

NOTICE OF FILING

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Details of Filing

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



Sia Lagos

Dated: 15/09/2022 7:19:41 PM AEST

Registrar

Important Information

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

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WESTPAC BANKING CORPORATION & ORS

v

FORUM FINANCE PTY LTD (IN LIQUIDATION) & ORS

Federal Court of Australia Proceedings NSD616/2021, NSD642/2021 and NSD681/2021

TESORIERO RESPONDENTS' OUTLINE OF SUBMISSIONS

FOR HEARING ON 16 SEPTEMBER 2022

Introduction

1. These submissions are made on behalf of the Third Respondent (**Mr Tesoriero**), his associated entities which are respondents in this proceeding, and the Forty-Fifth Respondent (collectively, the **Tesoriero Respondents**). They are made in relation to proceeding NSD616/2021 (**Westpac Proceeding**), proceeding NSD681/2021 (**SMBC Proceeding**) and proceeding NSD642/2021 (**SocGen Proceeding**), which are listed together.
2. The matters to be determined by the Court on 16 September 2022 include:
 - (a) timetabling orders in relation to interlocutory applications foreshadowed by the Tesoriero Respondents, to the extent those applications remain necessary; and
 - (b) timetabling orders for the progression of the proceeding to trial, including the referral of the three proceedings to mediation before a Registrar.
3. For the purposes of the hearing on 16 September 2022, the Tesoriero Respondents rely on:
 - (a) the affidavit of Nigel Evans of 15 September 2022 (**Evans Affidavit**); and
 - (b) short minutes of order setting out the orders sought by the Tesoriero Respondents, which have been provided to the Court and which appear at pages 210-211 of Annexure NDE-1 to the Evans Affidavit (**NDE-1**).

Proposed applications

4. The Tesoriero Respondents have foreshadowed interlocutory applications seeking orders:
 - (a) requiring the applicants in the Westpac Proceeding (**Westpac**) to file and serve either an amended statement of claim, or a separate document, that complies with rules 16.41, 16.42 and 16.43 of the *Federal Court Rules 2011* (Cth) (**Rules**);
 - (b) to adjourn the trial, which is currently listed to commence in all three proceedings on 10 October 2022; and/or
 - (c) to vary the freezing orders made against Mr Tesoriero in the Westpac Proceeding.
5. An adjournment application may no longer be required, in light of the indication given by the Court that there is no judge available to hear a trial commencing on 10 October 2022. The foreshadowed application is addressed below, in the event that it remains relevant having regard to available dates for the rescheduled trial.

Application requiring compliance with the Rules

6. Rule 16.41 requires a party to state:

...in a pleading, or in a document filed and served with the pleading, the necessary particulars of each claim, defence or other matter pleaded by the party.

7. In relation to pleadings of fraud and certain other conduct, r 16.42 requires:

A party who pleads fraud, misrepresentation, unconscionable conduct, breach of trust, wilful default or undue influence must state in the pleading particulars of the facts on which the party relies.

8. Rule 16.43 provides the particulars that must be pleaded of 'conditions of mind', including knowledge and any fraudulent intention of the party: r 16.43:

(1) A party who pleads a condition of mind must state in the pleading particulars of the facts on which the party relies.

(2) If a party pleads that another party ought to have known something, the party must give particulars of the facts and circumstances from which the other party ought to have acquired the knowledge.

9. It is uncontroversial that the allegations made against the Tesoriero respondents, which include allegations of conspiracy by unlawful means, knowing receipt, and knowing assistance, are of a nature which engages rules 16.42 and 16.43. Accordingly, particulars of the facts and circumstances on which the Applicants rely in relation to these allegations must be set out in a pleading, or in a document filed and served with the pleading.
10. The current pleading is the Second Further Amended Statement of Claim filed on 5 November 2021 (**SFASOC**). No document setting out particulars of facts and circumstances has been filed and served with the SFASOC, or at any other time.
11. Further and better particulars of the SFASOC and Amended Statement of Claim (**ASOC**) have been provided in letters dated 10 September 2021, 22 September 2021 and 31 January 2022 from Westpac's solicitors to the Tesoriero Respondents' former solicitors, in response to letters from the Tesoriero Respondents' former solicitors dated 23 August 2021 and 3 December 2021. However:
 - (a) none of the letters were filed;
 - (b) none of the letters are capable of being read and understood in isolation; and
 - (c) the letters apparently do not reflect the final case to be made at trial, at least in respect of the amounts claimed against each of the Tesoriero Respondents.
12. The Tesoriero Respondents' current solicitors (**Aptum**) wrote to Westpac's solicitors (**MinterEllison**) on 15 September 2022, requesting confirmation as to whether Westpac agreed to file an amended pleading or other document complying with rules 16.41, 16.42 and 16.43: Evans Affidavit [16.2], NDE-1 pp 57-164.
13. MinterEllison responded to this letter on 15 September 2022, stating that:
 - (a) the incorporation of particulars in a pleading, or document filed and served with the pleading, "does not accord with modern practice, nor the practicalities of an already long pleading"; and
 - (b) the Tesoriero Respondents are bound by a "deliberate forensic choice to not pursue" such an incorporation.
14. The incorporation of up to date particulars of all of the facts and circumstances on which Westpac relies as against the Tesoriero Respondents in a single filed document, is

required in order for the Tesoriero Respondents to fully understand the case that they will be required to meet at trial, in addition to being required by the Rules. The Tesoriero Respondents accordingly intend to make an application for an order that Westpac file such a pleading or document.

Adjournment application

15. The foreshadowed adjournment application arises in circumstances where:
 - (a) the Tesoriero Respondents changed legal representation on 5 August 2022; and
 - (b) on 19 August 2022, his Honour Justice Lee made orders referring the proceedings to the National Operations Registrar for the purposes of reallocation to another judge of the Court.
16. Section C of the Evans Affidavit sets out the work that has been undertaken since the change of legal representation on 5 August 2022, and the work which remains to be done before the Tesoriero Respondents will be in a position to participate fully in the trial.
17. Aptum were retained on 5 August 2022, but only received the previous solicitors' file between 26 and 30 August 2022. Since being engaged, Aptum has undertaken a substantial amount of work, including:
 - (a) reviewing the pleadings, and corresponding with Westpac's solicitors regarding issues identified;
 - (b) commencing a review of the Tesoriero Respondents' defences;
 - (c) commencing a review of Westpac's discovery, and an additional approximately 10,000 documents which had not been provided to the Tesoriero Respondents prior to Aptum's engagement;
 - (d) commencing a review of the adequacy of the Tesoriero Respondents' discovery;
 - (e) commencing a review of Westpac's lay evidence;
 - (f) reviewing Westpac's tracing evidence, including:
 - (i) the affidavits of Mr Preston, which exhibit detailed tracing models; and

- (ii) summaries pursuant to s 50 of the *Evidence Act 1995* (Cth), including additional and amended summaries served for the first time on 22 August 2022, and versions of the summaries identifying the documents purported to be summarised which were provided for the first time on 1 September 2022;
 - (g) corresponding with MinterEllison regarding issues identified in the tracing evidence and s 50 summaries, and considering the scope of responsive expert evidence; and
 - (h) conducting initial interviews with potential lay witnesses.
18. Notwithstanding the substantial amount of work undertaken to date, the following steps remain to be completed:
- (a) issuing the foreshadowed application for a document complying with the Rules, and considering the case that is made against the Tesoriero Respondents in the light of any such document;
 - (b) reaching a final position on amendments to the Tesoriero Respondents' defences, and (if necessary) making those amendments;
 - (c) completing the review of Westpac's discovery, and the other documents provided by Westpac's solicitors;
 - (d) completing the review of the Tesoriero Respondents' discovery, and rectifying any deficiencies;
 - (e) completing the review of Westpac's lay evidence, identifying witnesses required for cross-examination, and preparing for that cross-examination;
 - (f) preparing and, if appropriate, filing and serving lay and/or expert evidence;
 - (g) considering the Tesoriero Respondents' position in relation to the strike out/summary judgment application filed on 21 February 2022; and
 - (h) completing other required pre-trial steps, including conferral regarding agreed documents, preparation of opening submissions, and other general trial preparation.
19. This is a significant amount of work, and could not sensibly have been completed in time for a trial to commence on 10 October 2022. The Tesoriero Respondents expect to be

in a position to indicate the likely timeframe for completion of this work by 23 September 2022, being the proposed date for the filing of the foreshadowed interlocutory applications. Depending on the available dates for any reschedule trial, it may remain necessary for the Tesoriero Respondents to apply for a later trial date.

Application to vary freezing orders

20. The proposed application to vary the freezing orders made against Mr Tesoriero in the Westpac Proceeding are addressed in section E.1 of the Evans Affidavit.
21. In summary, pursuant to the current orders, and when regard is had to amounts owed the Tesoriero Respondents' previous solicitors, Fortis Law, there remains only \$70,663.72 of funds available, of the \$1,250,000 permitted for Mr Tesoriero's legal expenses. This amount is plainly insufficient to undertake the steps required before trial.
22. The parties' solicitors are currently corresponding regarding this issue, in an attempt to avoid the need for a further application. However, in the event that the issue cannot be resolved by consent, the Tesoriero Respondents intend to apply for a further variation of the freezing orders, to allow sufficient funds to conduct the steps outlined in section C of the Evans Affidavit.

Timetabling

23. The Tesoriero Respondents are currently in default of the following paragraphs of the Orders of Justice Lee of 10 March 2022:
 - (a) Order 10, which requires notification of witnesses required for cross-examination;
 - (b) Orders 12, which requires service of an index of any additional documents proposed to be tendered at the hearing; and
 - (c) Orders 15 and 16, which relate to documents that were to be agreed following the Conferral required by Order 13.
24. Further, given the work set out in section C of the Evans Affidavit, the Tesoriero Respondents will not be in a position to comply with the other pre-trial orders, either by the dates in the current orders, or by the dates proposed in Westpac's short minutes of order.

25. Once a rescheduled trial date is fixed, and any application by the Tesoriero Respondents for a later trial date is resolved (if required), it is likely that the parties will be able to agree revised pre-trial orders by consent.
26. In the interim, the orders should be vacated, as proposed in the Tesoriero Respondents' short minutes of order.

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15 September 2022
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