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Details of Filing

Document Lodged:	Outline of Submissions
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WESTPAC BANKING CORPORATION v FORUM FINANCE PTY LIMITED

FEDERAL COURT NSD 616 of 2021

WESTPAC'S OUTLINE OF SUBMISSIONS IN OPPOSITION TO APPLICATION TO TRANSFER PROCEEDINGS TO THE DOCKET OF ANOTHER JUDGE

1. Mr Vincenzo Tesoriero applies to have these proceedings transferred to the docket of another judge, because, following cross examination of Mr Tesoriero during an interlocutory application in these proceedings, "*the general impressions* [Lee J] *formed of the evidence of Mr Tesoriero were unfavourable as to his reliability as a witness*": *Westpac Banking Corporation v Forum Finance Pty Limited (Freezing Order Variation)* [2022] FCA 910 (**J**) at [46]. The application is brought in circumstances in which Lee J is the docket judge, and the proceedings are listed for a three-week trial (although that estimate may be longer than necessary) commencing on 10 October 2022.

2. It is important first to identify the position of the applicants in the proceedings (**Westpac**). Westpac has no preference for any judge over any other judge. It considers that neither it, nor generally any party, can or should have a legitimate view as to the identity of the judge who will hear the proceedings it brings (or is a party to). The irrelevance of the identity of the judicial officer is a matter of fundamental institutional, and at least in this Court constitutional, importance. Of course, there is a limitation to that proposition. Also of fundamental importance is that all litigants are entitled to a hearing by a judge who is not biased, and in respect of whom there is not a reasonable apprehension of bias: *Charisteas v Charisteas* (2021) 95 ALJR 824 at [11].

3. However, in the present circumstances Westpac has a real interest in having these proceedings heard on the present trial dates, or at least heard before the end of term. It is concerned that if the trial dates are lost costs will increase, and that the assets known to be available to meet its claim if it is successful (and sufficient only to meet a small fraction of the loss it has suffered) will at best remain static or be diminished by the consequences of the passage of time. Because there is a risk or real uncertainty as to whether the case will be heard this year if transferred to another judge, and because properly understood there is no reasonable apprehension of bias, Westpac does advance the proposition that the

application should be dismissed, with costs in the cause. Pausing there, that is not to make the error of characterising the present issue as one of either case management or discretion. It is not. The circumstances either establish the legal criterion of a reasonable apprehension of bias[1], or the circumstances do not, with the consequence that necessarily follows. The point is to avoid the invidious appearance which could otherwise arise in Westpac taking a position on an application of this character.

4. The so-called double "*might*" test is well known: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]; and while a precautionary approach is appropriate, because of the intersection of fundamental principles already identified and corresponding private rights of parties, for a judge to decide not to hear a matter the reasonable apprehension must be "*firmly established*": *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 352 (Mason J); see also the frequently applied passages in *Cabcharge Australia Limited v ACCC* [2010] FCAFC 111 at [25]-[34] (Kenny, Tracey and Middleton JJ). The application requires (a) the identification, it may be added with precision, of what it is which is said might lead a judge to decide the case other than on its merits; and (b) the articulation of the logical connection between that matter and the feared departure from the required judicial decision-making process: *Ebner* at [8]; *Charisteas* at [11].

5. Here the matter is that Lee J, having observed Mr Tesoriero being cross examined on his disclosure of assets and liabilities in the course of hearing an interlocutory application in these proceedings and when Mr Tesoriero was represented by senior and junior counsel, formed "*general impressions… of the evidence of Mr Tesoriero*" which were "*unfavourable as to his reliability as a witness*". The question is then the logical connection of that matter to the feared departure from the judge's obligation to decide the factual contest solely on the basis of evidence at trial: the authorities are usefully summarised in *GetSwift Limited v Webb* (2020) 283 FCR 328 at [35] (the result in that case tells one nothing about the present, quite different, circumstances).

6. On analysis there is no logical connection. Lee J formed an impression, on the basis of Mr Tesoriero's evidence, as to the reliability of Mr Tesoriero as a witness. The words "*as a witness*" are important.

[1] These submissions avoid reference to the hypothetical or reasonable observer, an example of anthropomorphic justice: the difficulty referred to in *McKenzie v Cash Converters International Limited (No 3)* [2019] FCA 10 at [28]; more generally in relation to the abstraction see *Davis Contractors Limited v Fareham UDC* [1956] AC 696 at 728 (Viscount Radcliffe).

7. *First*, the impression was not as to Mr Tesoriero more generally. It would be impermissible to reason from a finding that a witness' evidence was not reliable to a finding about conduct, including of the witness, in issue in the proceedings. It would be quite wrong to suggest that Lee J would make that fundamental error.

8. *Second*, Mr Tesoriero may well not give evidence at trial. In that circumstance his reliability as a witness is irrelevant. If Mr Tesoriero gives evidence at trial, he will be cross-examined as to the reliability of his evidence. The trial judge (on the relevant hypothesis, Lee J) will observe that evidence and make findings on that evidence: the authorities cited in *GetSwift* at [35]. This is not a case of two large, overlapping proceedings but with different parties and overlapping but in some respects different evidence. Rather, the present is a familiar and unexceptional circumstance in which judges do, and are understood to, act only on evidence admitted at trial. Juridically the present is no different to a *voir dire* during which a party gives evidence, either at or prior to the trial. Judges similarly often see – in order to hear argument about – highly prejudicial material which is rejected: frequent examples are often extended hearings about the admissibility of evidence under ss 97, 98 and 138 of the *Evidence Act 1995* (Cth). And in the context of modern case management (including the docket system) judges will often at pre-trial stages see or be told about material which is not evidence at trial. Another example is that trial judges will, prior to trial, be provided with and read Court Books which contain affidavits which are not ultimately read and material not ultimately tendered. Judges do form impressions, but equally if not based on the evidence put those to one side.

9. *Third*, the asserted right of Mr Tesoriero to make a decision as to whether to give evidence absent judicial impression, or known judicial impression, does not alter the analysis. If the asserted right is to say no more than that Mr Tesoriero has a right to a trial before a judge in respect of whom there is no reasonable apprehension of bias the argument takes the analysis no further – either there is a *reasonable* apprehension or there is not. But if the asserted right goes further, on analysis the proposition is wrong. Judges (and juries) do form impressions, sometimes made quite plain, during a trial (and judges may do so before trial). A defendant will often have made observation of those impressions, communicated orally or by non-verbal communication (and sometimes in an interlocutory judgment, such as following a *voir dire*), before deciding to give evidence. That is an inevitable aspect of the trial process and is not the source of a reasonable apprehension of bias. The correct legal analysis allows for that fact, and that the trial judge will decide the case based on the

evidence at the end of the trial. Correctly the analysis proceeds from the premise that the judge will observe and listen to the witness, if called, and on that basis make findings at trial.

10. The required second stage of the analysis, necessary for Mr Tesoriero's application to succeed, is not established. There is no logical connection between the precise expression of impression by Lee J and an apprehension that Lee J might fail to make findings, following the trial, based solely on the evidence at trial.

11. To an extent that conclusion is demonstrated by the events which occurred. As recorded at J[45], in the course of closing submissions on 20 July 2022 (that is, after the cross examination had completed) Lee J raised the question of the impressions (then not identified) which he had necessarily formed in observing Mr Tesoriero's cross examination. Mr Tesoriero was in Court, represented by senior and junior counsel and solicitors. The query was raised well before the end of the hearing. Mr Tesoriero by senior counsel then took the position that Lee J need not express a view about the reliability of Mr Tesoriero's evidence, and that the existence of an unexpressed impression caused no difficulty. That is, aware that an impression was necessarily formed by Lee J, Mr Tesoriero (correctly) took the position that the uncommunicated impression did not result in a reasonable apprehension of bias. Properly understood, the present circumstances are not relevantly different. On 20 July 2022, Mr Tesoriero knew he had been cross examined about the reliability of his sworn evidence as to his assets and liabilities, and had by senior counsel conceded that his sworn disclosure was "*less than ideal*" and had "*ragged edges*". He knew that Lee J had assessed his evidence. The only present difference is that Mr Tesoriero now knows that the real possibility that Lee J had formed an impression unfavourable to his reliability as a witness is the fact. Whether viewed through the prism of informed waiver or that the events are confirmatory of the objective analysis, the events of 20 July show this application should be dismissed.

Jeremy Giles

Catherine Hamilton-Jewell

18 August 2022