

NOTICE OF FILING

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Details of Filing

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| 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: 30/06/2022 9:33:06 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.

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.



Westpac Banking Corporation & anor v Forum Finance Pty Ltd (in liquidation) & ors ★

Federal Court of Australia NSD 616/2021

**APPLICANTS' (WESTPAC PARTIES') OUTLINE OF SUBMISSIONS
FOR HEARING ON 1 JULY 2022**

Introduction

1. By interlocutory application dated 17 June 2022, the Third Respondent, Mr Vincenzo Frank Tesoriero (**Mr Tesoriero**) seeks:
 - a. a variation to the freezing orders made against him¹ (**Freezing Orders**) to increase the amount provided for his reasonable legal expenses to \$1,866,000; and
 - b. an order to allow certain funds to be paid into his solicitor's trust account, up to the amount of \$1,866,000, to pay his legal expenses.²
2. The Applicants, Westpac Banking Corporation (**WBC**) and Westpac New Zealand Limited (**WNZL**) (together **Westpac**), oppose the variation to the Freezing Orders in the terms proposed by Mr Tesoriero. Subject to one exception Westpac opposes the orders for release of identified funds sought by Mr Tesoriero because those funds constitute (or there is a *prima facie* case the funds constitute) the traceable proceeds of the stolen money. Expressly without admissions Westpac will consent to a variation to the Freezing Orders to increase the amount provided for in the exception for legal expenses to the amount of \$642,511.65; and to provide for the release of funds held up to the amount of \$462,511.65 from an identified controlled monies account, because that release of funds from that controlled monies account will not erode funds in respect of which proprietary claims have been made and supported by evidence filed in the proceedings. The variation to which Westpac is prepared to consent is set out in the accompanying short minutes of order.³

¹ Initially made on 2 July 2021; varied and extended on 9 July 2021; 27 August 2021; and 12 November 2021.

² To the extent the order seeks the amount of \$1,866,000 to be released to the trust account of Mr Tesoriero's solicitors it is noted that Mr Tesoriero's evidence is that the amount of \$180,000 has already been paid from frozen funds to Mr Tesoriero's solicitors: see Tesoriero June Affidavit at [35] and as such this amount is overstated.

³ The tracked amendments set out in the proposed short minutes of order reflect the changes to the terms of the Freezing Orders as varied on 12 November 2021.

3. Westpac has agreed to, and has facilitated, the release of the amount of \$270,000 from the controlled monies account, as set out in further detail below.

Materials before the Court

4. The Applicants rely on:
 - a. certain of the materials before the Court on 1 October 2021 and 12 November 2021, including the affidavit of Ms Caitlin Murray of 30 September 2021 (**Murray 30 Sept**) and the exhibit to that affidavit CMM-13; extracts from Exhibit CMM-10, certain documents referred to at the 12 November 2021 hearing (**12 Nov Bundle**) and a mortgage statement for the Rozelle Property. For ease, the relevant extracts have been included in the Court Book prepared for the hearing on 1 July 2022 (**CB**); CB 616; and
 - b. the affidavit of Ms Caitlin Murray sworn 28 June 2022 (**Murray 28 June**) and Exhibit CMM-25 to that affidavit: CB 41 and 51.
5. Mr Jason Preston and Mr Jason Ireland are the joint and several liquidators (**Liquidators**) of Forum Finance Pty Ltd (receivers appointed) (in liquidation) (**Forum Finance**) and Forum Group financial Services Pty Ltd (in liquidation) (**FGFS**). It is anticipated that the Liquidators will rely upon the affidavit of Mr Preston affirmed 28 June 2022 (**Preston Affidavit**) and Exhibit JI-6 to that affidavit: CB 9 and 24.

Background to the application

6. On 28 July 2021, proceeding NSD616/2021 (**Westpac Proceeding**) was commenced. On 2 July 2021, the Freezing Orders were obtained *ex parte* against Mr Tesoriero. The Freezing Orders were extended and varied by consent on 9 July 2021; 27 August 2021; and 12 November 2021 (although on each occasion consent was provided on a without admissions basis).⁴
7. On 9 July 2021, the Freezing Orders were varied to allow an additional amount for legal expenses: namely, \$30,000 per month up to an amount of \$350,000. On 12 November 2021, the Freezing Orders were varied again to allow an additional amount for legal expenses, to provide a total amount of \$450,000 albeit that a further variation was then envisaged. This is the exception for legal expenses currently provided for in the Freezing Orders.

⁴ The 12 November 2021 orders are at VTF-5 p25, CB 528

8. The Westpac Proceeding is listed together with proceeding NSD681/2021 commenced by SMBC Leasing and Finance, Inc. Sydney Branch (**SMBC**) (the **SMBC Proceeding**) and proceeding NSD642/2021 commenced by Societe General (**SocGen**) (the **SocGen Proceeding**). Mr Tesoriero is not a respondent in either the SMBC or SocGen Proceeding, although some companies he controlled are now respondents to the SMBC Proceeding. The proceedings have been listed for final hearing commencing 10 October 2022.
9. Subsequently and by amendment in July 2021, 14 James Street Pty Ltd (in liquidation) (**James Street**); 26 Edmonstone Road Pty Ltd (in Liquidation) (**Edmonstone Road**); 5 Bulkara Street Pty Ltd (in liquidation) (**5 Bulkara**); 6 Bulkara Street Pty Ltd (in liquidation) (**6 Bulkara**); 23 Margaret Street Pty Ltd (**Margaret Street**) and 1160 Glen Huntly Road Pty Ltd (**Glen Huntly**) were joined to the Westpac Proceeding as the Ninth to Fourteenth Respondents, respectively. At that time:
 - a. Edmonstone Road was the registered proprietor of the property with the address 26 Edmonstone Road, Bowen Hills, QLD (**Edmonstone Rd Property**);
 - b. James Street was the registered proprietor of the properties in James and Parsons Streets, Clayton South, VIC (**James Street Properties**)⁵;
 - c. 5 Bulkara was the registered proprietor of the property with the address 5 Bulkara Street Wagstaff, NSW (**5 Bulkara St Property**);
 - d. 6 Bulkara was the registered proprietor of the property with the address 6 Bulkara Street Wagstaff, NSW (**6 Bulkara St Property**);
 - e. Margaret Street was the registered proprietor of the property with the address 23 Margaret Street, Rozelle, NSW (**Rozelle Property**); and
 - f. Glen Huntly was the registered proprietor of the property with the address 1160 Glen Huntly Road Glen Huntly VIC (**Glen Huntly Property**).
10. Edmonstone Road, 5 Bulkara, 6 Bulkara and Margaret Street are also respondents to the SMBC Proceeding.
11. The Liquidators, in addition to being appointed as Liquidators of Forum Finance and FGFS, are also the joint and several liquidators of other companies within the Forum Group of companies and companies associated with Mr Tesoriero, including Edmonstone Road; James Street; 5 Bulkara and 6 Bulkara: Preston Affidavit at [1].

⁵ See Annexure A to the orders made on 3 September 2021, Exhibit Ji-6 p 1, CB 24

12. On 3 September 2021, the Liquidators were appointed as receivers and managers (**Receivers**) of the Edmonstone Rd Property; the James Street Properties, the 5 Bulkara St Property and the 6 Bulkara St Property: Preston Affidavit at [3]. Those orders permit the Liquidators, in their capacity as Receivers, to sell those properties on the terms set out in those orders.
13. As to 8-12 Natalia Ave Oakleigh South VIC 3167 (**Oakleigh Property**): Mr Tesoriero entered into a contract to purchase that property prior to the commencement of the Proceedings, however, that purchase did not complete. A letter received from Mr Tesoriero's then solicitors, Fortis Law, on 17 August 2021, disclosed that as Mr Tesoriero was not in a position to complete the purchase of the Oakleigh Property, a new purchaser would assume the obligations under the contract of sale and would pay Mr Tesoriero a nomination fee: Murray 30 Sept at [25]; CMM-10 p 624-625, CB 661.
14. 8-12 Natalia Ave Oakleigh Pty Ltd (**Natalia Ave**) is the Forty-First Respondent in these proceedings. It is not a respondent to the SMBC or SocGen Proceedings.
15. On 1 October 2021, orders were made in the Westpac Proceeding concerning funds paid as a deposit on the Oakleigh Property. Following those orders, the amount of \$773,362.88 was paid into Court⁶ (**Natalia Fund**).
16. On 9 February 2022, a declaration was made in relation to the Rozelle Property. Pursuant to the declaration as to the proper construction of a Sale Process Deed, the net proceeds from the sale of the Rozelle Property were to be placed after settlement of the sale of the Rozelle Property into an interest-bearing controlled monies account in the names of Westpac and Mr Tesoriero.
17. On 3 March 2022, the proceeds from the sale of the Glen Huntly Property, in the amount of \$759,619 were paid into the Supreme Court of Victoria (**Glen Huntly Fund**).⁷
18. Belatedly, on 16 May 2022, a controlled monies account was opened in relation to the proceeds from the sale of the Rozelle Property, into which the amount of \$1,340,866.65 was paid (**Margaret CMA**).⁸
19. The Edmonstone Rd Property and the 6 Bulkara St Property have been sold and the net proceeds are held by the Receivers: Preston Affidavit at [17], [23] and [27]. This includes

⁶ Tesoriero June Affidavit at [11], although the Applicants' dispute that the funds were a deposit that was paid by Mr Tesoriero.

⁷ Tesoriero June Affidavit at [12], VTF-5 p 47

⁸ Tesoriero June Affidavit at [15], VFT-5 p 48

the amount of \$9,808,169.94 held in relation to the sale of the 6 Bulkara St Property (**6 Bulkara Fund**): Preston Affidavit at [27].

20. On 30 May 2022, through his solicitors, Mr Tesoreiro sought Westpac's consent to: a) a variation to the Freezing Orders to provide for legal expenses in the amount of \$1,866,000; b) an immediate release of the amount of \$270,000 from the Margaret CMA for payment of legal expenses; and c) a future release from the Margaret CMA for future legal expenses: Murray 28 June at [5], CMM-25 p1; CB42, 52. An urgent response was requested by no later than the following day. Pausing there, that urgency was either not real or, if real, was the product of Mr Tesoriero's failure to take any steps between early March and late May 2022 to engage with Westpac about a variation to allow further legal fees to be spent. That delay occurred at a time when Mr Tesoriero ought to have been preparing his discovery and evidence (neither of which have been served).
21. On 2 June 2022, Westpac provided a substantive response to the variation request: Murray 28 June at [8], CMM-25 p18, CB 69 and 71.⁹ Relevantly, Westpac indicated that the amount of \$270,000 could be released from the Margaret CMA provided consent was also obtained from SMBC. This was both sensible and necessary in circumstances where SMBC has commenced proceedings against Margaret Street and asserts a proprietary interest in funds received by Margaret Street to the extent that they can be traced to funds stolen from SMBC. By this same letter, Westpac requested further information from Mr Tesoriero in connection with his estimate of legal expenses and his assets and ability to meet those expenses from other sources so that it could consider the variation proposed and the requested further release from the Margaret CMA.
22. Despite the asserted urgency of the request from Mr Tesoriero, no immediate response was received to this letter. Indeed, no adequate response has yet to be received to the requests for information.
23. On 14 June 2022, Mr Tesoriero's solicitors sent an email enclosing a letter authorising the release of the \$270,000 from the Margaret CMA: Murray 28 June at [10], CMM-25 p23; CB 74. No response was provided in relation to the estimate of legal expenses or the request for information as to Mr Tesoriero's assets and ability to pay his legal expenses. Westpac's solicitors responded that day: Murray 28 June at [12], CMM-25 at p25, CB 76

⁹ An acknowledgement and holding response having been provided on 30 May 2022: Murray 28 June at [7], CMM-25 p10; CB 61.

reiterating that the consent of SMBC to the release should be obtained and noting no other response had been received to Westpac's request for further information.

24. On 16 June 2022, Mr Tesoriero's solicitors, without providing any further response to the correspondence or the request for information as to Mr Tesoriero's financial and asset position, foreshadowed that Mr Tesoriero wished to make an urgent application to vary the Freezing Orders: Murray 28 June at [14], CMM-25 p 27; CB 78. Approximately 11 minutes later an email was sent to the Associate to Lee J requesting that the application be listed for urgent hearing: Murray 28 June at [15], CMM-25 p 32; CB 83.
25. On 16 June 2022, Westpac's solicitors sent a further letter to Mr Tesoriero's solicitors in relation to the requested amendments to the Freezing Order and the requested release of funds from the Margaret CMA: Murray 28 June at [16], CMM-25 p38; CB 89.
26. On 24 June 2022, further correspondence was sent to Mr Tesoriero's solicitors in relation to the application indicating that Westpac would consent to certain funds being released from the Margaret CMA (subject to consent from SMBC) and to a variation to the Freezing Orders in relation to the exception for legal expenses: Murray 28 June at [25], CMM-25 p 64; CB 115. No response has been received to that letter: Murray 28 June at [27].
27. Against that background, two issues arise for determination in relation to the application: *first*, the amount of the exception for legal expenses that should be provided for in the Freezing Orders; and *secondly*, the source of funds, if any, to which Mr Tesoriero should have access in order to meet those legal expenses. In this respect, Westpac opposes the increase sought by Mr Tesoriero and opposes the use of any funds over which Westpac has a proprietary claim for the purposes of satisfying Mr Tesoriero's legal expenditure.

Application to vary the Freezing Orders

28. As set out above, the current Freezing Orders provide for an amount of \$450,000 for reasonable legal expenses until 10 March 2022. This variation, and the amount for legal expenses, 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. That application has been adjourned until the commencement of the trial.¹⁰ Although it is accepted that a variation to the Freezing Orders is required, Westpac disputes that the amount of \$1,866,000 is a reasonable amount for legal expenses and has indicated it is

¹⁰ See orders made on 10 March 2022

prepared to consent to the amount of \$642,511.65 for legal expenses: Letter 24 June 2022, CMM-25 at p67, CB 118.

29. There are a number of reasons why no greater variation should be allowed.
30. *First*, the amount identified by Westpac is fixed by reference to the moneys presently held in various funds as a result of the sale of properties owned by companies controlled by Mr Tesoriero (but which are not in liquidation of receivership) and which are not subject to a claim for quantified proprietary relief.
31. *Second*, as already described, although Mr Tesoriero, through his solicitors, made a written request for Westpac's consent to vary the Freezing Orders before approaching the Court, when information was requested to enable Westpac to consider the request; and when clarification was sought in relation to the amount proposed for legal expenses, no response was received: Murray 28 June at [27]. The amount is not self-evidently reasonable, and components appear plainly unreasonable.
32. As the evidence currently stands, Mr Tesoriero has not demonstrated the reasonableness of his legal expenses said to have been incurred to date; nor the reasonableness of the further \$1,320,000 said to be required until the conclusion of the hearing. It does not appear that either amount includes any expenses incurred by Fortis Law, Mr Tesoriero's former firm of solicitors, which are currently in the process of being taxed: Tesoriero June Affidavit [18]-[24]. If those expenses are accepted on a taxation, Mr Tesoriero would have incurred the amount of \$779,660.52 in the period from the commencement of the Westpac Proceeding until the end of April 2022. Despite the Court's orders he has not given discovery, or apparently commenced preparation of his affidavit evidence.
33. *Third*, the usual position is that a respondent subject to a freezing order should be able to access (relevantly) the *respondent's* assets for the payment of legitimately incurred legal expenses: *Deputy Commissioner of Taxation v Bolland*s [2012] FCA 1050 at [22]. However, the Freezing Orders are not "all assets" Freezing Orders, but pertain to a specified amount. As Mr Tesoriero seeks a relaxation of the existing Freezing Orders, to increase by a significant margin the amount that can be expended on legal expenses, he bears the evidentiary onus of demonstrating that he does not have any other assets available out of which the legal expenses could be paid: see *Clout (Trustee) v Anscor Pty Ltd* [2001] FCA 174 at [19]-[20]; also Gee "Commercial Injunctions" (7th edn) at [21-047], [21-050]. The variation of a freezing order will be dictated by what justice demands

in the particular circumstances of the case: *MG Corrosion Consultants Pty Ltd v Gilmour* [2012] FCA 568 at [14] per Barker J.

34. *Fourth*, set out further below, and aside from the question of quantum, legal expenses should not in a general sense be paid from the funds the subject of a strongly arguable proprietary claim: *Petar v Macedonian Orthodox Community Church St Petka Inc* [2006] NSWCA 277 at [59]. In the present case, in addition to *in personam* claims against Mr Tesoriero and the companies controlled by him, the Applicants have proprietary claims and have been able to trace stolen funds into the hands of Mr Tesoriero, Giovanni Tesoriero (**Mr Tesoriero Snr**), and companies controlled by Mr Tesoriero and Mr Tesoriero Snr.
35. For each of those reasons Mr Tesoriero has failed to demonstrate that the variation to the Freezing Orders sought is justified. Two of those reasons ought to be expanded on.

Mr Tesoriero's asset position

36. Mr Tesoriero has provided two affidavits as to his assets: the Tesoriero July Affidavit and the Tesoriero September Affidavit said to be for the purpose of setting out his interest in worldwide assets. However, those affidavits appear not to adequately and fully disclose Mr Tesoriero's assets or those assets under his control, for at least the following reasons.
- a. *First*, the Tesoriero July Affidavit failed to disclose Mr Tesoriero's interest in the Mangusta XOXO yacht (which has been subsequently disclosed in his September Affidavit).
 - b. *Secondly*, the Tesoriero July Affidavit did not disclose Mr Tesoriero's interest in the Oakleigh Property. No explanation has been provided as to why this was not included in the Tesoriero July Affidavit.
 - c. *Thirdly*, there are a number of bank accounts referred to in the affidavit of Tesoriero October Affidavit, see at [4], which were not disclosed in the Tesoriero July Affidavit: see Annexure B of the July Affidavit. Further, Mr Tesoriero deposed in his October Affidavit as follows: "I believe I may have up to 30 accounts with NAB" (at [4]). Only 18 accounts are referred to in the Tesoriero October Affidavit. Contrary both to the operation and intention of the disclosure order, and despite request, Westpac remains uniformed whether additional accounts exist which have not been disclosed by Mr Tesoriero.

- d. *Fourthly*, Mr Tesoriero did not disclose in his July Affidavit other vehicles and motorbikes which have subsequently been discovered by the Applicants: see for example, the 2019 BRP Can-Am Ryker 600 registration RYKER referred to in 7(B)(h) of the Freezing Orders. Again, no explanation has been provided as to why this was not disclosed.
 - e. *Fifthly*, the Tesoriero July 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 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: CMM-25 p78, CB 129. Despite request, no explanation has been provided as to the status of this property.
 - f. *Sixthly*, although Mr Tesoriero has an interest in the café that is operated by 65 Nelson Street Enterprises Trust (see for example paragraph 10A(a) of Annexure A to the Freezing Orders and the July Tesoriero Affidavit), no evidence as to the income or assets of this café has been provided.
37. *Seventhly* and relevantly apparent on the evidence filed in support of this application, there is a significant disparity in the rental income and mortgage expenses referred to in the Tesoriero July Affidavit and the Tesoriero June Affidavit: 24 June letter, CMM-25 p 64, CB 118. A schedule prepared by MinterEllison extracting amounts for rent and interest from the Tesoriero July Affidavit (excluding properties that have been sold or where the registered proprietor is in external administration) shows monthly interest payments totaling approximately \$71,400 and sets out monthly rental income in the amount of \$113,150: see CMM-25 p100, CB 151. By way of comparison, at paragraph [37] of the Tesoriero June Affidavit, Mr Tesoriero deposes that interest expenses were in the amount of \$107,600 and rental income was in the amount of \$99,089.98. Despite request (CMM-25 p 118) no explanation has been provided as to the significant increase in interest expenses and the significant decrease in rental income: Murray 28 June at [27]. Where Mr Tesoriero bears the onus, and the facts are within his knowledge, that unexplained difference has the consequence that no order (other than to the extent of consent by Westpac) ought to be made.
38. In seeking to obtain a variation to the Freezing Orders, Mr Tesoriero has not provided proper disclosure of his assets. This shortcoming has several consequences. *First*,

Mr Tesoriero has not proved his assets and the need for a variation as to quantum for legal expenses. *Second*, his opaque approach, to say the least, has impeded identification of the assets acquired using money fraudulently obtained from Westpac and which is subject to a proprietary claim. He has not even sought to prove assets acquired by him before the fraud was commenced and which were not funded using stolen money. *Third*, in light of Mr Tesoriero's opaque disclosure to date, his application should properly be supported by updated evidence of his assets, income and liabilities. That information was requested: Murray 28 June at [8], CMM-25 p20, CB 71, but has not been provided. Further a notice to produce was issued to Mr Tesoriero: see CMM-25 p67 and p71, CB 118 and 112, and he has failed to respond.

Quantum of legal expenses

39. Mr Tesoriero deposes that he had been told by Mr Nasimi that "his fees" are in the amount of \$546,000 (including disbursements and counsel expenses): Tesoriero June Affidavit at [34]. Immediately that is curious and involves a conflation between Mr Tesoriero and some of the corporate defendants. There is no evidence as to the nature of the tasks that have resulted in those expenses being incurred or on whose behalf those expenses have been incurred, despite Mr Nasimi swearing a recent affidavit deposing to the future estimate of costs: Nasimi June Affidavit at [6].
40. Further, Mr Tesoriero's evidence is that he has yet to pay the legal expenses of his former law firm, Fortis Law, which are in the process of being taxed. Assuming, only for present purposes, that Mr Tesoriero is liable to pay the full amount of Fortis Law's invoice, Mr Tesoriero would have incurred the amount of \$779,660.52 in the period from the commencement of the Westpac Proceeding until the end of April 2022. It is unclear how, in circumstances where Mr Tesoriero has filed a defence, but not yet served any evidence to be relied upon at the final hearing, or provided discovery, that an amount of \$799,660 is a reasonable amount for legal expenses. To the extent that the expenses incurred relate to work done in connection with other proceedings (such as the statutory demand proceedings referred to at [25]-[28] of the Tesoriero June Affidavit) to justify the reasonableness of those expenses, it is unclear why such significant further expenses are reasonably required to be incurred in connection with the preparation of evidence (as referred to at [34] Tesoriero June Affidavit).
41. To the extent these costs incurred include the costs of Mr Tesoriero's opposition to the winding up of FGFS; Forum Enviro Pty Ltd (in liquidation) (**FE**); and Forum Enviro (Aust) Pty Ltd (in liquidation) (**FEA**) heard on 12 November 2021 or his interlocutory

application dated 6 February 2022 seeking to oppose the sale of certain properties over which the Receivers had been appointed (with the consent of Mr Tesoriero) it is difficult to see why it can be said that those costs incurred were reasonable. As to the winding up application, the companies were plainly insolvent and Mr Tesoriero was not a director of those companies and did not otherwise appear to have standing to challenge the winding up applications. As to the 6 February 2022 application, the Court dismissed the application and ordered that Mr Tesoriero pay the Receivers costs.

42. Further, the position taken by Mr Tesoriero in relation to the sale of the Rozelle Property and the payment of the net proceeds of that sale into a controlled monies account that resulted in the need to bring an application in relation to the net proceeds (which resulted in the declaration made on 1 October 2021), equally cannot be described as reasonable. Mr Tesoriero was ordered to pay 50% of Westpac’s costs of that application.¹¹
43. Finally, Mr Tesoriero does not appear to engage with correspondence in connection with the Freezing Orders. Materials before the Court on 12 November 2021 show that despite repeated requests Mr Tesoriero did not articulate the amendment to, or variation of, the Freezing Orders that he sought at that time: 12 Nov Bundle: CB 666-671. The same has occurred on this occasion. Although an email request was sent setting out the variation proposed by Mr Tesoriero, when consent was not provided and information sought, no response was provided to the concerns raised as to the reasonableness of the estimated legal expenses or the concerns raised as to Mr Tesoriero’s disclosure of his assets and liabilities: Murray 28 June at [4]-[27].
44. Issues also arise as to the reasonableness of the estimate future costs which are said to be in the amount of \$1,320,000: Tesoriero June Affidavit at [34]. No detailed breakdown in relation to those expenses has been provided. A high-level breakdown has been provided which includes reference to “reply”, discovery and evidence (in the amount of a further \$467,000), “Experts” (in the amount of \$370,000); and trial preparation and trial (in the amount of \$538,000).
45. The defence to the Westpac Proceeding articulated by Mr Tesoriero, and for the most part repeated *verbatim* by respondents associated with Mr Tesoriero, is to the effect that there was an agreement with Mr Papas that funds would be paid out of the Forum group as a

¹¹ To that end, the position of Mr Tesoriero set out in the correspondence was described by the Court as “a really silly attitude” 9.2.22 T.71: 21, a concept that does not sit congruently with the notion of reasonable legal expenses.

“return on investment” for Mr Tesoriero. It is unclear how it can be said that a further amount of \$467,000 for “reply, discovery and lay evidence” is reasonable.

46. Having regard to the articulated defence it is also unclear why it will be reasonable to incur the amount of \$370,000 in relation to “Experts;” nor is it clear why it is reasonable that this has increased from the previous estimate of \$43,295 provided set out in Nasimi November Affidavit at [21].
47. As to the costs for the hearing, no explanation has been provided as to why it is likely that counsel and solicitors will be required to work 6 days per week during the three weeks of the hearing (which will involve issues going to the underlying fraud, which Mr Tesoriero does not admit but does not positively contest).
48. Having regard to the matters set out above, as to the concerns as to the reasonableness of the estimated legal expenses there is no justifiable basis for the Freezing Orders to be varied to provide additional amount for legal expenses sought by Mr Tesoriero. The proposed short minutes of order provided by the Applicants are perhaps generous in light of the inadequate evidence in support of this application.

Mr Tesoriero should not be permitted access to the funds paid into Court or in the controlled monies account

49. By prayer 2 of the interlocutory application, Mr Tesoriero seeks access to “funds paid into Court or the controlled monies account”. The Tesoriero June Affidavit refers to the Natalia Fund, Glen Huntly Fund, Margaret CMA, and the 6 Bulkara Fund (together the **Funds**).
50. Dealing with each of the properties and funds from the sale of those properties in turn, Westpac can demonstrate that money stolen from it has been used for, or to the benefit of the properties which have been purchased. The Liquidators have conducted a tracing exercise and have identified through their analysis payments that have been made to, or for the benefit of, the Respondents in the Proceedings. The tracing analysis has identified the “source” of funds, in that the analysis has followed the flow of funds originating from WBC and WNZL: Murray 28 June at [28]-[37];¹² and CMM-25 p110, CB 161.
51. The tracing analysis shows that the amount of funds traced, or for the benefit of Margaret Street, Natalia Ave and Glen Huntly (the 6 Bulkara Fund is not included as liquidators are

¹² And funds originating from SMBC and SocGen, as well as “other” funds, being those that have not originated from the four financiers.

appointed to 6 Bulkara and Mr Tesoriero cannot access that fund) as follows: Murray 28 June at [36]-[37]:

| Entity | Transaction Number | Westpac Funds | Westpac NZ Funds | SMBC Funds | SocGen Funds | Other Funds | Total |
|--|--------------------|---------------|------------------|------------|--------------|-------------|-----------|
| 1 1160 Glen Huntly Road Pty Ltd ACN 639 447 984 | | 26 705,740 | 236,692 | 31,359 | 12,849 | (0) | 986,640 |
| 7 23 Margaret Street Pty Ltd ACN 623 715 373 | | 57 530,221 | 108,212 | 187,349 | 20,006 | 32,567 | 878,355 |
| 17 8-12 Natalia Ave Oakleigh Pty Ltd ACN 643 838 626 | | 45 2,014,780 | 256,643 | 529,208 | 26,919 | 35,121 | 2,862,671 |

52. As set out in the above table, funds from each WBC and WNZL have been traced to each of these entities. These funds have been traced as originated from payments made by Westpac, being the stolen funds the subject of Transactions 1 to 100 in the case of WBC and Transactions NZ1 to NZ36 in the case of WNZL.
53. A schedule setting out the total of the traced funds relative to the value of the funds has been prepared by MinterEllison: see CMM-25 p 99, CB 150. From this analysis, it is clear that it is not possible to release \$1,866,000 from the Funds without eroding proprietary claims in respect of those Funds. Relevantly, it is only the Margaret CMA that holds a surplus that exceeds the proprietary claims.

Margaret CMA

54. The Liquidators' tracing analysis for Margaret Street shows payments in the total amount of \$878,355 made by FGFS to or for the benefit of Margaret Street. Of those funds, an amount of \$638,433 has been traced back to Westpac funds: CMM-26 p 112.
55. An examination of the bank statements for Margaret Street reveals that payments received from FGFS, using money stolen from Westpac, were in turn used to make mortgage payments on the Rozelle Property mortgage: CMM-10 p308-311 and mortgage statement, CB 633 and CB 663.
56. Accordingly, Westpac has a good *prima facie* case that money that was misappropriated from it and paid in to FGFS's bank account was then used to fund the deposit and purchase price paid for the Rozelle Property.

Glen Huntly

57. The tracing analysis shows the amount of \$986,640 as being traced as paid to, or for the benefit of Glen Huntly. Of that amount, the amount of \$942,432 has been traced as

Westpac funds: Murray 28 June at [37], CMM-25 p 111, CB 162. This exceeds the amount in the Glen Huntly Fund.

58. A review of the summary page for Glen Huntly shows that the first payment from FGFS that has been traced as being to the benefit of Glen Huntly was a payment in the amount of \$152,000 made on 15 November 2019 with the description “Deposit 1160 Glen”. The tracing summary also shows a further payment in the amount of \$100,000 with the same description made on 25 May 2020. Documents located during Westpac’s investigations show that the payment was made as the deposit for the purchase of the Glen Huntly Property: Murray 28 June at [38], CMM-25 p 114-117, CB 165-168.
59. Further payments towards the purchase of the Glen Huntly Property are recorded in the tracing summary, including a payment in the amount of \$525,575.79 made to Property Exchange Australia on 10 June 2020.
60. The Liquidators tracing analysis reveals that 100% of the deposit funds and settlement funds for the purchase of the Glen Huntly Property have been traced as originating from Westpac.
61. Accordingly, Westpac has a good *prima facie* case that money that was misappropriated from it and paid in to FGFS’s bank account was then used to fund the deposit and purchase price paid for the Glen Huntly Property.
62. Mr Tesoreiro has not provided any evidence that the funds used to purchase the Glen Huntly Property were his funds.

Natalia Fund

63. The tracing analysis completed by the Liquidators shows that the amount of \$2,862,671 has been traced as being paid to, or for the benefit of Natalia Ave: CMM-25 p 113. An examination of the payments that have been traced shows that this includes two payments in the amount of \$586,000 paid from the account of FGFS with descriptions referring to “Natalia Deposit”.
64. Westpac’s investigations are consistent with the tracing analysis, revealing (as set out in Murray 30 Sept) that an amount of \$1,172,000 had been paid from FGFS in relation to the purchase as the Oakleigh Property as follows:
 - a. on 19 December 2019, a payment in the amount of \$586,000 with the description “Deposit 12 Natalia” was made from the FGFS account: CMM-13 p.30, CB 625;

- b. on 9 June 2020, a further payment in the amount of \$586,000 with the description “Natalia Deposit” was made from the FGFS account: CMM-13 p.59, CB 627.
65. Receipts have been located during Westpac’s investigations which show that the payments were received as payment of the deposit for the purchase of the Oakleigh Property: CMM-13 p.154 and p.155. Accordingly, Westpac has a strong *prima facie* case that money that was misappropriated from it and paid in to FGFS’s bank account was used to fund the deposit paid for the Oakleigh Property.
66. The Natalia Fund was paid into Court following orders made on 1 October 2021. The money had been held in the Fortis Law trust account and was part of the price paid by a purchaser from Mr Tesoriero (**Nominee**) to acquire Mr Tesoriero’s right to purchase the Oakleigh Property under a Contract for Sale of Land. Pausing there, as set out above, neither Mr Tesoriero’s right to purchase the Oakleigh Property nor the contract with the Nominee for the purchase of this right is disclosed in the Tesoriero July Affidavit.
67. To the extent that the Natalia Fund is the return of the deposit from Mr Tesoriero’s proposed purchase of the Oakleigh Property, the evidence establishes that those funds were paid from FGFS’s account. The tracing analysis shows that 100% of the funds used by FGFS to pay the deposit have been traced back as originating from Westpac. To the contrary, Mr Tesoriero has provided no documentary or other evidence to establish that he paid that deposit and that he has an interest in the funds in the Natalia Fund.
68. Accordingly, Westpac has a strong *prima facie* case that money that was misappropriated from it and paid in to FGFS’s bank account was used to fund the deposit paid for the Oakleigh Property. Westpac has a strong *prima facie* case that the funds in the Natalia Fund are its funds in respect of which it has a proprietary claim.

Companies in external administration

69. 6 Bulkara, James Street and Edmonstone Road are each in external administration. Receivers have been appointed for the sale of the properties owned by those companies. To the extent that the properties have been sold and there are net proceeds held as a fund, those proceeds are held by the liquidators or receivers subject to various competing proprietary claims, including claims by Westpac. It is not appropriate for Mr Tesoriero to have access to those funds, nor has he demonstrated any basis or entitlement to those funds.

Mr Tesoriero should not have access to Funds where a proprietary claim has been made

70. Westpac has stated in correspondence (which was curiously omitted from the Tesoriero June Affidavit) that it would be prepared to consent to the portion of the Margaret CMA that has not been traced as originating from FGFS and over which there is no direct proprietary claim. To the extent the funds in the Margaret CMA exceed the traced amount, the surplus may well be attributable to the profit made on the acquisition. Westpac has sought an account of profits, but does not seek to rely on an account of profit to defeat this application (it relies on proprietary remedies including an account of the traceable proceeds of money stolen, but not of the profits). Agreement to any release from the Margaret CMA is made without any admissions, including in relation to the claim for an account of profits Westpac has in relation to Margaret Street and the Rozelle Property.
71. Mr Tesoriero has not explained, or not adequately explained, why he should be permitted access to the Funds, or part of the Funds, in circumstances where Westpac makes proprietary claims in the proceeding, and have indicated that to the extent funds can be traced, those funds, at least *prima facie*, should be held on trust for their benefit.
72. The Court should not allow Mr Tesoriero access to the moneys to which he has no legal or moral right to enable him to spend it on his private representation of choice in the proceeding: *Birketu Pty Ltd v Westpac Banking Corporation (No 2)* [2018] NSWSC 494 at [30]; [63]; *Polly Peck International Plc v Nadir (No 2)* [1992] 4 All ER 769 at 784 (also Gee “Commercial Injunctions” at [21-055]-[21-056]). As the Applicants claim a proprietary interest in the Funds, “*there is no predisposition to allow access to the trust funds for payment of a defendant’s living or legal expenses*”: *Petar v Macedonian Orthodox* at [59], see also *Crosby Textor Research Strategies Results Pty Limited v Syed* [2020] NSWSC 1792 at [41]-[46] per Rees J. In these circumstances, the Court must assess whether Mr Tesoriero should use those same funds to pay for his defence of the Proceedings: *Polly Peck*; *PCW Underwriting v Dixon* [1983] 2 All ER 158. The question is whether the balance of convenience favours the continuation of the restraint.
73. Put at the most favorable to Mr Tesoriero, the Court must weigh any potential injustice to Mr Tesoriero against injustice to the Applicants and as identified by Rees J in *Crosby*, the ultimate question is whether the respondent should be allowed to use “*what may well be the plaintiff’s money to defend himself*”: see at [41]. The already identified disclosure issues show that Mr Tesoriero cannot discharge that onus.

74. Mr Tesoriero has provided scant evidence in relation to his financial position and to his ability to meet these expenses from other sources. To the contrary, the letter from Pacific Blue Tax Services Pty Ltd (VTF-5 p52) states “Mr Tesoriero is currently meeting his personal expenses from loans being made to him from friends and family”. Accepting that “personal” expenses are not legal expenses, Mr Tesoriero has not provided any explanation as to whether those friends and family could provide him with funds for the defence of the proceedings. No evidence is before the Court, in relation to the capacity of Mr Tesoriero Snr, to provide funds for the defence of the Westpac Proceeding (either in relation to his defence or that of the companies of which he is a director and shareholder, or the defence of Mr Tesoriero). Further, there is no evidence as to why a company, Margaret Street, should use money subject to a proprietary claim to fund Mr Tesoriero’s defence.
75. Mr Tesoriero has not demonstrated to the Court that it is necessary to have access to the Fund in order to pay his legal expenses. There is no evidence that he does not have or is not able to obtain further funds in order to fund his legal expenses, nor has he demonstrated that there are no other assets from which legal expenses could be paid: see *BCI Finances Pty Limited (in liq) v Binetter (No 7)* [2018] FCA 1083 at [57]. Mr Tesoriero has not demonstrated a legal or moral claim to the Glen Huntly or Natalia Funds or to monies in the Margaret CMA that are the subject of proprietary claims.
76. Given the strength of Westpac’s proprietary claims, there is no basis for Mr Tesoriero to have access to those funds: *Birketu* at [60]-[68]; *National Australia Bank Limited v Human Group Pty Limited (No 2)* [2020] NSWSC 1900 at [110]. The Court should not permit Mr Tesoriero to access the Glen Huntly or Natalia Funds or to Margaret CMA to the extent of the proprietary claims to pay his legal expenses in this proceeding as the potential injustice to the Applicants (the depletion of funds which it is its money) outweighs any potential injustice to Mr Tesoriero.

Timetable and case management orders

77. The Proceedings have been set down for final hearing commencing 10 October 2021 for a period of three weeks.¹³ The Respondents were, by orders made on 10 March 2022 to

¹³ Orders made on 25 February 2022

serve evidence on which they intended to rely and to provide discovery. To date, this has not occurred.¹⁴

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30 June 2022

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¹⁴ Noting that the companies in external administration have been excused from providing defences and giving discovery and noting that the Liquidators have served detailed tracing evidence.