

NOTICE OF FILING

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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD747/2021
File Title:	IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED ACN 151 964 626 (ADMINISTRATORS APPOINTED) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 8/02/2022 6:12:23 PM AEDT

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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No. NSD747/2021

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

In the matter of The Forum Group of Companies Pty Limited (Administrators Appointed)

The Forum Group of Companies Pty Limited (Administrators Appointed) ACN 151 964 626
and others

Plaintiffs

Outline of Submissions of Vincenzo Frank Tesoriero

I. Summary

1. By this application, Mr Tesoriero seeks orders:
 - (a) amending the orders made by the Court on 3 September 2021, to prevent the sale of various real properties, and a yacht, until the determination of proceedings brought against him by Westpac; and
 - (b) permitting him to access further funds for his legal fees in relation to this matter.
2. The orders staying the asset sales are sought on the basis that, although Mr Tesoriero originally consented to the sales, he did so based on assurances from the Liquidators that they would engage with him and keep him updated regarding the sales process. Those assurances were not kept, and circumstances have now changed such that Mr Tesoriero now seeks to preserve these assets until he has had an opportunity to properly defend Westpac's claim made against him in proceeding number NSD616/2021.

II. Variation of 3 September 2021 Orders—stay of sale of specific assets

A. Orders of 3 September 2021

3. Mr Tesoriero's application concerns orders which were made in proceeding NSD747/2021 upon application by the liquidators of the Forum group of companies (the **Liquidators**) pursuant to s 57 of the *Federal Court Act 1976* (Cth) and Order 14.21 of the *Federal Court Rules 2011* to be appointed receivers over:
 - (a) a schedule of real properties located in Victoria, New South Wales and QLD (the **Real Properties**); and
 - (b) a motor yacht moored in Florida in the United States of America (the **Mangusta Yacht**).

4. The principal action, proceeding NSD616/2021 (the **Westpac Proceeding**), is a claim made by Westpac against the Forum group, and directors and other entities, which in general terms alleges that Westpac was defrauded to the extent of \$450 million as a consequence of Mr Bill Papas (the second respondent in that proceeding) fraudulently obtaining monies from Westpac as a consequence of 137 falsified transactions. Westpac alleges that Mr Tesoriero was a party to a conspiracy to defraud Westpac, and he is also the subject of a *Barnes v Addy* claim, on the basis that he allegedly knowingly assisted in the transactions, and knowingly received the proceeds of the fraud committed by Mr Papas. Mr Tesoriero strongly denies Westpac's claim. Further, Westpac's claim against Mr Tesoriero (to the extent that it can be made out) appears to be founded on circumstantial evidence—it is a weak case.
5. Mr Tesoriero proposes to press a strike out application for summary dismissal when the matter is returnable before the Court on 9 March 2022.
6. Mr Tesoriero has an interest in the assets as follows:
 - (a) *Real Properties*: The registered proprietors of the Real Properties hold the properties as the corporate trustees of various unit trusts. 50% of the units in those trusts are held by the Tesoriero Investment Trust, which is a discretionary trust of which Mr Tesoriero and his family members are beneficiaries.¹
 - (b) *Mangusta Yacht*: Mangusta (Vic) Pty Ltd (in liquidation) holds the Mangusta Yacht as trustee for the Mangusta Trust. The Mangusta Trust is a discretionary trust, with Mr Tesoriero as one of two primary beneficiaries (the other primary beneficiary is Mr Papas).²
7. On 3 September 2021 (with different legal representation), Mr Tesoriero agreed to the appointment of receivers and managers to the Real Properties and the Mangusta Yacht. As addressed further below, Mr Tesoriero's agreement to the orders was based on representations made by the Liquidators to Mr Tesoriero's solicitors in correspondence in the lead up to the hearing. This correspondence was not before the Court on 3 September 2021.
8. In addition to seeking to be appointed as receivers to the Real Properties and the Mangusta Yacht, the Liquidators also sought orders from the Court pursuant to Order 14.21 for the power to sell the Real Properties and the Mangusta Yacht. Mr Tesoriero agreed to these orders, subject to conditions set out in the correspondence

¹ Affidavit of Sazz Nasimi dated 3 February 2022 (**Nasimi Affidavit**) [5]-[11].

² Affidavit of Melissa Passarelli dated 6 February 2022 (**Passarelli Affidavit**) [6]-[7].

leading up to the hearing on 3 September 2021. The grounds for seeking such orders were that in respect of:

- (a) the Real Properties, the mortgages that were registered over the properties were in default, and payments were not being made pursuant to the mortgages;³
 - (b) the Mangusta Yacht, the registered proprietor (controlled by Mr Tesoriero) consented to the appointment and the sale.⁴
9. The Court made orders appointing the Liquidators as receivers of the Real Properties and the Mangusta Yacht, and authorising them to take possession of, preserve, maintain and sell those assets (which are the subject of the Westpac Proceeding by reason of Westpac tracing monies to Mr Tesoriero, and very much in dispute). As such, the purpose of the Liquidators' application was to preserve these assets, prior to the determination at trial of the issues in dispute between the parties.

B. Relevant legal principles

10. The jurisdiction for the Court to appoint a receiver in circumstances such as those that existed on 3 September is found in s 57 of the *Federal Court Act 1976* (Cth) and is acknowledged. This is not a matter of controversy.
11. The general ground on which a receiver is appointed is for the protection or preservation of real or personal property for the benefit of persons who have an interest in it.⁵
12. This includes circumstances, such as the present, where such property is the subject of a dispute between parties to litigation in the Court.⁶ In effect, the power facilitates the maintenance of the status quo between the parties pending the outcome of the litigation.
13. The appointment of a receiver to preserve the property is a discretionary power that should be exercised judicially, and the Court should do so in a manner where it is in the interests of justice between the parties.

³ 3 September transcript P3.41-43, Affidavit of Jason Ireland affirmed 21 August 2021 (**Ireland 21 August**) [38(d)-(e)], [62(c)].

⁴ 3 September transcript P6.22-23, Ireland 21 August [61].

⁵ *Hosking, Re Business Aptitude Pty Ltd (in liquidation)* [2016] FCA 1438 at [17]-[22] (Gleeson J).

⁶ *Leney & Sons v Callingham* [1908] 1 KB 79 at 84.

C. Wagstaffe Properties (2 properties)

14. 5 Bulkara Road and 6 Bulkara Road, Wagstaffe (the **Wagstaffe Properties**) are two residential waterfront properties located next to each other on the central coast of New South Wales. These are unique properties, which Mr Tesoriero now intends to hold, rather than sell, with a view to his retirement.⁷
15. In the Westpac Proceeding, Mr Tesoriero has given evidence that his interests in the Real Property and the Mangusta Yacht are a return on and of his financial contribution to the Forum business.⁸
16. The 3 September Orders were made with Mr Tesoriero's consent. That consent was given based on the express representations on behalf of the Liquidators that they "would be content to engage with [Mr Tesoriero] regarding the sales process, including the proposed method of sale and the provision of updates."⁹
17. Since the 3 September Orders were made (in summary):
 - (a) The Liquidators' promised engagement with Mr Tesoriero never transpired. Instead, the Liquidators have proceeded to sell the Real Properties and the Mangusta Yacht without providing Mr Tesoriero any opportunity to comment on, or assist with, the sales process (for example, by identifying potential buyers within his network of associates) or updating him at all as to the steps they were taking to realise these assets.¹⁰ The Liquidators simply proceeded to realise these assets on their own terms, and did not sincerely engage with him in any meaningful way in the process.
 - (b) Mr Tesoriero has changed solicitors and reconsidered his position having regard to the breach of the Liquidators' assurances, and no longer wishes for the Real Properties or the Mangusta Yacht to be sold.¹¹
 - (c) Mr Tesoriero has obtained an offer to refinance the NAB debt over the Wagstaffe Properties in a manner that would not require interest payments to be made for a 12 month period,¹² which would preserve these properties until the Westpac Proceeding is determined.

⁷ Nasimi Affidavit [40].

⁸ Affidavit of Vincenzo Tesoriero sworn 8 November 2021 (**Tesoriero Affidavit**) [21]-[23].

⁹ Nasimi Affidavit [14]-[15], Passarelli Affidavit [10]-[11].

¹⁰ Nasimi Affidavit [17]-[29].

¹¹ Nasimi Affidavit [17], Passarelli Affidavit [19].

¹² Nasimi Affidavit [34]-[35].

- (d) Mr Tesoriero has filed evidence in the Westpac Proceeding demonstrating that:
- (i) he is not a volunteer in relation to his interest in the Real Properties and the Mangusta Yacht;¹³ and
 - (ii) he was a non-executive director who played little role in the company's affairs, and had no knowledge whatsoever of Mr Papas' alleged fraud or the 137 allegedly falsified transactions.¹⁴
- (e) Mr Tesoriero has been able to more fully consider Westpac's case against him, which as stated above is lightly circumstantial and weak. As such, he proposes to bring an application for its summary dismissal. At the very least, Mr Tesoriero's application for summary dismissal will provoke a preliminary review of the strength or merits of Westpac's case against him, which in itself is a factor relevant to the exercise of the Court's discretion as to whether to permit the properties to be sold, prior to the determination of Westpac's claim.
18. It is well established in equity that, as land is unique (or presumed to be unique), damages may be an inadequate remedy for a breach of contract.¹⁵ By way of analogy, if the Real Properties are sold against Mr Tesoriero's wishes, and he ultimately successfully defends the Westpac proceeding and retains his interest in those properties, then it may not be possible to adequately compensate him for what would have been a premature sale.
19. On the other hand, Westpac's claim in the Real Properties is solely monetary. If the interest on the mortgages over the properties is paid and maintained until the trial of the Westpac Proceeding, then there is no real prejudice to Westpac if the properties are not sold now. This is the case even without regard to the rising property market in Australia.
20. In the circumstances, permitting the sale the Wagstaffe Properties now, before Mr Tesoriero is able to have his day in Court and properly defend the Westpac Proceeding, would be cruelly premature.

¹³ Tesoriero Affidavit [21]-[23].

¹⁴ Tesoriero Affidavit [28]-[39].

¹⁵ See eg *Mehmet v Benson* (1965) 113 CLR 295 at 307-8 (Barwick CJ).

D. Clayton South income producing properties (9 properties)

21. The Clayton South properties consist of 9 commercial properties.¹⁶ The propositions advanced in section C above, relating to the law's treatment of real property assets as being unique, the events since 3 September 2021, and the circumstances surrounding Westpac's claim, apply equally in respect of the Clayton South properties.
22. Although Mr Tesoriero intends to hold these properties as investments, rather than for personal use, the properties are currently tenanted, with rental income exceeding the interest payments on the mortgages over the properties.¹⁷
23. Mr Tesoriero has in any event secured a finance proposal in relation to the properties, in the amount of \$4 million, which is sufficient to refinance the NAB debt over the properties and which would not require interest repayments for 12 months.¹⁸
24. As with the Wagstaffe Properties, there is accordingly no real prejudice to Westpac if the properties are not sold now.

E. Mangusta Yacht

25. The Mangusta Yacht is a motor yacht which, although it is not land, is unique to Mr Tesoriero, which is not surprising given he has spent a significant amount of time on it over the years with family and friends, and it has sentimental value to him.¹⁹
26. As with the Real Properties, the Liquidators have failed to comply with their assurances to consult and engage with Mr Tesoriero in relation to the sale process of the Mangusta Yacht.²⁰
27. Further, there are additional concerns with respect to the sale process of the yacht:²¹
 - (a) it was initially listed as not for sale to US residents, despite being moored in US waters;
 - (b) it is currently listed with the statement that it "*Must Go Immediately*";

¹⁶ Nasimi Affidavit [5(a)].

¹⁷ Nasimi Affidavit [31].

¹⁸ Nasimi Affidavit [33].

¹⁹ Passarelli Affidavit [25].

²⁰ Passarelli Affidavit [13]-[20], [23].

²¹ Passarelli Affidavit [12]-[18], [22], [28]-[29].

- (c) Mr Tesoriero has an available insurance claim, and potential chose in action, to recover approximately \$100,000 relating to damage sustained to the yacht during a charter, which he has been unable to progress;
 - (d) there is a potential maritime debt claim by the former captain of the Mangusta Yacht which may lead to its arrest.
28. For these reasons, and also for the same reasons advanced in section C above, it is premature to permit the sale of the Mangusta Yacht now, and its sale should be delayed until after the determination of the Westpac Proceedings.

III. Mr Tesoriero's legal costs

29. The Westpac Proceeding, and the conduct of the associated liquidations and sales of property, are being driven by Westpac and the Liquidators in a way which has greatly expanded the issues in dispute beyond the central case, and which requires significant attention by Mr Tesoriero's legal representatives in order to maintain his position.
30. The regular voluminous correspondence exchanged between the parties is evident from the evidence filed in relation to Mr Tesoriero's application for a stay of the sale of the Real Properties and the Mangusta Yacht.
31. In order to ensure that Mr Tesoriero is afforded 'equality of arms' and a fair hearing in relation to this matter, he requires additional funds in order to properly preserve his position and defend his claims.
32. Mr Tesoriero proposes that these additional funds be provided out of the proceeds of sale of 23 Margaret Street, which are the subject of Westpac's application filed on 7 February 2022.
33. A further affidavit from Mr Tesoriero's solicitors addressing the discrete issue of his legal costs is to be filed with the Court today. The grounds to support a further release of funds to permit him to properly defend the Westpac Proceeding will be advanced orally at tomorrow's hearing.

IV. Conclusion

34. Mr Tesoriero seeks:

- (a) orders varying Orders 2 and 6 of the 3 September Orders to provide that the Receivers not be authorised to sell the Real Properties or the Mangusta Yacht until the final determination of the Westpac Proceeding;
- (b) orders increasing the amount of legal costs that he is entitled to receive as a carve out from the freezing order, and permitting him to draw those funds from the sale of 23 Margaret Street; and
- (c) orders requiring the Liquidators to pay his costs of this application.

Dated: 8 February 2022

P J HAYES

M O'HAIRE

Counsel for Mr Tesoriero