

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 14/07/2021 7:42:17 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

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



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 14/07/2021 7:43:44 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## APPLICANT'S OUTLINE OF SUBMISSIONS

### FOR HEARING ON 15 JULY 2021

#### Matters for hearing

1. The applicant (**Westpac**) has filed and served two interlocutory applications which are listed for hearing on 15 July 2021.
2. The first interlocutory application is addressed to National Australia Bank Limited (**NAB**). It in effect seeks third party discovery, whether under the rules or by application of the power conferred by s 23 of the *Federal Court of Australia Act 1967* (Cth), of bank statements for accounts held by companies across the Forum group of companies. These are sought in order to enable the funds that, at least *prima facie*, were fraudulently obtained by the first respondent (**Forum Finance**) to be traced throughout the group. As is discussed further below, the pattern that occurred from the start of the fraudulent scheme was for the payments made by Westpac into the bank account of Forum Finance to be immediately transferred out to accounts which appear to be in the name of Forum Group Financial Services Pty Ltd (**FGFS**), Forum Group Pty Ltd (**FG**), Forum Enviro Pty Ltd (**FE**) and Forum Enviro (Aust) Pty Ltd (**FEA**). It appears that those funds were both transferred away for the benefit of (a) at least the second and third respondents and also (b) within the Forum group.
3. The second interlocutory application is addressed to FGFS, FG, FE and FEA (together, the **Forum Group Companies**) to join them as parties to the proceedings and appoint either provisional liquidators or liquidators (the **Forum Group Companies application**). On the evening before the hearing on 9 July 2021 with respect to Forum Finance, Mr Papas appointed Domenic Calabretta, Grahame Ward, and Thyge Trafford-Jones (the **Administrators**) as the administrators of FGFS, FG, FE and FEA.<sup>1</sup>
4. The Administrators have foreshadowed an application to adjourn the application. In correspondence, the Administrators have asserted that it is not clear that any money stolen from Westpac is “necessarily traceable into the assets or property of” the Forum Group Companies or the other Papas / Tesoreiro companies that they control (CMM-6, p 17). As

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<sup>1</sup> Initial information for creditors issued by the Administrators dated 12 July 2021.

will be seen, there is no basis for the assertion, and it may be based on assertions made to the Administrators by Mr Papas and his solicitor, who they communicated with before their appointment.

5. For the reasons developed below, the Forum Group Companies application should not be adjourned. It is vital to the proper investigation of the affairs of those companies and in the interests of the substantial creditors, namely Westpac, Société Générale (**SocGen**) and SMBC Leasing and Finance, Inc (**SMBC**), that provisional liquidators or liquidators be appointed who can thoroughly investigate these issues on a group-wide basis, in circumstances where the Administrators have neither the resources nor (apparently) the inclination to do so. In fact, the Administrators appear not even to accept that the Forum Group Companies have been the beneficiaries of the fraudulent scheme and, therefore, they are unlikely to investigate the matter further.
6. There are also some additional orders sought, including appointing an additional partner of McGrath Nicol as a joint and several liquidator of Forum Finance, given the scope of the work to be done in investigating its affairs.
7. The orders sought by Westpac are identified in the short minutes which accompany these submissions.

#### **Material before the Court**

8. For the purposes of the hearing, Westpac relies upon:
  - a. the evidence that it read on 28 June 2021; 2 July 2021 and 9 July 2021: namely the affidavits of Mr Anderson (a first affidavit of 28 June 2021 (the **First Anderson Affidavit**) and a second affidavit of 8 July 2021 (the **Second Anderson Affidavit**)), Mr O'Brien (27 June and 1 July 2021) and Ms Murray (a first affidavit of 28 June 2021, a second affidavit of 28 June 2021, a third affidavit of 2 July 2021; a fourth affidavit of 2 July 2021, a fifth affidavit of Ms Murray (7 July 2021) and a sixth affidavit of Ms Murray (8 July 2021);
  - b. the affidavit of Felicity Healy (2 July 2021);
  - c. that part of the transcript of the hearing on 7 July 2021 recording the cross-examination of Mr Panetta;
  - d. a seventh affidavit of Ms Murray (12 July 2021);
  - e. an eighth affidavit of Ms Murray (14 July 2021) (the **Eighth Murray Affidavit**);
  - f. an affidavit of Vince Damiano (14 July 2021);
  - g. an affidavit of Jason Ireland (13 July 2021) (**Ireland Affidavit**);

- h. the exhibit to each affidavit; and
  - i. consents to act as provisional liquidators or liquidators of FGFS, FG, FE and FEA signed by Mr Preston, Mr Ireland and Ms Sozou of McGrath Nicol (the **Liquidators**).
9. Westpac also relies upon its written submissions dated 28 June 2021 (**June Submissions**) and 9 July 2021 (**July Submissions**) and does not repeat the analysis set out in those submissions here.

### **The NAB application**

10. On 9 July 2021, bank statements, including the bank statements for an account in the name of Forum Finance, were produced in response to a subpoena issued to the NAB.
11. Those bank statements have now been analysed. They confirm the receipt by Forum Finance of significant amounts from Westpac in the period from September 2018 to June 2021 and that on receipt of those funds, Forum Finance transferred approximately:
- a. \$277 million to “Fgfs” which appears to be FGFS: CMM-5 pp.256-264;
  - b. \$25 million to “Group” or “Fg” which appears to be FG: CMM-5 pp.266-272;<sup>2</sup> and
  - c. \$13 million to “Enviro” which appears to be either or both of FE and FEA :CMM-5 pp.279-280.
12. This analysis is further confirmed by the liquidator of Forum Finance, Mr Ireland who says that the Liquidators’ preliminary analysis shows that the funds from Westpac were paid out to FGFS, FG, “various ‘Enviro’ entities” and various third parties: Ireland Affidavit at [17]. SMBC can say much the same, although its payments went initially to FE and FEA.
13. It is necessary, in order for Westpac properly to understand where the money fraudulently obtained from it by Forum Finance, Mr Papas and Mr Tesoreiro has been dispersed to, that it be able to inspect all of the bank statements of the group of companies comprising what can loosely be called the **Forum corporate group**. This is because, from a legal and accounting sense, all or most of those companies have a common parent, occupied the same premises and prepared consolidated financial statements. More importantly, from a practical standpoint, they were all controlled by Mr Papas and Mr Tesoreiro. Westpac is not going to be able to trace its funds with precision without that access.
14. Orders of this nature have been granted in the Court’s equitable jurisdiction from at least the decision of the Court of Appeal of England and Wales in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 per Lord Denning MR, Waller and Dunn LJJ. That case concerned a fraudulent

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<sup>2</sup> Approximately \$29 million appears to have been received from “Fg Forum NSW” into the Forum Finance account in the relevant period: CMM-5 pp273-278

cheque purportedly issued by a bank in Saudi Arabia which had been presented and honored by a bank in New York, who had, in turn, paid funds into accounts of the two “rogues” (as Lord Denning described them at 1279E) at the London branch of a Swiss bank. The New York bank sought orders directed to the Swiss bank requiring it to discover certain banking records, including external and internal correspondence, cheques, debit vouchers and transfer applications in relation to the accounts of the two rogues: see order at 1280B-E.

15. Lord Denning held that the Court had the power to make such an order by extension from the principles in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133. His Lordship said the following at 1281F-1282B:

In order to enable justice to be done — in order to enable these funds to be traced — it is a very important part of the court's armoury to be able to order discovery. The powers in this regard, and the extent to which they have gone, were exemplified in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133. The Customs authorities were perfectly innocent: but they had to disclose the names of infringers of patents whose goods had passed through their hands. Lord Reid said, at p. 175:

“They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers”

referring to the views expressed by Lord Romilly M.R. and Lord Hatherley L.C. in *Upmann v. Elkann* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130 .

So here the [Swiss bank] incur no personal liability: but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men: and they come under a duty to assist the [New York bank] by giving them and the court full information and disclosing the identity of the wrongdoers. In this case the particular point is “full information.”

[...]

Applying this principle, I think the court should go to the aid of the [New York bank]. It should help them follow the money which is clearly theirs: to follow it to the hands in which it is: and to find out what has become of it since it was put into the [Swiss bank].

16. These principles are reflected in, and identified with more particularity, in rules 7.22 and rule 20.23 of the *Federal Court Rules 2011* (Cth) (**FCR**). Rule 7.22 of FCR permits an application to be made for non-party discovery to discover the identity of a prospective respondent. Rule 20.23 of FCR permits an application to be made for non-party discovery if the applicant believes that the non-party has is likely to have in the person's control, documents that are directly

relevant to an issue raised on the pleadings or affidavits. Here, the identity of the persons to whom Forum Finance transferred funds, and any subsequent transfers, will identify Westpac's claim against the existing respondents and also whether any additional parties need to be added to the proceedings for Westpac to vindicate its proprietary remedies to trace into funds or assets into which the fraudulently obtained funds were paid. The bank statements are also documents which are directly relevant to that question, which is raised both by the current and proposed version of the originating application and by the affidavits read in the proceedings and identified above.

17. There is no dispute that Westpac should pay NAB's reasonable expenses in giving the discovery sought, and an order is sought to that effect. It is understood that NAB does not oppose the order and will be ready to produce the documents (or most of them) at or shortly after the hearing tomorrow.

#### **Leave to amend the originating application**

18. Westpac seeks leave to file an amended originating application in the form annexed the Forum Group Companies application. It seeks leave under s 440D of the *Corporations Act 2001* (Cth) (the **Corporations Act**) to the extent necessary to file the originating application. It is not necessary for leave to be sought or obtained for the winding up application or to the application for the appointment of the provisional liquidator – those applications being within the province of s 440A of the *Corporations Act*.<sup>3</sup>
19. The starting point for an application of this kind was set out succinctly by Hammerschlag J in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 285 ALR 207; [2011] NSWSC 1305, in particular at [36] to [40], wherein his Honour considered the policy rationale underlying the relevant sections, namely “to maximise the chances of the beleaguered company staying alive”. That this was the appropriate starting point was accepted by O’Callaghan J in *Hyundai Engineering and Steel Industries Co Ltd v Two Ways Constructions Pty Ltd* [2018] FCA 1427. It cannot be said that the administration of the Forum Group Companies will maximise their chances of “staying alive”.
20. On the face of the present evidence, FGFS, FG, FE and FEA have each received funds from Forum Finance, which funds were *prima facie* fraudulently and dishonestly obtained from Westpac. The commonality of directors (that is Mr Papas and Mr Tesoreiro) means that those companies will necessarily be imputed with the knowledge of Mr Papas’ fraudulent acts.<sup>4</sup> It

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<sup>3</sup> *In the matter of Plutus Payroll Australia Pty Limited* [2017] NSWSC 1041 at [14]-[15] (per Brereton J) and the authorities cited therein.

<sup>4</sup> See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 511 (per Lord Hoffman); *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421 at [94]-[105]

has long been accepted that “where the [applicant] is claiming [its] own property from a company in liquidation, leave to proceed is granted as a matter of course”.<sup>5</sup> That is the position in relation to the present proceedings: Westpac’s claims include those that are proprietary in nature, and, while the investigations are continuing, the presently available evidence before the Court shows that the Forum Group Companies received misappropriated funds.

21. As articulated in the July Submissions at [59]-[63], to the extent that the Forum Group Companies have received funds as a consequence of the fraudulent transactions, that money will be held on trust for Westpac and each Forum Group Company will need to account for the traceable proceeds from the time that each Forum Group Company became aware of the misappropriation: see *Black v Freedman*; *Sze Tu v Lowe* [2014] NSWCA 462 (2014) 89 NSWLR 317 at [157]-[160] per Gleeson JA.
22. Given the nature of these claims, and the *prima facie* evidence in support of them addressed further below, Westpac should be given leave to join the Forum Group Companies. The question of whether and how those claims should continue can be left for another day, once Westpac has filed a statement of claim on 26 July 2021, pursuant to the orders already made.

## **Appointment of provisional liquidator to Forum Group Companies**

### **Principles**

23. The principles in relation to the power of the Court to appoint a provisional liquidator pursuant to section 472(2) of the Corporations Act are set out in the July Submissions and are not repeated here: see July Submissions [7]-[13]; [27]; and [38].
24. Recognising that the appointment of a provisional liquidator is a drastic intrusion into the affairs of the company and will not be done if other measures would be adequate to preserve the status quo;<sup>6</sup> it is also apt to note:<sup>7</sup>

*the appointment of a provisional liquidator is ... uniquely apt and necessary to preserve effectively and expeditiously the status quo, prevent the dissipation of assets prior to the final hearing of the winding up application and to ensure, in the public interest, that an independent official liquidator investigates and identifies the companies’ records, transactions, assets and liabilities.*

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<sup>5</sup> *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited* [2009] FCA 131 at [7] (per Finkelstein J) and cited in *Senvion GmbH, in the matter of Senvion GmbH (No 2)* [2019] FCA 1732; 140 ACSR 20 at [54]-[55] (per Anastassiou J)

<sup>6</sup> *Zempilas v J N Taylor Holdings Ltd (No 2)* (1990) 3 ACSR 518 at 522; *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625 at 635.

<sup>7</sup> *ASIC v Tax Returns Australia Dot Com Pty Ltd* [2010] FCA 715 at [86] (per Dodds-Streton J)

### **Winding up application before the Court**

25. Westpac has proprietary claims against each of the Forum Group Companies in relation to the fraudulently obtained funds those companies have received: see [20] to [22] above. On this basis Westpac is a creditor of each of those companies. A further amended originating application has been included with the Forum Group Companies application which sets out the relief sought against each of the Forum Group Companies. The relief sought in respect of each Forum Group Company includes an order for the winding up of that company.
26. A consent to act as provisional liquidator or liquidator of the Forum Group Companies from Jason Preston, Jason Ireland and Katherine Sozou of McGrathNicol in respect of each of the Forum Group Companies has been filed.<sup>8</sup> Mr Preston, Mr Ireland and Ms Sozou are each registered liquidators.

### **Reasonable prospects a winding up order will be made**

27. At the final hearing of the proposed further amended originating application, an order for the winding up of the Forum Group Companies will be sought on the basis that a) each is insolvent: see Corporations Act, s.459P; and b) further or alternatively, on the basis that it is just and equitable for each company to be wound up: see Corporations Act s.461(1)(k).

### **The Forum Group Companies are insolvent**

28. Having regard to the appointment of the Administrators a presumption of insolvency arises. Mr Papas, the second respondent, is the sole director of each of the Forum Group Companies: CMM-5 pp.1, 5-6, 20-21, 31-32. Mr Papas and Mr Tesoriero are the shareholders of FGFS: CMM-5 p2. The Forum Group of Companies Pty Ltd (**TFGS**) (which also now has administrators appointed) is the ultimate shareholder of FG, FE and FEA: CMM-5 p5-6; 20-22; 31-33. Mr Papas is the sole director of TFGS: CMM-5 pp42-43.
29. The amounts that each of the Forum Group Companies received through the fraudulent scheme are identified at paragraph 11 above. Westpac has a claim against each of the Forum Group Companies for knowing receipt of trust funds (relevantly the trust between Forum Finance and Westpac in accordance with the principles in *Black v S Freedman & Company* (1910) 12 CLR 105 at 110 (O'Connor J), see also *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at [36] per Leeming JA with whom Bathurst CJ and Sackville AJA agreed). This is proprietary claim, and each of the Forum Group Companies have an obligation to account for those amounts they received. When a person has received for their own benefit property transferred in breach of trust, the person is liable if they received actual or

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<sup>8</sup> Consents to act as liquidators have also been filed.

constructive notice that it was trust property transferred and is liable to account for the property as from the time the property was received or when they received notice: *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 291G.

30. It is now clear that the fraudulently obtained funds were used to pay onto other companies throughout the Forum corporate group. In the time that Westpac has had the search documents (which it accessed at 5pm on 13 July 2021), there are a number of documents which reveal the extent of money being moved between the group. The following examples demonstrate this.
31. First, document 24 obtained from the North Sydney premises is an undated handwritten note obtained from Craig Rollinson, who describes himself as the Executive General Manager Operations, Forum Group.<sup>9</sup> This note records that “revenue & intercompany – Forum / Orca” were “cleared through FGFS global”. This suggests that FGFS operated as an internal funding source for the group, through which intercompany amounts were transferred. It would appear that the amounts fraudulently obtained from Westpac were used to support the Forum corporate group more generally
32. The following is the relevant extract from the note (CMM-6, p 209):

• xero/invoices/all of Nov. in Dec BAS.

• missing contracts aly.

• Back out entries from Xero - TODAY

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• External amounts. @ End of Dec

Revenue \$ <sup>cleared thru FGFS Global</sup> Intercompany — Forum — Orca

Veolia true up in 2020.

Brandon BAS taken revenue. tie<sub>xero</sub> to this ↕

FRIDAY

★ Change Meeting to following wk.

<sup>9</sup> Affidavit of Felicity Healy (2 July 2021), p 110.

33. Document 82 was located in the accounts area of the Sydney premises in an open plan area and was contained in a folder marked "Sofer & Infrashield & FGFS & Others".<sup>10</sup> It is a general ledger transaction report for FG which records that FGFS made loans to FGFS (recorded as a negative loan by FG to FGFS).
34. The following is the relevant extract from the general ledger showing these entries (CMM-6, p 289):

FORUM GROUP PTY LTD Date 14 Oct 2019 Page 1

>ql21 : GL Transaction Report [yguan] Transactions from ... 03/2020 to ... 03/2020

Account	Unl Xref	Date	Reference	Amount	Balance	Source Xref
11640	Syd Olympic football club Clearing acc				1870831.60	SUMSIL/663923
1 I	SUMSIL	13/09/19	20020786	15.02	15.02	
	SUMMIT AUTO LEASE AU / 663923					TELINT/AUG19
41 I	TELINT	16/09/19	20030275	55.00	55.00	
	TELSTRA INTERNAL ACC / AUG19					VOD/1219356019
5 I	VOD	27/09/19	20030537	75.37	75.37	
	Vodafone Australia / 1219356019					NABCC1/BPAUG19
6 I	NABCC1	26/09/19	20030257	75.00	75.00	
	NAB QUANTAS BUSINESS / BPAUG19					NABCC1/TBAUG19
7 I	NABCC1	26/09/19	20030254	1335.95	1335.95	
	NAB QUANTAS BUSINESS / TBAUG19					AMEXTB/AUG19
3 I	AMEXTB	30/09/19	20030549	103.24	103.24	
	AMEX - MOUSSA BOUCHA / AUG19				1872491.18	
11660	Loan to Intrashield				2968788.16	
6 I	NABCC1	26/09/19	20030257	2127.48	2127.48	NABCC1/BPAUG19
	NAB QUANTAS BUSINESS / BPAUG19				2970915.64	
11670	Loan to FGFS				8543702.76-	REALLOCATION HWL-WESTRAC-CEREBRAL-FINDEX
	DP6478/0	02/09/19		623872.56	463320.00	
1 A	HWL		601667	ADJUSTMENT	93280.00	
2 A	WESTRAC		601668	ADJUSTMENT	25652.00	
3 A	CEREBRAL		601659	ADJUSTMENT	41620.56	
4 A	FINDEX		601670	ADJUSTMENT		
	Finindex Group Limited					BANK:160919 - OW
1 P	BJ12537/1	16/09/19		AUDI	2991.61	
	AUDI MONTHLY DD / AUDI					BANK:17/09/2019
2 D	BJ12542/2	17/09/19		LOAN	250000.00-	
	LOAN FROM FGFS / LOAN					BANK:27/09/2019
3 D	BJ12560/3	27/09/19		LOAN	300000.00-	
	LOAN FROM FGFS / LOAN					Intercompany Clearing 30.09.2019
2 D	BJ12561/2	30/09/19		INTERCOMPA	248023.42-	
	Intercompany Clearin / INTERCOMPA				8714862.01-	

35. Further, TFGS prepared accounts which were consolidated with its controlled entities: CMM-6, p 164.<sup>11</sup> These were audited by Rothsay Audit & Assurance Pty Ltd (**Rothsay**). The most recent financial statements available are those for the year ended 30 June 2020: Eighth Murray Affidavit [25]-[26]. These show that TFGS had 13 subsidiaries as at 30 June 2020, including Forum Finance, FG, FE and FEA: note 19 (CMM-6, p 191). However, a conscious decision appears to have been made to keep FGFS out of the consolidated group, which is consistent with its use as the primary repository and disperser of the stolen funds to Mr Papas and Mr Tesoriero and across the Forum corporate group.
36. The net cash flow for the 2020 financial year was negative (-\$4 million): CMM-6, p 172. The net assets of TFGS were \$19.5 million: CMM-6, p 170. Accordingly, there is strong prima

<sup>10</sup> Affidavit of Felicity Healy (2 July 2021), page 116.

<sup>11</sup> It did so even though it appears not to have had in place a deed of cross-guarantee as required by ASIC Class Order: see *Wiggins Island Coal Export Terminal Pty Limited v New Hope Corporation Limited* [2020] NSWCA 316

facie evidence that the Forum Group Companies, in the face of the proprietary claims for relief by Westpac, SocGen and SMBC, are insolvent. The fact that Mr Papas placed the Forum Group Companies and a number of other companies into administration confirms this.

Just and equitable winding up

37. Westpac, if granted leave to file the further amended originating application, will also seek the winding up of each of the Forum Group Companies on the basis that it is just and equitable to do so. This is because:
  - a. Mr Papas is the sole director of each of the Forum Group Companies and his conduct in relation to the prima facie fraudulent scheme run under the guise of Forum Finance is sufficient to demonstrate a justifiable lack of confidence in the conduct and management of the Forum Group Companies such that there is a risk to the public interest that warrants protection: *ActiveSuper* at [20]–[24]; *Australian Securities and Investments Commission v ABC Fund Managers* [2001] VSC 383; (2001) 39 ACSR 443; at [119];
  - b. the evidence *prima facie* establishes that the Forum Group Companies have been part of the dishonest and unlawful scheme;
  - c. no defence has been put forward by Forum Finance or the Forum Group Companies, or either of its directors, in relation to the claims made in these proceedings: July Submissions [3] and [47].
38. The evidence of dishonest and unlawful conduct is summarised in the June Submissions and the July Submissions at [28] to [30]. Each of the Forum Group Companies appears to have been part of this dishonest scheme:
  - a. each has as a sole director Mr Papas;
  - b. each appears to have received significant funds from Forum Finance in circumstances where those funds have not been accounted for: Ireland Affidavit [17];
  - c. transfers between Forum Finance and FGFS were made at the direction of certain employees or contractors of FG or FGFS: Ireland Affidavit [19].
39. Material recently made available from Rothsay (the group's accountants) confirms the extent of the fraudulent conduct. In a letter addressed to Minter Ellison dated 7 July 2021 (but only provided in the subpoenaed material and only available to Westpac on 13 July 2021), Rothsay

have confirmed that Forum Finance did not prepare separate financial statements or income tax returns.<sup>12</sup>

40. Rothsay have now revealed that, on 23 June 2021, they were notified by “the General Manager of [TFGS] of potential misconduct of the Director of [Forum Finance]”. The director must be Mr Papas. Accordingly, by 23 June 2021, TFGS, the ultimate shareholder of Forum Finance and the Forum Group Companies, had formed the view that Mr Papas was engaged in misconduct.
41. Despite this, Mr Papas remained involved in the management of the companies in the group, either directly or through his solicitor, Mr Panetta. The day after TFGS told Rothsay that it had uncovered Mr Papas’ misconduct, Mr Papas spoke with Mr Calabretta.
42. In initial information to creditors, Mr Calabretta has provided the following disclosure to creditors about this interaction:<sup>13</sup>

**Mr. Domenic Calabretta of Mackay Goodwin received an email from Mr. Rocco Panetta of Panetta Lawyers in relation to another company, Forum Finance Pty Ltd on 24 June 2021. On even date, Mr. Calabretta had a meeting with Mr. Panetta who represented the Director, Mr. Basile Papadimitriou. Present at this meeting was Mr. Vincenzo Tesoriero, a shareholder of Forum Finance Pty Ltd. The meeting lasted for approximately one (1) hour. Mr. Calabretta also had a telephone discussion with Mr. Papadimitriou for approximately five (5) minutes during that meeting.**

43. Thereafter:
  - a. on 28 June 2021, Mr Calabretta sent an email to Mr Panetta in respect of a potential appointment of an investigative accountant to all of the group companies, which engagement did not eventuate;
  - b. on 30 June 2021, Mr Calabretta met with Mr Nehme of Fortis Law (then the solicitor for the companies) for approximately one hour;
  - c. on 2 July 2021, Mr Calabretta spoke to Mr Panetta, Mr Papas’ solicitor, for about six minutes;
  - d. on 5 July 2021, Mr Calabretta met with Mr Nehme (now acting for Mr Tesoriero), Mr Safi of Fortis Law and Mr Dewhurst of Hunts Law (now acting for the group companies);
  - e. on 6 July 2021, Mr Calabretta met with Mr Hunt (now acting for the group companies) for approximately one hour;
  - f. on 6 July 2021, Mr Calabretta spoke with Mr Panetta (Mr Papas’ solicitor) for approximately 11 minutes;

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<sup>12</sup> CMM-6, p 129.

<sup>13</sup> Initial information for creditors issued by the Administrators dated 12 July 2021, page 11.

- g. on 7 July 2021, Mr Calabretta met with Mr Nehme (now acting for Mr Tesoriero) for 30 minutes and sent an email to Mr Hunt;
  - h. on 8 July 2021, Mr Calabretta spoke to Mr Panetta twice for about four minutes;
  - i. on 8 July 2021, Mr Calabretta exchanged email correspondence with Mr Papas in relation to the documents appointing the Administrators.
44. To date, and despite a request for the documents pursuant to the Insolvency Practice Schedule, Mr Calabretta has not produced the documents recording these communications. Mr Calabretta's account is inconsistent with the evidence given by Mr Panetta to the Court on 7 July 2021, when he said that he was not engaged by Mr Papas as at 28 June 2021, and was only engaged on around 1 July 2021.<sup>14</sup>
45. Rothsay say that they were provided with bank statements for Forum Finance for the period 1 July 2018 to 31 May 2021.<sup>15</sup> On 25 June 2021, they carried out a review of these bank statements and found that there were transactions from the bank statements which were not recorded in Forum Finance's accounts, including in its general ledger.<sup>16</sup> Rothsay asked the relevant accounting staff who told them that all of these transaction were authorised by Tony (Moussa) Bouchahine, the chief financial officer of TFGS and FG.<sup>17</sup> However, Rothsay were limited in their ability to continue their investigation because the person they were told had access to the records (Brandon Chin) had resigned the week prior.
46. The size and magnitude of the funds which appear to have been transferred, dishonestly, to the Forum Group Companies, goes to the balance of convenience and urgency of the appointments, which are addressed further below.

### **Urgency and balance of convenience**

47. Pursuant to s.440A(3) of the Corporations Act the Court must not appoint a provisional liquidator if a company is under administration *and the* Court is satisfied that it is in the interest of creditors for the company to continue under administration rather than have a provisional liquidator appointed. The section requires the Court to consider whether the interests of the creditors will be better served by the appointment of a provisional liquidator or through the continuance of the voluntary administration: *In the matter of Pages Equipment Holdings Pty Ltd (admin apptd)* [2020] NSWSC 959 at [7] (per Black J).

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<sup>14</sup> Transcript of the hearing on 7 July 2021, p 19 where Mr Panetta said: "Not 28 because he didn't instruct us till after. But around 1 July, I would guess".

<sup>15</sup> Letter to Minter Ellison dated 7 July 2021; CMM-6, p 129.

<sup>16</sup> See Rothsay workpaper dated 25 June 2021: CMM-6, p 133.

<sup>17</sup> See Rothsay workpaper dated 25 June 2021: CMM-6, p 133.

48. There are good reasons why intervention through the appointment of a provisional liquidator is justified prior to the hearing of the winding up application, and equally why it is in the interests of creditors for the Forum Group Companies to have the Liquidators appointed as provisional liquidators or liquidators.
49. *First*, Forum Finance, as set out above in the July and June Submissions, at least *prima facie*, has been used to carry out a fraudulent scheme. As explained above, the Forum Group Companies are also involved in and have benefited from the fraudulent scheme. Significant funds, in excess of \$250 million, have been paid to Forum Finance. A preliminary analysis of the bank account for Forum Finance shows that those funds were transferred out of the account of into the accounts of one of the Forum Group Companies, almost immediately upon receipt of those funds: CMM-5 pp.256-280; Rothsay Letter; Ireland Affidavit [17]. Westpac has significant claims against each of the companies for the account and return of those funds.
50. For the same reasons set out in the July Submissions, there is an urgent need for professionals (*a fortiori*, officers of the Court) who are external to and independent of the company and its directors to undertake a close examination of the state of the accounts of the Forum Group Companies, in particular to determine whether any funds paid away can be recovered. There are presently no freezing orders in place in relation to the assets of the Forum Group Companies (except to the extent that those assets or directly or indirectly under the control of Mr Papas and Mr Tesoriero and thereby caught by the freezing orders made against Mr Papas and Mr Tesoriero). There is a sufficiently real likelihood that other entities and persons who have received funds as a result of the misconduct may dissipate those funds. This needs to be properly investigated, and steps taken to seek preserve and then recover those funds. A provisional liquidator will have the power to cause that examination to occur.
51. As Hodgson CJ in Eq said in *Unifor Office Systems Australia Pty Ltd v Brewer Partnership Pty Ltd* [1999] NSWSC 137 at [6]-[7]:

This Court, in winding up proceedings, has acted on a general principle that liquidators should not be chosen by the directors or other principals of the company. It is considered to be in the interests of creditors that someone entirely independent undertake that role. There is no evidence as to the complete independence of the administrators, although it was asserted from the Bar Table that they were independent, and had no prior connection with the company or its principals.

Even if this is so, however the selection by directors of the person who is to have the responsibility to investigate possible breaches of the law is against the policy of the Court. That policy is not itself given weight in s440A; but as I understand it, one basis of the policy is that it is considered in the interests of creditors that someone completely independent have this

role. The history of this matter, and the timing of the various steps apparently taken by the directors of the company in response to steps taken by this creditor, give further reasons for being concerned about the directors being able to choose who is to have the responsibility of administering the company.

52. See also *Workers Compensation Nominal Insurer v Denny Earthmoving & Bulk Haulage Pty Ltd* [2008] NSWSC 1167 at [10] per Barrett J.
53. Consistently with these principles, it is in the interests of creditors and the broader public interest for the investigations into the fraudulent conduct to be carried out expeditiously and by liquidators appointed by and answerable to the Court.
54. *Second*, having regard to the current state of the investigations, in order to ensure, in the public interest, that the investigations in relation to the use and disbursement of the funds received from Westpac, SocGen and SMBC are continued in an expeditious and unhampered manner, the Liquidators should be appointed as provisional liquidators or liquidators. This is particularly so when it appears that the Administrators primary focus is on shutting down the business (CMM-6, p 122) or a sale of the assets or business of the group of companies and not on the investigation of the significant fraud the subject of these proceedings: Eighth Murray Affidavit [8]-[9]; CMM-6 pp 1-2 (which is an advertisement published by the Administrators asserting that one of the Forum group companies has turnover of \$45 million per annum and profit of \$1.41 million, which given the intermixing in the group of the fraudulent funds are assertions which must be seriously doubted); CMM-6, p 74. This demonstrates that at least in so far as Westpac is concerned, together with other financiers that have provided funds to Forum Finance, the continuation of the Administrator's appointment is not in the best interest of those creditors. Indeed, the investigation has not been facilitated by the administrators, who for example initially sought to resist Westpac having access to the hard copy documents obtained on the search orders.
55. The Liquidators, in their role appointed to Forum Finance, have already conducted preliminary investigations in relation to the flow of the funds from Forum Finance and the subject transactions: Ireland Affidavit. The continuation of the administration in relation to the Forum Group Companies, in circumstances where the Liquidators are obliged to investigate and report in relation to those transactions will necessarily lead to duplication of work, and costs for that work. Any duplication of costs would not be for the benefit of creditors of the various companies.
56. Further, Westpac has provided an indemnity to the Proposed Provisional Liquidators in relation to the investigations: Eighth Murray Affidavit [27]. No proposal in relation to funding

has been put forward by or for the Administrators. This is in circumstances where they have indicated that they expect their costs to be in the vicinity of \$750,000 to \$1 million plus GST.<sup>18</sup>

57. Relatedly, McGrathNicol have the resources and skill set to conduct exactly this type of investigation: Ireland Affidavit [24]ff.
58. *Third*, the appointment of a provisional liquidator (or even a liquidator) does not foreclose the possibility that an administrator could subsequently be appointed – if a firm and credible proposal for a deed of company arrangement, in respect of any company in the Forum corporate group carrying on a legitimate business and that has not received funds pursuant to the fraudulent scheme, is put forward. Having said that, the prospect of a deed of company arrangement appears remote.
59. *Fourth*, it is likely that the entire group will collapse into liquidation. The Administrators have not focused on investigating the transactions of concern, but rather have focused on a sale of what could be assets into which Westpac may be able to trace funds. There is unlikely to be any utility coming out of the administration of the Forum Group Companies, there is no evidence before the Court as to how a deed of company arrangement of other plan that could be explored through the administration will result in a better return to the creditors than a winding up (with the attendance powers of liquidators to assist in bringing in the assets of the company).
60. To the contrary, it is likely to be in the interests of creditors for McGrath Nicol to be appointed across the entities connected with the fraudulent conduct, so that they can more efficiently investigate what has occurred. In that regard, Mr Ireland's evidence at Ireland Affidavit [29] is pertinent:

In my experience, for the purpose of tracing funds and investigating a fraud of the scale that is alleged to have occurred and which is the subject of this (and other) proceedings before this Court across multiple entities, it would be more efficient if my partners and I were liquidators of each group entity that received the proceeds of the fraud. That would assist with the process of tracing where those funds went to and being able to access all of the documentary records (including the book and records of those entities, emails, text messages) created at the relevant times. As Forum Finance appears to have remitted the funds to other Forum group entities, being liquidator of Forum Finance only will limit my ability to investigate the underlying circumstances of the fraud.

61. In all of the circumstances, there are circumstances which justify the urgent need for the appointment of a provisional liquidator prior to the hearing of the winding up application, and notwithstanding the appointment of the Administrators to the Forum Group Companies. The

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<sup>18</sup> Initial information for creditors issued by the Administrators dated 12 July 2021, p 23: CMM-6, p 109.

investigation of the fraudulent conduct is going to be done more efficiently if that occurs as soon as possible, so that the Liquidators can most effectively carry out their investigations in the interests of creditors, including Westpac, SocGen and SMBC.

62. The Court has power to make an order terminating administration in conjunction with the appointment of provisional liquidators under s 447A of the Act or s 90-15 of the Insolvency Practice Schedule (Corporations) being Schedule 2 to the Corporations Act. Once a provisional liquidator is appointed to the companies, the continued appointment of voluntary administrators to the companies would have no useful purpose: *In the matter of Pages Equipment Holdings Pty Ltd (admin apptd)* [2020] NSWSC 959 at [25].

**Conclusion in relation to provisional liquidation**

63. In the present circumstances, the public interest supports the appointment of a provisional liquidators who will be able to forthwith take into their possession all of the books and records of the Forum Group Companies, examine the state of the accounts including between related entities and take steps to protect the position of creditors: see *Re Huntford Pty Ltd* (1993) 12 ACSR 274 at 278. The appointment is supported by the public interest and the balance of convenience weighs in favour of the appointment.
64. For the reasons articulated above, provisional liquidators should be appointed prior to the final hearing of the winding up.
65. Mr Preston, Mr Ireland and Ms Sozou of McGrathNicol have provided their consent to act as provisional liquidators which consents indicate that they are not aware of any conflict of

interest or duty, or relevant relationship which would prevent their appointment as provisional liquidators.

66. In the circumstances the Court should make the orders sought in Forum Group Companies application.

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