G (at 81). This is surprising, given the deed was executed on 14 June 2022, with the effect being to reduce the monthly repayments on the Berkely Street property to the amount of \$33,000 per month (subject to interest rate changes). Mr Tesoriero's affidavit sworn on 12 July 2022 sets out that the repayments are \$58,600 per month.

25 Furthermore, Mr Tesoriero has not been forthcoming in relation to his current account balances, the following of which were not disclosed in his July 2022 Affidavits:

- (1) an amount of \$150,841.76 held in an account in the name of 14 Kirwin Road Morwell Pty Ltd as of 12 July 2022;
- (2) an amount of \$11,945.42 in the name of 286 Carlisle Street Pty Ltd as of 30 June 2022 (Exhibit D); and
- (3) an amount of \$40,921.15 in an account in the name of Tesoriero Investment Group Pty Ltd as of 30 June 2022 (see Exhibit E).

26 *Secondly*, there are aspects of Mr Tesoriero’s evidence of his assets and liabilities that remain unclear. An example emerging during the course of cross-examination was a reference to the “John Tesoriero Trust” of which Mr Tesoriero was a beneficiary: see Exhibit J. Details of this trust were omitted from his previous affidavit material, and indeed it appears that the trustee of that trust may be the trustee of two or three other trusts in respect of which the Court knows nothing.

27 *Thirdly*, there is a remarkable disparity between the values ascribed to certain assets, including 10 rural Victorian petrol stations. Mr Tesoriero swore in his July 2021 Affidavit as to the value of those properties, based on formal valuations obtained in early 2020. In his July 2022 Affidavits, Mr Tesoriero deposed that the value of these properties remains substantially unchanged since his July 2021 Affidavit. However, those values are in stark contrast to the indicative valuations of those properties set out in a schedule of properties prepared by a broker engaged by Mr Tesoriero and his father, Mr Giovanni Tesoriero, in April 2022: see Exhibit C. I am satisfied on the evidence that, although Mr Tesoriero was not the source of these indicative valuations, they were provided on his behalf (and with his consent) by his broker to a proposed incoming mortgagee in relation to the service station properties in the event that their application to refinance the properties was successful.

28 The disparity between these valuations can be seen in the following table.

Property	March–April Valuation 2020	Indicative Value to Financier 8 April 2022	Estimate in Evidence July 2022
2-4 Cowslip Street, Violet Town, VIC 3669	\$3,486,000	\$5,177,343	\$3,400,000

160 Murray Valley Highway, Lake Boga, VIC 3584	\$1,800,000	\$2,944,052	\$1,800,000
31 Ellerman Street, Dimboola, VIC 3414	\$1,050,000	\$1,735,440	\$1,050,000
14 Kirwin Road, Morwell, VIC 3840	\$1,140,000	\$2,025,916	\$1,140,000
89 Betka Road, Mallacoota, VIC 3892	\$1,140,000	\$1,738,911	\$1,200,000
55 Nolan Street, Maryborough, VIC 3465	\$1,200,000	\$1,983,360	\$1,200,000
9 Gregory Street, Ouyen, VIC 3490	\$900,000	\$1,440,000	\$900,000
9-15 Main Street, Derrinallum, VIC 3325	\$1,250,000	\$2,185,455	\$1,250,000
124 High Street, Taradale, VIC 3447	\$562,500	\$983,455	\$560,000
9/269-275 High Street, Golden Square, VIC	\$3,580,000	\$5,245,089	\$3,500,000
Total	\$16,108,500.00	\$25,459,021.00	\$16,000,000.00

29 I described these disparities during submissions as “staggering”. Although this description was contested by senior counsel for Mr Tesoriero, I think it is an accurate description as is reflected by the above figures.

C.2 Reasonable Legal Expenses

30 The simple point made by Westpac is that, in circumstances where I can have no confidence that Mr Tesoriero has been frank and transparent as to his assets, he cannot have discharged his onus to satisfy the Court that there are no assets available to him to source his reasonable legal expenses.

31 There is much force in this submission but, on balance, I do not think I should accede to it. I am far from satisfied that Mr Tesoriero’s explanation on oath as to his assets and liabilities

has revealed a complete picture of his financial interests in all material particulars. Having said that, I am conscious, as his senior counsel points out, that it is open to conclude that those areas where disclosure has been deficient may be more readily explained by a maladroit approach to the preparation of the affidavits than any conscious desire to withhold information from the Court. I do not think it is necessary for me to form a final view in relation to this matter for the purposes of this application, other than to note that I am conscious that Mr Tesoriero's financial affairs could be fairly described as Byzantine.

32 Wading through the complexity of a vast number of entities, discretionary trusts and bank accounts is not a straightforward task. It seems to me to be likely that the substance of Mr Tesoriero's asset and liability position has finally been revealed, despite the deficiencies to which Westpac rightly points. More relevantly for present purposes, I think, on balance, that there is unlikely to be a significant pool of sums upon which Mr Tesoriero can draw in order to access the funds necessary to conduct these legal proceedings fairly, without there being some variation of the Freezing Orders. I say this with a degree of hesitation, because I remain unconvinced that the true position concerning Mr Tesoriero's financial affairs has been completely disclosed with any precision.

33 Returning to the indicative valuations of the various properties set out in Exhibit C, Mr Tesoriero's father, or at least his father and other relatives, were said to have unencumbered real estate assets of approximately \$50 million in April 2020. Although I consider I should specifically reject Mr Tesoriero's affidavit evidence that Mr Tesoriero is unable to continue to fund his son's lifestyle or his expenses, I do not think that this is determinative of the application. Notwithstanding my misgivings as to this aspect of the evidence, Mr Tesoriero's father has no legal obligation to continue to fund his son's legal expenses.

34 At the end of the day, I have to satisfy myself that there will be a fair trial according to law. The resources available to the applicants in these proceedings are very considerable. The amount of legal costs that have already been expended in relation to both this matter and to the administration of the Forum Group companies generally has no doubt been extremely large. This case is one of considerable factual complexity (at least superficially). It is unnecessary for me, for present purposes, to form a final view as to its strength, other than being satisfied that there is a serious question to be tried. I had no doubt that a *prima facie* case had been established sufficient to have persuaded me to grant interlocutory relief which

is the subject of this application for variation. Given I may be the trial judge, and have not had access to all the material, I do not think it is appropriate for present purposes for me to go further in this regard.

35 Applications of this type do involve to some extent an evaluative process of trying to do the best one can to facilitate the overall justice of the case. I think there is a need to ensure that Mr Tesoriero is properly represented. Mr Tesoriero has already paid an amount of \$180,000 to his current solicitors and is said to owe his previous solicitors the amount of \$200,000 in legal costs, which is currently the subject of an ongoing dispute.

36 In fixing upon the figure of \$1.25 million, I am conscious that there will be a need for Mr Tesoriero to pay a properly assessed or taxed amount payable to his previous solicitors, pay his solicitors and counsel who have undertaken work since November last year without payment, and also fund the work necessary to prepare the trial and appear at the hearing.

37 Evidence was given by Mr Tesoriero's solicitor of further amounts that will be necessary for Mr Tesoriero to defend the proceeding through to the conclusion of the trial. However, I consider this amount can be reduced through effective case management, for example, in relation to an amount of \$370,000 proposed to be set aside for the payment of experts (which I consider to be unnecessary given the nature of the defence proposed).

38 I am satisfied that Mr Tesoriero can have a fair trial if the Freezing Orders are varied to allow him to have access to a figure of \$1.25 million. If the case were to develop in some extraordinary way such that this assessment is wrong, then there obviously would be an ability for Mr Tesoriero to apply for a further variation. However, unless there was a very cogent reason for such an application, I doubt that it would be easy to persuade me to allow further funds to be disbursed.

39 I accept that this will mean that in addition to the \$462,511.65 that can be paid from the identified controlled monies account, the amount of \$787,488.35 will have to be paid from companies not presently in external administration, being funds in respect of which there is an extant proprietary claim. It appears to me that such a release of funds should operate fairly and equitably across those who currently assert that they have a proprietary claim, and I have been told by counsel for Westpac and SMBC that the relative proportions of the proprietary claims in respect of the available assets have been identified and no doubt that area of detail can be worked out between the parties.

C.3 Ordinary Living Expenses

40 Although not stated in the interlocutory application filed by Mr Tesoriero, an additional variation was sought in his written submissions in respect of the amount for living expenses provided for by the Freezing Order.

41 Despite an entitlement under the Freezing Order to ordinary living expenses of up to \$5,000 per week, it is said that Mr Tesoriero has been unable to access those funds since September 2021. For this reason, Mr Tesoriero seeks a lump sum payment of \$200,000 (being an amount calculated from September 2021 to the date of judgment). I do not propose to make that order.

42 Currently, the Freezing Orders provide for the not ungenerous amount of up to \$5000 per week to be payable in relation to ordinary living expenses. This has been the case since 9 July 2021. While it is said that Mr Tesoriero has been unable to access those funds since September 2021, I do not consider that the fact that it is only being raised now entitles Mr Tesoriero to be “back-paid” the total amount up to which he was not prohibited from accessing under the Freezing Orders. Mr Tesoriero is not on his uppers. He has been able to fund adequately his personal expenses to date.

43 Further, I do not propose to vary the Freezing Orders so as to provide Mr Tesoriero with a lump sum for his ordinary living expense up to the date of judgment. If there needs to be some communication making it clear the nature of the exceptions that are in the current Freezing Orders, then I would expect both solicitors for the parties to send a joint communication to the relevant financial institution making it clear that he has an entitlement to have access periodically to those limited funds.

D CONCLUSION

44 Despite the fact that I have granted the variation of the Freezing Orders, I do not consider that the position taken by Westpac to this application has been anything other than reasonable in the light of what has emerged concerning Mr Tesoriero’s compliance with his disclosure obligations to date. In those circumstances, my preliminary view was that there be no order as to costs. However, upon delivering the above reasons, senior counsel for Mr Tesoriero sought that the relevant costs be costs in the cause – a position readily adopted by senior counsel for Westpac. Accordingly, the costs of the interlocutory application will be costs in the cause.

45 Upon reflection, I think I should add a further comment to my above reasons revised following their delivery *ex tempore*. This comment relates to a matter I referred to briefly at the end of the hearing: T139.32–141.39. Evidence from Mr Tesoriero was adduced on his behalf, and Westpac (for entirely understandable reasons) cross-examined Mr Tesoriero at some length during this interlocutory hearing. Accordingly, it became necessary for me to assess Mr Tesoriero’s evidence closely and observe him in the witness box. Although it was unnecessary for me to make general credit findings to dispose of this application, it would leave the parties in a state of incomplete information to fail to record that I necessarily formed opinions as to the reliability of Mr Tesoriero as a witness. Despite this, when I raised this issue, senior counsel for each of the parties did not suggest that my hearing the cross examination caused any ongoing difficulty with me continuing as the docket judge and conducting the final substantive hearing.

46 It is presently unclear as to whether Mr Tesoriero will be called and whether it will be necessary to hear him give evidence again. In fairness, however, I think I should record my view that the general impressions I formed of the evidence of Mr Tesoriero were unfavourable as to his reliability as a witness. Although I believe that I can fairly proceed to hear and determine the issues at the final hearing, I am well aware that this is not the test. I record these remarks to provide full transparency to the parties. The parties have been apprised of all relevant facts. I note that I will continue to proceed on the basis that I will hear the case, unless an application is made that I disqualify myself from doing so.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate:

Dated: 4 August 2022

SCHEDULE OF PARTIES

No. NSD 616/2021

Federal Court of Australia
District Registry: New South Wales
Division: General

Respondents

Fourth Respondent:	Forum Group Financial Services Pty Ltd (provisional liquidators appointed) ACN 623 033 705
Fifth Respondent:	Forum Group Pty Ltd (Receivers Appointed) (in liquidation) ACN 153 336 997
Sixth Respondent:	Forum Enviro Pty Ltd (provisional liquidators appointed) ACN 168 709 840
Seventh Respondent:	Forum Enviro (Aust) Pty Ltd (provisional liquidators appointed) ACN 607 484 364
Eighth Respondent:	64-66 Berkeley St Hawthorn Pty Ltd ACN 643 838 662
Ninth Respondent:	14 James Street Pty Ltd (in liquidation) ACN 638 449 206
Tenth Respondent:	26 Edmonstone Road Pty Ltd (in liquidation) ACN 622 944 129
Eleventh Respondent:	5 Bulkara Street Pty Ltd (in liquidation) ACN 630 982 160
Twelfth Respondent:	6 Bulkara Street Pty Ltd (in liquidation) ACN 639 734 473
Thirteenth Respondent:	23 Margaret Street Pty Ltd ACN 623 715 373
Fourteenth Respondent:	1160 Glen Huntly Road Pty Ltd ACN 639 447 984
Fifteenth Respondent:	14 Kirwin Road Morwell Pty Ltd ACN 641 402 093
Sixteenth Respondent:	Canner Investments Pty Ltd ACN 624 176 049
Seventeenth Respondent:	123 High Street Taradale Pty Ltd ACN 639 872 512
Eighteenth Respondent:	160 Murray Valley Hwy Lake Boga Pty Ltd ACN 641 392 921
Nineteenth Respondent:	31 Ellerman Street Dimboola Pty Ltd ACN 641 392 887
Twentieth Respondent:	4 Cowslip Street Violet Town Pty Ltd ACN 639 872 352
Twenty-First Respondent:	55 Nolan Street Maryborough Pty Ltd ACN 641 392 912
Twenty-Second Respondent:	89 Betka Road Mallacoota Pty Ltd ACN 641 393 179

Twenty-Third Respondent:	9 Gregory Street Ouyen Pty Ltd ACN 641 392 707
Twenty-Fourth Respondent:	9 Main Street Derrinallum Pty Ltd ACN 639 872 736
Twenty-Fifth Respondent:	286 Carlisle Street Pty Limited ACN 610 042 343
Twenty-Sixth Respondent:	275 High Street Golden Square Pty Ltd ACN 639 870 545
Twenty-Seventh Respondent:	Mazcon Investments Hellas IKE
Twenty-Eighth Respondent:	Palante Pty Ltd ACN 135 344 151
Twenty-Ninth Respondent:	Anastasios Giamouridis
Thirtieth Respondent	The Forum Group of Companies Pty Ltd (in liquidation) ACN 151 964 626
Thirty-First Respondent	Iugis Pty Ltd (in liquidation) ACN 632 882 243
Thirty-Second Respondent	Iugis (UK) Limited
Thirty-Third Respondent	Iugis Holdings Limited
Thirty-Fourth Respondent	Iugis Global Financial Services Limited
Thirty-Fifth Respondent	Iugis Finance Limited
Thirty-Sixth Respondent	Spartan Consulting Group Pty Ltd (in liquidation) ACN 168 989 544
Thirty-Seventh Respondent	Intrashield Pty Ltd (in liquidation) ACN 133 426 534
Thirty-Eighth Respondent	Tesoriero Investment Group Pty Ltd ACN 161 088 115
Thirty-Ninth Respondent	Mangusta (Vic) Pty Ltd ACN 631 520 682
Fortieth Respondent	193 Carlisle Street Enterprises Pty Ltd ACN 612 615 237
Forty-First Respondent	8-12 Natalia Ave Oakleigh Pty Ltd ACN 643 838 626
Forty-Second Respondent	Iugis Hellas IKE
Forty-Third Respondent	Iugis Energy SA